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A Study of the Costs of Legal Services in Personal Injury Litigation in Ontario: Final Report

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FINAL REPORT

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Introduction

Contingency Fee Agreements (CFAs) are now a fixed feature of the Ontario litigation landscape. However, little research or study has been done on exactly how they operate in practice, whether they advance the objectives that they were intended to achieve, and whether litigants are best served by the current arrangements. In this study, I intend to make a preliminary start to that research, set out some tentative criticisms of the CFA system as it currently operates, and, where appropriate, suggest preliminary proposals for change.

It should be said at the outset that my efforts to obtain real and serious data and information about the reliance on and kind of CFAs utilized by Ontario lawyers have been frustrated at every turn. Although often divided and divisive in interests, the Plaintiffs' Bar seems to be almost uniquely united in striving to resist any efforts to render the fee-charging process more transparent and knowable. Accordingly, this Report has been written not only without any assistance from the Plaintiffs' Bar, but with its concerted opposition. While there is an understandable concern among the Plaintiffs' Bar about any inquiry that is driven and funded by the Insurance Bureau of Canada (IBC), the extent of the concern has reached almost paranoid proportions in attitude and response. However, I have tried to ensure that this fact has not influenced my analysis and recommendations.

In what follows, I will first outline the formal regime within which contingency fees are allowed and regulated in Ontario. The focus of this Part is to get a general and comparative sense of the legal and policy framework for CFAs. The core of the Report attempts to go behind the received picture of CFAs and get to a more realistic sense of how they actually work in practice. Next, I draw some tentative conclusions and critical observations from the available data and information. Finally, I will put forward some proposals to address the more apparent failings of the present system in order to enhance its efficiency, fairness, and transparency.

Throughout the Report, the emphasis will be on understanding and improving the existing system from the point of view of the litigant-as-consumer. The challenge is to make justice more available, but at a reasonable cost so that the interests of both litigants and lawyers are fairly represented, balanced and advanced.

PART A -- THE REGIME OF CFAs

1. The Costs of Litigation

The expense incurred in staffing and maintaining the courts is met largely by the state, with the litigant paying only a minimal sum to utilize these facilities. The major financial burden incurred by the parties is the cost of legal representation. A lesser expense is the payment of incidental expenses, so-called disbursements, that are incurred throughout the litigation. In allocating this burden, the legal system has two alternative solutions. It can permit costs to lie where they fall and leave litigants to pay their own costs, regardless of the outcome of the litigation, or it can order that costs should follow the event and require the unsuccessful litigant to pay the costs of the successful litigant.

Whereas the Americans have adopted the former as a general rule, the Anglo-Canadian system has opted for a general rule of indemnity. This means that successful litigants may recover any costs that have been

reasonably incurred in litigating the dispute, provided that their conduct is not of a kind that should result in no entitlement. It is generally acknowledged that a successful party will receive about 50-60% of the actual costs incurred.

Although contingency fee arrangements are a long-standing feature of the American litigation system, they have only been allowed in Canada in more recent decades. This reflects an historical antipathy in the Anglo-Canadian system to allowing CFAs because they are generally thought to encourage lawsuits. The basic hostility to contingency fees as a form of champertous[1] agreement is captured by Spiegel J.'s statements in Bergel & Edson v. Wolf:

> Rules against maintenance and champerty were introduced over 700 years ago in response to abusive interference in the legal system by powerful royal officials and nobles. Although the particular abuses against which the prohibitions were directed had been cured by the time of the Tudors, the rules continued to survive. In modern decisions concerning maintenance, courts do not refer to the mediaeval origins of the doctrine, but justify its continued existence on the basis of public policy considerations. The antipathy of the courts to champertous agreements similarly is supported by policy concerns. In these expressions of policy are the roots of the arguments justifying the present ban on contingent fees.2

Nevertheless, a proportionate relation between fees and the amount of damages awarded has always played a role in fee arrangements, even if a limited and understated one. For instance, in Cohen v. Kealey & Blaney in 2000, the Ontario Court of Appeal affirmed a list of considerations to be taken into account by an assessment officer when conducting a fee assessment:[3]

> the time expended by the solicitor;
> the legal complexity of the matters to be dealt with;
> the degree of responsibility assumed by the solicitor;
> the monetary value of the matters in issue;
> the importance of the matter to the client;
> the degree of skill and competence demonstrated by the solicitor;
> the results achieved;
> the ability of the client to pay; and
> the client's expectation as to the amount of the fee.

2. Rationale for Contingency Fee Agreements

The basic rationale for allowing any kind of CFA is that it allows people who cannot afford legal services to bring claims that they would otherwise have to abandon. This general policy objective seems unimpeachable in its logic and effect. The litigant will be able to proceed in the confidence that they will not be left with an enormous economic burden if their claim fails. Of course, this state of affairs is

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[1] Definition: referring to sharing in the proceeds of a lawsuit by an outside party who has funded or assisted in funding the litigation.

[2] Bergel & Edson v. Wolf (2000), 50 O.R. 3rd 777 at para. 22. For a general history from an Ontario standpoint, see Andrew Murray, Contingency Fees What Is Old Is New Again (March 4, 2005).

[3] Cohen v. Kealey & Blaney (1985), 26 C.P.C. (2d) 211 at 215.

premised on the high cost of legal services – lawyers' fees are often perceived to be prohibitive by many potential litigants, especially where they are already injured or indebted. That said, it also must be recognized that lawyers should be entitled to a reasonable rate of compensation for services rendered. Consequently, the challenge is to ensure that the benefits of CFAs to litigants are not obtained at an exorbitant cost and that a balance is struck and maintained between the advantages of more claims being litigated and the costs of doing so. In other words, any legitimate regime of CFAs must work to ensure that both sides of the equation, litigants and lawyers, are balanced. Access to justice should be obtainable at a reasonable cost and lawyers should be entitled to fair compensation for their services, but they should not be allowed to obtain undue financial benefit from the plight of impecunious or vulnerable litigants. In short, although promoted as a device to benefit litigants, CFAs must not be permitted to operate to prioritize the financial interests of lawyers over litigants.

When a lawyer is paid a percentage of the settlement amount (with the settlement amount often equaling the insurance limit), a lawyer's financial incentives will vary considerably. Under the traditional billing regime, a lawyer knows that he or she will be paid in accordance with the work that they have done. While this system presents some risk that the client will not pay, most lawyers finesse this possibility by requiring retainers up-front. Indeed, under the traditional arrangements, there is a genuine concern that lawyers will have an incentive to do more work than a file may require.

Under a CFA, a lawyer will face a very different set of incentives. This is because, irrespective of the amount of hours the contingency fee lawyer puts in, the lawyer will be paid a percentage of the settlement or judgment amount. While this may incentivize them to ensure that their client wins a substantial amount, they will also be disincentivized from putting in "too much" time since their compensation remains fixed. Indeed, their economically optimal approach is to ensure that their efforts will lead to an improved resolution of the case, but only up to a certain point. In other words, rational lawyers under CFAs will strive to maximize their compensation by constantly assessing the cost-benefit of proceeding further in the case. The cost can simply be seen as the amount of hours the lawyer puts into a case, while the benefit is their percentage of the total settlement amount. A potential conflict of interest arises if the lawyer's incremental financial benefit from proceeding further will cause the lawyer's effective hourly rate or total compensation to fall.

According to Richard Posner, the doyen of law-and-economics scholars, the lawyer is effectively a "co-tenant of the property represented by the plaintiff's claim" and therefore "may lack an adequate incentive to exploit the right (to litigate) because the value he creates will accrue in part to another person".[4] Indeed, this may well incentivize lawyers to settle too early. Again, Posner offers a good example of this:

> "A problem with the contingent fee is that in any situation of joint ownership – and a contingent fee contract makes the lawyer in effect a co-tenant of the property represented by the plaintiff's claim – each owner… may lack an adequate incentive to exploit the right because the value he creates will accrue in part to another person. Suppose the plaintiff's lawyer is offered a settlement of $100,000; if he goes to trial, there is a 90 percent chance that the plaintiff will win $150,000 but it will cost the lawyer $25,000 worth of his time to try the case; the parties are risk averse; and the contingent fee is 30 percent. If the plaintiff agrees to the settlement, he will net $70,000 and the lawyer

[4] RICHARD POSNER, THE ECONMICS OF JUSTICE (*th ed. 19**).

> $30,000. If the case goes to trial, the net expected gain to the plaintiff rises to $94,500 (.9 * ($150,000 - $45,000)) but the lawyer's net expected gain falls to $15,500 ($45,000 * .9 - $25,000). So there is a conflict of interest between the parties that is due to the fact that the lawyer does not obtain the whole benefit of a trial (the expected net benefit of trial is ($50,000 * .9) - $25,000, and is thus positive)."[5]

In accordance with this perspective, it can be argued that lawyers should be entitled to receive a higher fee than might otherwise be the case since they are seeking to spread the risk across a range of cases that have no guarantee of success. So, in assessing the fairness of any fee received by a lawyer under a CFA, it is important to acknowledge that, in some cases, a lawyer will invest considerable time and effort in a case that does not produce any, or sufficient, funds to cover the time expended by the lawyer. However, as Posner puts it, this "risk is reduced because the lawyer specializing in contingent fee matters can pool many claims and thereby minimize the variance of the returns." Accordingly, in order to assess the overall fairness of lawyers' compensation from CFAs, it would be necessary to obtain data on all files covered by CFAs to ascertain the relative number of 'losing' cases (i.e., the lawyer receives no fees) that are undertaken by lawyers as well as the relative number of 'winning cases' that are undertaken.

As regards the conflicting incentives for lawyers and clients under CFAs, the courts have acknowledged that the difference between settling and going to trial can have some perverse effects on the lawyer-client relationship. For instance, in the leading case of Hodge, it was estimated that, prior to trial, disbursements amounted to $65,177.52. If the matter had proceeded through trial preparation or through trial, that figure would have been several times higher due to the cost of expert witnesses. Moreover, the lawyer's fees would have been many times higher if the matter had proceeded to trail. But the cost to the lawyer might be so high as to place the lawyer's firm in serious jeopardy.

The challenge of mediating conflicting interests was well described by the court, especially when the problem of "double-dipping"[6] was involved:

> "[W]hen cases settle prior to trial, such clauses will frequently put the solicitor in a direct conflict of interest with his own client. It is the solicitor who negotiates the settlement. Defendants typically have no particular interest in how much of a settlement payment is allocated to damages and how much is allocated to costs. What a defendant is interested in is the bottom line - how much in total the defendant is prepared to pay to settle the case. Often, the settlement amount is an all-in figure. If the plaintiff's lawyer is taking a flat percentage, there is no issue. However, if the plaintiff's lawyer takes a percentage of the damages in addition to all of the costs, it is in the interests of the lawyer to maximize the amount allocated to costs and in the interests of the client to maximize the amount allocated to damages. A simple example is illustrative. Suppose there is a contingency agreement providing for a 20% fee to the lawyer and a settlement agreement is reached for $100,000, all-in. The lawyer's fee would be $20,000. On the other hand, if the lawyer's fee is 10% of the damages plus all of the costs, and the $100,000 settlement is allocated as $70,000 for damages and $30,000 for costs, then the lawyer's fee is $37,000. Since it is often the plaintiff's lawyer who negotiates the allocation of costs, or, even

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[5] Posner , id. at 614.

[6] See later in this report for more on this topic.

worse, allocates the costs/damages himself, the conflict of interest is obvious."[7]

3. Contingency Fee Agreements

It was not until October 1st, 2004 that the *Solicitors Act* was amended to allow for contingency fee arrangements (see *Appendix One)*. Ontario was the last Canadian province to take this step. Section 28.1 provides that a solicitor may enter into a contingency fee agreement – the lawyer's fees may be contingently calculated upon the disposition of the matter -- with a client as long as certain conditions are met. In particular, the CFA cannot contain a provision that any amount that is to be paid for partial indemnity costs or substantial indemnity costs can be subject to a contingency arrangement. The only exception is where the lawyer and client jointly apply to a Judge of the Superior Court of Justice for the inclusion of such costs in the CFA and the Judge is satisfied that there are exceptional circumstances (see s.28.1 (8)).

Also, for personal injury claims, there are additional provisions under Ontario Regulation 195/04: Contingency Fee Agreements (under the *Solicitor's Act*) that must also be included in order for a CFA to be valid (see *Appendix Two)*:

1. If the client is a Plaintiff, a statement that the solicitor shall not recover more in fees than the client recovers as damages or receives by way of settlement;
2. A statement in respect of disbursements and taxes, including the GST payable on the solicitor's fees, that indicates,

whether the client is responsible for the payment of disbursements or taxes and, if the client is responsible for the payment of disbursements, a general description of disbursements likely to be incurred, other than relatively minor disbursements; and

that if the client is responsible for the payment of disbursements or taxes and the solicitor pays the disbursements or taxes during the course of the matter, the solicitor is entitled to be reimbursed for those payments, subject to Section 47 of the Legal Aid Services Act, 1998 (legal aid charge against recovery), as a first charge on any funds received as a result of the judgment or settlement of the matter;

1. A statement that explains costs and the awarding of costs and that indicates,
    a. that, unless otherwise ordered by a Judge, a client is entitled to receive any costs contribution or award, on a partial indemnity scale or substantial indemnity scale, if the client is the party entitled to costs; and

that a client is responsible for paying any costs contribution or award, on a partial indemnity scale or substantial indemnity scale, if the client is the party liable to pay costs;

1. If the client is a Plaintiff, a statement that indicates that the client agrees and directs that all funds claimed by the solicitor for legal fees, cost, taxes and disbursements shall be paid to the solicitor in trust from any judgment or settlement money;
2. If the client is a party under disability, for the purposes of the Rules of Civil Procedure, represented by a litigation guardian,

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[7] Hodge v. Neinstein (2015 ONSC

a. a statement that the Contingency Fee Agreement either must be reviewed by a Judge before the Agreement is finalized or must be reviewed as part of both the motion or application for approval of a settlement or a consent judgment under Rule 7.08 of the Rules of Civil Procedure;

a statement 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 or consent judgment under Rule 7.08 of the Rules of Civil Procedure; and

a statement that any money payable to a person under disability under an Order or settlement shall be paid into Court unless a Judge orders otherwise under Rule 7.09 of the Rules of Civil Procedure.

In November of 2002, Rule 2.08(3) was amended to incorporate a comment about CFAs. As well as confirming the general validity of CFAs, there is editorial commentary (see *Appendix Three*):

> In determining the appropriate percentage or other basis of the contingency fee, the lawyer and the client should consider a number of factors, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery and who is to receive an award of costs. The lawyer and client may agree that, in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or as a part of a settlement is to be paid to the lawyer, which agreement under the Solicitors Act must receive judicial approval. In such circumstances, a smaller percentage of the award than would otherwise be agreed upon for the contingency fee, after considering all relevant factors, will generally be appropriate. The test is whether the fee in all of the circumstances is fair and reasonable.

In general, therefore, CFAs are approved if they are found to be:

-- In compliance with the relevant provisions of the *Solicitors Act* and accompanying Regulation;
-- Fair, assessed as of the date the arrangement was entered into; and
-- Reasonable, assessed as of the date of the hearing.

A contingency fee agreement can only be declared void, or be cancelled and disregarded, where the court determines that it is either unfair or unreasonable. In other words, the emphasis of the analysis is on the reasonableness and fairness of the agreement over and above compliance with the more discrete requirements of CFAs set out in the CFA Regulation. However, compliance with these requirements may also have some bearing on whether or not the CFA is determined to be fair and reasonable. For example, if a CFA does not include the required statement that the client has a right to review, that shortfall may be considered in weighing the CFA's fairness. Accordingly, if the agreement is not fair and reasonable, it will be declared void and referred for an assessment to the courts' assessment officers.

In Raphael Partners v Lam (2002), 61 O.R. (3d) 417, the Ontario Court of Appeal explained the two-step process to be followed by a judge where enforcement of a CFA is sought pursuant to s. 24 of the Solicitors Act:

> Upon any such application, 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 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. R.S.O. 1990, c. S.15, s. 24. [emphasis added]

The lawyer bears the onus of satisfying the Court that the agreement was fair; it would be unjust to expect the client to show that it was unfair in light of the overall imbalance in power and circumstances between lawyer and client. As such, the fairness requirement is about the circumstances surrounding the making of the agreement and whether clients fully understand and appreciate the nature of the agreement that they executed. As noted, this is to be determined as of the date that the CFA was entered into.[8] Notably, any breach of the rules and regulations must be fundamental, not merely technical in nature and scope.[9]

In Hodge, the court made it plain that lawyers have a fiduciary duty to protect and promote the client's interests above their own. It went on to say that:

> "Ms. Hodge's claim alleges that the solicitors in this instance entered into agreements that enabled the solicitor to receive as fees both costs and a percentage of the damages. Further, they did so without including in the agreement a provision that advises the client that costs belong to the client unless a judge orders otherwise (as required under the Regulations [sic]) and without getting a judge's approval for taking the costs (as required under the *Solicitors Act*). The purpose of both provisions is the protection of clients ... Further, the plaintiff alleges that the law firm entered into all-in settlements and then simply allocated a portion of the proceeds to costs, thereby increasing the fees to be received by the solicitors, to the detriment of the client. That would be a conflict of interest and a further basis for a claim in contract and for breach of fiduciary duty. These provisions [ss. 28.1(6), 28.1(8), 28.1(9)] of the *Solicitors Act* are intended for the protection of the public and to improve access to justice. These are issues vitally important to the integrity of our justice system. As such, they are to be given a broad and liberal construction, consistent with that remedial purpose"[10]

In the recent case of Zha, it was stated that:

> "It is unfortunate that experienced counsel are not following the guidelines that have been repeatedly set out by the Court, as to what is required insofar as solicitor's fees are concerned, in numerous cases dating back to at least 2007. See, for example, Marcoccia (Litigation Guardian of) v. Gill, [2007] O.J. No. 12 (Ont. S.C.J.) and Lau (Litigation Guardian of) v. Bloomfield [2007 CarswellOnt 5269 (Ont. S.C.J.)], 2007 CanLII 34443. Furthermore, in an effort to provide assistance to counsel in their preparation of written motion material for these motions Justice Wilkins of this Court, who deals with the vast majority of these motions, issued the Rule 7.08 Best Practices Guidelines in late April 2013 ("the Guidelines")."[11]

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[8] Edwards (Litigation guardian of) v. Camp Kennebec (Frontenac*)* 2016 ONSC 2501

[9] Séguin v. Van Dyke (2013 ONSC 6576)

[10] Hodge , supra note 7.

[11] Zhau (2015 ONSC 785)

Also, in Warnica, the court went further and contended that the lawyer has to demonstrate what it is that she or he actually did in order to earn the 30% contingency fee claimed. Because that was not done, "the appropriate mechanism to permit that to happen, and also to ensure that [the lawyer] is paid a fair fee for the service provided… is to refer the matter for assessment" [12] This approach has much to recommend it.

4. A Comparative Survey

The Ontario scheme bears many similarities to and differences from other Canadian provinces as well as other common law jurisdictions (i.e., the United Kingdom and Australia) (see *Appendices Four* and *Five*). I have included detailed charts that summarize these comparisons. I have not thought it pertinent to canvass the arrangements in the United States because the basic difference in handling of costs (i.e., there is no general rule in the U.S. that a substantial portion of the winner's legal fees is paid by the loser; each party is responsible for their own lawyer's fees) makes any comparisons unreliable and distorted. However, it is worthwhile to offer some general comments on the contrasts between the Ontario regime and other jurisdictions in regard to contingency fee arrangements. While I do not pretend that these comments are exhaustive or definitive, I do believe that they capture some important insights into factors that make for a fair and effective CFA system.

1. While all provinces provide that there are lists of factors that must be contained in any CFA, only New Brunswick provides and requires that a standard form be used;
2. Although there are exceptional circumstances in which court approval is required, almost all provinces do not offer any approval or filing process. However, New Brunswick and Northwest Territories/Nunavut require that a CFA must be filed with an officer of the court;
3. Apart from the filing process in 2 above, any complaints about a CFA are left to the discretion of the client. Each province offers a court-based process for challenging a CFA;
4. As regards permissible percentages or fees charged under a CFA, only New Brunswick (25%) and British Columbia (33 1/3%) impose a maximum figure. As for the other provinces, Alberta and Saskatchewan have established very limited constraints on contingency fees, while the remainder generally demand that fees charged are 'fair and reasonable'.

5. The Way Forward

The proof of any pudding is in the eating. It is only possible to assess the fairness and efficacy of a particular scheme if data is available as to compliance with the letter and spirit of the statutory framework. While there will inevitably be a gap between legislative intent and practice, the key issue is the size of the gap – are the statutory expectations followed more in the breach than in observance? And how can the requirements and rules be amended so as to better protect the interests of litigants and maintain the integrity of the litigation process from a public policy perspective?

[12] Warnica v. Van Moorlehem (2012 ONSC 4241)

PART B – THE REALITY OF CFAs: DATA AND STUDY

1. Initial Attempts at Data Collection

As stated in the introduction to this report, my efforts to conduct a rigorous and sophisticated empirical study were foiled at every turn by the plaintiffs' bar. There was not only no appetite for the study, but also a defiant refusal to be part of it. Although I found this to be a disturbing and entirely over-heated reaction, I have tried to remain open and balanced in my approach; I have sought to keep an open mind about the both the benefits and drawbacks of CFAs and their operation in practice.

The study began with personal e-mails to a sampling of leading plaintiffs' counsel in late October 2015. The plan was to gauge counsels' responses to a draft set of questions and determine if changes to the questions were needed for the study itself. The initial e-mail sent read as follows:

> I am writing to you as part of a research project that I am conducting on Lawyers' Fees in Personal Injury Actions.
>
> It is my intention to obtain as much empirical data as possible on the fee arrangements entered and charges made by both plaintiff and defendant lawyers. My focus is on the situation of the injured parties and whether the present regime is best suited to advancing their interests and needs. I have no axe to grind in this matter; it is simply a matter of obtaining better and fuller information than is presently available.
>
> *In accordance with the ethics protocol for academic research, any information disclosed will be held in the strictest confidence and treated with complete anonymity. I consider this to be an essential commitment of professional integrity as a result of being both a lawyer and a professor.*
>
> As such, I attach a short questionnaire for your perusal. I am sending this to all the leading law firms in Ontario who engage in personal injury litigation. Ideally, I would like to meet with you to discuss these matters.
>
> I look forward to hearing from you and thank you in advance for your cooperation in this important matter.
>
> Regards, Hutch
>
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The questionnaire attached to the e-mail read as follows:

> Personal Injury Litigation (Plaintiffs)
>
> What kind of fee agreement do you generally enter into with prospective clients as regards personal injury claims?
>
> Do you use a standard retainer letter/contract? Please provide a copy if you do so.
>
> Is it by way of hourly rates (which are?)?
>
> Is it by way of contingency fee (which is?)?
>
> Or is it a combination of both?
>
> If it is by way of a contingency fee, is your percentage fixed? Or does your percentage vary depending on a set of variables (e.g., length of time, amount of claim, etc.)?
>
> Whether you use a contingency fee arrangement or not, do you provide the client with a billing statement of hours spent on the file?
>
> What do you do about disbursements? Are they chargeable whether the client wins or loses? And, if they win, is it on top of the contingency fee?
>
> If you are successful and recover costs as part of a settlement or judgment, are those costs treated as part of the contingency percentage? Or is it on top of that percentage?
>
> Do you loan money to clients or arrange for them to obtain loans? On what terms and conditions? Please provide a copy if you do so.
>
> Can you provide examples of cases that you have settled or won and what the final figures were for damages obtained, fees charged, disbursements charged, and any other connected charges?

The response to this initial e-mail was a firestorm of negative e-mails and phone calls. The views ranged from reasonable suspicion through suggestions of political naivety on my part to outright allegations of betrayal (as a fellow member of the Plaintiffs' Bar). The fact that the work was being done through the IBC was considered to be a major bone of contention. Despite efforts by me to allay concerns that I was a prejudiced and 'bought' researcher, the criticism and resistance did not abate. Accordingly, it soon became clear that any attempt to proceed with my proposed approach would be met with stiff and concerted opposition. After consulting with staff at IBC, it was agreed that I should proceed with the research, but in a very scaled-down and modest manner. Consequently, I developed and implemented a second-best approach to studying the operation of CFAs in practice.

2. Revised and Second-Best Approach

A plan was made to access all reported Ontario cases that mentioned the words 'contingency fee'. The period under study was from January 2010 to April 2016. This search generated an overall total of 471 cases. A number of these cases only mentioned 'contingency fee' in passing and so were deleted from the database. The bulk of cases arose by way of application by a disgruntled litigant who was objecting to the fees charged by their lawyer. The sample included not only those cases involving personal injury matters, but also encompassed other subject matter, such as class actions and guardians. The justification for

including the latter was that some of the commentary by judges and assessment officers had relevance to contingency fees more generally. However, care has been taken to place the personal injury cases front and centre in the ensuing analysis.

It should be noted at the outset that it is fully appreciated that this is a far from ideal way of proceeding with the study. These cases represent a narrow view of contingency fees in that the cases only involve files either where the plaintiff party identified some problem, real or imagined, with the ultimate charge for legal fees or where the claimant, by law, required a litigation guardian and court approval of fee arrangements was compulsory. Of course, there were many cases during the period examined in which such circumstances did not apply and there was no court review. It seems reasonable to comment, therefore, that looking at the overall practice of CFAs through the lens of such cases is like watching and analyzing the world by looking through a keyhole; what you see might well not be representative of the overall situation and may well be distortive of it. However, all that having been said, this way of proceeding was the only one available in the circumstances. Although the conclusions drawn from the data may well be limited and flawed, I maintain that they do offer some, albeit partial, insight into the operation of the CFA system.

The recent Clatney case offers an example of the kind of unscrupulous, heavy-handed and frankly abusive tendencies that can be engaged in. The case focuses on the plaintiff switching law firms in mid-litigation, and casts a further shadow over the murky world of fee arrangements between personal injury lawyers and injured parties. It notably demonstrates that there can be a considerable disconnect between work done and fees charged. In her decision, Epstein JA for the Ontario Court of Appeal cited two excellent sources concerning the overall role and stance of courts in regulating lawyers' fees:

> "In Plazavest Financial Corp. v. National Bank of Canada (2000), 47 O.R. (3d) 647 C.A.), at para. 14, Doherty J.A. explained how the public interest informs the court's role in supervising the rendering of legal services and payment of legal fees:
>
> > "The rendering of legal services and the determination of appropriate compensation for those services is not solely a private matter to be left entirely to the parties. There is a public interest component relating to the performance of legal services and the compensation paid for them. That public interest component requires that the court maintain a supervisory role over disputes relating to the payment of lawyers' fees. I adopt the comments of Adams J. in Borden & Elliot v. Barclays Bank of Canada:
> >
> > > "The Solicitors Act begins with s.1 reflecting the legal profession's monopoly status. This beneficial status or privilege of the profession is coupled with corresponding obligations set out in the Act and which make clear that the rendering of legal services is not simply a matter of contract. This is not to say a contract to pay a specific amount for legal fees cannot prevail. It may. But even that kind of agreement can be the subject of review for fairness: see s.18 of the Solicitors Act."
>
> In Price, at para. 19, Sharpe J.A. further elucidated the court's role:
>
> > "Public confidence in the administration of justice requires the court to intervene where necessary to protect the client's right to a fair procedure for the assessment of a solicitor's bill. As a general matter, if a client objects to a solicitor's account, the solicitor should facilitate the assessment process, rather than frustrating the

> process.... In my view, the courts should interpret legislation and procedural rules relating to the assessment of solicitors' accounts in a similar spirit. As Orkin argues, "if the courts permit lawyers to avoid the scrutiny of their accounts for fairness and reasonableness, the administration of justice will be brought into disrepute." The court has an inherent jurisdiction to control the conduct of solicitors and its own procedures. This inherent jurisdiction may be applied to ensure that a client's request for an assessment is dealt with fairly and equitably despite procedural gaps or irregularities."[13]

3. Analysis of Available Data

The available data does not lend itself to rigorous or quantitative analysis. It is merely suggestive, at best, revealing certain tendencies and trends (see *Appendices Six, Seven and Eight*). However, on the whole, it does not represent a very reassuring snapshot of the landscape of CFAs. Thus, it appears that not only are some lawyers pushing on and back the limits of what is permitted in CFAs, but also some are engaged in routine disregard of both the letter and spirit of the rules and regulations in regard to CFAs.

There are four particular issues that bear more attention – judicial oversight, disbursements, 'double-dipping', and percentages charged by way of a contingency fee.

A. Judicial Oversight

Hodge gives a stark glimpse of what can happen when contingency fee agreements are made outside of the courtroom and without judicial oversight. In this case, the lawyers created agreements that were contrary to the law (e.g., the lawyer receiving compensation through both costs and a contingency fee, without court approval, and thus contrary to s.28 (1)(8)). Furthermore, the proposed representative plaintiff in Hodge was provided with only 27% of the total settlement amount apportioned for that individual; there are 4-6,000 others who also had agreements with the law firm of Neinstein LLP.[14] Hodge is the first case where the Superior Court interpreted the regulatory framework surrounding contingency fees. For instance, the court clearly contrasted permissive and mandatory language, such as "may" and "shall", within the *Solicitors Act*. Thus, ss. 28.1(1) and (2) are permissive, stating that a solicitor "may" enter into these agreements, while s. 28.1(4) is expressed in mandatory language: a contingency fee agreement "shall be in writing." Likewise, there is a proscription in s. 28.1(3) against contingency fee agreements in certain types of cases - criminal and family - and it also employs mandatory language (the solicitor "shall not enter into a contingency fee agreement...").

While lawyers seem to understand that the law does not allow them to be compensated with contingency fees in criminal law or family law cases, the data reveals many cases where lawyers have acted contrary to the double-dipping section (i.e., lawyers cannot receive both a contingency fee and any costs awarded or agreed to) of the legislation. This is despite "s.28.1 (8) [using] the same kind of proscriptive language as the subsection prohibiting contingency fees in criminal and family law cases [with that section being s.28.1(3)]."[15]

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[13] Clatney v. Quinn Thiele Mineault Grodzki (2016 ONCA 377) pp. 24-26

[14] Hodge, supra note 7 at at para. 26.

[15] Hodge, supra note 7 at para. 23.

B. Disbursements

There are several sample CFAs available on the web. A good example, incorporating more than two dozen required clauses further to the *Solicitors Act*, R.S.O. 1990, c.S.15 and *Contingency Fee Agreements*, O. Reg. 195/04, is contained in *Appendix Nine*.[16]

In practice, it is very difficult to ascertain what a "typical" CFA is in personal injury cases. Very few actual agreements are evidenced in the reported cases; reference is usually only made to particular disputed clauses. There are several sample CFAs available on the web. A good example is contained in *Appendix Nine*. This document incorporates more than two dozen required clauses further to the *Solicitors Act*, R.S.O. 1990, c.S.15 and *Contingency Fee Agreements*, O. Reg. 195/04.

For instance, there is no simple answer to whether CFAs require the client to pay disbursements whatever the outcome. While many do contain such clauses, not all do. The courts have indicated that what constitutes a fair and appropriate contingency fee may well be influenced by whether the agreement requires the client plaintiff to recompense the lawyer for disbursements even if the case fails. Further, the Ontario Superior Court has held that a firm may not charge interest on outstanding disbursements.

In Hodge, Ms. Hodge signed a standard form retainer agreement that included a clause stipulating that she would be required to pay the firm 25% of any damages recovered plus anything recovered for partial indemnity costs (the total of which would be no more than 40% of the damages award). She would also be liable to pay for any disbursements incurred by the firm."[17] This was not considered reasonable. By contrast, in Cogan the Court found that a contingency fee of 33% was fair and reasonable because plaintiff's counsel had assumed the risk of paying the disbursements in the event that the action was unsuccessful." It is notable that for few of the cases identified for this study was there a breakdown of what was to be included in disbursements.

Another important issue is what expenses can or should be included under the general rubric of 'disbursements'. In Henricks-Hunter, the reported disbursements were found to include a significant number of office expenses and items such as "drinks" and "finding a Tim Horton's restaurant."[18] Again, in Hodge, an amount of 48,942.37 was charged for disbursements. The disbursements included $4,008.27 for photocopies; $2,791.20 for laser copies; $1,280.70 for scanned documents; $1,372.33 for interest recovery; and $200.00 for Miscellaneous Expenses/File Closing Charges. It has to be remembered that Ms. Hodge ultimately only recovered the total sum of $41,906.41."[19]

Some lawyers have sought to charge interest on outstanding disbursements. The rationale is that these amounts are paid at the end of the case, once it is settled or fully litigated. Yet the courts have held that lawyers may not charge interest on outstanding disbursements. In Umbach, the courts took the view that interest charges totaling $937.01 in respect of a particular expert could not be charged: "As one of the justifications for contingency fee agreements is that the lawyer often has to carry significant disbursements for a prolonged period of time, I decided to invite submissions as to why the client should

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[16] See http://www.practicepro.ca/practice/financesbookletprecedents.asp

[17] Hodge, supra note 7.

[18] Henricks-Hunter (Litigation Guardian) 2012 ONSC 4564.

[19] Hodge, supra note 7.

pay interest on unpaid disbursements as well as fees on a contingency basis, when part of the rationale behind contingency fees is that the lawyer carries the disbursements."[20]

C. Double-Dipping

A very egregious practice is where lawyers charge a contingency fee on any settlement reached as well as pocket any costs recovered as a result of or included in the settlement. This might best be described as 'double-dipping'. As per s.28.1 (8) of the Solicitors Act, the lawyer's costs cannot be claimed over and above the contingency percentage unless the court elevates the circumstances to exceptional. The courts' general attitude to the issue has been in conformity with the regulation. In Dryden v. Oatley Vigmond, the assessment officer inferentially reduced the lawyers' fees by the exact amount of costs. The action was settled for $285,000 in respect of damages and interest, plus $42,500 for costs inclusive of sales tax, and $47,500 for disbursements. Following the settlement, Mr. Dryden was charged $127,905.16 for legal services. The assessment officer held that the CFA that had been established between the law firm and Mr. Dryden was unjustified. Further, she concluded that the $128,000 legal bill that had been rendered to Mr. Dryden was excessive and should be reduced by almost $43,000, to $85,000 including GST. On this issue, the Hodge case is notorious for the fact that the client was required to pay to the law firm the contingency fee plus any costs recovered or bargained for, up to 40% of the amount recovered. She would also be liable to pay for any disbursements incurred by the firm. Although the CFA provided that the solicitors would be paid a fee plus any costs recovered, no application was made to a judge for approval of the agreement, as required under s. 28.1(8) of the Solicitors Act.

There are other cases on the public record where the lawyer sought to claim costs on top of a contingency fee. In Seguin v Van Dyke,21 the plaintiff signed a CFA with her lawyer pursuant to which the lawyer was to be paid, in the event of a settlement, 33.3% of the settlement amount (including costs) plus disbursements. However, in the event of judgment after trial, her lawyer was to receive 33.3% of the damages, plus 100% of the costs. The CFA was declared to be unenforceable. Also, in Choi v Choi,22 the CFA was found to be unenforceable where a lawyer sought to obtain $1M be paid to the law firm for partial indemnity costs and disbursements inclusive of GST; and a further $1.6M as a contingency fee.

D. Percentages Charged

The data that was available for this study (see *Appendix 6* for summaries of the relevant cases) is wholly inadequate for describing the typical experience of Ontario personal injury plaintiffs with respect to the cost of their legal representation. It does, however, illustrate that, of the CFAs that have been challenged or reviewed before the courts in recent years, a large number have been either deemed unenforceable, in violation of the *Solicitors Act*, ordered for reassessment and/or otherwise had their original terms altered in favour of the client. It also shows that even among challenged CFAs that have ultimately received court approval, the total amount of compensation paid to the lawyer in contingency fee, costs, and disbursements, depicted as a percentage of the total of awarded damages, can be quite high.

The chart that follows shows the break-down of compensation paid to the plaintiff lawyer in thirteen personal injury cases where the CFA was challenged and ultimately deemed to be enforceable. For

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[20] Umbach (Litigation guardian of) v. Wilmot (Township) (2014 ONSC 2995).
[21] Seguin, supra note 9.
[22] Choi v. Choi (2010 ONSC 4800).

illustrative purposes, the amounts for the class action case of Hodge v Neinstein -- where the CFA was determined to be unenforceable -- are included in the chart.

NOTE: Red is the highest % whereas green is the lowest		**Compensation paid to lawyer (% of settled or awarded damages)[23]**			**Other relevant information**	
Chronological	**Settlement Amount[24]**	**Contingency Fee (CF)**	**CF + Costs**	**CF + Costs + Disburse**	**Disburse (% of settlement amount)**	**Costs paid to lawyer**
1. *Cogan (Litigation Guardian)*	$7,362,500.00	25%	25%	26%	1%	$-
5. *Aywas (Litigation Guardian)*	$144,375.00	17%	17%	27%	9%	$-
9. *Choi (Litigation Guardian)*	$14,350,000.00	7%	13%	14%	1%	$863,110.00
12. *Dolan (Litigation Guardian)*	$75,000.00	8%	8%	10%	2%	$-
14. *Laushway*	$650,000.00	32%	32%	36%	5%	$-
17. *Consky*	$250,000.00	24%	24%	31%	7%	$-
19. *Dryden*[25]	$285,000.00	30%	30%	46%	17%	$-
21. *Henricks-Hunter (Litigation Guardian)*	$2,050,000.00	22%	22%	24%	2%	$-
29. *Soulliere (Litigation Guardian)*	$8,500,000.00	28%	28%	31%	4%	$-
33. *Umbach (Litigation Guardian)*	$1,250,000.00	25%	25%	32%	7%	$-
30. *St. Jean*	$550,000.00	29%	29%	45%	15%	$-
81. *Hodge v Neinstein* (2015)	$150,000.00	20%	40%	73%	33%	$30,000.00
38. *Batalla*	$5,741,560.00	17%	17%	19%	1%	$-
37. *Edwards (Litigation Guardian)*	$2,750,000.00	8%	8%	10%	2%	$-

[23] This necessarily excludes agreements deemed unenforceable by the court.

[24] Complete amount paid by the defense for tort/negligence action (i.e., excludes SAB actions). This also excludes costs. GST was oftentimes broken out, but sometimes not.

[25] This is the case where the assessment officer reduced the amount payable by the dollar value of costs.

PART C – THE FAILINGS OF THE PRESENT REGIME OF CFAs

In both theory and practice (insofar as it is possible to know), Ontario's CFA regime is open to a number of serious objections and criticisms. The main appeal of CFAs and the basic rationale for allowing them is that they permit claimants to pursue litigation that would otherwise remain out of reach. They are intended as a response to the fact, and widespread perception, that the costs of legal services are prohibitively expensive. While other ways exist to contain or respond to the high cost of legal services (e.g., legal aid, pro bono, etc.), CFAs are one way to enable claimants to have access to the courts and perhaps, through that, to some measure of justice. They allow claimants to seek to enforce their legal rights with confidence that, although they might not be successful, they will not be even worse off than they already are.[26] This purpose is not be underrated or scoffed at.

At the same time, a central question is whether, in current circumstances, the benefit to plaintiffs is often being obtained at too high a price to litigants and at too large an advantage to lawyers. While litigants may gain from CFAs, it must not be to the greater comparative advantage of lawyers who might receive a regular windfall in the fees received, In short, is the price of access to justice still too high? Are lawyers, not claimants, the big winners under the present regime of CFAs?

1. Consumer Protection

The focus that I have taken to this study can be broadly understood as a 'consumer protection' perspective. It is now fully accepted that consumers need to be protected against the greater economic and bargaining power of large merchants and corporations in the marketplace; there is consequently a detailed and comprehensive set of protections and entitlements (e.g., standard terms, enhanced remedies, etc.) in both statute and common law that serve to guard the consumer against disreputable and exploitative practices. If there is a case for such safeguards in the general market (which there surely is), then there is an even stronger case for protections and entitlements in regard to dealings between lawyers and potential clients. Three particular considerations spring to mind: the enforcement of legal rights is a mainstay of society's commitment to democracy and the Rule of Law; the stakes are extremely high for clients, especially those with personal injuries, seeking compensation for damages caused by the wrongdoing or negligence of others; and lawyers hold a monopoly as gatekeepers to the legal process. Taken together, these factors mean that there should not only be appropriate and similar protections in place for legal clients as in the general consumer context, but perhaps that the protections provided in the legal context should be elevated.

When persons with personal injuries seek legal assistance to pursue any claims available to them, they are doubly vulnerable. Not only is there an obvious and large imbalance in knowledge and power between them and lawyers in regard to the validity, strength and viability of their claims, but they are also in a debilitated and injured state. In such circumstances, it is essential that the system operates to ensure that they are not further taken advantage of, especially by their legal advisers. Insofar as lawyers hold themselves out as a 'noble profession' with social duties and responsibilities, they are not simply another

[26] Unsuccessful claimants will not be entirely protected because most CFAs require them to compensate lawyers for disbursements that can be not inconsiderable.

business in the marketplace. Accordingly, it is incumbent on the system, both by way of legislation and professional regulation, to take decisive steps to ensure that the interests of clients are given the fullest protection against exploitive and unfair practices and that, conversely, lawyers are restrained from and penalized for engaging in such practices.

As things stand now and as a result of the research done for this study, it cannot be reported that the present scheme in regard to CFAs is operating to protect and advance the interests of clients in their dealings with lawyers. Indeed, there is evidence that the existing scheme of regulations and rules are allowing some lawyers to recoup larger fees than they otherwise might do under the normal hourly-fee arrangements for services rendered. While lawyers are fully entitled to receive fair and reasonable fees for services rendered, there is suggestive evidence that lawyers are cashing in on the opportunities for enhancing their fees afforded by CFAs.

While the data assembled and available is limited and opaque, it appears that there are two major claims by lawyers that need immediate and reliable confirmation:

> -- that lawyers take on a significant number of cases that are unsuccessful in producing any or sufficient compensation for the client such that the lawyer does not receive adequate fees for the time expended on the file?; and
>
> -- that it is possible for clients to choose to enter arrangements with personal injury lawyers that are not based on a CFA?

Any defence of the existing system demands that both these questions can be answered in the affirmative. Unless there is a significant number of 'losing cases', the argument in favour of allowing lawyers to receive more by way of fees than they otherwise would do so becomes unpersuasive. Secondly, unless personal injury claimants can enter other kinds of fee-arrangements with lawyers and not be simply presented with a take-it-or-leave-it CFA (even a balanced and reasonable one), they are being exploited by the legal process. Genuine and informed choice by consumers is a basic standard that consumers are accorded in other commercial settings. To have less than that in the lawyering and rights-enforcement context is simply unacceptable and against the public interest. The legal profession as much as the public at large has a serious interest in ensuring that 'access to justice' is real, and not simply a stated ambition.

2. Baseline Standards

A major challenge in making a sensible and reasoned assessment of Ontario's CFA system is the need to develop a base-line level of compensation against which any changes in the billing arrangements can be measured. One possibility recommends itself – to measure what happens across files that have CF agreements against what those files would have generated if they had been billed on a traditional hourly basis.

Imagine that a lawyer charges an hourly rate of $200; this is about average for a Toronto personal injury lawyer and could be said to represent what the lawyer thinks is a reasonable and achievable rate (less substantial overheads) for their services. The precise amount will vary from lawyer to lawyer, but this is not important for illustrative purposes. If they only worked on a traditional hourly basis, they might bill $400,000 annually if they worked 40 hours per week for 50 weeks. Assuming that this amounts to a reasonable level of remuneration for the hours of work done, it seems reasonable that a broadly similar

amount should be earned under CF arrangements, assessed as the cumulative total for both 'winning' and 'losing' files.[27] If lawyers were to earn substantially more than this, then they would seem to be taking advantage of those clients who were obliged by circumstances to enter into such CF agreements. If they were to earn substantially less than this, then they would be providing their services on a discounted rate.

To play out this logic more fully, if a lawyer were to take on files and had a 50% success rate, they would be entitled to charge an amount that would average out to $400 per hour (or twice their normal fee of $200) for the winning cases. This would result in them receiving their normal level of annual billing if they were billing on an hourly basis. If their success rate were 75/25%, they would be entitled to charge an amount that would average out to $266 per hour (or 1/3rd (25/75) over their normal fee) for the winning cases. This would result in them receiving their normal level of annual billing of $400,000 if they were billing on an hourly basis.

To determine the reasonableness of the fee, law firms would need to keep time dockets, and Ontario courts occasionally do request such information of lawyers. In Young (Litigation Guardian of) v. Hinks Estate, it was stated that "it is incumbent on Mr. Acri to justify the reasonableness of the [$67k] his firm claims in relation to the tort claim and [$76k] in relation to the accident benefits settlement… I want to see documents evidencing his retainer and dockets and understand exactly [what Mr. Acri did on the case over 6 years]." That said, there are many instances where the court has not requested time docket information, and have actually spoken against a reliance on time dockets, in both personal injury and class action litigation. In Henricks-Hunter (Litigation guardian of) v. 814888 Ontario Inc, it was noted that "the determination of the proper fee in a CFA is not based on the value of the time spent, but rather on the amount recovered for the client." Also, in West Coast Soft Wear Ltd. v. 1000128 Alberta Ltd., it was concluded that "using a percentage calculation in determining class counsel fees properly places the emphasis on the quality of representation, and the benefits conferred to the class. A percentage-based fee rewards 'one imaginative, brilliant hour' rather than '1000 plodding hours'."

3. Losing Cases?

As regards the reasonableness of lawyers' billing under CFAs, the key factor will obviously be the ratio of winning to losing cases that they take on. There is no reliable information~~,~~ about this ratio, but it is not as though lawyers have not made the 'losing cases' argument before the court. However, it defies both logic and reason to assume that experienced lawyers are taking on more than 25% of files that they consider to be likely to lose. There is no evidence that lawyers are risking taking on files with a less than 75% chance of success. Because the effect of taking on losing cases is so dramatic (i.e., no remuneration for work done), it would be foolhardy of lawyers to take on too many losing cases.

Moreover, it would also be wrong-headed for the legal process to proceed on the basis that lawyers took on more losing cases than winning cases and to make rules (e.g., CFA legislation) that assumed such miscalculation. Accordingly, any system of billing that routinely results in lawyers receiving significantly more or less than their base-line hourly-billings amount would be unreasonable. In the former case, litigants would be paying too much by way of legal fees and lawyers would be receiving too

[27] By 'losing' and 'winning' cases, I do not simply mean to include only those that generate nothing and something. By winning, I mean that litigants will receive a sizeable amount after their lawyer has been paid that will go a substantial way to compensating them fairly for their claims.

much. In the latter, lawyers would be receiving less than they deserve and litigants would collectively be paying less than they should.

PART D – SOME PROPOSALS FOR REFORM OF CFAs

The reality of the functioning of CFAs and the criticism that I and others have leveled at them suggest a number of possible reforms. While the continued use of CFAs seems to be taken as a given from an 'access to justice' standpoint (and for good reasons), there are several relatively small changes that could be made that would enhance the operation and regulation of CFAs. The challenge is, as previously stated, to make justice more accessible, but at a reasonable cost so that the interests of both litigants and lawyers are fairly represented and balanced. The following proposals are made with this end in mind.

(1) The most pressing need is to get a better and fuller picture of how CFAs work in practice. At present, there is far too much dark and shadow to go forward confidently with any wide-ranging reform. In light of the aversion shown by the Plaintiffs' Bar to an outside study, it is incumbent upon the Law Society of Upper Canada (LSUC), the legal profession's governing body, to commission and implement a thorough and wide-ranging study of lawyers' fees in personal injury litigation. The LSUC is the only organization that has the prestige and authority to conduct the kind of thorough, unconditional and comprehensive survey that is needed, and it can deal effectively with any concerns that lawyers claim to have about privacy and confidentiality. Such a study would benefit everyone. It would confirm or contradict the findings, criticisms, and proposals put forward in this Report, and it might well develop and validate other insights and concerns about the whole process of fee-charging by lawyers.

(2) A particular challenge is whether leaving lawyers to fix their own percentage contingency is a fair and defensible way to proceed. My own sense is that this has had a tendency to price access to justice at too high a cost. While contingency fees open up litigation to more people than would otherwise be the case, the available evidence indicates that the system has allowed some lawyers to reap financial benefits that are out of proportion to the work done and the risk undertaken. there is not only an imbalance of power between lawyers and clients when it comes to entering the litigation process, but clients are also in an injured and often desperate situation. In short, clients are in need of protection. Accordingly, although the better preference might be be to go with a fee-multiplier for successful cases rather than a straight percentage (as this would ensure a link between the final compensation received and the actual amount of work done), a second-best proposal would be to fix a maximum percentage that lawyers could charge. Such maximum figure might be 25%. On the evidence available this would be a generous figure as it generally assumes that lawyers will be taking on around 20% of cases that lose. While this seems high, it nevertheless offers a basis on which to ensure that lawyers are adequately rewarded for their efforts.

(3) Lawyers should be mandated to keep hourly log/dockets of the time worked on any file, especially those that are the subject of a CFA. The absence of this requirement is irresponsible and permits abuse by unscrupulous lawyers. It is impossible to assess the fairness or reasonableness of any fee-charging agreement between lawyers and clients without some knowledge of the time expended by the lawyer on the file. Indeed, without such information, no court or assessment officer can realistically arrive at any decision about the fairness or reasonableness of the fee charged. Consequently, failure to keep hourly log/dockets of the time worked on any file should be a basis for ordering that no fees are awarded to the

lawyer under a CFA.

(4) In order to reduce the scope for abuse or misunderstanding, lawyers should be required to use a 'standard-form' CFA. At present, only New Brunswick provides and requires that a standard form be used. If lawyers wanted to deviate from that standard form, they would need to obtain the approval of the court. In any other situation, a deviation from the standard form would render the CFA invalid and unenforceable. The great attractions of the standard form are that the information provided would be consistent and put consumers in a position to compare the costs of using different law firms, while they would also ensure fairness and protection for clients. Although there are many possible formats that such a standard form might take, I have included a possible draft of such a standard-form CFA in *Appendix Nine.*

(5) All CFAs should be registered or filed with an officer of the court. At present, this requirement has only been mandated by New Brunswick and the North West Territories. This recommendation is not that all CFAs are approved by an officer of the court; this would be too time-consuming and expensive. However, the need to register or file all CFAs, along with the reliance on standard forms, will place appropriate and increased pressure on any lawyer who might be tempted to operate through unfair or unreasonable agreements. This requirement will introduce a level of transparency that is sorely missing from the existing process of regulation. In particular, again when combined with a standard-form requirement, this will provide a genuine check on the unlawful and not uncommon temptation to double-dip. Of course, truly unscrupulous lawyers might still be prepared to do 'side-deals' with clients, but this will hopefully be extremely rare (and a cause for severe disciple or disbarment).

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APPENDIX ONE

Solicitor's Act, RSO 1990, c S15

Agreements Between Solicitors and Clients

Definitions

15. In this section and in sections 16 to 33,

"client" includes a person who, as a principal or on behalf of another person, retains or employs or is about to retain or employ a solicitor, and a person who is or may be liable to pay the bill of a solicitor for any services; ("client")

"contingency fee agreement" means an agreement referred to in section 28.1; ("entente sur des honoraires conditionnels")

"services" includes fees, costs, charges and disbursements. ("service") R.S.O. 1990, c. S.15, s. 15; 2002, c. 24, Sched. A, s. 1.

Agreements between solicitors and clients as to compensation

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. R.S.O. 1990, c. S.15, s. 16 (1).

Definition

(2) For purposes of this section and sections 20 to 32, "agreement" includes a contingency fee agreement. 2002, c. 24, Sched. A, s. 2.

Approval of agreement by assessment officer

17. Where the agreement is made in respect of business done or to be done in any court, except the Small Claims Court, the amount payable under the agreement shall not be received by the solicitor until the agreement has been examined and allowed by an assessment officer. R.S.O. 1990, c. S.15, s. 17.

Opinion of court on agreement

18. Where it appears to the assessment officer that the agreement is not fair and reasonable, he or she may require the opinion of a court to be taken thereon. R.S.O. 1990, c. S.15, s. 18.

Rejection of agreement by court

19. The court may either reduce the amount payable under the agreement or order it to be cancelled and the costs, fees, charges and disbursements in respect of the business done to be assessed in the same manner as if the agreement had not been made. R.S.O. 1990, c. S.15, s. 19.

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. R.S.O. 1990, c. S.15, s. 20 (1).

Idem

(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. R.S.O. 1990, c. S.15, s. 20 (2).

Awards of costs in contingency fee agreements

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. 2002, c. 24, Sched. A, s. 3.

Same

(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. 2002, c. 24, Sched. A, s. 3.

Same

(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. 2002, c. 24, Sched. A, s. 3.

Claims for additional remuneration excluded

21. Such an agreement excludes any further claim of the solicitor beyond the terms of the agreement in respect of services in relation to the conduct and completion of the business in respect of which it is made, except such as are expressly excepted by the agreement. R.S.O. 1990, c. S.15, s. 21.

Agreements relieving solicitor from liability for negligence void

22. (1) A provision in any such agreement that the solicitor is not to be liable for negligence or that he or she is to be relieved from any responsibility to which he or she would otherwise be subject as such solicitor is wholly void. R.S.O. 1990, c. S.15, s. 22.

Exception, indemnification by solicitor's employer

(2) Subsection (1) does not prohibit a solicitor who is employed in a master-servant relationship from being indemnified by the employer for liabilities incurred by professional negligence in the course of the employment. 1999, c. 12, Sched. B, s. 14.

Determination of disputes under the agreement

23. No action shall be brought upon any such agreement, but every question respecting the validity or effect of it may be examined and determined, and it may be enforced or set aside without action on the application of any person who is a party to the agreement or who is or is alleged to be liable to pay or who is or claims to be entitled to be paid the costs, fees, charges or disbursements, in respect of which the agreement is made, by the court, not being the Small Claims Court, in which the business or any part of it was done or a judge thereof, or, if the business was not done in any court, by the Superior Court of Justice. R.S.O. 1990, c. S.15, s. 23; 2006, c. 19, Sched. C, s. 1 (1).

Enforcement of agreement

24. Upon any such application, 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 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. R.S.O. 1990, c. S.15, s. 24.

Reopening of agreement

25. Where the amount agreed under any such agreement has been paid by or on behalf of the client or by any person chargeable with or entitled to pay it, the Superior Court of Justice may, upon the application of the person who has paid it if it appears to the court that the special circumstances of the case require the agreement to be reopened, reopen it and order the costs, fees, charges and disbursements to be assessed, and may also order the whole or any part of the amount received by the solicitor to be repaid by him or her on such terms and conditions as to the court seems just. R.S.O. 1990, c. S.15, s. 25; 2002, c. 24, Sched. B, s. 46 (2); 2006, c. 19, Sched. C, s. 1 (1).

Agreements made by client in fiduciary capacity

26. Where any such agreement is made by the client in the capacity of guardian or of trustee under a deed or will, or in the capacity of guardian of property that will be chargeable with the amount or any part of the amount payable under the agreement, the agreement shall, before payment, be laid before an assessment officer who shall examine it and may disallow any part of it or may require the direction of the court to be made thereon. R.S.O. 1990, c. S.15, s. 26; 1992, c. 32, s. 26.

Client paying without approval to be liable to estate

27. If the client pays the whole or any part of such amount without the previous allowance of an assessment officer or the direction of the court, the client is liable to account to the person whose estate or

property is charged with the amount paid or any part of it for the amount so charged, and the solicitor who accepts such payment may be ordered by the court to refund the amount received by him or her. R.S.O. 1990, c. S.15, s. 27.

Purchase of interest prohibited

28. A solicitor shall not enter into an agreement by which the solicitor purchases all or part of a client's interest in the action or other contentious proceeding that the solicitor is to bring or maintain on the client's behalf. 2002, c. 24, Sched. A, s. 4.

Contingency fee agreements

28.1 (1) A solicitor may enter into a contingency fee agreement with a client in accordance with this section. 2002, c. 24, Sched. A, s. 4.

Remuneration dependent on success

(2) A solicitor may enter into a contingency fee agreement that provides that the remuneration paid to the solicitor for the legal services provided to or on behalf of the client is contingent, in whole or in part, on the successful disposition or completion of the matter in respect of which services are provided. 2002, c. 24, Sched. A, s. 4.

No contingency fees in certain matters

(3) A solicitor shall not enter into a contingency fee agreement if the solicitor is retained in respect of,

(a) a proceeding under the *Criminal Code* (Canada) or any other criminal or quasi-criminal proceeding; or

(b) a family law matter. 2002, c. 24, Sched. A, s. 4.

Written agreement

(4) A contingency fee agreement shall be in writing. 2002, c. 24, Sched. A, s. 4.

Maximum amount of contingency fee

(5) If a contingency fee agreement involves a percentage of the amount or of the value of the property recovered in an action or proceeding, the amount to be paid to the solicitor shall not be more than the maximum percentage, if any, prescribed by regulation of the amount or of the value of the property recovered in the action or proceeding, however the amount or property is recovered. 2002, c. 24, Sched. A, s. 4.

Greater maximum amount where approved

(6) Despite subsection (5), a solicitor may enter into a contingency fee agreement where the amount paid to the solicitor is more than the maximum percentage prescribed by regulation of the amount or of the value of the property recovered in the action or proceeding, if, upon joint application of the solicitor and his or her client whose application is to be brought within 90 days after the agreement is executed, the agreement is approved by the Superior Court of Justice. 2002, c. 24, Sched. A, s. 4.

Factors to be considered in application

(7) In determining whether to grant an application under subsection (6), the court shall consider the nature and complexity of the action or proceeding and the expense or risk involved in it and may consider such other factors as the court considers relevant. 2002, c. 24, Sched. A, s. 4.

Agreement not to include costs except with leave

(8) 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, unless,

(a) the solicitor and client jointly apply to a judge of the Superior Court of Justice for approval to include the costs or a proportion of the costs in the contingency fee agreement because of exceptional circumstances; and

(b) the judge is satisfied that exceptional circumstances apply and approves the inclusion of the costs or a proportion of them. 2002, c. 24, Sched. A, s. 4.

Enforceability of greater maximum amount of contingency fee

(9) A contingency fee agreement that is subject to approval under subsection (6) or (8) is not enforceable unless it is so approved. 2002, c. 24, Sched. A, s. 4.

Non-application

(10) Sections 17, 18 and 19 do not apply to contingency fee agreements. 2002, c. 24, Sched. A, s. 4.

Assessment of contingency fee

(11) For purposes of assessment, if a contingency fee agreement,

(a) is not one to which subsection (6) or (8) applies, the client may apply to the Superior Court of Justice for an assessment of the solicitor's bill within 30 days after its delivery or within one year after its payment; or

(b) is one to which subsection (6) or (8) applies, the client or the solicitor may apply to the Superior Court of Justice for an assessment within the time prescribed by regulation made under this section. 2002, c. 24, Sched. A, s. 4.

Regulations

(12) The Lieutenant Governor in Council may make regulations governing contingency fee agreements, including regulations,

(a) governing the maximum percentage of the amount or of the value of the property recovered that may be a contingency fee, including but not limited to,

(i) setting a scale for the maximum percentage that may be charged for a contingency fee based on factors such as the value of the recovery and the amount of time spent by the solicitor, and

(ii) differentiating the maximum percentage that may be charged for a contingency fee based on factors such as the type of cause of action and the court in which the action is to be heard and distinguishing between causes of actions of the same type;

(b) governing the maximum amount of remuneration that may be paid to a solicitor pursuant to a contingency fee agreement;

(c) in respect of treatment of costs awarded or obtained where there is a contingency fee agreement;

(d) prescribing standards and requirements for contingency fee agreements, including the form of the agreements and terms that must be included in contingency fee agreements and prohibiting terms from being included in contingency fee agreements;

(e) imposing duties on solicitors who enter into contingency fee agreements;

(f) prescribing the time in which a solicitor or client may apply for an assessment under clause (11) (b);

(g) exempting persons, actions or proceedings or classes of persons, actions or proceedings from this section, a regulation made under this section or any provision in a regulation. 2002, c. 24, Sched. A, s. 4.

Where solicitor dies or becomes incapable of acting after agreement

29. Where a solicitor who has made such an agreement and who has done anything under it dies or becomes incapable of acting before the agreement has been completely performed by him or her, an application may be made to any court that would have jurisdiction to examine and enforce the agreement by any person who is a party thereto, and the court may thereupon enforce or set aside the agreement so far as it may have been acted upon as if the death or incapacity had not happened, and, if it deems the agreement to be in all respects fair and reasonable, may order the amount in respect of the past performance of it to be ascertained by assessment, and the assessment officer, in ascertaining such amount, shall have regard, so far as may be, to the terms of the agreement, and payment of the amount found to be due may be ordered in the same manner as if the agreement had been completely performed by the solicitor. R.S.O. 1990, c. S.15, s. 29.

Changing solicitor after making agreement

30. If, after any such agreement has been made, the client changes solicitor before the conclusion of the business to which the agreement relates, which the client is at liberty to do despite the agreement, the solicitor, party to the agreement, shall be deemed to have become incapable to act under it within the meaning of section 29, and upon any order being made for assessment of the amount due him or her in respect of the past performance of the agreement the court shall direct the assessment officer to have regard to the circumstances under which the change of solicitor took place, and upon the assessment the solicitor shall be deemed not to be entitled to the full amount of the remuneration agreed to be paid to him or her, unless it appears that there has been no default, negligence, improper delay or other conduct on his or her part affording reasonable ground to the client for the change of solicitor. R.S.O. 1990, c. S.15, s. 30.

Bills under agreement not to be liable to assessment

31. Except as otherwise provided in sections 16 to 30 and sections 32 and 33, a bill of a solicitor for the amount due under any such agreement is not subject to any assessment or to any provision of law respecting the signing and delivery of a bill of a solicitor. R.S.O. 1990, c. S.15, s. 31.

Security may be given to solicitor for costs

32. A solicitor may accept from his or her client, and a client may give to the client's solicitor, security for the amount to become due to the solicitor for business to be transacted by him or her and for interest thereon, but so that the interest is not to commence until the amount due is ascertained by agreement or by assessment. R.S.O. 1990, c. S.15, s. 32.

APPENDIX TWO

Ontario Regulation 195/04: Contingency Fee Agreements (under the Solicitor's Act)

CONTENTS

Signing and dating contingency fee agreement

1. (1) For the purposes of section 28.1 of the Act, in addition to being in writing, a contingency fee agreement,

a. shall be entitled "Contingency Fee Retainer Agreement";

b. shall be dated; and

c. shall be signed by the client and the solicitor with each of their signatures being verified by a witness. O. Reg. 195/04, s. 1 (1).

(2) The solicitor shall provide an executed copy of the contingency fee agreement to the client and shall retain a copy of the agreement. O. Reg. 195/04, s. 1 (2).

Contents of contingency fee agreements, general

2. A solicitor who is a party to a contingency fee agreement shall ensure that the agreement includes the following:

1. The name, address and telephone number of the solicitor and of the client.

2. A statement of the basic type and nature of the matter in respect of which the solicitor is providing services to the client.

3. A statement that indicates,

i. that the client and the solicitor have 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,

ii. that the client has been advised that hourly rates may vary among solicitors and that the client can speak with other solicitors to compare rates,

iii. that the client has chosen to retain the solicitor by way of a contingency fee agreement, and

iv. that the client understands that all usual protections and controls on retainers between a solicitor and client, as defined by the Law Society of Upper Canada and the common law, apply to the contingency fee agreement.

4. A statement that explains the contingency upon which the fee is to be paid to the solicitor.

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.

6. A simple example that shows how the contingency fee is calculated.

7. A statement that outlines how the contingency fee is calculated, if recovery is by way of a structured settlement.

8. 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 and that includes the applicable timelines for asking for the review.

9. A statement that outlines when and how the client or the solicitor may terminate the contingency fee agreement, the consequences of the termination for each of them and the manner in which the solicitor's fee is to be determined in the event that the agreement is terminated.

10. A statement that informs the client that the client retains the right to make all critical decisions regarding the conduct of the matter. O. Reg. 195/04, s. 2.

Contents of contingency fee agreements, litigious matters

3. In addition to the requirements set out in section 2, a solicitor who is a party to a contingency fee agreement made in respect of a litigious matter shall ensure that the agreement includes the following:

1. If the client is a plaintiff, a statement that the solicitor shall not recover more in fees than the client recovers as damages or receives by way of settlement.

2. A statement in respect of disbursements and taxes, including the GST payable on the solicitor's fees, that indicates,

i. whether the client is responsible for the payment of disbursements or taxes and, if the client is responsible for the payment of disbursements, a general description of disbursements likely to be incurred, other than relatively minor disbursements, and

ii. that if the client is responsible for the payment of disbursements or taxes and the solicitor pays the disbursements or taxes during the course of the matter, the solicitor is entitled to be reimbursed for those payments, subject to section 47 of the *Legal Aid Services Act, 1998* (legal aid charge against recovery), as a first charge on any funds received as a result of a judgment or settlement of the matter.

3. A statement that explains costs and the awarding of costs and that indicates,

i. that, unless otherwise ordered by a judge, a client is entitled to receive any costs contribution or award, on a partial indemnity scale or substantial indemnity scale, if the client is the party entitled to costs, and

ii. that a client is responsible for paying any costs contribution or award, on a partial indemnity scale or substantial indemnity scale, if the client is the party liable to pay costs.

4. If the client is a plaintiff, a statement that indicates that the client agrees and directs that all funds claimed by the solicitor for legal fees, cost, taxes and disbursements shall be paid to the solicitor in trust from any judgment or settlement money.

5. If the client is a party under disability, for the purposes of the Rules of Civil Procedure, represented by a litigation guardian,

i. a statement that the contingency fee agreement either must be reviewed by a judge before the agreement is finalized or must be reviewed 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,

ii. a statement 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 or consent judgment under rule 7.08 of the Rules of Civil Procedure, and

iii. a statement that any money payable to a person under disability under an order or settlement shall be paid into court unless a judge orders otherwise under rule 7.09 of the Rules of Civil Procedure. O. Reg. 195/04, s. 3.

Matters not to be included in contingency fee agreements

4. (1) A solicitor shall not include in a contingency fee agreement a provision that,

(a) requires the solicitor's consent before a claim may be abandoned, discontinued or settled at the instructions of the client;

(b) prevents the client from terminating the contingency fee agreement with the solicitor or changing solicitors; or

(c) permits the solicitor to split their fee with any other person, except as provided by the Rules of Professional Conduct. O. Reg. 195/04, s. 4 (1).

(2) In this section,

"Rules of Professional Conduct" means the Rules of Professional Conduct of the Law Society of Upper Canada. O. Reg. 195/04, s. 4 (2).

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).

Contingency fee excludes costs and disbursements

6. A contingency fee agreement that provides that the fee is determined as a percentage of the amount recovered shall exclude any amount awarded or agreed to that is separately specified as being in respect of costs and disbursements. O. Reg. 195/04, s. 6.

Contingency fee not to exceed damages

7. Despite any terms in a contingency fee agreement, a solicitor for a plaintiff shall not recover more in fees under the agreement than the plaintiff recovers as damages or receives by way of settlement. O. Reg. 195/04, s. 7.

Settlement or judgment money to be held in trust

8. A client who is a party to a contingency fee agreement shall direct that the amount of funds claimed by the solicitor for legal fees, cost, taxes and disbursements be paid to the solicitor in trust from any judgment or settlement money. O. Reg. 195/04, s. 8.

Disbursements and taxes

9. (1) If the client is responsible for the payment of disbursements or taxes under a contingency fee agreement, a solicitor who has paid disbursements or taxes during the course of the matter in respect of which services were provided shall be reimbursed for the disbursements or taxes on any funds received as a result of a judgment or settlement of the matter. O. Reg. 195/04, s. 9 (1).

(2) Except as provided under section 47 of the *Legal Aid Services Act, 1998* (legal aid charge against recovery), the amount to be reimbursed to the solicitor under subsection (1) is a first charge on the funds received as a result of the judgment or settlement. O. Reg. 195/04, s. 9 (2).

Timing of assessment of contingency fee agreement

10. For the purposes of clause 28.1 (11) (b) of the Act, the client or the solicitor may apply to the Superior Court of Justice for an assessment of the solicitor's bill rendered in respect of a contingency fee agreement to which subsection 28.1 (6) or (8) of the Act applies within six months after its delivery. O. Reg. 195/04, s. 10.

11. OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THIS REGULATION). O. Reg. 195/04, s. 11.

APPENDIX THREE

LSUC Rules of Professional Conduct

Contingency Fees and Contingency Fee Agreements

3.6-2 Subject to rule 3.6-1, except in family law or criminal or quasi-criminal matters, a lawyer may enter into a written agreement in accordance with the Solicitors Act and the regulations thereunder, that provides that the lawyer's fee is contingent, in whole or in part, on the successful disposition or completion of the matter for which the lawyer's services are to be provided. [Amended – November 2002, October 2004]

Commentary [1] In determining the appropriate percentage or other basis of the contingency fee, the lawyer and the client should consider a number of factors, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery and who is to receive an award of costs. The lawyer and client may agree that in addition to the fee payable under the written agreement, any amount arising as a result of an award of costs or costs obtained as a part of a settlement is to be paid to the lawyer. Such agreement under the Solicitors Act must receive judicial approval. In such circumstances, a smaller percentage of the award than would otherwise be agreed upon for the contingency fee, after considering all relevant factors, will generally be appropriate. The test is whether the fee in all of the circumstances is fair and reasonable.

[New - October 2002, Amended October 2004, October 2014] [2] [FLSC - not in use]

LSUC Rules of Paralegal Conduct

Contingency Fees (7) Except in quasi-criminal or criminal matters, a paralegal may enter into a written agreement that provides that the paralegal's fee is contingent, in whole or in part, on the successful disposition or completion of the matter for which the paralegal's services are to be provided. (8) In determining the appropriate percentage or other basis of a contingency fee under subrule (7), the paralegal shall advise the client on the factors that are being taken into account in determining the percentage or other basis, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery, who is to receive an award of costs and the amount of costs awarded. (9) The percentage or other basis of a contingency fee agreed upon under subrule (7) shall be fair and reasonable, taking into consideration all of the circumstances and the factors listed in subrule (8).

APPENDIX FOUR

CONTINGENCY FEES IN CANADIAN JURISDICTIONS

	B.C.	ALTA.	SASK.	MAN.	QUE.	N.B.
Permitted	Yes	Yes	Yes	Yes	Yes	Yes
Legal Authority	Legal Profession Act SBC 1998, c 9, ss 66, 67.	Alberta Rules of Court, Alta Reg 124/2010, r 10.7, 10.8, 15.5.	The Legal Profession Act, 1990, SS 1990-91, c L-10.1, ss 64, 65, 67. (See also, Speers v Hagemeister (1974), 52 DLR (3d) 109 (SK CA).)	The Legal Profession Act, SM 2002, c 44 - Cap L107, s 55.	Code of Professional Conduct of Lawyers, CQLR c B-1, r 3.1, ss 99-110. Note: Quebec no longer has any specific regulations regarding contingency fees, their only requirement is that the fees be fair and reasonable.	Law Society Act, 1996, SNB 2009, c 25, s 83.
Since when	1979	1969	1975	1980	1968	1973
Pre-Authorized Forms	Benchers may make rules including but not limited to: form, content, limits on how much lawyer may charge, conditions lawyer must meet From *Law Society Rules 2015*, Part 8: Must be in writing	Must be: in writing; signed by lawyer and client(s) or agent; witnessed by a person who sees the client(s) sign the agreement and witness must swear an affidavit of execution; served to client(s) within 10 days after signed and person who serves client(s) must swear an affidavit of service	Benchers may make rules re: form, content, scope, and subject matter of provisions that shall or shall not be included in fee agreements From *Rules of The Law Society of Saskatchewan*, r 1501(1), (3): Must be in writing, signed by each party, and copies delivered to each party by lawyer	Must be in writing; signed by client(s)/agent; and lawyer must provide client(s) with a copy of the "contingency contract"	No	Standard "Contingent Fee Agreement" provided by Law Society; agreement may vary from standard form if approved by a reviewing officer and consistent with requirements set-out under section 83 of the Act

	P.E.I.	N.S.	N.L.	Y.T.	N.W.T./N.U.	ONT.
Permitted	Yes	Yes	Yes	Yes	Yes	Yes
Legal Authority	Rules of Civil Procedure, r 57. (adopted from Ontario in 1990)	Nova Scotia Civil Procedure Rules, r 36.15, 77.14, 82.05.	Rules of Supreme Court, 1986, r 55.15 -55.20.	Legal Profession Act, RSY 2002, c.134, s 5.	Rules of the Supreme Court of the Northwest Territories, NWT Reg 010-96, r 657-663.	Solicitors Act, RSO 1990, c S15, ss 20-30.
Since when	1977	1972	Formally 1986	1980	Formally 1979	Formally 2004
Pre-Authorized Forms	Must be in writing & signed by client(s)/agent	Must be in writing & signed and dated by client(s)/agent and lawyer; once signed, lawyers must deliver copy “immediately” to each client(s), place original in a sealed envelope, and keep it so that it can be produced on order of an adjudicator under the Small Claims Court Act or a judge	Must be in writing & signed by client(s)/agent; copy must be provided to client(s)	Must be in writing; cannot contain provision stating that lawyer is not liable for negligence; Benchers may make rules re: form and content, maximum % for different classes of service and for different stages of a proceeding	Must be in writing & signed by client(s)/agent	Must be in writing; entitled “Contingency Fee Retainer Agreement”; dated; signed by lawyer and client(s); signatures must be verified by witness; lawyer must provide client(s) with executed copy and keep copy themselves From Ontario Regulation 195/04: Contingency Fee Agreements (under the *Solicitors Act*)

	B.C.	ALTA.	SASK.	MAN.	QUE.
Statutory Lists of Mandatory and Restricted Contents	Agreement must state that client(s) may apply to district registrar of the Supreme Court of British Columbia for review within 3 months after agreement was made or retainer was terminated; agreement cannot include provision stating that lawyer not liable for negligence or relieved from any responsibility lawyer would otherwise be subject; agreement cannot include provision stating that lawyer is entitled to both fee based on proportion of amount recovered and portion of amount awarded as costs or paid as costs in settlement (*Law Society Rules 2015*, ss 8-1(2), 8-3.) For personal injury or wrongful death arising out of the use or operation of a motor vehicle: agreement must include statement per s. 8-4(1) of *Law Society Rules 2015*[28] In any other claim for personal injury or wrongful death: agreement must include statement per s. 8-4(2) of *Law Society Rules 2015*[29]	Name & address of client(s) & lawyer; nature of claim; statement of event or contingency; statement about manner of calculation; maximum fee or rate; responsibility for disbursements and other charges; if lawyer to receive part of costs award, then statement of: whether complete or partial portion of costs, acknowledgement of client(s) waiving right to complete or partial costs, acknowledgement that lawyer's portion of costs award is in addition to other legal fees, % of costs award that lawyer receives may not exceed % of judgement or settlement lawyer is entitled to; statement that client(s) may terminate agreement within 5 days after being served; statement that review officer may review agreement and any lawyer's charges upon client(s)'s request and review officer's decision may be appealed to a judge	Agreement cannot purport to: 1) exclude the member's liability for negligence; 2) require the member's consent before a client(s)'s cause may be abandoned, discontinued or settled; or 3) prevent the client(s) from changing solicitors before the conclusion of the retainer (*Rules of The Law Society of Saskatchewan*, r 1501(2))	Lawyer must provide client(s) with notice of their right to review accompanying their "contingency contract"	No
Filing with Courts	No	No	No	No	No
Sanctions	If lawyer does not comply with agreement requirements, lawyer only entitled to compensation in absence of agreement, but only if the event that would have allowed payment under the void agreement occurs	If lawyer does not comply with agreement requirements, lawyer only entitled to compensation in absence of agreement	No	If don't deliver notice of right of review, lawyer only entitled to compensation in absence of agreement; if contract found to be void upon review lawyer may have to reimburse the client(s) for any payment made under the contract	No

[28] Statement must read: Under the Rules of the Law Society of British Columbia, without court approval, a lawyer may charge a maximum of 33 1/3% of the total amount recovered in a claim for personal injury or wrongful death arising out of the use of a motor vehicle. The percentage limit applies to all matters related to the trial of a lawsuit, but does not include any appeal. A lawyer and a client(s) may make a separate agreement for legal fees for an appeal. Fees charged by different lawyers vary.

[29] Statement must read: Under the Rules of the Law Society of British Columbia, without court approval, a lawyer may charge a maximum of 40% of the total amount recovered in a claim for personal injury or wrongful death. The percentage limit applies to all matters related to the trial of a lawsuit, but does not include any appeal. A lawyer and a client(s) may make a separate agreement for legal fees for an appeal. Fees charged by different lawyers vary.

	N.B.	P.E.I.	N.S.	N.L.	YUKON
Statutory Lists of Mandatory and Restricted Contents	Name of client(s) & lawyer/firm; description of legal services to be performed; amount of fees to be charged for legal services; method by which fees are to be calculated and paid; description of costs, charges, disbursements and taxes to be paid under agreement; manner in which costs awarded by the court are to be applied to the payment of fees, costs, changes, disbursements and taxes; any other matter that affects the agreement; statement that client(s) is entitled to copy of the agreement upon execution; agreement shall not include provision allowing lawyer to be paid both a fee based on a proportion of amount recovered and costs awarded to client(s) by order of a court or by settlement of the matter	Name & address of client(s) & lawyer; nature of claim; statement of contingency and whether and to what extent the client(s) is liable to pay compensation otherwise than from amounts collected by the lawyer; a statement that reasonable contingent compensation is to be paid for the services; the maximum amount or rate of compensation after disbursements; statement to the following effect: "This agreement may be reviewed by the Prothonotary at the client(s)'s request, and may either at the instance of the Prothonotary or the client(s) be further reviewed by the court, and either the Prothonotary or the court may vary, modify or disallow the agreement".	Name & address of client(s) & lawyer; nature of claim; description of client(s)'s claim; condition prescribing contingency upon which services or disbursements are to be paid; term providing for any part of the services or disbursements the client(s) is required to pay regardless of the contingency, or providing that there are no such services or disbursements; term providing the amount to be paid on the contingency, either as a gross sum or by a stated formula; the responsibilities of the parties if the solicitor-client(s) relationship terminates before the claim is settled or determined; statement that the client(s) has the right to have the agreement and any payment due under it reviewed for the reasonableness and necessity of the charges by an adjudicator under the Small Claims Court Act or a judge	Name & address of client(s) & lawyer; nature of claim; statement of contingency; whether and to what extent the client(s) is to be liable to pay compensation otherwise than from amounts collected by the lawyer; statement that reasonable contingent compensation is to be paid for services; maximum amount or rate which the compensation is not to exceed after deduction of disbursements; and statement to the following effect: "This agreement may be reviewed by a taxing officer at the client(s)'s request, and may either at the instance of the taxing officer or the client(s) be further reviewed by the Court, and either the taxing officer or the Court may vary, modify or disallow the agreement."	Specify % applied; notice of right of review by the clerk of the Supreme Court
Filing with Courts	Yes, filed with the Executive Director as a confidential document and maintained on file until the final disposition of the matter	Yes, filed with the Prothonotary as a confidential document within 10 days of being signed	No	No	No
Sanctions	If lawyer does not comply with agreement requirements, lawyer only entitled to compensation in absence of agreement, but only if the event that would have allowed payment under the void agreement occurs	If lawyer does not comply with agreement requirements, lawyer only entitled to compensation in absence of agreement	No	If don't deliver notice of right of review, lawyer only entitled to compensation in absence of agreement; if contract found to be void upon review lawyer may have to reimburse the client(s) for any payment made under the contract	No

	N.W.T./N.U.	ONT.
Statutory Lists of Mandatory and Restricted Contents	Memorandum evidencing contingency agreement shall state: name & address of client(s) & lawyer; nature of the claim; contingency and whether and to what extent the client(s) is liable to pay compensation otherwise than from amounts collected by the solicitor; that contingent compensation must be reasonable and is to be paid for services; maximum amount or rate after deduction of disbursements; and statement to the following effect: "This agreement may be reviewed by the Clerk of the Supreme Court at the client(s)'s request and may at the instance of either the Clerk or the client(s) be further reviewed by a Judge of the Supreme Court and either the Clerk or the Judge may vary, modify or disallow the agreement."	Name, address & telephone number of client(s) & lawyer; statement of the basic type and nature of lawyer's services; description of contingency upon which fee is based; method by which fees are to be determined; if method is percentage, then statement that recovery excludes costs and disbursements; a simple example of how fee is calculated; statement outlining how fee is calculated if recovery is by structured settlement; statement that client has right to ask for review, including applicable timelines; explanation of how lawyer or client may terminate agreement, and the consequences for each party and manner in which fees would be determined in the event the agreement is terminated; agreement cannot contain provisions stating client cannot terminate contingency fee agreement or that the lawyer may split the fee with any person, other than provided for under LSUC's Rules of Professional Conduct; statement that client(s) retains right to make all critical decisions regarding the matter; and statement indicating: 1) client(s) and lawyer have discussed options other than contingency fee agreement, including hourly-rate retainer; 2) client advised that hourly rates may vary across lawyers and that they can compare rates; 3) client has chosen to retain lawyer by way of contingency fee agreement; and 4) client understands that all usual protections and controls on retainers apply In addition to the above, if agreement is with regard to litigious matter, then agreement must also include: if client is plaintiff, statement that lawyer shall not recover more in fees than damages or settlement; statement with regard to disbursements and taxes, including if client(s) is responsible for payments and a description of disbursements likely to be incurred, and that the client(s) may have to reimburse lawyer for these payments; statement explaining that, unless otherwise ordered by a judge, if client(s) is party entitled to costs they are entitled to receive costs contribution or award on a partial indemnity scale or substantial indemnity scale, and if client(s) is the party liable and responsible to pay costs then they must pay on one of the two aforementioned scales; if client is a plaintiff, statement indicating client(s) agrees and directs all funds claimed by lawyer for legal fees, cost, taxes, and disbursements to be paid to the lawyer in trust from any judgement or settlement money; if client(s) under disability and represented by a litigation guardian under the Rules of Civil Procedure: statement that agreement must either be reviewed by judge before finalized or reviewed as part of motion or application for approval of settlement or a consent judgment under rule 7.08 of the Rules of Civil Procedure, along with all of legal fees, costs, taxes, and disbursements, and statement that any money payable to person under disability under an order or settlement shall be paid into court unless a judge orders otherwise under rule 7.09 of the Rules of Civil Procedure From Ontario Regulation 195/04: Contingency Fee Agreements (under the Solicitors Act)
Filing with Courts	Yes, memorandum filed with the Clerk as a confidential document within 15 days of signing	No
Sanctions	If agreement does not comply with content and filing requirements, lawyer only entitled to compensation in absence of agreement	Upon application to the Superior Court of Justice, agreement may be declared void and cancelled; in that case, any costs, fees, charges and disbursements incurred or chargeable are to be assessed in the ordinary manner

	Child custody or access; Matrimonial disputes (unless Court approved)	No	Child custody or access; Matrimonial disputes (unless Court approved) (*Rules of The Law Society of Saskatchewan*, r 1502)	No	No	Child custody or access; Matrimonial disputes; Criminal or quasi-criminal matters, unless approved by the Court
	Yes, client(s) may apply to district registrar of the Supreme Court of British Columbia for review within 3 months after agreement was made or retainer was terminated	Yes, client(s) can request an officer to review the reasonableness of the account and contingency agreement; review officer's decision may be appealed to a judge	Yes, at any time after agreement is made up until 30 days after the client(s) is billed, or at any time if the court is satisfied that it is in the interests of justice to do so; alternatively, an application for review can be made to the local registrar after the client(s) has been billed, at the request of both the lawyer and client(s)	Yes, at any time within 6 months after receiving the bill client(s) may apply for assessment; or within 6 months after payment of the bill, client(s) may seek a declaration that the contract is not fair and reasonable	No	Yes, within 90 days after the agreement is made or the retainer is terminated client(s) can apply to reviewing officer, notwithstanding payment under the agreement

	P.E.I.	N.S.	N.L.	YUKON	N.W.T./N.U.	ONT.
Prohibited Areas & Clients	No	No	No	Family law; distribution of Estates; any proceeding in relation to the property of any person under Legal Disability	No	Criminal or quasi-criminal matters; Family law Court approval required for agreements made with persons under disability (Ontario Regulation 195/04: Contingency Fee Agreements)
Court Review Available & Limitation Period	Yes, at any time after the agreement is formed up until 6 months after payment of the bill, client(s) may apply to the Prothonotary, who then may refer to court	Yes, client(s) has right to have agreement and any payment due under it reviewed by an adjudicator or a judge under the Small Claims Court Act	Yes, client(s) can apply to taxing officer at any time after agreement is made until expiry of 6 months from date on which lawyer received fee or part of the fee, and from there, taxing officer can refer to the Court	Yes, within 90 days after agreement made or retainer terminated client(s) may apply to clerk of the Supreme Court for review, notwithstanding payment under the agreement; decision may be appealed to judge of the Supreme Court	Yes, client(s) may request review from Clerk at any time after agreement made until 1 year from last date lawyer has received the fee or part of the fee; at any time while contingency agreement is before the Clerk for review or within 15 days after Clerk's decision, Clerk may, on the request of client(s) or lawyer refer to a judge	Yes, client(s) or lawyer may apply to the Superior Court of Justice for assessment of the lawyer's bill within 6 months after its delivery From Ontario Regulation 195/04: Contingency Fee Agreements (under the *Solicitors Act*)

	B.C.	ALTA.	SASK.	MAN.	QUE.	N.B.
Fixed or Maximum Fee Specified & Basis of Compensation	Total fee cannot exceed the remuneration provided for in the agreement For personal injury or wrongful death arising out of the use or operation of a motor vehicle: 33 1/3% of the amount recovered (unless higher remuneration approved by Court) In any other claim for personal injury or wrongful death: 40% of the amount recovered (unless higher remuneration approved by Court)[30]	If lawyer receives portion of costs award then % of costs award received may not exceed % of judgement or settlement lawyer is entitled to	Total fee cannot exceed the remuneration provided for in the agreement	No	No	Unless approved by a reviewing officer, lawyer may retain 25% at most of the amount recovered for the client(s), exclusive of costs, taxes and disbursements; if the matter proceeds to an appeal, the maximum percentage increases to 30%
Settlement Provision	Agreement cannot purport to require lawyer consent to abandon, discontinue, or settle	None	Agreement cannot purport to require lawyer consent to abandon, discontinue, or settle (Rules of The Law Society of Saskatchewan, r 1501(1)(d))	None	None	None
Termination/ Change Lawyer Provision	Agreement cannot purport to prevent the client(s) from changing solicitors before the conclusion of the claim or cause of action	Client(s) may terminate lawyer without incurring any liability under the agreement within 5 days of service	Agreement cannot purport to prevent the client(s) from changing solicitors before the conclusion of the retainer (Rules of The Law Society of Saskatchewan, r 1501(e))	None	None	None

[30] In the alternative, agreement may provide that the lawyer may elect to forego any remuneration based on a proportion of the amount recovered and receive instead an amount equal to any costs awarded to the client by order of a court.

	P.E.I.	N.S.	N.L.	Y.T.	N.W.T./N.U.	ONT.
Fixed or Maximum Fee Specified & Basis of Compensation	No	No	No	No	No	No fixed or maximum fee, however contingency fee must exclude costs and disbursements, and cannot exceed damages From Ontario Regulation 195/04: Contingency Fee Agreements (under the *Solicitors Act*) (*Solicitors Act*: The Lieutenant Governor in Council may make regulations governing the maximum amount or percentage of remuneration that may be paid to lawyer pursuant to a contingency fee agreement; agreements may exceed any regulated maximum if, upon joint application by the lawyer and client(s), agreement is approved by the Superior Court of Justice within 90 days after agreement executed)
Settlement Provision	Provision requiring lawyer consent to abandon, discontinue, or settle is void	None	Provision requiring lawyer consent to abandon, discontinue, or settle is void	None	Provision requiring lawyer consent to abandon, discontinue, or settle is void	Agreement cannot contain provision requiring lawyer consent to abandon, discontinue, or settle From Ontario Regulation 195/04: Contingency Fee Agreements (under the *Solicitors Act*)
Termination/ Change Lawyer Provision	Client(s) may change lawyer before the conclusion of the retainer, notwithstanding agreement	Agreement must include provision outlining the responsibilities of the parties if the solicitor and client(s) relationship terminates before the claim is settled or determined	If lawyer terminated/changed then application may be made by or on behalf of either party to the taxing officer to determine the amount, if any, due for the services rendered under the retainer with regard to terms of the agreement	No	Client(s) may change lawyers notwithstanding agreement	Agreement cannot contain provision preventing client(s) from terminating agreement with lawyer or from changing lawyers From Ontario Regulation 195/04: Contingency Fee Agreements (under the *Solicitors Act*)

Note: This chart is up-to-date as of 2015.

APPENDIX FIVE

CONDITIONAL & DAMAGES-BASED AGREEMENTS IN THE U.K. AND AUSTRALIA

	UK Conditional Fee Agreements [CFA] with/without success fee (or "uplift")	UK Damages-based Agreements [DBA]	Australia Conditional Costs Agreements with/without success fee (or "uplift")	Australia Damages-based Agreements
Description	**CFAs "…are sold on the understanding that a lawyer will not take a fee if the claim fails. In most cases, if the claim is successful, the lawyer will charge an uplift (known as a success fee) in addition to their base costs." ("'No win, no fee' agreements" from the Legal Ombudsman)**	"DBAs are a type of 'no win, no fee' agreement under which a representative can recover an agreed percentage of a client's damages if the case is won, but will receive nothing if the case is lost." (Damages-Based Agreements Regulations 2013) Note: the Civil Justice Council has recently published a report on Damages-Based Agreements, including a number of recommended changes (see, *The Damages-Based Agreements Reform Project: Drafting and Policy Issues*)	"A costs agreement may provide that the payment of some or all of the legal costs is conditional on the successful outcome of the matter to which those costs relate" (*Legal Profession Act 2004*, No 112, ss 323-24)	From the Productivity Commission's final report on Access to Justice Arrangements: The Australian, State and Territory Governments should remove restrictions on damages based billing (contingency fees). This recommendation should only be adopted subject to the following protections being in place for consumers: • the prohibition on damages based billing for criminal and family matters, in line with restrictions for conditional billing, should remain. • comprehensive disclosure requirements — including the percentage of damages, and where liability will fall for disbursements and adverse costs orders — being made explicit in the billing contract at the outset of the agreement. • percentages should be capped on a sliding scale for retail clients with no percentage restrictions for sophisticated clients. • damages based fees should be used on their own with no additional fees (for example, lawyers should not be able to charge a percentage of damages in addition to their hourly rate).

	UK Conditional Fee Agreements [CFA] with/without success fee (or "uplift")	UK Damages-based Agreements [DBA]	Australia Conditional Costs Agreements with/without success fee (or "uplift")	Australia Damages-based Agreements
Permitted	Yes	Yes	Yes	No (not yet anyway… see above)
Legal Authority	Courts and Legal Services Act 1990, c 41, s 58.	Courts and Legal Services Act 1990, c 41, s 58.	**Each state and territory has an Act in force entitled *Legal Profession Act*, based on national template legislation, which allows for Conditional Costs Agreements and sets-out the** specific **requirements and restrictions of the Agreements with and without success fees; at least some of these Acts also explicitly ban contingency fee or damages-based agreements (see for example: New South Wales' *Legal Profession Act 2004*, No 112, s 325, "contingency fees are prohibited")**	NA
Since when	1998	2010 (for employment proceedings only); 2013 (for all civil litigation)		
Pre-Authorized Forms	Must be in writing; must relate to proceedings of a description specified by order made by the Lord Chancellor; must comply with any requirements prescribed by the Lord Chancellor (Law Society provides model CFA as a suggested starting point for building agreements)	Must be in writing; must not provide for a payment above a prescribed amount or for a payment above an amount calculated in a prescribed manner (see, "Fixed or Maximum Fee Specified & Basis of Compensation"); must comply with such other requirements as to its terms and conditions as are prescribed (see, "Statutory Lists of Mandatory and Restricted Contents"); and must be made only after the person providing services under the agreement has provided prescribed information (see below) For employment matters: any amendment to a DBA to cover additional causes of action must be in writing and signed by client and lawyer; and lawyer must provide client with, Information in writing about the meanings of terms, as defined in the Damages-Based Agreements Regulation; Further explanation, advice, or information about the	NA	NA

	UK Conditional Fee Agreements [CFA] with/without success fee (or "uplift")	UK Damages-based Agreements [DBA]	Australia Conditional Costs Agreements with/without success fee (or "uplift")	Australia Damages-based Agreements
		circumstances in which client may seek a review of lawyer's costs and expenses and the procedure for doing so the dispute resolution service provided by the Advisory, Conciliation and Arbitration Service (ACAS) in regard to actual and potential claims; Whether other methods of pursuing the claim or financing the proceedings are available, and, if so, how they apply to the client and the claim or proceedings in question (i.e., advice under the Community Legal Service, legal expenses insurance, pro bono representation, or trade union representation); The point at which expenses become payable; and A reasonable estimate of the amount that is likely to be spent upon expenses, inclusive of VAT		
Statutory Lists of Mandatory and Restricted Contents	Description of damages (can only include those specified by the Lord Chancellor in the Conditional Fee Agreements Order 2013; see "Fixed or Maximum Fee Specified & Basis of Compensation"); statement that the success fee is subject to a maximum limit; maximum limit expressed as a % of the damages awarded in the proceedings (see "Fixed or Maximum Fee Specified & Basis of Compensation"); statement that the % by which the amount of fees which would be payable if it were not a CFA is to be increased	Description of claim or proceedings or the parts of them to which the agreement relates; description of the contingency; explanation for setting the amount of payment at the level agreed (in an employment matter, must include whether the claim or proceedings is one of several similar claims or proceedings) DBAs must not require an amount to be paid by client other than the payment, net of any costs, disbursements incurred by lawyer, and any expenses incurred by lawyer For personal injury proceedings: DBAs must not require an amount to be paid by client other than: general damages for pain, suffering and loss of amenity, damages for pecuniary loss (other than		

	UK Conditional Fee Agreements [CFA] with/without success fee (or "uplift")	UK Damages-based Agreements [DBA]	Australia Conditional Costs Agreements with/without success fee (or "uplift")	Australia Damages-based Agreements
		future pecuniary loss), net of any sums recoverable by the Compensation Recovery Unit of the Department for Work and Pensions		
Filing with Courts	No	No		NA
Sanctions	Breach of the statutory requirements of s.58 of the Courts and Legal Services Act renders a CFA unlawful/unenforceable and no costs may be recovered Examples of breaches are: a success fee of more than 100% the CFA is not in writing there is no statutory cap in PI cases where the CFA provides for a success fee to be paid	No (If DBA terminated, lawyer may not charge client more than their normal costs and expenses for the work undertaken in respect of the client's claim or proceedings)		NA
Prohibited Areas & Clients	Criminal proceedings (other than under section 82 of the Environmental Protection Act 1990); Family proceedings (including child custody or access and matrimonial disputes)	No (open to all civil litigation) Previously, DBAs were limited to employment tribunals only		
Court Review Available & Limitation Period	No	No		NA
Fixed or Maximum Fee Specified & Basis of Compensation	Success fee may not exceed 100% of the lawyer's fee Success fee under a CFA may not be recovered by a lawyer from a losing	For personal injury claims at first instance: maximum fee is 25% of damages, including VAT; fee may be taken from general damages for pain, suffering, loss of amenity, damages for pecuniary loss [other than future pecuniary loss], and net of any sums		

NA

	UK Conditional Fee Agreements [CFA] with/without success fee (or "uplift")	UK Damages-based Agreements [DBA]	Australia Conditional Costs Agreements with/without success fee (or "uplift")	Australia Damages-based Agreements
	party, only from their successful client (previously, lawyer could recover from losing party) For personal injury claims: maximum fee is 25% of damages in proceedings at first instance; and 100% of damages in all other proceedings, i.e. appeals; (in proceedings at first instance or on appeal, fee may be taken from general damages for pain, suffering, loss of amenity, damages for pecuniary loss [other than future pecuniary loss], and net of any sums recoverable by the Compensation Recovery Unit of the Department for Work and Pensions (some limitations such as in the case of diffuse mesothelioma, insolvency work or publication and privacy proceedings, see the Conditional Fee Agreement Order 2013, s 6(2))	recoverable by the Compensation Recovery Unit of the Department for Work and Pensions For employment matters: maximum fee is 35% of the sums ultimately recovered by the client in the claim or proceedings, including VAT In any other claim or proceedings at first instance: maximum fee is 50% of the sums ultimately recovered by the client, including VAT		
Settlement Provision	No	No		NA
Termination/ Change Lawyer or Agreement Provision	No	Client may not terminate DBA after settlement has been agreed; or within 7 days before the start of the tribunal hearing Lawyer may not terminate DBA and charge costs unless the client has behaved or is behaving unreasonably (see, "Pre-Authorized Forms" for amending a DBA relating to an employment matter)		

APPENDIX SIX

Personal Injury/Malpractice Decisions

Cogan, Re (2010 ONSC 915)

2010 Carswell Ont 1148, 2010 ONSC 915, [2010] O.J. No. 827, 185 A.C.W.S. (3d) 779, 92 C.P.C. (6th) 356

Date	Heard: N/A Judgement: February, 2010
Parties	Moving Party: Cogan, Q.C.
Counsel	For himself (motion): J. Arthur Cogan, Q.C.
Judge/s	Then: Hackland R.S.J.
Quick Facts	P. (minor) and Litigation Guardian ("LG") brought a medical negligence action (birth injury). MOTION by solicitor for approval of contingency fee to be charged to minor plaintiff and litigation guardian.
Statute & Rules Considered	*Solicitors Act*: ss. 28.1(1), 28.1(2), 28.1(8), 28.1(8), 28.1(12); *Reg* 195/04: s.5(1); *Rules of Civil Procedure*: referred to: s.5; *Family Law Act*
Contingency Fee Agreement	33.33% CFA: "[s.2.(4) of Reg] "…the clients hereby agree that the lawyer's fee shall be contingent upon the successful resolution of the litigation whether by court disposition after trial or by way of settlement during trial, which fee shall be: [33% and then there was a calculation example provided, as per the Reg]" AND "[Solicitor] arranged for independent legal advice for them in relation to the [CFA]." Settlement: $8.5M with $800,000 attributable to party-and-party costs
Issue/s with Agreement	**A.** What fees should be allowed to the solicitor whether under the CFA, or otherwise, for his services to the minor P. in this action **B.** Should the CFA be strictly interpreted **C.** What factors should be considered when assessing the CF%
Outcome	**Held**: Motion granted. 25% contingency fee + disbursements + GST approved. **A.** Responding party ordered to pay fees of $1.84M [25% * ($8.5M -0.800M-0.338M)]; also ordered to pay disbursements of $65k "The fees allowed amount, in my estimation, to a premium of about four times the billings which would likely have accrued on an hourly basis [*quantum meruit*] and accordingly promote the goal of access to justice in that the economics of taking on a complex medical negligence action such as this are sufficiently favourable to attract experienced counsel of the calibre of the solicitor." **B.** "Submissions of Solicitor and Litigation Guardian indicated that strict wording of CF not applicable to pre-trial settlement; **C.** Solicitor incurred significant financial risk and incurred $65k in costs prior by settlement; adverse results could have placed Solicitor's law firm in serious jeopardy; P. (minor) had strong case on liability; Given strength of case apparent from preliminary expert reports, case was of low to medium risk for Solicitor; Solicitor's fees wouldn't encroach on amounts for P. (minor) present or future needs

Seguin v. Chaput (2010 ONSC 1275)

2010 CarswellOnt 1092, 2010 ONSC 1275, [2010] O.J. No. 767, 186 A.C.W.S. (3d) 70

Date	Heard: February, 2010 Judgement: February, 2010
Parties	Plaintiff: Seguin Defendant: Chaput
Counsel	For Plaintiff: William J. Sammon, S. Tia Hazra For Defendant: Pat Peloso
Judge/s	Then: Lafrance-Cardinal J.
Quick Facts	The P. was injured in a motor vehicle accident, and then attended mediation with her lawyer, and insurance company reps. ACTION to set aside the minutes from the settlement meeting, as the P. desires more money
Statute & Rules Considered	*Rules of Civil Procedure:* 1.03(1), 59.06(2)
Contingency Fee Agreement	NA – the issue regarding CFA requires a further application Settlement: P. accepted offer of [$340k]
Issue/s with Agreement	"Secondary Issue: Does the Court have jurisdiction in this Motion to set aside the [CFA] between Plaintiff and Solicitor?"
Outcome	**Held**: Motion dismissed. Motion to set aside the meeting minutes set aside Secondary issue: "As the original claim has been satisfied by the judgment issued, a fresh application will have to be brought against the Plaintiff's original solicitor if [the CFA] issue is to be argued. In that action, the Plaintiff will be able to raise the validity and legality of the [CFA]."

Access Legal Services Professional Corp. v. Padjen (2010 ONSC 1412)

– SEE ONCA DECISION BELOW

2010 CarswellOnt 1302, 2010 ONSC 1412, 185 A.C.W.S. (3d) 880

Date	Heard: October, 2009 Judgement: March, 2010
Parties	Plaintiff: Access Legal Services Professional Corporation; Mundulai Defendant: Padjen
Counsel	For Plaintiff: Aliamisse O. Mundulai For Defendant: Jean-Paul Waldin
Judge/s	Then: Patricia C. Hennessy J.
Quick Facts	The defendant suffered a workplace injury and retained the services of the Paralegal Corporation Access Legal Services to represent her in an appeal before the WSIB. Mr. Mundulai was retained by the paralegal firm to present the plaintiff's case. His services included a one day hearing. The appeal was successful. Ms. Padjen was awarded pension arrears of $160,053.02, $72,245.01 for interest, $950.18 per month for ongoing disability benefits. The plaintiff Corporation and Paralegal (Mr. Mundulai is now a lawyer but was a paralegal at the time) sued Ms. Padjen for outstanding fees. This [CFA] is the main basis of the claim.
Statute & Rules Considered	N/A – see "Outcome" section
Contingency Fee Agreement	N/A – see "Outcome" section
Issue/s with Agreement	N/A – see "Outcome" section
Outcome	"At the time the alleged [CFA] is said to have been signed and performed, [CFAs] between paralegals and their clients were considered void and prohibited by law (*Tri Level.*…. Therefore even if the disputed agreement exists, it is void and of no effect."

Access Legal Services Professional Corp. V Padjen (2010 ONCA 669)

– SEE ONSC DECISION ABOVE

2010 CarswellOnt 7748, 2010 ONCA 669, 193 A.C.W.S. (3d) 426

Date	Heard: October 8, 2010 Judgment: October 8, 2010
Parties	Access Legal Services Professional Corporation and Aliamisse Mundulai (Plaintiffs/Appellant) Mirjana Padjen (Defendant / Respondent)
Counsel	Aliamisse Mundulai for himself L. Leslie Dizgun for Access Legal Services Professional Corporation Jan-Paul Waldin for Defendant / Respondent
Judge/s	H.S. LaForme J.A., R.A. Blair J.A., and R.G. Juriansz J.A.
Quick Facts	Client retained paralegal firm in connection with workers' compensation appeal. Paralegal firm retained paralegal to represent client at appeal hearing. Client won appeal and was awarded $160,053.02 for pension arrears, $72,245.01 for interest, and $950.18 per month for ongoing disability benefits. Paralegal firm billed client $21,995.05 and she paid promptly. About one year later, paralegal firm billed client for $73,473.18. Paralegal firm alleged client had signed CFA providing for contingency fee of 30% of total amount recovered. Paralegal firm and paralegal commenced action against client for payment of contingency fee. Client served request to admit but paralegal firm and paralegal failed to respond. Client brought motion for summary judgment dismissing action. Motion was granted. Deemed admissions indicated paralegal firm was unlicensed at time and that client had not signed CFA. Paralegal firm never sought leave to withdraw deemed admissions. Paralegal firm did not provide evidence to establish basis for granting leave to withdraw deemed admissions. Original CFA was never produced. Paralegal firm acknowledged in submissions that CFAs were void and prohibited at relevant time. Paralegal admitted his retainer agreement was with paralegal firm and not with client directly. No claim based on *quantum meruit* had been pleaded. Paralegal appealed.
Statute & Rules Considered	NA
Contingency Fee Agreement Breakdown	Paralegal firm alleged client had signed CFA providing for contingency fee of 30% of total amount recovered
Issue/s with Agreement	Whether or not client had signed a CFA with the paralegal firm
Outcome	**Held:** Appeal dismissed. “This appeal is utterly devoid of any merit.” (para 1) … “We fix the costs of the abandoned appeal against Access in the total amount of $7,000 inclusive of disbursements plus HST.” (para 9) … “we fix the costs of the Mundulai appeal against Mr. Mundulai personally on a substantial indemnity basis in the amount of $13,000 inclusive of disbursements and any applicable taxes.” (para 10)

Aywas (Litigation Guardian of) V Kirwan (2010 ONSC 2278)

2010 CarswellOnt 4447, 2010 ONSC 2278, [2010] O.J. No. 2713, 190 A.C.W.S. (3d) 739, 99 C.P.C. (6th) 199

Date	Heard: March, 2010 Judgement: April, 2010
Parties	Plaintiff: Wadi Aywas, by his Litigation Guardian Selma Hanna; Selma Hanna; Dina Aywas; Raad Aywas; Rafid Aywas; Dalya Aywas; Lina Aywas; minors, by their Litigation Guardian: Zena Aywas and Ramey Aways Defendant: Kirwan
Counsel	For Plaintiff: Hector H. Emond, Asfrah Syed For Defendant: Not listed on Westlaw
Judge/s	Then: Charles T. Hackland J.
Quick Facts	P. (then 47 y.o.) was a pedestrian and hit by the D.'s vehicle:"[P.'s] post accident course has been very unusual. He has suffered daily severe headaches, sleep disruption, balance problems, reduced memory and concentration, depression, anxiety and post traumatic stress syndrome... He has not been employed since the accident." Parties brought application for **[A]** court approval of tort settlement, statutory accident benefits (SAB) settlement, and **[B]** solicitor's CFA claimed on both settlements.
Statute & Rules Considered	*Family Law Act*, ss. 42, 61; *Insurance Act*, *Substitute Decisions Act*
Contingency Fee Agreement	CFA: "'35% of the settlement funds obtained' both in tort and accident benefits [SAB]." Settlement: $550k
Issue/s with Agreement	**B.** Whether or not a CFA, in the case of an incapable person, is binding on the Court.
Outcome	**Held:** Application granted in part. 25% for the tort and 15% for the SAB **A.** "I agree with [P.'s] counsel's assessment of the risk of proceeding to trial [with the principal disability being psychiatric in nature and the P. not having suffered a head injury] and I consider this settlement [$550k] to be fair and prudent in the circumstances." **B.** "The Court will allow a fee in the amount of 15% of the SAB's lump sum settlement plus the fees of [$36k] previously deducted on the monthly benefits received of [$366k]. The tort [CF%] is reduced to 25% which fairly compensates the solicitors for the work done." "A [CFA] in the case of an incapable person is not binding on the Court, but is certainly a matter of importance to be considered as a matter of client expectations" "I regard this as a good settlement in a matter of average complexity. The risk assumed by the solicitors was moderate and related mainly to the causation aspects of the plaintiff's injuries. I do not think that applying the same contingency fee to the SAB's settlement as to the tort settlement is generally appropriate, although each case must be considered individually."

Young (Litigation Guardian of) V Hinks Estate (2010 ONSC 2067)

2010 CarswellOnt 2718, 2010 ONSC 2067, 188 A.C.W.S. (3d) 78, 56 E.T.R. (3d) 92

Date	Heard: N/A Judgement: April, 2010
Parties	Plaintiff: Shawna Young (by her Litigation Guardian Glynn Young); Pamela Young Defendant: Smitiuch (Litigation Administrator of Marion Hinks Estate); Goodwin; Cessco Enterprises
Counsel	For Plaintiff: D.V. Orlando For Defendant: Not listed on QL
Judge/s	Then: Sproat J.
Quick Facts	In 1997, minor plaintiff (then 3 y.o.) suffered brain injury after collision in car driven by her aunt — Aunt's liability was clear. MOTION for approval of solicitor fees, inclusive of GST in the amount of $162k plus disbursements, inclusive of G.S.T. in the amount of $8k.
Statute & Rules Considered	NA
Contingency Fee Agreement	15% CFA: “The retainer agreement entered into by the Litigation Guardian … provided that if successful in the tort action the fee charged would be the costs recovered from the defendants plus 15-20% of the damages plus interest on damages.” Settlement: "The case was settled for what essentially amounted to the policy limit that had been offered "early on". The total settlement inclusive of costs, interest, and $50,000, contributed by Goodwin, amounted to $651,000."
Issue/s with Agreement	**A.** What fees are fair and reasonable in this case? **B.** “In support of the [CFA], and the quantum of fees claimed, Mr. Orlando's affidavit makes reference to the fact his firm carries a high level of disbursements and bears the cost of disbursements incurred in a losing case." To what extent does this factor in to the strength of his CFA?
Outcome	**Held:** Motion dismissed. **A. “**It is incumbent on Mr. Acri to justify the reasonableness of the [$67k] his firm claims in relation to the tort claim and [$76k] in relation to the accident benefits settlement… I want to see documents evidencing his retainer and dockets and understand exactly [what Mr. Acri did on the case over 6 years]." "What, if any, litigation risk existed in relation to the past attendant care claim? In this regard, I want to review all correspondence between counsel touching on the issue of liability, the quantum of the claim and the settlement of the claim." **B.** "What, if any, weight can I properly attach to paragraph 50 of Mr. Orlando's affidavit filed in the tort regarding action regarding "losing cases" [the fact that the firm has to pay disbursements for losing cases] in the absence of some supporting documentation?"

MPampas V Steamatic Toronto Inc. (2010 ONCA 373)

2010 CarswellOnt 3385, 2010 ONCA 373, [2010] O.J. No. 2099, 188 A.C.W.S. (3d) 562

Date	Heard: May 19, 2010 Judgment: May 20, 2010
Parties	John Mpampas, Suzanne King and Nicolas Mpampas (plaintiffs), Appellant Steamatic Toronto Inc. and Gerling Global General Insurance Company, Defendants BETWEEN John Mpampas and Suzanne King Appellant (plaintiffs) and Andrew Marcus, Honda Canada Finance Inc., Viki Doidge and Toyota Credit Canada Inc. Defendants BETWEEN John Mpampas Appellant(plaintiff) and Guarantee Company of North America Defendant
Counsel	John Mpampas for Appellant / Respondent by way of Cross-Appeal, for himself Eric Freedman for Respondent / Appellant by way of Cross-Appeal, Joel Freedman
Judge/s	Armstrong J.A., Goudge J.A., and Sharpe J.A.
Quick Facts	Client retained lawyer as legal counsel on three personal injury matters. Parties entered into CFA. Some legal work was done and settlement offers were being discussed. Lawyer was removed from record on his own motion. Lawyer brought successful motion for charging order for his unpaid account under s. 34 of *Solicitors Act*. Charging order was granted for two of client's three actions. Motion judge found that preconditions were satisfied that fund or property was in existence at time order was granted, property was "recovered or preserved" through instrumentality of solicitor, and that there was some evidence client could or would not pay fees. Motion judge held that lawyer preserved client's right to sue, which was chose in action and therefore property. Motion judge concluded that client could not pay lawyer's fees other than out of judgments or settlements. Client appealed. Cross-appeal by lawyer from costs award (no costs awarded).
Statute & Rules Considered	NA
Contingency Fee Agreement Breakdown	NA
Issue/s with Agreement	NA
Outcome	**Held:** Appeal dismissed. Cross-appeal dismissed. Costs awarded to the respondent fixed at $3000 inclusive of disbursements and GST. “We see no error in the reasons of the motion judge. The charging orders over any settlement funds were properly issued. The respondent acknowledges that any claim that the solicitor get off the record without just cause can be taken into account by the assessment officer in determining what fees are reasonable.” (para 1) And, motion judge acted within his discretion in awarding no costs.

Alves v. Azevedo & Nelson Barristers & Solicitors (2010 ONSC 2853)

2010 CarswellOnt 3348, 2010 ONSC 2853, 189 A.C.W.S. (3d) 76

Summary	Only one mention of CFA and CFA not considered: Mr. "Alves alleged that he had entered into a [CFA] with the defendant law firm, Azevedo & Nelson ("Azevedo"), to pursue his tort and SABs claim."

Skocir v. Premier Fitness Clubs (Yorkdale) Inc. (2010 ONSC 4636)

2010 CarswellOnt 6285, 2010 ONSC 4636, [2011] W.D.F.L. 311, 191 A.C.W.S. (3d) 1068

Summary	The only mention of CFA: "In my view, the amount suggested by the solicitor for the defendant bears no semblance to reality given the history of this case and I reject it. Most of the time spent up to and including the trial before me is now wasted and unrecoverable. In addition, the fees expended trying to execute on the judgment are completely wasted. The existence of a CFA with the Plaintiff is irrelevant to my consideration of the costs the plaintiff is entitled to as a result of the conduct of the defendant, in my opinion."

Jean Estate v. Wires Jolley LLP (2010 ONSC 4835)

2010 CarswellOnt 6817, 2010 ONSC 4835, 193 A.C.W.S. (3d) 1062, 324 D.L.R. (4th) 140, 61 E.T.R. (3d) 258

Date	Heard: June, 2010 Judgement: September, 2010
Parties	Plaintiff: Applicants: Wong, Estate Trustee of Estate of Jean Defendant: Respondent: Wires Jolley LLP
Counsel	For Plaintiff: Glenn A. Hainey, Christopher Stanek For Defendant: Paul Michell, James Renihan
Judge/s	Then: A.D. Grace J.
Quick Facts	Previous action was an arbitration.
Statute & Rules Considered	*Solicitors Act*: s.28(1); *Reg 195/04*: s.15; *Rules of Civil Procedure*: R. 3.02; *Arbitration Act*
Contingency Fee Agreement	CFA (note this is really not a normal Personal Injury or Class Action case): "The arrangement was not outlined in a single document. Its terms are to be drawn from a proposal of Wires Jolley and subsequent communications. While the parties seemed to agree the fee was to be equal to ten per cent of the net value of the estate's assets, the valuation date is the subject of disagreement." Settlement: "Net proceeds of [$20.5M] were generated after the settlement of protracted, world-wide litigation."
Issue/s with Agreement	"The issue is whether Wires Jolley should be paid a contingency fee of [$2.05M] as ordered by the Honourable Fred Kaufman, Q.C., who acted as arbitrator"
Outcome	**Held:** Application dismissed. "The arbitrator did consider the relevant factors. A reading of the reasons in their entirety evidence the fact the Arbitrator considered the time and effort required and spent, legal complexity, the degree of responsibility assumed, the monetary value of the matters at issue, the importance of the matters to the clients, the degree of skill and competence demonstrated by Mr. Wires, the results achieved, the ability of the client to pay and to the extent he could, the clients' expectations as to the amount of the fee. While my determination of what was appropriate may not have accorded with the Arbitrator's, I am not in a position to say it was unreasonable"

Choi v. Choi (2010 ONSC 4800)

2010 Carswell Ont 6352, 2010 ONSC 4800, 192 A.C.W.S. (3d) 420

Date	Heard: August, 2010 Judgement: September, 2010
Parties	Plaintiff: Hijung Choi and Yea Lim Choi (by her Litigation Guardian); Hijung Choi Defendant: Doo Hyun Choi; Roy Foss Motors; Roy Foss Leasing; Betty Ammirato; Francesco Ammiratio; Ka Man Cheng; Siu Hing Leung; (Third-party: Newmarket Honda)
Counsel	For Plaintiff: Mr. J. McLeish For Defendant: Mr. S. Moore for Defendants, Doo Hyun Choi, Roy Foss Motors Limited, No one for Third Party
Judge/s	Then: M. Fuerst J.
Quick Facts	The plaintiff Yea Lim ("Annie") Choi (then 9) suffered catastrophic injuries as the result of a motor vehicle collision that occurred during a family outing. MOTION for approval of the settlement and legal fees of Annie's tort claim.
Statute & Rules Considered	*Rules of Civil Procedure*: R 2.08(3), R. 7.08; *Insurance Act*
Contingency Fee Agreement	15% - 20% CFA: "[P.] entered into a CFA to pay the law firm costs received from the defendants plus 15% to 20% of damages." Settlement:"The settlement totals $14.4M … approximately [$3.6k] be paid to Annie's case manager for outstanding fees; [$1M] be paid to the law firm for partial indemnity costs and disbursements inclusive of GST; and [as sought under a CFA, a further [$1.6M]" "On the materials before me, I cannot find that Mrs. Choi is a financially sophisticated person, as was the litigation guardian (and her spouse) in the 2007 decision *Cogan*..."
Issue/s with Agreement	**B.** What fees are fair and reasonable taking into account the existing CFA?
Outcome	**Held:** Motion granted. 7% + 7% of disbursements with no time docket provided to court by solicitor. **A.** I am satisfied that the amount of the settlement itself is in Annie's best interests." **B.** "I allow fees to the law firm under the [CFA] in the amount of [$1M], which is in addition to the sum of $1 million for costs and disbursements. The law firm therefore will receive a total of [$2M]." "I have considered the factors set out in both cases of *Cogan*… which incorporate those set out in the commentary to Rule 2.08(3) of the [Rules]: The risk that this action would be unsuccessful was minimal... Unlike the situation in both *Cogan*… this was not a complex case, nor is it suggested that the settlement resulted from the lawyer's persuasive advancement of some unique or novel legal argument.... The amount of disbursements actually carried by the law firm to the point of settlement, just under[$140k] was not large... no dockets were kept by those who worked on the file, which would have permitted me to assess the reasonableness of the fee in light of the time expended" Mr. Orlando swore in his affidavit, and both [P. lawyer] and [D. lawyer] told me that based on what is known at this time, the monthly tax free amount paid from the structure will be sufficient to address Annie's ongoing needs [but possibly not the purchase of a more suitable home by Annie's mother]." "The prospect that the legal fees claimed might encroach on the amount needed to cover Annie's needs [expert hired by P. estimate present value of $17M - $23M] is a factor I must consider."

Attis v. Ontario (Minister of Health) (2010 ONSC 4508)

2010 CarswellOnt 6727, 2010 ONSC 4508, 192 A.C.W.S. (3d) 745, 323 D.L.R. (4th) 309

Date	Heard: July, 2010 Judgement: September, 2010
Parties	Plaintiff: Attis; Tesluk Defendant: Ontario (Minister of Health/AG)
Counsel	For Plaintiff: Samuel L. Marr for Plaintiff, S. Joyce Attis; A. Tesluk, Plaintiff for herself For Defendant: Paul J. Evraire, Shain Widdifield, John Soldatich for Defendant / Moving Party, Attorney General of Canada Sandra L. Secord for Respondents, John B.J. Legge, Legge & Legge, Barristers and Solicitors
Judge/s	Then: Cullity J.
Quick Facts	N/A - see "Contingency Fee Agreement" section for explanation
Statute & Rules Considered	*Solicitors Act*: ss. 28.1(12)(c), 28.1(12)(d), 28.1(12)(e); *Reg 195/04*: s.3; *Rules of Civil Procedure*: ss. 15.02, 57.07, 59.06(2)
Contingency Fee Agreement	This is more of a case about payment of the D.'s costs, and there is only one mention of CFA: "The following chronological summary of relevant facts that led up to the present dispute may be helpful: ... 2. February 5, 2000 — Ms Attis and Ms Tesluk execute retainer agreements which contain no references to potential liability for the defendant's costs, and provide for a percentage contingency fee for Mr Legge's firm."

Loreto v. Little (2010 ONSC 4764)

2010 CarswellOnt 6854, 2010 ONSC 4764, 193 A.C.W.S. (3d) 643

Summary	CFA, as between a solicitor and client, not at issue here: "Frank Loreto is a lawyer. He had a thriving practice. It operated as a sole proprietorship. Frank Loreto had no partners. The lawyers who worked with him were employees. At some point, Frank Loreto indicated that he was prepared to take on partners…" "Mr. Justice Belobaba pointed out that the retainers were based on contingency billing rather than time spent. There is no disagreement about this. The affidavit sworn by the lawyer acting for Frank Loreo says: "Frank had a contingency fee arrangement with his personal injury clients".

Séguin v. Van Dyke (2010 ONSC 6636)

– see further reasons below in (2013 ONSC 6576)

2010 CarswellOnt 10279, 2010 ONSC 6636, 197 A.C.W.S. (3d) 53

Date	Heard: N/A Judgement: October, 2010
Parties	Plaintiff: Applicant: Seguin Defendant: Respondent: Van Dyke
Counsel	For Plaintiff: For Applicant: William J. Sammon For Defendant: For Respondent: John Cannings
Judge/s	Then: Martin James J.
Quick Facts	"Donna Seguin is a former client of Frank Van Dyke, barrister and solicitor. Mr. Van Dyke represented Ms. Seguin in a personal injury action. His fees were based on a Contingency Fee Agreement ("CFA"). The action was settled at mediation. The agreed settlement sum consisted of a global amount that did not specifically identify the amount payable for the plaintiff's claim, legal costs or pre-judgment interest." Ms. Seguin commenced an application seeking a declaration that the CFA is unenforceable and for an order that Mr. Van Dyke's account be assessed.
Statute & Rules Considered	*Solicitors Act*: ss.23, 28.1, 29.1
Contingency Fee Agreement	CFA: Very limited detail on CFA, i.e. "[Mr. Seguins legal fees] were based on a Contingency Fee Agreement ("CFA"). " Settlement: "The tort action was ultimately settled during mediation in the fall of 2009. At that time the plaintiff accepted an offer of $340,000 "all in."" "The agreed settlement sum consisted of a global amount that did not specifically identify the amount payable for the plaintiff's claim, legal costs or pre-judgment interest."
Issue/s with Agreement	Should the CFA be enforced or set aside (s.23 of *SA*)? "This would leave the enforceability of the CFA to be the only question determined by the application. In my view, this issue is sufficiently discreet from the issues raised by the action that the two proceedings need not be tied together in some fashion at this time or that the issues raised by the application ought be rolled into the action."
Outcome	**Held:** I am not persuaded that there is sufficient basis to grant the relief sought by the moving party. "It is contrary to the *Solicitors Act* for CFAs to provide for fees to be calculated on an award of costs except where a special application is made to the court under Section 29.1. It appears in this case that the relevant provisions of the Solicitors Act have not been complied with."

Séguin v. Van Dyke (2013 ONSC 6576)

– see above also

2013 CarswellOnt 15252, 2013 ONSC 6576, 233 A.C.W.S. (3d) 1015

Date	Heard: October, 2013 Judgement: November, 2013
Parties	Applicant: Séguin Respondent: Van Dyke (lawyer)
Counsel	For Applicant: William Sammon For Respondent: John Cannings
Judge/s	Then: Paul F. Lalonde J.
Quick Facts	"Donna Séguin (DOB 25th May 1962) is married to Leo Séguin. They have three daughters, Tammy (31), Julie (23), and Jenna (21), and two grandchildren, Cameron (9) and Sara (4). Ms. Séguin was involved in a motor vehicle accident on October 20, 2006, with Lianne Chaput, from which she sustained catastrophic injuries." MOTION by Ms. Séguin seeks a declaration that the CFA is unenforceable and void, as well as an order requiring Mr. Van Dyke to repay immediately, and with interest, the 33.3% contingency which he charged on costs, including disbursements and HST.
Statute & Rules Considered	*Solicitors Act*, ss.23, 24, 28, 28.1 *Contingency Fee Agreements*, O. Reg. 195/04
Contingency Fee Agreement	I am including the full CFA agreement to show that, aside from the inclusion of costs within the CFA (the issue dealt with in this motion), the CFA seems to comply with the other requirements (e.g., in writing, sets out the % and has an example calculation). Ms. Séguin entered into a Contingency Fee Agreement with Mr. Van Dyke dated May 11, 2007. The following are the relevant provisions of the Agreement: **(a)** No Trial It is agreed that with respect to the Action, it is a civil proceeding, the final account for services (excluding disbursements and G.S.T.) with respect to the Action is to be contingent on FVD securing a settlement. The fee shall be 33.3% of the settlement amount, including all amounts received for costs and disbursements received in relation to the civil proceeding. This estimate includes hourly rates and a premium based on results achieved. Example #1: Award - $10,000.00 (all inclusive of costs and disbursements) Fee (33.3%) - $3,330.00 plus disbursements and G.S.T. Example #2: Award - $150,000.00 plus costs of $30,000.00 plus disbursement of $5,000.00 Fee (33.3%) - $61,605.00 plus disbursements and G.S.T. **(b)** Trial It is agreed that with respect to the Action, if the matter proceeds to trial, FVD will be entitled to receive 100% of any costs awarded by the Court in addition to 33.3% of the amount awarded for damages by the Court. Example: Damages Awarded $450,000.00 plus costs of $75,000.00 Fee: $224,850.00 ($450,000.00 × 33.3% + $75,000.00) **Recommended Settlement** 13. In the event that I recommend a settlement for acceptance but you choose to proceed further in the proceeding, you will be obligated to pay FVD 35% of the settlement proposed, plus disbursements and G.S.T. and thereafter will retain myself on the basis of an hourly rate. You acknowledge that my hourly rate is $200.00 per hour.

	"In the present motion before the Court, Ms. Séguin seeks a declaration that the CFA is unenforceable and void, as well as an order requiring Mr. Van Dyke to repay immediately, and with interest, the 33.3% contingency which he charged on costs, including disbursements and HST. Ms. Séguin posits that this amounts to $22k."
Issue/s with Agreement	Is the CFA so flawed as to render it unenforceable?
Outcome	**Held:** Application granted. "In the case at bar, I am concerned with an agreement which, on its face, breaches the *Solicitors Act.*" "*Beaudoin* agreed that a CFA could survive if the deficiencies were minor or of a technical variety. At para. 122, he states: Justice Aston differentiated between "minor" or "technical' breaches and "significant" ones. This implies that a CFA may be enforced regardless of certain breaches. One can accept this analysis when one looks at the list of deficiencies ... In Laushway, the judge was faced with minor deficiencies. In the case at bar, the breach is fundamental and not technical..."
Additional Reasons given in [#06] *Seguin v. Van Dyke* (2013 ONSC 7759):	Dealing with costs in the above motion: "The Respondent did not reasonably expect that costs of this motion would be over $20,000.00. The Respondent's own costs are $13,467.91. Furthermore, the costs for the two previous motions between the parties were assessed at $6,500.00 and $8,000.00 plus HST. Having considered the costs as claimed and the factors enumerated in Rule 57.01, I find that a fair and reasonable award of costs is $10,000.00. I order that the Applicant shall have her costs of the motion fixed in the sum of $10,000.00 plus HST, payable by the Respondent within 30 days."

Dolan (Litigation Guardian of) v. Reid (2010 ONSC 6608)

2010 CarswellOnt 10415, 2010 ONSC 6608, 198 A.C.W.S. (3d) 608

Date	Heard: N/A Judgement: November, 2010
Parties	Plaintiff: Applicant: Dolan (Litigation Guardian of) Defendant: Respondent: Reid
Counsel	For Plaintiff: For Appicant: Robert Deutschmann For Defendant: No one
Judge/s	Then: G.E. Taylor J.
Quick Facts	"On October 27, 2007 [then 11 y.o.], Kassandra was at the home of Winston and Paula Reid visiting with their daughter, Rachel. Kassandra was to spend the night with Rachel at the Reid home. Kassandra fell asleep on the couch while watching TV. She awoke to find the Reid's Springer Spaniel/Labrador Retriever dog staring directly into her face. Without warning or provocation the dog bit Kassandra in her face causing injury to her right cheek and lip." APPLICATION by litigation guardian of infant plaintiff for approval of settlement reached in personal injury action approval of 20% counsel fee.
Statute & Rules Considered	NA
Contingency Fee Agreement	20% CFA: "the amount to be paid to Kassandra's solicitors was based on a [CFA] signed by Lisa Dolan, providing for fees to be calculated on the basis of a 20% contingency." Settlement: of $75k
Issue/s with Agreement	Are counsel’s fees fair and reasonable?
Outcome	**Held:** Application granted. 7% + disbursements of [$1.4k] "I am prepared to approve solicitor's fees of [$5.5k] plus disbursements of [$1.4k] plus applicable taxes." "Based on my review of the client ledger, I conclude that this file was not one involving a significant degree of complexity. I disagree with Mr. Deutschmann's assessment that the risk undertaken by him was moderate. Liability was clear. After a demand letter was forwarded to the Reids it was apparent that they were insured [thus able to pay]."

394 Lakeshore Oakville Holdings Inc. v. Misek (2010 ONSC 7238)

2010 CarswellOnt 9939, 2010 ONSC 7238, [2010] O.J. No. 5692, 195 A.C.W.S. (3d) 959

Summary	Only mention of contingency fee: "However, if that was the arrangement, it should not disentitle Mrs. Purvis to recover costs payable by the opponent. This approach is common for contingency fee and pro bono retainers."

Broesky v. Lüst (2011 ONSC 167)

2011 CarswellOnt 188, 2011 ONSC 167, 199 A.C.W.S. (3d) 1333, 330 D.L.R. (4th) 259

Quick Facts	Lack of written agreement is the only real issue here "There are significant factual disputes with respect to the retainer. The Plaintiff says that during the initial telephone call … she made it clear to the Defendant that she wanted to retain him on all matters arising out of the motor vehicle incident ..." "There were many other factual issues raised in the hearing... she maintained that she and the Defendant discussed a 20 percent contingency fee arrangement during their first telephone call in August 2001. There is no note of this in the Defendant's file."

Billings (Litigation Guardian of) v. Lanark Mutual Insurance Co. (2011 ONSC 2564)

2011 CarswellOnt 3008, 2011 ONSC 2564, 201 A.C.W.S. (3d) 635

Judge/s	Then: Beaudoin J.
Quick Facts	"... after 6 weeks of trial and one week of deliberations, a jury returned a verdict on favour of the Plaintiffs. The Plaintiffs had brought a claim against their insurers Lanark after a fire destroyed their home and contents. The Defendant Insurer denied their claim on the basis of arson." case is more about the indemnity scale and pretty well the extent of the discussion on the CFA agreement is as follows: "I disagree with his submission that hourly rates are irrelevant in assessing the reasonableness of a CFA. Information about the actual hourly rates is an important litmus test in assessing the reasonableness of a claim for cost."
Statute & Rules Considered	*Rules of Civil Procedure*: R.49, R.57, R.57.01

Ledroit v. Rooplall (2011 ONSC 2751)

2011 CarswellOnt 2892, 2011 ONSC 2751, [2011] O.J. No. 2022, 202 A.C.W.S. (3d) 178

Date	Heard: April, 2009 Judgement: May, 2011
Parties	Client Moving Party: Rooplall Responding Party: Ledroit, Solicitor
Counsel	For Defendant: G. Schible For Solicitor: K. Souch
Judge/s	Then: Daley J.
Summary	"The client had instituted an action against a physician alleging sexual abuse. The client was represented by another solicitor up until July of 2009, at which time she retained Ledroit to continue on with the action on her behalf." This case is more about a dispute with respect to what retainer applied, and not about the fee charged: "The solicitor contends that his initial [CFA] retainer, as discussed below, was terminated with the client and a new retainer agreement was entered into on the day the client's action was scheduled to proceed to trial.": "On July 27, 2009 the client entered into a Contingency Fee Retainer Agreement ("CFRA") with the solicitor on the basis that he would receive 25% of the amount recovered if the action settled before trial plus the costs contribution from the defendants." "The solicitor advised the client on January 4, 2010 [the date scheduled for trial] that he was terminating the CFRA [because she had been dishonest and the lawyer discoverd that dishonesty on the date of the trial] and giving the client two options, namely: (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 ["total fees through to the completion of trial in the sum of [$260k] plus disbursements and taxes."]." Settlement: "Following the new retainer agreement, and prior to the trial commencing, the solicitor engaged in settlement negotiations with the defendant's counsel on behalf of the client. On the afternoon of January 4, 2010, she accepted an offer to settle her action in the all-inclusive sum of [$275k] "

Karkar v. Karkar (2011 ONSC 2550)

2011 CarswellOnt 5171, 2011 ONSC 2550, 216 A.C.W.S. (3d) 156

Summary	Only mention of CFA: "The applicant seeks an order granting her interim disbursements in the amount of $25,000.00 on the grounds that she has no income other than the support payments made by the respondent, she does not qualify for legal aid, and her lawyer is not prepared to proceed to trial on contingency."

Ontario (Public Guardian & Trustee) v. Charland (2011 ONSC 2961)

2011 CarswellOnt 4009, 2011 ONSC 2961, 202 A.C.W.S. (3d) 474

Judge/s	Then: Moore J.
Summary	"The matters in issue in these actions arise from a motorbike/motor vehicle collision that occurred on September 12, 1998. At that time, Joshua was...13... As a result of the collision, Joshua was thrown approximately 50 feet and landed on a gravel road. He suffered catastrophic brain injuries with resulting obvious and debilitating cognitive and physical impairments." This case does not involve a CFA, but provides a nice ovetview of the *Cogan* factors: "Although legal fees are not sought in this matter on the basis of a [CFA], I have considered the factors that moved Smith J in the *Cogan* case" "Having referred to the *Cogan* factors and those outlined in *rule 57,* Hackland J. allowed a fee equivalent to 15% of the settlement of accident benefits claims and 25% for fees in the tort settlement before him in the *Aywas* case. In that case, the retainer agreement called for a 35% contingency fee on both tort and accident benefits claims and the legal expenses claimed equated to a premium of $142,195 over docketed time of $226,350. His Honour saw a good settlement in a matter of average complexity. The risk assumed by counsel was determined to be moderate and related mainly to the causation aspects of the plaintiff's injuries. He determined not to apply the same contingency fee to accident benefit and to tort-based settlements." Settlement: "... payment by defendants of [$2.21M], inclusive of all claims of all claimants for damages, interest and costs." "The net settlement funds remaining after deducting legal fees and associated taxes in the accident benefits settlement becomes [$1.06M]. Disbursements will be deducted and paid from that sum, leaving a new net of [$1.01M] for distribution."

Laushway Law Office v. Simpson (2011 ONSC 4155)

– see ONCA decision below

2011 CarswellOnt 6238, 2011 ONSC 4155, 205 A.C.W.S. (3d) 857, 336 D.L.R. (4th) 632

Date	Heard: February - September, 2010 Judgement: July, 2011
Parties	Solicitors: Laushway Law Office ("LLO"); Barry Laushway Client: Simpson
Counsel	For Solicitors: John J. Cardill For Client: Himself
Judge/s	Then: Robert N. Beaudoin J.
Quick Facts	"Simpson was injured in a motor vehicle accident... Although trained as a lawyer, Simpson was not in practice at that time. Acting as his own counsel, he commenced legal proceedings in Kingston … to recover damages resulting from the injuries he sustained in the accident against the tort defendant..." "This is an assessment of a solicitor's account between the Laushway Law Office ("LLO") sought by their former client Robert Burton Simpson ("Simpson"). The final account was in the amount of [$172k] and was based on a contingency fee agreement ("CFA")."
Statute & Rules Considered	*Solicitors Act*, ss.16, 24, 28.1; *Contingency Fee Agreements* O. Reg 194
Contingency Fee Agreement	33% CFA: "P. retained a Kingston lawyer, John Zuber ("Zuber"), to conduct the litigation on his behalf ["the agreement with Zuber allowed for an estimated 33% of any award including damages costs and disbursements"]… there was a breakdown in the relationship with Zuber and Simpson sought new counsel. In May of 2005, he retained the [law firm] LLO to act on his behalf..." "On March 1, 2006 Simpson formally entered into a new CFA with LLO [, which provided that] legal fees would be 30% of the total amount recovered for the claim and that the client would be responsible for the disbursements over and above the 30%." Settlement: "The applicant's claim was settled at a pre-trial conference held in November 2007 for a total payment of $751k plus assessable disbursements. Simpson's claims had been settled at $650k and the defendants agreed to pay 15% costs on that sum."
Issue/s with Agreement	Is the CFA valid and enforceable, i.e. does it comply with the relevant provisions of the *SA* and is it reasonable?

Outcome	Held: CFA is valid and enforceable. "In jurisdictions in which CFAs are subject to review by the court, the lawyer must bear the onus of demonstrating that the fee is reasonable, … The reasonableness of the fee should of course be assessed by reference to the risk as it appeared at the time the assessment was negotiated, and not as of the time of the assessment, when it may falsely appear with the benefit of hindsight that the risk of failure was minimal all along" "I conclude that a CFA that does not meet the requirements of O. Reg 195/04 is not inherently void or voidable. The terms of the CFA and any breaches must be examined to determine whether they are "minor" or "technical" or if they are "significant". ..." "[in this case], There was substantial risk to the Solicitors, as chronic pain files are by their very nature risky. Further, the likelihood of success was in doubt due to Simpson's nature. It was repeatedly stated by several individuals that Simpson was not going to be credible or likable on the stand, and there was a good chance that this would affect the amount awarded to him."
Additional Reasons given in [#135] Laushway Law Office v. Simpson (2011 ONSC 5759)	"An important issue to be decided was the validity of the CFA entered into between RBS and LLO... [in the previous proceeding (2011 ONSC 4155),] Following six days of hearing, I concluded that the CFA entered into between RBS and LLO was valid and enforceable and that, in any event, the fees charged by LLO were fair and reasonable on a quantum meruit basis. ..." "In this case, the solicitors had actually been paid their account. … Moreover, there was more in issue than the quantum of the fees charged by LLO. RBS wanted to test the validity of the CFA and [another Justice (not Beaudoin)] directed that this issue be dealt with at trial." "The first [issue] was whether the [CFA] was void or voidable insofar as it did not comply with the regulations under the Solicitors Act. The second issue addressed any potential negligence on the part of the solicitors in failing to amend their statement of claim in time thereby triggering a postponement of the trial date." "In my view, the fair and reasonable result in this case would be to allow the solicitors their costs on a partial indemnity basis for all of their time up to and including the first three days of the trial and to award them costs on a substantial indemnity basis thereafter since the client's conduct during the last three days was so outrageous as to be deserving of sanction … His repeated attacks on the integrity of the solicitors and their counsel in his costs submissions are completely unacceptable.")"

Laushway Law Office v. Simpson (2013 ONCA 317)

– see ONSC decision above

2013 CarswellOnt 5534, 2013 ONCA 317, 228 A.C.W.S. (3d) 11

Date	Heard: April 12, 2013 Judgment: May 10, 2013
Parties	Laushway Law Office, Barry D. Laushway (solicitors), Respondents/Responding Parties Robert Burton Simpson (client), Appellant/Moving Party
Counsel	Robert Burton Simpson, for himself (trained as a lawyer) John J. Cardill, for Responding Parties
Judge/s	John Laskin J.A., In Chambers
Quick Facts	Moving party, Simpson was injured in a car accident in 1997. Eventually he retained Barry Laushway of the Laushway Law Office (LLO) to represent him. Simpson and LLO entered into a CFA. Simpson, now moving party, asked for order to further extend time for perfecting appeal from judgment. He had already been granted two lengthy extensions. See 'CFA Breakdown' for more details…
Statute & Rules Considered	NA
Contingency Fee Agreement Breakdown	Under the parties' CFA, LLO was to be paid legal fees equal to 30% of any recovery. In November 2007, Simpson's claim was settled at a pre-trial conference for $750,000 plus disbursements. After some adjustments to settle the claims of ODSP and Ontario Works, Simpson received the net amount of $516,473.64, and LLO received a net fee of $138,456.24. At the time of this motion, the fee has been paid, and subject to these proceedings, LLO has the funds. Simpson then challenged the enforceability of the CFA. In November 2008, McLeod-Beliveau J. ordered a hearing of that issue. Shortly after, Barry Laushway died. At the hearing on July 4, 2011 Beaudoin J. found the CFA to be enforceable, and in the alternative would have upheld the amount claimed on quantum meruit basis.
Issue/s with Agreement	No issues with agreement on this motion. Simpson is looking for an extension on his appeal of Beaudoin J.'s decision that the CFA is enforceable.
Outcome	**Held:** Motion dismissed. Simpson had not shown any merit in proposed appeal. The reasons of trial judge were thorough and appeared to be well reasoned. Although he found that CFA was enforceable, even if it was not enforceable, he also found that fee received by law firm was fully justified on quantum meruit basis. Simpson's' general and conclusory contentions in notice of motion did not raise any arguable ground of appeal arising from reasons.

Miller (Litigation Guardian of) v. Bender (2011 ONSC 4379)

2011 CarswellOnt 6645, 2011 ONSC 4379, 205 A.C.W.S. (3d) 80

Date	Heard: July, 2011 Judgemet: July, 2011
Parties	Plaintiff/Applicant: Brayden Miller and Alicia Miller, by their Litigation Guardian; Caroline Miller; Amber Miller Defendant/Respondent: John Bender; Mark Bender; Intact Insurance
Counsel	For Plaintiff: Robert M. Ben For Defendant: No one
Judge/s	Then: Turnbull J.
Quick Facts	a tort action and an accident benefits claim (no further detail provided in the case). "Counsel for the plaintiffs brought two applications... for **[A]** approval of the settlement of the tort action and the accident benefits claims and **[B]** approval of the Management Plan proposed by Brayden's parents."
Statute & Rules Considered	*Solicitors Act*, s.28.1 *Contingency Fee Agreements*, O. Reg. 195/04
Contingency Fee Agreement	CFA: "I have had a chance to review the retainer agreement ... It raises a number of questions for the court to consider. It provided that the fees would be comprised of the partial indemnity costs recovered by the plaintiffs plus 15-25% of the total recovery made by the plaintiffs." "The fees sought are approximately [$585k] (" [$517k] by Thomson Rogers and approximately [$72k] by the former solicitors for the plaintiffs, Giffen Lee." Settlement: "[$1.08M] in the tort action and [$1.25M] in the Accident Benefit claim"
Issue/s with Agreement	Are the solicitors' fee reasonable and does it comply with the relevant provisions of the *SA*?
Outcome	**Held:** "It is ordered that the sum of [$250k] may forthwith be paid out of the proceeds of the settlement to the plaintiffs' counsel Thomson Rogers as a partial payment [additional documents are required: see below] of their fees for services rendered to the plaintiffs plus the sum of [$65k] for disbursements incurred by them on behalf of the plaintiffs" "In reviewing the Retainer agreement, it appears to me at first glance that it does not comply with many of the requirements for such an agreement under the Solicitors Act. In particular, section 28.1(8) of the Solicitors Act provides as follows:..." "Section 28.1(12) of the Solicitors Act enables the Lieutenant Governor in Council to make regulations governing contingency fee agreements and several aspects of those agreements. Pursuant to that enabling power, Regulation 195/04 was passed and was in effect at the time that the plaintiffs signed their retainer agreement with Thomson Rogers.The Retainer Agreement signed by the plaintiffs and prepared by Thomson Rogers does not comply with the Regulation in many respects... Because of my concern that the Retainer Agreement may violate the provisions of the Regulation and the Solicitors Act, I have asked Thomson Rogers to provide additional information to the court in affidavit form on that issue and on other issues such as dockets showing time actually spent, the nature of the services provided and who provided the services, the hourly billing rate applicable for each individual working on the file and such other information as would be relevant in an assessment of costs."

Consky v. Farooq (2011 ONSC 5148)

– see ONCA decision below

2011 CarswellOnt 8957, 2011 ONSC 5148, [2011] O.J. No. 3890, 207 A.C.W.S. (3d) 152

Date	Heard: N/A Judgement: August, 2011
Parties	Plaintiff: Consky Defendant: Farooq
Counsel	For Plaintiff: Frank Feldman For Defendant: Michael Czuma
Judge/s	Then: D.L. Corbett J.
Quick Facts	"It all started back on May 3, 1999. Mr. Farooq was a student pilot. He was injured when another student pilot collided with him on the tarmac at a flight training school." "Mr. Farooq claimed to suffer serious injuries in the accident. He alleged total and permanent disability. On May 7, 1999, he retained Mr. Consky to claim for his losses." This is a MOTION to oppose confirmation of the Report of Assessment Officer Boyd is dismissed.
Statute & Rules Considered	*Solicitors Act*,s.28.1
Contingency Fee Agreement	CFA: "Mr. Farooq had a fee agreement with Mr. Consky. Mr. Farooq says that he understood the agreed fees would be 10% of the total settlement." notable but not super relevant: "Mr. Consky expected to be paid his fees from the settlement proceeds. Mr. Farooq had other ideas. He terminated Mr. Consky's retainer after settlement was agreed, but before it was implemented. Then he tried to obtain the full settlement proceeds behind Mr. Consky's back. Counsel for the defendant gave Mr. Consky notice. The funds were ordered paid into court, and Mr. Farooq was ordered to pay costs for Mr. Consky's motion to protect his fees." Settlement: $250k (plus costs of $54k)
Issue/s with Agreement	"Was the Fee Agreement Illegal? If So, Did the Assessment Officer Err in Failing to Find the Agreement Illegal?" "Mr. Farooq argues that the fee agreement breaches s.28.1(8) of the Solicitors Act. That provision prohibits contingency fee agreements that include both recovered costs plus an additional fee payable to the solicitor (unless there are special circumstances and the agreement is approved on joint application to a judge). Although this provision was not enacted until 2004, some five years after the fee agreement was agreed, Mr. Farooq argues that the litigation was not concluded until 2008, and thus s.28.1(8) applied at the time that fees were calculated. Mr. Farooq argues that, in this event, s.20(3) of the Solicitors Act has the effect of limiting Mr. Consky's entitlement to the costs portion of the settlement."
Outcome	Held: "The motion to oppose confirmation of the Report of Assessment Officer Boyd is dismissed. The Report [to fix Mr. Consky's account at $76k] is confirmed, [thus,] the [CFA] is now immaterial. "[as an aside,] the amendments to the Solicitors Act do not have retrospective effect to existing fee agreements." "Total costs of $13,245 were awarded in Mr. Consky's favour. Of these, $6,000 was for the costs of assessing the disbursements."

Consky v. Farooq (2013 ONCA 393)

– see ONSC decision above

2013 CarswellOnt 7939, 2013 ONCA 393, 229 A.C.W.S. (3d) 269

Date	Heard: June 10, 2013 Judgment: June 11, 2013
Parties	Abdul Kasim Farooq, Appellant Harvey S. Consky, Solicitor, Respondent
Counsel	Michael Czuma, for Appellant Frank Feldman and Darrell Paul, for Respondent
Judge/s	Laskin J.A., Rosenberg J.A., Tulloch J.A.
Quick Facts	Appellant appealed confirmation of assessment of retainer agreement from Justice Corbett's decision in *Consky v. Farooq* (2011), 2011 ONSC 5148. Appellant claimed that retainer agreement was a CFA that violated the *Solicitors Act*. Appellant sought to set aside confirmation of assessment.
Statute/Rules Considered	NA
Contingency Fee Agreement Breakdown	NA
Issue/s with Agreement	NA
Outcome	**Held:** Appeal dismissed with costs fixed at $7000, inclusive of disbursements and applicable taxes. Here is the entire substance of the Court's decision: "(1) We agree with Justice Corbett that the retainer agreement was not a contingency fee agreement. (2) Even if it was a contingency fee agreement, the *Solicitors Act* does not apply retrospectively to it. (3) The appellant disavowed the agreement and asked for an assessment of the fairness and the reasonableness of the account. That is what he got."

Oakley & Oakley Professional Corp. v. Aitken (2011 ONSC 5613)

2011 CarswellOnt 12301, 2011 ONSC 5613, 209 A.C.W.S. (3d) 52

Date	Heard: N/A Judgement: September, 2011
Parties	Applicant: Oakley & Oakley Professional Corp. Respondents: Aitken and others
Counsel	For Applicant: Paul Harte For Defendant: N/A
Judge/s	Then: Perell J.
Quick Facts	Formerly a class action of 99 individuals but those individuals separated into individual actions: "who, in 99 separate actions, claim damages for medical malpractice against gynaecologist, Richard Austin." APPLICATION "for permission to include in its contingency fee agreements with the 99 clients any award of costs to the clients in their respective actions against Dr. Austin. Because the award of costs would be in addition to the [CFAs] with the 99 clients, court approval is required. Under s. 28.1 (8), court approval is available in "exceptional circumstances."
Statute & Rules Considered	*Solicitors Act*, s.28.1(8)
Contingency Fee Agreement	25% or 30% CFA: "Under the contingency fee agreements Oakley & Oakley agree to assume the risk of both fees and disbursements [signed by each of the 99 clients]. The agreements provide for a contingency fee of 25% or a contingency fee of 30% where it is anticipated that a limitation period defence could be raised by Dr. Austin... As may be noted, the [CFAs] provide for both a percentage of recovery plus any amount paid by Dr. Austin for costs"
Issue/s with Agreement	Do these circumstances qualify as "exceptional" within the meaning of the *SA*, as to warrant award of costs in addition to the CFA?
Outcome	Held: Application granted. "The circumstances of the 99 medical malpractice actions viewed individually or viewed collectively constitute exceptional circumstances that justify granting approval under s. s. 28.1 (8) of the Solicitors Act." "Generally speaking, medical negligence litigation is a challenging area of civil litigation, and the 99 actions against Dr. Austin are all complex and difficult. This type of litigation inevitably requires the parties to retain expert witnesses to testify about the standard of care and whether there was negligence.... It appears that, but for ... [the lawyers'] agreement to enter into [CFAs], the individual plaintiffs would not have been able to advance their claims." "In *Williams*... involving a party under a disability, Justice Roccamo approved a contingency fee of 28% plus any costs awarded or paid by the defendant. She held that counsel's assumption of significant and unusual risk, together with complications arising from feuding plaintiffs amounted to extraordinary circumstances that justified granting approval." "In *Cogan*, ... , Justice Hackland agreed with *Williams*... but distinguished it from the circumstances of *Cogan*, which was a complex obstetrical negligence case but one in which the financial risk assumed by the lawyer under a [CFA] was moderated by the circumstance that there were admissions of liability... Justice Hackland stated: 30. As to what constitutes special [exceptional] circumstances...."

Dryden v. Oatley Vigmond LLP (2011 ONSC 7303)

2011 CarswellOnt 14463, 2011 ONSC 7303, [2011] O.J. No. 5565, 210 A.C.W.S. (3d) 544

Date	Heard: November, 2011 Judgement: December, 2011
Parties	Moving Party: [Mr.] Dryden Responding Party: Oatley Vigmond LLP
Counsel	For Moving Party/Himself: John Dryden For Solicitor/Responding Party: Shenthuran Subramanian
Judge/s	Then: Michael G. Quigley J.
Quick Facts	"This litigation arose out of a 1997 motor vehicle accident. Mr. Dryden had previously retained several solicitors before he came to Mr. Oatley."MOTION: "to set aside the Report and Certificate of Assessment [which reduced the lawyers' CF % to 30%]"
Statute & Rules Considered	NA
Contingency Fee Agreement	CFA "Mr. Oatley agreed to represent Mr. Dryden. He accepted the case on a contingency fee basis" Settlement: "The action was settled for [$285k] in respect of his claims and interest, plus [$42.5k] for costs inclusive of sales tax, and [$47.5k] for disbursements. Following that settlement, ... the solicitor's law firm rendered its account to Mr. Dryden for [$128k] for its services... in accordance with the signed contingency fee retainer agreement"... That left Mr. Dryden with a net settlement of [$225k]..."
Issue/s with Agreement	"In her [Report and Certificate of Assessment], [the assessment officer] found that the [CFA] that had been established between the law firm and Mr. Dryden was unjustified. Further, she concluded that the [$128k] account that had been rendered to Mr. Dryden was excessive and should be reduced by almost [$43k] [from the original $128k] to [$85k]."
Outcome	**Held:** "Mr. Dryden's application to oppose the certification of the Assessment Officer's award is dismissed ..." [the case doesn't really discuss the reasonableness and fairness of the fee]: "In considering my jurisdiction relative to the approval or rejection of the Certificate of Assessment, it is important to acknowledge that it is settled law that the court is to be concerned only with questions of principle on an appeal from a Certificate of Assessment reached by an assessment officer. I am not to be concerned with mere questions of amount, or the manner in which the assessment officer has exercised her discretion, unless the amounts are so inappropriate or the assessment officer's decision is so unreasonable as to suggest the existence of an error in principle:"

Merovitz Potechin LLP v. Cantor (2011 ONSC 79)

2012 CarswellOnt 456, 2012 ONSC 79, 216 A.C.W.S. (3d) 875

Summary	This case involves a former law firm employee alleging a constructive trust of the firm's CFA agreements: "The personal injury work at MP was undertaken on a contingency fee basis. The standard retainer agreement set out that there would be a fee of 30 percent of the client's total recovery if MP was successful on the client's behalf. There is no issue that the wording of the contingency fee retainer agreement was approved by MP." "The statement of claim seeks a declaration that a constructive trust be imposed over a portion of the contingency fee recovered by the defendants on the personal injury files transferred from MP to LM, once [they are actually] settled."

Ahou (Guardian of Property) v. State Farm Mutual Automobile Insurance Co. (2012 ONSC 1601)

2012 CarswellOnt 2931, 2012 ONSC 1601, 214 A.C.W.S. (3d) 372

Date	Heard: March, 2012 Judgement: March, 2012
Parties	Applicant: Ahou (Guardian of Property) Respondent: State Farm Mutual Automobile Insurance
Counsel	For Applicant: Ms T. Romano For Respondent: No one
Judge/s	Then: MacKenzie J.
Quick Facts	"Very briefly, Sara Ahou (born July 22, 1991) was a child of tender years, one month shy of her sixth birthday when on June 8, 1997 she suffered significant injuries while riding her bicycle... She suffered extensive injuries, both physical and mental, full particulars of which are set out in the materials and are not in issue here. Suffice to say, they were sufficiently serious to be fairly characterized as catastrophic." In pursuance of the settlement, MOTION was brought under Rule 7.08 for approval of the settlement and the fees of $219k and the disbursements of $37k all-inclusive, being sought by Counsel.
Statute & Rules Considered	*Rules of Civil Procedure*, R.57.01(1)
Contingency Fee Agreement	CFA: 20% "[Sara's] ... statutory guardian of property, ... entered into a retainer agreement with the law firm (Counsel) ... to act on their behalf ... One of the terms of this agreement was that the fees were to be "20% plus party to party costs, plus disbursements." The 1997 retainer agreement predated the 2002 amendments to the Solicitor's Act, R.S.O. 1990, c. S.15, which permitted contingency fees in the type of litigation here." Settlement: "... settlement of all statutory accident benefits (SABs) claims.... The total settlement amount is [$1.28M]"
Issue/s with Agreement	Are counsel’s fees fair and reasonable, and in compliance with the R 57.01?
Outcome	**Held:** Motion granted. 17% "the minor plaintiff's guardian herein has no objection to the claim for fees and

	disbursements." "In its report, the Public Guardian and Trustee has referred to current case law from this court in which the rule of thumb for fees for plaintiffs' counsel in SABs claims is about 15 percent of the amount of the settlement amount for such claims: see *Aywas*... In response to *Aywas,* ... Mr. Gluckstein has cited two other cases dated from 2007 (i.e. three years before the *Aywas* case in 2010) wherein the legal fees in relation to the accident benefits claims were set at approximately 18% of the settlement of damages recovery in one case... and 16% percent in the other case ...." "These types of actions by their nature necessarily require counsel to take into account the difficulty of ascertaining ultimate disability and impact of injuries to children of tender years. Here counsel ... delivered services over an extended period of time, i.e. 13 years, should not have the value of their services discounted by further debits against the amount of fees that are in all other respects reasonable on their face and that take into account the Rule 57.01(1) factors ... the spread from the "usual" 15 percent to the present rate of 17 percent can hardly be described as unreasonable... in terms of the results achieved and recovery made for the minor plaintiff."

Henricks-Hunter (Litigation guardian of) v. 814888 Ontario Inc. (2013 ONSC 5245)

– see ONCA decision below

2013 CarswellOnt 11234, 2013 ONSC 5245, 231 A.C.W.S. (3d) 256

Date	Heard: July, 2013 Judgement: August, 2013
Parties	Plaintiff: Henricks-Hunter, by her litigation guardian, the Office of the Public Guardian and Trustee Defendant: 814888 Ontario Inc. carrying on business as Phoenix Concert Theatre; Sherbourne Community Clinic
Counsel	For Plaintiff: Richard Shekter, for Plaintiff, Stephanie Marie Henricks- Hunter; J. Gardner Hodder, for Howie, Sacks & Henry LLP; Sidney Peters, for Public Guardian and Trustee For Defendant:
Judge/s	Then: Darla A. Wilson J.
Quick Facts	"Stephanie fell from a second storey balcony on October 27, 2005 while at a concert at the Phoenix Concert Theatre. According to the evidence before me, she climbed on to a balcony that had been marked "off limits" after having consumed a significant amount of alcohol. At the time, she was 34 years of age. As a result of the fall, she sustained a severe traumatic brain injury with associated serious cognitive deficits. She was deemed incapable of managing her finances and person and the office of the PGT was appointed to manage her financial affairs in 2006. Her parents retained authority over her person. Stephanie was at a long term care facility in Toronto receiving 24 hour a day care until 2009 when she moved to Missouri where her family resides." MOTION by law firm for order that Contingency Fee Agreement between plaintiff through her litigation guardian, Public Guardian and Trustee and plaintiffs' counsel be declared fair and reasonable in accordance with s. 24 of *Solicitors Act*.
Statute & Rules Considered	*Solicitors Act*, s 24.
Contingency Fee Agreement	CFA: "... for amounts recovered as net damages on behalf of Stephanie, the solicitor is entitled to recover fees of 25% up to $2.5M dollars plus taxes and disbursements. Pursuant to the CFA, the amount of party and party costs offered by the Defendant belongs to Stephanie." Settlement: $2.05M
Issue/s with Agreement	Should the legal fees determined under a CFA reflect the docketed time or should they be based on the amount recovered for the client?
Outcome	**Held:** Motion granted. **A.** "The offer of net damages for Stephanie of $1,799,420 represents about 20% of the damages as assessed by HSH or 25% of the damages from the defence perspective." Clearly, the damages of Stephanie would assess in the $7-$9 million dollar range; however, when determining whether or not the results achieved were poor or stellar or something in between, the Court must look at the facts of the case and the insurance monies available to respond to the claim. In this case, the maximum funds that could be accessed from Phoenix pursuant to the insurance policy were $2 million. As Mr. Shekter pointed out in his materials, the settlement proposal for Stephanie is 91% of that policy." "In this case, the liability issue was significant. In my opinion, this is a case where there could have been a finding at trial that there was no liability on either Defendant. Independent counsel is of the view that a finding of

	contributory negligence of Stephanie in the 75% range was not beyond the realm of possibility. I agree. In all of the circumstances, I am of the view that the results achieved by HSH for Stephanie were very good." **B.** "On July 12, 2012, the Court of Appeal released its decision allowing the appeal. It stated that there is a two-step process that must be followed when enforcement of a CFA is sought: the fairness of the agreement must be assessed as of the date it was entered into; and the reasonableness of the agreement must be assessed as of the date of the hearing [emphasis mine]" time expended: " When the matter was initially reviewed by Justice Wilkins, he was of the view that the materials submitted by the solicitors in support of the requested fees were inadequate and he requested full particulars of docketed time and particulars of "undocketed work". In refusing to approve the proposed fee he was mindful of the fact that the docketed time on the file from lawyers and clerks was $236,676.80 and he added an additional $88,323.20 in fees, approving a fee of $371,831.27 all inclusive. As the Court of Appeal noted, this amount was determined "almost exclusively" by dockets and hourly rates... I am guided by the comments of the Court of Appeal in Raphael Partners, where it was noted that the determination of the proper fee in a CFA is not based on the value of the time spent, but rather on the amount recovered for the client... As noted by the Court of Appeal in Raphael Partners, at para. 54, "...the time spent by the solicitors...while a relevant factor, does not control the question of whether the solicitors were entitled to the maximum fees charged through enforcement of the fee agreement...""
Earlier Reasons in Henricks-Hunter (Litigation Guardian of) v. 814888 Ontario Inc. (2012 ONSC 4564)	Decision by Wilkins J on APPLICATION by lawyer for catastrophically-injured plaintiff to have trial judge recuse himself over potential issue of bias. A good case for what not to do when submitting a CFA to the court for approval: "The solicitor's contingency fee agreement seeks a recovery of $516,000, or 100% of his contingency fee, in a circumstance in which the Plaintiff is recovering approximately 15% of the value of her case and of the settlement funds... (i.e., "The solicitor's affidavit made it quite clear that the $2.05M [settlement] payment represented approximately 15% of the value of the Plaintiff's case.") […] In the absence of representation and given the obvious conflict of interest that the PG&T has, having drafted the CFA and having supported it against Ms. Henricks-Hunter, all sorts of other issues are clearly put into play, and those issues should properly be canvassed before the Motions Judge determining the question of reasonableness [of counsel's fee]." "The issue of reasonableness [of counsel's fee] as at the time of the settlement was sent back to the Motions Court to be determined in that forum." "In the case at bar, there are so many other factors in play that involve a great deal broader interpretation and a much wider view on the part of the Court in order to ensure that in the overall picture, there is justice not just for the solicitor who wants to recover 100% of his fees (100% of his contingency fee being [$516k], his docketed time being [$234k], or such other fee as might be appropriate) ..." "The CFA sought to be enforced against the lady under a disability was presented in the Court of Appeal as being important to the justice system and access to justice. Needless to say, no evidence was ever presented in this matter to show that the contingency fee in issue in any way, shape or form contributed to Ms. Henricks-Hunter's access to justice or how the justice system was benefited by the solicitor's recovery of a contingency fee, or how Ms. Henricks-Hunter was in any way, shape or form advanced in her claims by reason of that agreement. In the endorsement set aside by the Court of Appeal, a fund of $325,000 including taxes was made available to pay the solicitor's fees, plus the disbursements incurred, which disbursements, on a closer view, disclosed a significant number of office expenses and items such as "drinks" and "finding a Tim Hortons restaurant."
And… Henricks-Hunter	This other earlier decision by Wilkins J. does not discuss the fee % and focused on the following question: "RULING to determine whether public guardian and trustee required independent counsel for determination of reasonableness of CFA... In all these matters, a

(Litigation Guardian of) v. 814888 Ontario Inc. (2012 ONSC 4252)	1000 year old duty of parens patria falls on the Court to act in the best interest of those who cannot act for themselves, and in circumstances where the government authority whose job it is to protect Stephanie's interests gets in conflict, independent counsel is required."

Henricks-Hunter (Litigation Guardian of) v. 814888 Ontario Inc. (2012 ONCA 496)

– see ONSC decisions above

2012 CarswellOnt 8969, 2012 ONCA 496, [2012] O.J. No. 3207, 219 A.C.W.S. (3d) 683, 28 C.P.C. (7th) 227, 294 O.A.C. 333

Date	Heard: July 6, 2012 Judgment: July 12, 2012
Parties	Howie Sacks and Henry LLP, Appellant Stephanie Marie Henricks-Hunter, Respondent
Counsel	J.G. Hodder, for Appellant No one for Respondent
Judge/s	D. O'Connor A.C.J.O., J.C. MacPherson, Paul Rouleau JJ.A.
Quick Facts	Client was seriously injured in fall from catwalk at concert premises. Public guardian became client's guardian of property and entered into a contingency fee agreement (CFA) with appellant law firm on client's behalf. Action was settled for gross amount of $2,050,000.00. Law firm sought $516,536.92 in accordance with CFA. Motion judge fixed fees and disbursements at total of $371,831.27. Law firm appealed.
Statute/Rules Considered	*Solicitors Act*, R.S.O. 1990, c. S.15, s. 24 *Solicitors Act*, R.S.O. 1990, c. S.15, *Contingency Fee Agreements*, O. Reg. 195/04, s. 5(1) *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 7.08
Contingency Fee Agreement & Settlement Breakdown	On March 2, 2006, the guardian entered into a CFA with the appellant on Stephanie's behalf. Pursuant to that agreement, the appellant agreed to defer rendering an account to Stephanie for disbursements or legal fees until a successful conclusion of her action. The CFA also provided: (paras 4-6) • appellant was to receive fees equal to 25% of any judgement or settlement up to $2.5 million, and 20% on any judgement or settlement in excess of that amount • appellant was to receive 100% of all out-of-pocket expenses and disbursements • respondent, Stephanie was to recover any partial indemnity costs awarded, and any amount attributed to costs in any settlement or judgement would be excluded from the application of the CFA The claim was settled in October 2009 at mediation without the need for a trial. The gross settlement amount was $2,050,000. (The liability insurance carried by Phoenix [the defendant] had limits of $2 million.) Appellant requested $516,536.92 in fees from respondent in accordance with their CFA.
Issue/s with Agreement	**Failure to consider CFA:** Whether or not the motion judge erred in failing to consider whether the CFA was “fair and reasonable” in accordance with the two-part test set out in s.

	24 of the *Solicitors Act*. **Failure to consider relevant factors:** And, in the alternative, if the two-part test does not apply to persons under a disability, then whether or not the motion judge's reasons were inadequate, such that he failed to consider the relevant factors in arriving at an appropriate fee.
Outcome	**Held:** Appeal allowed Matter remitted to motion judge for determination of the reasonableness of CFA in accordance with appellate reasons. Motion judge erred in failing to consider whether CFA should be enforced and by proceeding directly to determination of amount of fees without regard to the existing CFA. The CFA was fair, but appellate court was not well placed to carry assessment of reasonableness of CFA. **Followed:** *Raphael Partners v. Lam* (2002), 164 O.A.C. 129, 24 C.P.C. (5th) 33, 61 O.R. (3d) 417, 2002 CarswellOnt 3077, 218 D.L.R. (4th) 701 (Ont. C.A.)

Warnica v. Van Moorlehem (2012 ONSC 4241)

2012 CarswellOnt 9143, 2012 ONSC 4241, 218 A.C.W.S. (3d) 453

Date	Heard: May, 2012 Judgement: July, 2012
Parties	Applicant: Warnica Respondent: Moorlehem
Counsel	For Applicant: Stephen J. MacDonald For Respondent: Victor T. Bulger
Judge/s	Then: Michael G. Quigley J.
Quick Facts	"The solicitor, Moorlehem, represented Meagan Warnica in a tort claim she brought after she was injured in a motor vehicle accident.... Meagan's claims and those of another passenger in the vehicle were settled when the matter was mediated before trial, but there was only a limited amount of insurance funds available to compensate both Meagan and the other passenger of the vehicle because the City of Mississauga, who was allegedly at fault, would not admit any liability without going to trial. A decision was made not to pursue the City for damages for its alleged liability, given the costs risks associated with pursuing them alone. The Warnicas decided to settle the case." APPLICATION by plaintiffs to refer account rendered by their counsel [Moorlehem] for assessment.
Statute & Rules Considered	*Solicitors Act*, ss.8, 10, 11, 15, 28, 28.1; *Contingency Fee Agreements*, O. Reg 195/04, ss.3, 5(1)
Contingency Fee Agreement	30% CFA "... 30% of the settlement amount as the percentage based compensation that had been agreed at the outset when he was retained." Settlement: "Under [the] mediated settlement the two injured passengers had to share the available [$1M] insurance limit. After costs, disbursements and the addition of a *de minimis* without liability contribution by the City, Meagan Warnica's action was settled for the all-inclusive amount of [$570k]"
Issue/s with Agreement	Are the solicitor's fees fair and reasonable given that…"It is obvious that the amount of fees charged, along with disbursements and taxes, represent 37% of the entire amount that was awarded to the applicant by way of settlement." "... Warnica and her family expected to achieve greater success, were continually assured by the solicitor... that they had a very strong case, and yet the amount of the award received was plainly inadequate to fully compensate the applicant for the injuries she sustained and the damages that resulted."
Outcome	Held: Motion dismissed. "Fees and disbursements of in excess of $200,000 is handsome payment for pretrial work where there is so little evidence of what was done. In my view, the solicitor needs to be at least able to demonstrate what it is that he actually did to earn the 30% contingency fee he claims. He has not done that. The appropriate mechanism to permit that to happen, and also to ensure that he is paid a fair fee for the service he provided… is not to declare the agreements void or unenforceable. Rather, it is to refer the matter for assessment to ensure that the fee [is] commensurate to the service provided, and relative to the recovery achieved on behalf of the client." "…[there are] special circumstances that justify the referral of the solicitor's account for assessment... given the solicitor's failure to comply with either the contingency fee requirements of the Solicitors Act or the court approval requirements of Rule 7 for persons under disability, his possibly unjustified apparent elevation of the clients' expectations, the effort seemingly applied to the case, and the absence of detail in his own accounts that even begins to permit one to assess whether the clients got money's worth or not."

McAndrew (Litigation Guardian of) v. Roberts (2012 ONSC 4712)

2012 CarswellOnt 10143, 2012 ONSC 4712, 220 A.C.W.S. (3d) 519

Date	Heard: N/A Judgement: August, 2012
Parties	Plaintiff: Heather McAndrew, a Minor, by her Litigation Guardian Jane McAndrew; Defendant: Todd Roberts and TAC Mechanical Inc.
Counsel	For Plaintiffs: Mr. Michael D. Smitiuch For Defendants: Ms Patti Shedden
Judge/s	Then: J.C. Wilkins J.
Quick Facts	"...the Plaintiff, Heather McAndrew, a 14 year old who was injured in a motor vehicle accident, sustaining a fracture of the right femur and a non-displaced facial bone fracture, which are described as "linear fractures in the anterior wall of the right maxillary sinus and in the right orbit," with significant soft tissue swelling." MOTION for the approval of an infant settlement and of counsel's fees.
Statute & Rules Considered	NA
Contingency Fee Agreement	CFA: "There was a contingency fee agreement entered into by the litigation guardian [% unavailable]." Settlement: " The proposed settlement of the action is $85,000 including damages, interest, contribution towards legal fees, HST on costs and contribution towards disbursements."
Issue/s with Agreement	Are counsel's fees fair and reasonable under the CFA, such that the agreement is enforceable?
Outcome	**Held:** Motion denied. Referred to Office of the Children's Lawyer "The material filed is inadequate with respect to the issues required to be addressed on an application to enforce a contingency agreement." BUT "Having regard to the deficiencies of the material and the report of the assessments of the damages as well as the deficiencies in respect of the material that support the request to enforce the contingency fee agreement, this matter is referred to the Office of the Children's Lawyer to review and report on all issues, including the settlement, the contingency fee agreement's compliance with the statute and all of the issues of fairness and reasonableness as referred to by the Court of Appeal in Raphael, supra, and to conduct such investigation as may be necessary to satisfy those questions"

Meady v. Greyhound Canada Transportation Corp. (2012 ONSC 5568)

2013 CarswellOnt 14103, 2013 ONSC 5568, [2013] O.J. No. 4634, [2014] W.D.F.L. 188, 233 A.C.W.S. (3d) 322, 55 M.V.R. (6th) 120

Quick Facts	Police officers placed SD on bus after earlier incident in which SD exhibited anxiety and mild paranoia. SD told driver AD that people on bus wanted to hurt him and suddenly grabbed wheel of bus, forcing it across highway where it rolled into ditch. Plaintiffs, passengers who suffered injuries in accident, brought action against, inter alia, police officers and bus company, alleging negligence in placing SD on bus. Action was dismissed. Dispute arose as to costs. Defendant police officers brought application for costs totalling $790,363.93 jointly and severally on partial indemnity basis to date of offer to settle and on substantial indemnity basis thereafter. Defendant bus company brought application for costs totalling $1.22 million jointly and severally on substantial indemnity basis.
Summary	Only mention of CFA: "He references the decision in Danso-Coffey v. Ontario, [2009] O.J. No. 1136 (Ont. S.C.J.) at para. 8, where Hackland J. notes: [T]he question of what constitutes an appropriate hourly rate for any claim for costs is to be determined by referring to the criteria in rule 57.01 and not by the terms of the retainer between counsel and his or her client. This is subject to the proviso that costs must not be awarded in excess of counsel's hourly rate in non-contingency fee situations."

Kamboj v. Sidhu (2013 ONSC 2478)

2013 CarswellOnt 5752, 2013 ONSC 2478, [2013] O.J. No. 2149, 227 A.C.W.S. (3d) 1002

Quick Facts	Only one mention of CFA: "It appears that Mr. Voudouris met with the plaintiff in February 2011 at which time the plaintiff signed a Contingency Fee Retainer Agreement (the "Retainer Agreement"). The Retainer Agreement was dated February 28, 2011 and covered all potential claims the plaintiff may have had with respect to the September 2008 accident, including the claims made in this action. However, at no time after the Retainer Agreement was signed, did Mr. Voudouris serve a notice of appointment of lawyer. As far as the court record was concerned, the plaintiff continued to be self-represented."

Melvin (Litigation Guardian of) v. Ontario (Minister of Correctional Services) (2013 ONSC 5432)

2013 CarswellOnt 11868, 2013 ONSC 5432, 232 A.C.W.S. (3d) 353

Quick Facts	Plaintiff was assaulted while being held in custody in jail. Plaintiff suffered serious closed head injury. Plaintiff commenced action against provincial Crown and jail for damages for negligence. Plaintiff's guardian of property was appointed as his litigation guardian. Crown and jail agreed to settle for $750,000 and this amount was accruing interest. Plaintiff did not want his settlement to be structured. Plaintiff brought motion through litigation guardian for order approving settlement and his solicitors' fees.
Summary	Not a case involving a CFA: "The PGT appears to regard the requested fees as being in the nature of a contingency fee. I agree with the solicitors that this is not a contingency arrangement but rather is a fee for service case, based on time expended." "In 2003, when Mr. Courtis was initially retained, he told Mr. Melvin that the fees that would be charged at the end of the case would be the amount received for party and party costs (now partial indemnity costs) plus somewhere between 15% to 25% of the total amount received. This was not a contingency fee arrangement but rather an estimate at the outset of the case of the legal costs that Mr. Melvin could expect to pay."

Traffic Law Advocate (E.E.) Professional Corp. v. Yang (2013 ONSC 2887)

2013 CarswellOnt 6872, 2013 ONSC 2887, 228 A.C.W.S. (3d) 857

Date	Heard: May 15, 2013 Judgment: May 22, 2013
Parties	Traffic Law Advocate (E.E.) Professional Corporation, (plaintiff), Respondent Guo Yang, Defendant, Appellant
Counsel	Miguel Maruszki, for Plaintiff / Respondent Guo Yang, for himself
Judge/s	Herman J.
Quick Facts	Appellant was client of respondent paralegal firm. Firm brought action against client for unpaid fees. CFA between parties was found to be illegal, but firm was entitled to fees on quantum meruit basis. Firm was found to be entitled to $772.06 in fees. Client claimed that firm should not have been able to amend pleadings during trial, to plead quantum meruit. Client also claimed that hourly fee rate determined by judge was improper. Client appealed from judgment of Small Claims Court on above grounds.
Statute & Rules Considered	NA
Contingency Fee Agreement Breakdown	"By written Retainer signed on July 24, 2006, the defendant retained TLAI for paralegal services to pursue a claim for Accident Benefits (the "Retainer") ... The Retainer was a contingency arrangement providing for remuneration for TLAI for its services at the rate of 20% of the sum of all benefits and expenses obtained on behalf of the defendant, plus GST. It also provided that in the event that the Retainer was terminated then, the remuneration for the plaintiff was to be based on a specified hourly rate set out in the Retainer." (from Small Claims Court decision)
Issue/s with Agreement	**A.** Whether or not the Deputy Judge erred in law when he allowed TLA to amend its pleading to add the cause of action of *quantum meruit at the particular stage in the proceeding*; and **B.** Whether or not the Deputy Judge applied the wrong hourly rate ($200/hr) when he determined the amount Mr. Yang owed TLA (in a different case he had applied a $100/hr rate)
Outcome	**Held:** Appeal dismissed. Given the finding that the client had accepted the bulk of the charges, the amount awarded under *quantum meruit* was not unreasonable. Client claims that his acceptance of charges was due to belief in the legality of the CFA did not change fair and reasonable amount to be awarded. Determination of reasonable compensation was case-specific, and was not based on hourly rate as client claimed but rather on full examination of facts. Small Claims court judge made no error in principle. **Followed:** *Housen v. Nikolaisen* (2002), 10 C.C.L.T. (3d) 157, 211 DLR (4th) 577

Jane Conte Professional Corp. v. Smith (2014 ONSC 6009)

2014 CarswellOnt 14894, 2014 ONSC 6009, [2014] O.J. No. 5033, 246 A.C.W.S. (3d) 706, 329 O.A.C. 96

Date	Heard: October 8, 2014 Judgment: October 15, 2014
Parties	Josephine Smith (defendant), Appellant Jane Conte Professional Corporation (plaintiff), Respondent
Counsel	B. Weintraub, for Appellant A. Andreopoulos, for Respondent
Judge/s	Nordheimer J.
Quick Facts	In November 2009, defendant retained plaintiff law firm to assist in a personal injury claim arising out of motor vehicle accident. Defendant signed contingency fee retainer agreement prepared by plaintiff. Defendant later terminated plaintiff's services, and plaintiff firm submitted a final account amount to defendant. On March 7, 2014, plaintiff commenced action in small claims court for amount of fees. On April 29, 2014, defendant brought motion to strike out and dismiss plaintiff's claim. Defendant's motion was dismissed by deputy judge without reasons. Defendant appealed
Statute & Rules Considered	*Solicitors Act*, R.S.O. 1990, c. S.15, s. 3, 4, 16(2), 23, 24, 28, 29
Contingency Fee Agreement & Settlement Breakdown	The appellant signed a Contingency Fee Retainer Agreement prepared by the respondent. The Agreement provided that: (para 3) • respondent would be paid 30% of the amount of the appellant's recovery, <u>together with any costs awarded to the appellant</u> • if appellant terminates the respondent's services, the appellant would have to pay for the services provided up to that point <u>based on the respondent's hourly rates</u> Appellant terminated the respondent's services and respondent issued a "final" statement of account for $17,095.63. After some discussion with the appellant's new counsel regarding the amount of the account, the respondent delivered a new "final" account of $26,051.59 for their services up until the point of termination.
Issue/s with Agreement	**Can CFA's contain non-contingent components?** I.e. Whether or not the CFA ceased to be a CFA because it contained a provision providing for the application of hourly rates in determining the client's fee, where services are terminated. (paras 21, 22) **Jurisdiction:** Whether or not Small Claims Court had jurisdiction to consider a claim made by a lawyer based on a written fee agreement, including a CFA in particular **Was the CFA enforceable given the costs provision and failure to seek judicial approval?** Section 28.1(8) states that a contingency fee agreement that provides for the lawyer to receive costs awards must be approved by the court and only under "exceptional circumstances". Further, s. 28.1(9) expressly provides that a CFA, that contains such a provision regarding costs, is unenforceable unless it has been approved by the court (the whole CFA, not just the costs provision).
Outcome	Held: Appeal allowed. Order of Deputy Judge set-aside and order granted dismissing the proceeding in Small Claims Court. S. 28.1(2) of the *Solicitors Act* states that CFA may extend "in whole or in part" to the remuneration paid to the solicitor. Therefore, CFA's may contain non-contingent components of the fee arrangement.

	Small claims court had no jurisdiction to consider claim made by lawyer based on written fee agreement, including contingency fee agreement. Pursuant to the *Solicitors Act*, agreement between lawyer and client respecting amount and manner of payment was to be determined by court in which legal work was done and, if work was not done in any court, by Superior Court of Justice. In addition, the CFA had not been approved by court and was prima facie unenforceable for its inclusion of the costs provision [per s. 28.1(8) and (9)].

Chen v. Singer, Kwinter LLP (2013 ONSC 6712)

2013 CarswellOnt 15023, 2013 ONSC 6712, 234 A.C.W.S. (3d) 1060

Date	Note: this is not really a fee approval case, but the court does uphold a CFA Judgement: October, 2013
Parties	Plaintiff: Wei Chen Defendant: Singer, Kwinter LLP
Counsel	For Plaintiff: for himself For Defendant: Veronica Marson
Judge/s	Then: Frank J.
Quick Facts	"Mr. Chen was injured in a car accident in 2001. He retained Singer, Kwinter ... to act on his behalf in prosecuting the personal injury action arising out of that accident. Singer, Kwinter was the fifth law firm to go on record for Mr. Chen in that action." These are APPLICATIONS arising out of Wei Chen's assessment of Singer, Kwinter LLP's account for legal fees in a personal injury action settled on November 30, 2010. Mr. Chen challenges the Report and Certificate of the Assessment Officer [assessed Singer, Kwinter's account in the amount of $110,000] and Singer, Kwinter seeks confirmation of that Report and Certificate.
Statute & Rules Considered	*Solicitors Act*, s.3
Contingency Fee Agreement	CFA: no physical copy of the agreement could be produced; “A focus of Mr. Chen's impassioned submissions on this appeal was his denial of having entered into the contingency fee arrangement that Singer, Kwinter maintains was entered into on March 5, 2010.” Settlement: "Mr. Chen signed instructions directing Singer, Kwinter to settle this action for $340k net of fees, disbursements and taxes totaling $110k. The fee component was $62k."
Issue/s with Agreement	Should the alleged CFA factor into the determination of fair and reasonable fees, contra the assessment officer’s finding?
Outcome	**Held:** Mr. Chen's application is dismissed; SK’s application granted. “there is no basis on which this court can interfere with the assessment of the assessment officer.” On CFA: “…whether the terms of the March 5, 2010 retainer agreement, which provided for a percentage payment to Singer, Kwinter, prevailed is irrelevant to the quantification of the fees. The assessment officer did not rely on the retainer agreement. Instead, he assessed Singer, Kwinter's account on the basis of *quantum meruit*.”

Rops (Litigation guardian of) v. Intact Insurance Co. (2013 ONSC 7366)

2013 CarswellOnt 18789, 2013 ONSC 7366, 239 A.C.W.S. (3d) 348

Date	Heard: N/A Judgement: December, 2013
Parties	Applicant: Rops, by his litigation Guardian Micheal Rops Respondent: Intact Insurance Company
Counsel	For Applicant: B. Legate, K. Finley For Defendant: No one
Judge/s	Then: L.C. Leitch J.
Quick Facts	"Aaron was injured when he was aged 11 in an all-terrain vehicle crash. He suffered what are described as significant injuries that required three surgeries. The materials state that after diligently pursuing rehabilitation, he continues to suffer from a limp, scarring, numbness in his left thigh, pain, loss of mobility, instability, fatigue and loss of stamina." An APPLICATION was filed on behalf of the plaintiff for an order approving the Contingency Fee Retainer Agreement between Legate & Associates, LLP and Michael Rops… [et al.]
Statute & Rules Considered	*Contingency Fee Agreements*, O. Reg. 195/04, s.5(1)
Contingency Fee Agreement	CFA: "...contemplates a base contingency of 30% and "increases according to the stage of the litigation to reflect the greater risk and vastly increased costs going forward to trial", capping at 40% if the claim settles any time after the pretrial." Settlement: "Ultimately, the accident benefits claim was settled and the respondent insurer will pay $14,500 to resolve the infant plaintiff's accident benefits claim."
Issue/s with Agreement	Is counsel’s fee fair and reasonable and in accordance with the *SA*?
Outcome	Held: Application dismissed. "I note that in Henricks-Hunter at para. 21, the Court of Appeal commented that in that case it was apparent that the contingency fee agreement in issue was fair when it was negotiated, and it was noted "in particular, that when it was negotiated there was considerable uncertainty as to the likely success of the claim and the extent of the investment that would be required of the solicitors to bring the action to a favourable conclusion". It seems to me that similar commentary cannot be made in relation to the accident benefits claim. Therefore, again, I am not prepared to approve the Contingency Fee Retainer Agreement on this application."

Soullière (Litigation Guardian of) v. Robitaille Estate (2014 ONSC 851)

2014 CarswellOnt 1505, 2014 ONSC 851, [2014] O.J. No. 639, 237 A.C.W.S. (3d) 795

Date	Judgment: February 5, 2014
Parties	Christopher Soullière by his Litigation Guardian Martin Soullière, Marcelle Robitaille, Rene Soullière, and Elizabeth Soullière, Chantal Lefebvre, Plaintiffs The Estate of Isabelle Robitaille and Guy Laberge, East Hawkesbury Township and The Corporation of the United Counties of Prescott and Russell, Her Majesty the Queen in Right of Ontario, Defendants
Counsel	Derek Nicholson, for Plaintiffs Mark Charron, for Defendant, Corporation of the County of the United Counties of Prescott and Russell
Judge/s	Toscano Roccamo J.
Quick Facts	Plaintiff C became disabled after he was catastrophically injured in car accident. Lump sum accident benefit of $208,551.00 was used to purchase and renovate home for C. In settlement of tort action, $9 million would be paid to plaintiffs who would also keep $970,266, which was their pro rata share of amounts paid into court by insurer of driver of vehicle in which C was passenger. Settlement was based on notional discount of 50% of estimated value of plaintiffs' claims given liability and litigation risks inherent in action. Counsel for plaintiffs brought motion for approval of contingency fees in amount of **$2,398,849.15** plus applicable taxes (representing 15% of accident benefits and 25% of tort settlement, less $500,000 attributed to costs). In addition, counsel has sought an order for the payment of disbursements, plus applicable taxes in the amount of $1,144.12, on top of the earlier order (dated January 15, 2014) for the payment of $187,558.22 for disbursements incurred in these proceedings. Counsel spent an estimated 1,446.7 hours on the file to the date of this motion, for a value of $407,336.55 before taxes. The contingency fees, therefore, result in a payment of approximately $1,991,512.60 over and above the value of the docketed fees, after taxes are considered. (para 8)
Statute/Rules Considered	*Solicitors Act*, R.S.O. 1990, c. S.15, s. 28.1 [en. 2002, c. 24, Sched. A, s. 4] Motion under Rule 7.08 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194
Contingency Fee Agreement	Christopher's litigation guardian, Martin Soullière, entered into a CFA on March 26, 2009. The agreement provided for: – 30% contingency fee for the tort action – 15% contingency fee for the settlement of accident benefits. In order to facilitate settlement, counsel agreed to adjust % in the tort claim to 25%, but maintains that 15% would apply to the SAB settlement. Counsel also sought payment for disbursements (see ‘Quick Facts’).
Issue/s with Agreement	Whether or not to approve counsel’s fees in accordance with the CFA? I.e. was the CFA either unfair or unreasonable (per test and factors to consider in *Raphael Partners v Lam*)?
Outcome	Held: Motion granted. Christopher's needs for attendant care and medical and rehabilitation expenses would be adequate to give effect to the essential services he needs, after payment of the contingency fees sought by counsel, and after deducting amounts for disbursements and trial expenses addressed by my order of January 15, 2014. (para 15) While the contingency fees sought

	amount to over five times the time expended by counsel plus disbursements and taxes, this alone would not render the fees unreasonable in the appropriate case (para 27) In this case, there is little doubt that consideration of the other Raphael factors favours payment of the fees sought by counsel. (para 28) The results in this case were undoubtedly enhanced by counsel's willingness to prepare for and pursue a costly trial to its mid-point, with all its attendant risks on liability. (para 29) I have little doubt that, absent counsel's willingness to accept the risks, the social objective of providing access to justice for injured children and parties under disability of limited financial means would not have been met. (para 32) Followed: Henricks-Hunter (Litigation Guardian of) v. 814888 Ontario Inc. (2012 ONCA 496); Raphael Partners v. Lam (2002), 61 O.R. (3d) 417 (Ont. C.A.)

Baines v. Linett & Timmis Barristers & Solicitors (2014 ONSC 2348)

2014 CarswellOnt 4769, 2014 ONSC 2348, 239 A.C.W.S. (3d) 784, 33 C.C.L.I. (5th) 128

Date	Heard: March 27, 2014 Judgment: April 14, 2014*
Parties	Eleanor Denise Baines, Plaintiff Linett & Timmis Barristers & Solicitors, Defendant
Counsel	Eleanor Denise Baines, Plaintiff, for herself Bruce Hutchinson, for Defendant
Judge/s	Perell J.
Quick Facts	Client retained law firm in 2000 to represent her in personal injury proceedings. In 2008, client fired law firm after unsuccessful mediation. Self-represented client took action to trial and was unsuccessful. Client blamed law firm for poor result at trial and sued law firm for negligence, seeking damages and return of legal fees. Law firm brought motion for summary judgment, seeking dismissal of action
Statute/Rules Considered	*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rs 20, 20.04, 20.04(2)(a), 20.04(2.1) and (2.2).
Contingency Fee Agreement Breakdown	NA – no information as to what the alleged contingency fee agreement provided for.
Issue/s with Agreement	Plaintiff, Ms. Baines claims that she understood that retainer was a CFA. Linett & Timmis denies this understanding and a CFA is not confirmed by the written retainer agreement.
Outcome	**Held:** Motion granted. Action dismissed. On CFA issue: "It […] is not necessary to decide the issue about the nature of the retainer, because ultimately the summary judgment motion will turn on whether Ms. Baines can prove damages." (para 10) **Followed:** *Aguonie v. Galion Solid Waste Material Inc. (1998 – Ont CA); Combined Air Mechanical Services Inc. v. Flesch (2014 SCC 7)*

St. Jean v. Armstrong (2015 ONSC 13)

2015 CarswellOnt 199, 2015 ONSC 13, [2015] O.J. No. 131, 249 A.C.W.S. (3d) 313

Date	Heard: December 18, 2014 Judgment: January 14, 2015
Parties	Cindy St. Jean, Claude Pothier and Adam Pothier, a minor by his Litigation Guardian Claude Pothier, Plaintiffs Richard Armstrong, Co-op Taxi and Marcel Desjardins, Defendants
Counsel	Erin Cullin, Lindsay McNicholl, for Plaintiffs No one for Defendants
Judge/s	Robert G.S. Del Frate J.
Quick Facts	Minor plaintiff, when riding bicycle, was involved in collision with defendant's vehicle. Plaintiffs retained law firm to bring action against defendants. Parties entered into settlement agreement with defendants. Plaintiffs brought motion for approval of agreement and costs, and for sealing order on the basis of solicitor-client privilege.
Statute/Rules Considered	Motion pursuant to *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R 7.08.
Contingency Fee Agreement Breakdown	CFAs signed by Pothier on August 1, 2006 and January 30, 2014, which provide: • 1/3 of damages awarded in the accident benefits (AB) claim • latter agreement expands the original agreement by explaining that the fees on the tort action and the AB claim would be subject to the one-third amount. • if retainer terminated, then client liable for "reasonable legal fees" will be calculated based upon the number of hours or work performed for the Client as a percentage of the total work required to complete the file + disbursements This results in fees of $466,000, HST of $37,280 and disbursements of $84,510 for a total of $587,790. "It appears somewhat unusual that the CFA would be executed in excess of two years after the firm was retained and that an additional CFA would be asked to be signed after both claims had been resolved." (para 44)
Issue/s with Agreement	**A.** Whether or not to approve counsel's fees in accordance with the CFA? I.e. was the CFA either unfair or unreasonable (per test and factors to consider in *Raphael Partners v Lam*)? **B.** Would disclosure of CFA infringe on S-C privilege?
Outcome	Held: Motion granted in part. "In my view, knowing that the accident benefits had been lumped out without the usual steps in litigation and that there was no financial risk to the firm, a fee of one-third of the lumped out sum is not fair or reasonable (for the AB claim) […] However, on the tort action, in spite of the delay in signing the CFA as stated previously, with or without the CFA, the one-third being requested by the law firm is reasonable." (paras 46, 47) "Accordingly, fees for the AB claim will be fixed at $170,000, inclusive of HST, and fees for the tort action will be fixed at $183,333, inclusive of HST, for a total of $353,333 [and] Disbursements are fixed at $84,510, inclusive of HST." (paras 52, 53) As regards the second element of the motion, request for sealing ordered denied. There was no evidence establishing that disclosure would infringe on solicitor-client privilege. Facts of this case were not unusual. Infringement of privilege regarding CFA was minimal, if at all. All other information about accident and plaintiff's treatment would be public information in

	view of pleadings already filed. There was nothing extraordinary to justify such order. Followed: *Adler (Litigation Guardian of) v. State Farm Mutual Automobile Insurance Co. (92 OR (3d) 266 (Ont SCJ); Henricks-Hunter (Litigation Guardian of) v. 814888 Ontario Inc. (2012 ONCA 496); Raphael Partners v. Lam* (2002), 61 O.R. (3d) 417 (Ont. C.A.); *Symington (Litigation guardian of) v. Adam* (March 7, 2008), Doc. 05-0080, 0186-0 (Ont. S.C.J.)
Additional Reasons given in St. Jean v Armstrong (2015 ONSC 1049)	Parties made submissions regarding costs. Issue of costs was already adjudicated and slip rule under R. 59.06(1) CFA did not apply. CFA award was appropriate in tort action and provided that HST would be over and above any award for costs. Trial judge exercised discretion and included HST in assessment of costs.

Erickson & Partners v. Ontario (Ministry of Health and Long-Term Care) (2014 ONSC 4339)

– see ONCA decision below

2014 CarswellOnt 10770, 2014 ONSC 4339, 243 A.C.W.S. (3d) 1019, 38 C.C.L.I. (5th) 83

Date	Heard: April 1, 2014 Judgment: July 21, 2014
Parties	Erickson & Partners, Applicant Her Majesty the Queen in Right of Ontario (Ministry of Health and Long-Term Care), Respondent
Counsel	Brian Babcock, for Applicant Rita V. Bambers, Sonal Gandhi, for Respondent
Judge/s	J. deP. Wright J.
Quick Facts	Applicant solicitors were retained to represent plaintiffs in two actions for damages for personal injuries pursuant to CFAs. By operation of s. 39 of reg. 522 under *Health Insurance Act*, solicitors also represented respondent provincial government, Ministry of Health and Long Term Care or Ontario Health Insurance Plan, in subrogated claims for amounts paid under Plan. Legislation provided that, in return, whether litigation successful or not, Plan required to pay proportion of taxable costs. Solicitors and Plan disagreed on how Plan's obligation to pay costs should be calculated. Solicitors applied for declaration that CFAs complied with s. 28.1 of *Solicitors Act* and for directions concerning proper interpretation of s. 39 of reg. 522.
Statute/Rules Considered	*Family Law Act*, R.S.O. 1990, c. F.3, s 61. *Health Insurance Act*, R.S.O. 1990, c. H.6, s. 1 "insured person", 30, 30(1). *Solicitors Act*, R.S.O. 1990, c. S.15, s 28(1), (6), (8), (11).
Contingency Fee Agreement Breakdown	CFAs provided for: • fee of 25% of damages recovered by judgment or settlement • + % of damages equal to amount awarded as costs • + amount awarded as disbursements • + any disbursements not recovered • + HST on all of the above
Issue/s with Agreement	**A.** The enforceability of their CFAs with the injured plaintiffs, i.e. **Does the** CFA **comply with the *Solicitors Act* and Regulation?** and… **B.** The proper manner of dividing, between the injured party and the Plan, responsibility for payment under those agreements.
Outcome	**Held:** Contingency found not to be enforceable. **A.** No. By including recovery for percentage of costs awarded, without court approval and without including certain compulsory statements, CFAs failed to comply with s. 28 and ss. 2(5) and 3(3)(i) of the Regulation 195/04. **B** In determining plan's obligation to pay proportion of taxable costs, taxable amount of solicitors' fees should be ascertained by agreement of all parties, including plan, or assessment, full breakdown given at para 61.

Erickson & Partners v. Ontario (Ministry of Health and Long-Term Care) (2015 ONCA 285)

– see ONSC decision above

2015 CarswellOnt 6169, 2015 ONCA 285, 125 O.R. (3d) 762, 253 A.C.W.S. (3d) 196, 334 O.A.C. 74, 49 C.C.L.I. (5th) 187

Date	Heard: April 1, 2015 Judgment: April 27, 2015
Parties	Erickson & Partners (applicant), Appellant Her Majesty the Queen in right of Ontario (Ministry of Health and Long-Term Care), Respondent
Counsel	Brian A. Babcock, for Appellant Rita V. Bambers, Sonal Gandhi, for Respondent
Judge/s	K. Feldman, M.L. Benotto, David Brown JJ.A.
Quick Facts	Applicant solicitors were retained to represent plaintiffs in two actions for damages for personal injuries pursuant to CFAs. By operation of s. 39 of reg. 522 under *Health Insurance Act* (ON), solicitors also represented respondent provincial government, Ministry of Health and Long Term Care or Ontario Health Insurance Plan, in subrogated claims for amounts paid under Plan. Legislation provided that, in return, whether litigation successful or not, Plan required to pay proportion of taxable costs. Solicitors and plan disagreed on how plan's obligation to pay costs should be calculated. Solicitors' application for declaration that CFAs complied with s. 28.1 of *Solicitors Act* and for directions concerning proper interpretation of s. 39 of reg. 522 resulted in finding that contingency was not enforceable… Trial judge found that by including recovery for % of costs awarded, without court approval and without including certain compulsory statements, CFA failed to comply with s. 28.1. Trial judge also found that: • in determining plan's obligation to pay proportion of taxable costs, taxable amount of solicitors' fees should be ascertained by agreement of all parties, including Plan, or assessment. • amount of recovered costs attributable to Plan should be ascertained by multiplying Plan's share of damages and interest by amount of costs recovered and divided by amount of damages and interest personally recovered by insured. • amount of recovery made on behalf of Plan was sum of Plan's share of damages and Plan's share of costs receivable. • Plan's share of taxable costs could then be determined by multiplying amount of recovery made on behalf of Plan by amount of taxable costs divided by total amount recovered. Law firm appealed.
Statute & Rules Considered	*Health Insurance Act*, R.S.O. 1990, c. H.6, ss 11(1), 30, 30(1), 31, 31(1), 33 *Health Insurance Act*, R.S.O. 1990, c. H.6, *General*, R.R.O. 1990, Reg. 552, ss 39(6) and (7)
Contingency Fee Agreement Breakdown	CFA between appellant solicitors and plaintiffs in original claims provided for fee of 25% of damages recovered by judgment or settlement + % of damages equal to amount awarded as costs + amount awarded as disbursements + any disbursements not recovered + HST
Issue/s with Agreement	This appeal concerned the proper calculation of the Plan's portion of costs in the scenario where the insured person makes a recovery in the action, through the interpretation of s. 39(6) of the *Health Insurance Act* regulation.

Outcome	**Held:** Appeal dismissed. Respondent awarded costs in the amount of $7,500. Where an insured person makes a recovery, the amount of costs obtained by judgment or settlement should be deducted from the total costs of the insured person's lawyer, and the Plan's proportionate share of the taxable costs otherwise payable by the insured person should be calculated as follows: Costs x *recovery made on behalf of the Plan (Plan's damages + pre-judgment interest)* total recovery of the insured person (including Plan's damages + all pre-judgment interest) (para 33) **Followed:** *Mason (Litigation Guardian of) v. Ontario (Ministry of Community & Social Services)* (1998), 158 D.L.R. (4th) 604

Davis v. Cox-Kikkajoon (2015 ONSC 1946)

2015 CarswellOnt 4294, 2015 ONSC 1946, 251 A.C.W.S. (3d) 690

Date	Heard: March 19, 2015 Judgment: March 25, 2015
Parties	Jerome Davis, Applicant Heikki Cox-Kikkajoon and Boland Howe LLP, Respondents
Counsel	Applicant, for himself Heikki Cox-Kikkajoon, for Respondents
Judge/s	R.D. Gordon R.S.J.
Quick Facts	Client hired number of different law firms to represent him in relation to injuries he sustained when struck by motor vehicle. Client entered into CFA retainer with latest law firm (Boland Howe LLP). Tort claim was settled. Law firm sent its account and cheque to claimant for balance of settlement funds. Client brought motion: 1) for determination of validity of CFA; 2) order compelling law firm to produce full and detailed disclosure of all disbursements of settlement funds; 3) order compelling full disclosure of all documentation relating to motor vehicle accident by insurer; 4) and order to determine if threshold was met with respect to injuries suffered by client in accident law firm brought cross-motion to have client declared vexatious litigant
Statute/Rules Considered	*Courts of Justice Act*, R.S.O. 1990, c. C.43, s 140 *Solicitors Act*, R.S.O. 1990, c. S.15, s 24 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rs 5, 6.
Contingency Fee Agreement Breakdown	Details of CFA not provided
Issue/s with Agreement	**Sole issue with CFA**: Is the CFA "fair and reasonable" given that it did not include the required statement that Mr. David retained the right to make all critical decisions regarding the conduct of the matter?
Outcome	**Held:** Both motions dismissed. "If I were to accept that Mr. Davis was unaware of his ability to make critical decisions regarding the litigation, I would agree that the failure to include the required provision in the CFA would be fatal to it. However, the evidence before me is quite clear that Mr. Davis was fully aware of his right to control this litigation and his retainer with Boland Howe LLP." (para 21) Issue of the reasonableness of the CFA fees remitted back to assessment officer. **Followed:** *Lukezic v. Royal Bank (2012 – Ont CA)*

Umbach (Litigation guardian of) v. Wilmot (Township) (2014 ONSC 2995)

2014 CarswellOnt 6331, 2014 ONSC 2995, 240 A.C.W.S. (3d) 838, 60 C.P.C. (7th) 188

Date	Judgment: May 14, 2014
Parties	Timothy Andrew Umbach, by his Litigation Guardian, Lynda Umbach, Dale Umbach and Lynda Umbach, Plaintiffs The Corporation of the Township of Wilmot, Defendant
Counsel	Charles E. Gluckstein, for Plaintiffs James H. Bennett, for Defendant
Judge/s	C. Stephen Glithero J.
Quick Facts	On September 23, 2008, at the age of 17, plaintiff injured driver lost control of his vehicle while negotiating curve on gravel road in defendant township, resulting in severe brain injury and death of his passenger. Injured driver, though his litigation guardian, and his parents brought action for damages for personal injuries. After mediation, parties agreed to settle for $1.5 million comprising damages of $1.25 million, interest of $161,500 and disbursements of $88,500. Pursuant to CFA, injured driver's counsel was to receive 33 per cent of settlement for fees, being $466,125, although counsel agreed to forego HST, resulting in total fees of $412,500. During hearing, counsel agreed to further reduce his fees to 25 per cent of settlement, being $312,500 plus $40,625 HST. Injured driver and parents brought motion for approval of settlement
Statute/Rules Considered	Motion under *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 7.08
Contingency Fee Agreement Breakdown	The amount claimed in motion material was 33% of the $1,250,000 damages for the tort claim equalling $412,500. The HST on that amount was waived by counsel, representing a saving to the plaintiff in the amount of $53,625. In submissions, Mr. Gluckstein (counsel) indicated he would be prepared to reduce fees to 25% + HST, this option would afford the plaintiff further savings from the first option (33% - HST) of $59,375. (see 'Quick Facts') CFA was not court approved and thus was not binding on Glithero J. in his decision.
Issue/s with Agreement	Whether or not the proposed legal fees ought to be approved as claimed on a contingency fee basis?
Outcome	**Held:** Motion granted. "These plaintiffs would not have had access to litigation were it not for the [CFA]. Similarly the cost of disbursements would have been crippling, and likely impossible if the matter extended through a trial. The social objective of providing access to justice was enhanced here by counsel's willingness to do the case on a contingency fee basis with its inherent risks […] the claim for fees as modified during the hearing before me is fair and reasonable" (para 40, 41) **Followed:** *Aywas (Litigation Guardian of) v. Kirwan (2010 ONSC 2278); Lau (Litigation Guardian of) v. Bloomfield (2007) (Ont SCJ)*

Zhau (Litigation guardian of) v. 2100950 Ontario Inc. – additional reasons to judgement in (2015 ONSC 785)

2015 CarswellOnt 2331, 2015 ONSC 1093, 249 A.C.W.S. (3d) 703

Date	Judgment: February 18, 2015
Parties	Brian Zhau, a minor by his litigation guardian, Anthony Ngai, and Wendy Tan, Plaintiffs 2100950 Ontario Inc., operating as Congee Queen, Cho Design Inc., Lonna Wai-Fong Cho, Joe Cho, Tran Dieu and Associates Inc., ISI Contracting Limited, Defendants
Counsel	P. Michael Rotondo, for Plaintiffs Ramon V. Andal, for Defendant, Congee Queen
Judge/s	Spies J.
Quick Facts	Minor plaintiff suffered injury to wrist and hand at restaurant operated by defendant when he pushed open door that led to washroom and window in frame of door fell onto him. Defendants agreed to pay plaintiffs $225,000, all-inclusive and plaintiffs brought motion for court approval of settlement. Motion was granted. Structured settlement was ordered in amount of $110,000. Minor plaintiff was to be provided with annual payments of $15,000 once he turned 18, payable for four years and lump sum of remaining amount was to be paid out at age 25. CFA was not provided at that time, and court determined it was not in position to determine what amount should be approved for legal fees and disbursements of law firm. Lawyer provided supplementary affidavit. This was an application to deal with outstanding legal fees and disbursements.
Statute/Rules Considered	NA
Contingency Fee Agreement Breakdown	CFA signed by Mr. Ngai and dated March 26, 2010. Allegedly the same as the CFA signed by Wendy Tan at the start of the action, but that agreement could not be found. CFA provides: 30% of any settlement or recovery for its fees • + GST • + costs and expenses (disbursements) The CFA was not relied upon to support the firm's claim for fees. Fees claimed based on hourly rates provided in the CFA, which states that if services of firm are terminated, they are to be paid $250/hour for lawyers and $85/hour for law clerks. This provision in CFA does not formally apply but goes to the expectations of the clients. In total, the firm has asked for $58,268.83 in fees plus HST.
Issue/s with Agreement	NA
Outcome	**Held:** Settlement approved. "I am satisfied that the time spent by Mr. Rotondo and his law clerks and paralegals was reasonable and that it is justified. Assuming his hourly rate of $250 and $85 for his law clerks, which rates I find to be reasonable, the time spent justifies the fees claimed and does not include a premium. Accordingly, I approve of the fees plus HST as requested." (para 10)

Howie, Sacks & Henry LLP v. Chen (2015 ONSC 2501)

2015 CarswellOnt 5700, 2015 ONSC 2501, 253 A.C.W.S. (3d) 94

Date	Heard: April 18, 2015 Judgment: April 21, 2015
Parties	Howie, Sacks & Henry LLP and Singer Kwinter, Applicants Wei Chen, Respondent
Counsel	David Levy, for Applicant, Howie, Sacks & Henry LLP Alfred Kwinter, Veronica Marson, for Applicant, Singer Kwinter No one for Wei Chen
Judge/s	G. Dow J.
Quick Facts	Applicant law firm Howie, Sacks & Henry LLP (H) represented respondent in claim for accident benefits following motor vehicle accident. In 2007, action was settled on respondent's instructions. In 2012, respondent filed unsuccessful complaint against H with provincial law society about quality of service he received. Respondent also commenced action against H to assess accounts for tort claim. That matter was adjourned and respondent appealed adjournment. Respondent switched counsel again and retained applicant law firm Singer Kwinter to represent him in tort action arising out of motor vehicle accident pursuant to CFA. Tort action was settled on respondent's instructions in November 2011 at pre-trial conference. Despite fact that Alfred Kwinter had reduced amount of fees owing under CFA, respondent sought assessment of their account. Assessment officer allowed entirety of Kwinter account. Respondent opposed confirmation of certificate of assessment and brought motion. Motion was dismissed as was respondent's attempts to appeal. Respondent also brought two actions against Kwinter for solicitor's negligence in relation to tort action. Both actions were dismissed although respondent had filed for leave to appeal dismissal of one action. Applicants requested order declaring respondent to be vexatious litigant.
Statute/Rules Considered	*Courts of Justice Act*, R.S.O. 1990, c. C.43, s 140.
Contingency Fee Agreement Breakdown	As part of achieving a settlement satisfactory to Wei Chen, Alfred Kwinter agreed to reduce his fees from that available through the CFA (which would have been about $141,000) to $70,000 + $40,000 for disbursements (of which $25,534.53 was being paid to the previous firm that had acted for Wei Chen, McLeish Orlando LLP – that firm had agreed to waive any claim for legal fees).
Issue/s with Agreement	NA – decision focussed on respondent’s vexatious behaviour and not the CFAs at play.
Outcome	**Held:** Application granted. Chen ordered to pay costs in the amount of $1,500 to Applicants.

Russo (Litigation guardian of) v. Seligman (2015 ONSC 3019)

2015 CarswellOnt 7770, 2015 ONSC 3019, 254 A.C.W.S. (3d) 552

Date	Judgment: May 12, 2015
Parties	Benito Russo, by his Litigation Guardian, Frank Russo, Plaintiff/Moving Party Dr. James Seligman, Defendant
Counsel	Joel McCoy, for Plaintiff
Judge/s	Molloy J.
Quick Facts	Plaintiff retained counsel in relation to malpractice claim arising from surgery on his shoulder in 2004, when he was 74 years old. Statement of claim was issued in 2008. Plaintiff's son was appointed as litigation guardian in 2012, as plaintiff then suffered from dementia. Matter was settled for $52,500 all inclusive, of which $1,800 was to go to Ministry of Health for its subrogated claim. Plaintiff had entered into CFA with solicitors, Bermanis Preya, at the time he first retained the firm, and was later billed $22,950 for legal services. After payment of OHIP claim, plaintiff was to receive $27,500. Litigation guardian approved counsel fees and brought motion for approval of settlement
Statute/Rules Considered	*Solicitors Act*, R.S.O. 1990, c. S.15 (generally)
Contingency Fee Agreement Breakdown	The retainer CFA is dated on the 15th day of "an illegible month" in 2007. It provides that the fee will include: • the amount of party and party costs contributed by the defendant • disbursements • and that fees which will not exceed 30% of the gross amount received for damages and interest, over and above party and party costs.
Issue/s with Agreement	Including $7,000 toward party costs (which the judge is sceptical of) the amount of the fees charged exceeds 30% of the gross settlement proceeds, thereby violating the retainer CFA, that is unless the $7000 figure is deducted from the settlement amount.
Outcome	**Held:** Motion granted. "I have serious concerns that the contingency fee agreement in this case is not compliant with the legislation, and may be invalid." (para 13) Further, the proposed settlement involved payment of money to plaintiff who was said to be mentally incapable, with no provision for how money was to be used and who would have control over it. Settlement was approved and defence counsel could obtain order dismissing action after payment of settlement funds into court to credit of action, less $1,800 to be paid directly to OHIP for its subrogated claim, for total of $50,700. Given concern that best interests of incapable plaintiff might not be protected, copy of endorsement was directed to be sent to Public Guardian and Trustee and to Law Society of Upper Canada. Counsel for plaintiff was directed to obtain appointment for motion for directions on notice to Public Guardian and Trustee.

Romero v. Turnbull (2015 ONSC 3638)

2015 CarswellOnt 12707, 2015 ONSC 3638, 257 A.C.W.S. (3d) 470, 74 C.P.C. (7th) 389

Date	Heard: May 26, 2015 Judgment: June 4, 2015
Parties	Custodio Moreno Romero, Plaintiff Max Turnbull, Defendant
Counsel	K. Arvai, for Plaintiff / Moving Party S. Li, for Responding Party, Patey Law Group
Judge/s	B.W. Miller J.
Quick Facts	Plaintiff retained defendant solicitor (Patey Law Group) to represent him in action for damages arising from motor vehicle accident (on August 29, 2010) and signed CFA. Following breakdown in solicitor-client relationship, defendant requested Mr. Romeo to obtain new counsel and dismissed Romero as a client in January 2015. Plaintiff agreed to pay defendant's fees and disbursements, subject to assessment, out of any settlement or litigation proceeds from action. Defendant asserted solicitor's lien for payment of fees and disbursements incurred on plaintiff's behalf. Plaintiff brought motion for order requiring defendant, his former solicitor, to deliver his files to his new solicitor (Karl Arvai Professional Corporation). Patey is content with Arvai's undertaking with respect to fees, but takes the position that either Mr. Romero or Arvai should pay the disbursements incurred by Patey to date, in the amount of $4,358.56, as well as a $300 file duplication charge.
Statute/Rules Considered	*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R 15.03(4) and (5).
Contingency Fee Agreement Breakdown	CFA executed on February 18, 2011, which includes provisions that state the following: • in the event of termination of services, " I agree to your hourly fees for all work conducted on my matter, plus disbursements, plus H.S.T. on all services performed up to the date of termination of your services" • Patey reserves the right to charge full hourly rate in the event that client wishes to continue litigation against their recommendation, and/or where the client has misrepresented their claim, and/or where the client withdraws their claim at any point prior to settlement, and/or the client becomes noncompliant with reasonable requests • "I agree to pay to you your proper processing fees and disbursement plus H.S.T. on all services performed and to pay an interest penalty of 2% per month/ 24% per annum on all overdue accounts." • "I acknowledge having read and received a copy of this retainer and that I am liable for payment of your fees and disbursements incurred in this matter." "Arvai has advised that although it is willing to fund Mr. Romero's disbursements going forward, it is not prepared to pay the disbursements incurred to date, and will not take on Mr. Romero as a client if it is required to do so." (para 9)
Issue/s with Agreement	Does the former solicitor (Patey) have the right to withhold sending their former client's files to new counsel until they are paid?

Outcome	**Held:** Motion granted with costs payable to the plaintiff in the amount of $1,000 inclusive of disbursements and HST. Patey must deliver files to Arvai within 30 days and Arvai is to pay reasonable copying fees to Patey in the amount of $300. As regards the CFA, there is nothing in the agreement that requires payment of disbursements on an on-going basis, or on demand. Further, CFA does not address termination by Patey, only by the client, and does not speak at all to *when* payment is due in the event of client's termination. "On reading the Retainer Agreement it would be reasonable for Mr. Romero to believe, as he evidently did, that changing lawyers (at the instance of either party) would not generate an account that would be immediately payable." (para 20)
Additional Reasons given in (2015 ONSC 5159)	**Romero v. Turnbull (2015 ONSC 5159)** – additional reasons to the above Subsequent to earlier reasons, Arvai wrote to Miller J bringing to his attention – "quite rightly" - that Miller J had not had the benefit of his submissions on costs and had not taken into account an offer to settle that the plaintiff had made. **Held: "**Taking the plaintiff's offer into account, in conjunction with the factors enumerated in Rule 57.01, particularly the amount of costs that a party could reasonably be expected to pay, the complexity of the issues, and the quantum involved, I fix the costs of this motion at $1,500 plus $378.59 in disbursements plus HST." (para 9)

Gnys v. Narbutt (2015 ONSC 4407)

2015 CarswellOnt 11214, 2015 ONSC 4407, 257 A.C.W.S. (3d) 120

Date	Heard: June 26, 2015 Judgment: July 22, 2015
Parties	Valerie Gnys carrying on business as Health Services Recovery Network, Plaintiff Marta Narbutt, Defendant
Counsel	Shawn Knights, for Plaintiff Margaret Hoy, for Defendant
Judge/s	R.J. Nightingale J.
Quick Facts	Debtor retained solicitor in 2004 to pursue claim for damages arising from motor vehicle accident. Debtor sought litigation loan in 2008, and solicitor's law firm arranged one from creditor. Principal amount was $10,000, with interest at 18% compounded monthly. Interest rate was somewhat less than what other litigation loan providers charged. Debtor was not informed that creditor was owned by solicitor's spouse. Second loan for $2,500 was arranged on same terms to cover cost of medical report. Third loan for $1,000 was arranged on same terms about two months later. Debtor changed solicitors in late 2009 and received about $306,000 in 2011. Debtor paid solicitor's account but never repaid loans. Plaintiff loan company brought action against defendant, former client/debtor for payment of amounts owing.
Statute/Rules Considered	NA
Contingency Fee Agreement Breakdown	Defendant, Marta Narbutt had no money for a retainer and her litigation guardian signed a CFA with the law firm, providing for: • 1/3 of recovery, with the Defendant receiving credit for costs paid by the respondible party • Defendant was to be responsible for disbursements, regardless of the outcome in the case
Issue/s with Agreement	NA – no issues with CFA, decision focused on issues around the outstanding payment of loans.
Outcome	**Held:** Action allowed. "…the Plaintiff shall have judgment against the Defendant for the principal amount of the loans of $10,000 and $1000 respectively and lender fees thereon together with interest at the annual rate of 18% calculated monthly with an effective annual rate of interest of 19.5% calculated from the date of those loan advances. The Plaintiff shall also have judgment against the Defendant in the principal amount of the loan of $2500." (paras 105-106)

John Doe v. MacDonald (2015 ONSC 4850)

2015 CarswellOnt 12134, 2015 ONSC 4850, 257 A.C.W.S. (3d) 724

Date	Heard: July 21, 2015 Judgement: August 10, 2015
Parties	John Doe, Applicant (name kept confidential per the terms of the settlement) Andrea Macdonald and the Barrister Group, Respondents
Counsel	Greg M. Frenette, Jessica Lam, for Applicant Andrew J. MacDonald, for Respondents
Judge/s	M.D. Faieta J.
Quick Facts	In summer of 2006, J (applicant) orally retained lawyer, A (respondent), to represent him in veterinary malpractice action following death of his dog. J is on a public disability pension and does not have the ability to pay for legal services. J thought that A was providing his services on a *pro bono* basis. Action was settled in February 2014 for undisclosed amount. In April 2014, A issued final invoice to J in amount of $34,000 on contingency fee basis. J brought application under s. 23 of *Solicitors Act* for declaration that A's services were rendered on pro bono basis and for related relief.
Statute/Rules Considered	*Solicitors Act*, R.S.O. 1990, c. S.15, ss 3, 23, 28.1.
Contingency Fee Agreement Breakdown	A (respondent) stated: “There was never a discussion of a percentage of proceeds as a basis that I was requiring to be paid and it was not a contingency agreement in that typical sense.” (para 26) – decision provides further back and forth correspondence between A and J Agreement was never put in writing per requirement of *Solicitors Act*.
Issue/s with Agreement	**Central question to application**: Whether or not Andrew's services were provided on a *pro bono* or contingency basis. A (respondent) provided evidence of correspondence with J and J’s mother, as well as payment of $7,939.80 in trust by J’s mother on March 10, 2011 as evidence that they were engaged in a fee agreement.
Outcome	**Held:** Application granted. Relief granted. A ordered to pay costs to J in the amount of $1,684.57. There is presumption in Ontario that oral retainer is made on terms advanced by client. A (respondent) had not discharged heavy onus on him to satisfy court that his version of terms of retainer should be accepted over that of his client. Payment of $7,939.80 in March 2011 to A in trust by J's mother was not evidence that this was payment for fees. J's explanation was that this payment was for anticipated disbursements, and if A was retained on contingency basis, it did not make sense that this was payment for work to date. **Followed:** *Griffiths v. Evans (1953 – Eng CA); Rye & Partners v. 1041977 Ontario Inc. (2004 – Ont CA)*

Sawah v. Warren (2015 ONSC 5373)

2015 CarswellOnt 13173, 2015 ONSC 5373, 258 A.C.W.S. (3d) 644

Date	Heard: August 17, 2015 Judgment: August 26, 2015
Parties	John Sawah, Plaintiff Tyler David Warren (lawyer) and Sheetal Jhuti (paralegal) c.o.b. as SBJ Consulting Services, Defendants
Counsel	Ben Hahn, Ethan M. Rogers, for Plaintiff Brian A. Pickard, for Tyler David Warren David S. Lipkus, for Sheetal Jhuti
Judge/s	Gray J.
Quick Facts	Client suffered injuries in motor vehicle collision, and signed retainer agreement with paralegal authorizing her to represent his interests on claim for statutory accident benefits. Agreement was for contingency fee of 25 percent on any award or settlement. Statement of claim in connection with tort claim was filed by lawyer. Paralegal advised client of offer to settle tort claim in all-inclusive amount of $18,000, and client signed full and final release. Settlement funds in amount of $22,500 were advanced to lawyer and paralegal shortly thereafter. Client alleged that paralegal advised him of settlement of statutory accident benefits in amount of $6,000, but client refused to sign release. Client contacted insurer who provided documentation showing offer to settle was for $15,000. Client brought action for actual and punitive damages against lawyer and paralegal for fraud and breach of fiduciary duty. Client brought motion for summary judgment.
Statute/Rules Considered	NA
Contingency Fee Agreement Breakdown	CFA retainer signed January 7, 2009 between plaintiff and defendant provided for: • 25% on any award or settlement (lower than counsel's usual rate of 30%) • + disbursements No copy of CFA retainer could be produced by either party.
Issue/s with Agreement	NA – see issues re: fraud and breach of fiduciary duty set-out in 'Quick Facts'
Outcome	**Held:** Motion for summary judgement dismissed. Matter must proceed to trial. Releases regarding tort claim were suspicious, however evidence did not show that lawyer was responsible for or aware of such, and trial would be required to determine this. Evidence against paralegal was compelling, and it was clear that she falsely represented settlement amounts. Since matter was to proceed to trial anyway, no finding of fraud was made against paralegal. **Followed:** *C. (R.) v. McDougall (2008 SCC 53); Combined Air Mechanical Services Inc. v. Flesch* (2014 SCC 8)

Mishan v. York Central Hospital (2015 ONSC 6369)

2015 CarswellOnt 16276, 2015 ONSC 6369, 259 A.C.W.S. (3d) 578

Date	Judgment: October 19, 2015
Parties	Peter Mishan, Kathy Mishan, David J. Mishan, Adam M. Mishan, Sarah L. Mishan, and Naomi B. Mishan by her litigation guardian Peter Mishan, Plaintiffs York Central Hospital, Nurse Candy Wong, Nurse Nana Vadachkoriya, Nurse Michelle Van Der Valk, Nurse Janese Langley, Dr. Darryl J. Gebien and Dr. John A. Hayami, Defendants
Counsel	Miles Obradovich, for Plaintiffs Kate Crawford, for Defendants
Judge/s	Darla A. Wilson J.
Quick Facts	Plaintiff patient and family brought action against nurses, physicians and hospital for damages arising from negligent treatment. Patient no longer wished to pursue claim because he was not prepared to fund expert neurological opinion. Lawsuit had been at standstill for more than five years. Patient brought motion for approval of dismissal of claim.
Statute/Rules Considered	NA
Contingency Fee Agreement Breakdown	NA
Issue/s with Agreement	NA
Outcome	**Held:** Motion granted. "In my view, if lawyers are not prepared to take these difficult professional negligence cases on a CFA basis, recognizing they may have to absorb the legal fees and disbursements if no supportive expert opinion can be secured, the Plaintiff ought to be referred out to counsel who will take the case on such a basis." (para 11) However, given passage of time (5 years) and circumstances in which patient could not fund necessary expert opinion, action was dismissed. It was not possible on evidence to make finding about merits of claim or to determine whether it was in best interests of minor child to dismiss action.

Livent Inc. (Receiver of) v. Deloitte & Touche (2016 ONCA 11)

2016 CarswellOnt 122, 2016 ONCA 11, 128 O.R. (3d) 225, 24 C.C.L.T. (4th) 177, 262 A.C.W.S. (3d) 542, 31 C.B.R. (6th) 205, 342 O.A.C. 201, 393 D.L.R. (4th) 1

Date	Heard: March 23-26, 2015 Judgment: January 8, 2016
Parties	Livent Inc., Through its Special Receiver and Manager Roman Doroniuk, Plaintiff (Respondent/Appellant by Cross-Appeal) Deloitte & Touche and Deloitte & Touche LLP, Defendants (Appellant/Respondent by Cross-Appeal)
Counsel	John Mpampas for Appellant / Respondent by way of Cross-Appeal, for himself Eric Freedman for Respondent / Appellant by way of Cross-Appeal, Joel Freedman
Judge/s	G.R. Strathy C.J.O., R.A. Blair, P. Lauwers JJ.A.
Quick Facts	Client retained lawyer as legal counsel on three personal injury matters. Parties entered into CFA. Some legal work was done and settlement offers were being discussed. Lawyer was removed from record on his own motion. Lawyer brought successful motion for charging order for his unpaid account under s. 34 of *Solicitors Act*. Charging order was granted for two of client's three actions. Motion judge found that preconditions were satisfied that fund or property was in existence at time order was granted, property was "recovered or preserved" through instrumentality of solicitor, and that there was some evidence client could or would not pay fees. Motion judge held that lawyer preserved client's right to sue, which was chose in action and therefore property. Motion judge concluded that client could not pay lawyer's fees other than out of judgments or settlements. Client appealed. Cross-appeal by lawyer from costs award (no costs awarded).
Statute & Rules Considered	NA
Contingency Fee Agreement Breakdown	NA
Issue/s with Agreement	NA
Outcome	**Held:** Appeal dismissed. Cross-appeal dismissed. Costs awarded to the respondent fixed at $3000 inclusive of disbursements and GST. “We see no error in the reasons of the motion judge. The charging orders over any settlement funds were properly issued. The respondent acknowledges that any claim that the solicitor get off the record without just cause can be taken into account by the assessment officer in determining what fees are reasonable.” (para 1) And, motion judge acted within his discretion in awarding no costs.

Livent Inc. (Receiver of) v. Deloitte & Touche (2016 ONCA 11)

2016 CarswellOnt 122, 2016 ONCA 11, 128 O.R. (3d) 225, 24 C.C.L.T. (4th) 177, 262 A.C.W.S. (3d) 542, 31 C.B.R. (6th) 205, 342 O.A.C. 201, 393 D.L.R. (4th) 1

Date	Heard: March 23-26, 2015 Judgment: January 8, 2016
Parties	Livent Inc., Through its Special Receiver and Manager Roman Doroniuk, Plaintiff (Respondent/Appellant by Cross-Appeal) Deloitte & Touche and Deloitte & Touche LLP, Defendants (Appellant/Respondent by Cross-Appeal)
Counsel	John Mpampas for Appellant / Respondent by way of Cross-Appeal, for himself Eric Freedman for Respondent / Appellant by way of Cross-Appeal, Joel Freedman
Judge/s	G.R. Strathy C.J.O., R.A. Blair, P. Lauwers JJ.A.
Quick Facts	Client retained lawyer as legal counsel on three personal injury matters. Parties entered into CFA. Some legal work was done and settlement offers were being discussed. Lawyer was removed from record on his own motion. Lawyer brought successful motion for charging order for his unpaid account under s. 34 of *Solicitors Act*. Charging order was granted for two of client's three actions. Motion judge found that preconditions were satisfied that fund or property was in existence at time order was granted, property was "recovered or preserved" through instrumentality of solicitor, and that there was some evidence client could or would not pay fees. Motion judge held that lawyer preserved client's right to sue, which was chose in action and therefore property. Motion judge concluded that client could not pay lawyer's fees other than out of judgments or settlements. Client appealed. Cross-appeal by lawyer from costs award (no costs awarded).
Statute & Rules Considered	NA
Contingency Fee Agreement Breakdown	NA
Issue/s with Agreement	NA
Outcome	**Held:** Appeal dismissed. Cross-appeal dismissed. Costs awarded to the respondent fixed at $3000 inclusive of disbursements and GST. “We see no error in the reasons of the motion judge. The charging orders over any settlement funds were properly issued. The respondent acknowledges that any claim that the solicitor get off the record without just cause can be taken into account by the assessment officer in determining what fees are reasonable.” (para 1) And, motion judge acted within his discretion in awarding no costs.

Edwards (Litigation guardian of) v. Camp Kennebec (Frontenac) (1979) Inc. (2016 ONSC 2501)

2016 Carswell Ont 5702, 2016 ONSC 2501

Date	Heard: January 20, 2016 Judgment: April 13, 2016
Parties	Jared Edwards, by his Litigation Guardian Eve Ojasoo and Eve Ojasoo, Russell Topp, Leiki Candace Edwards and Ailie Anne Bikaunieks, Plaintiffs Camp Kennebec (Frontenac) (1979) Inc., Kennebec Holdings Limited, Courtney Rondeau and Cameron Wilson, Defendants
Counsel	David Burstein, for Plaintiffs Timothy P. Alexander, for Defendants
Judge/s	M.D. Faieta J.
Quick Facts	Plaintif, Jared Edwards suffered from an existing learning disability and seizure disorder when he fell while entering a sailboat at the defendant's six-week summer camp for the disabled, causing him a spinal injury. Eve (Jared's mother and Litigation Guardian) and her partner Russell retained De Rose Professional Corporation pursuant to a CFA dated October 4, 2012 to seek recovery of damages arising from the above accident on behalf of Jared, his parents and his sisters. This action was commenced in April 2014. In October 2015 the parties agreed to settle this action for $2,750,000.00, inclusive of costs and taxes. It is proposed that the net proceeds of Jared's settlement will be supplemented by Eve's settlement to pay $1,475,000.00 for an annuity that will pay Jared the sum of $5,825.00 per month, without indexation, for the rest of his life. Plaintiffs bring this motion for Judgment approving the settlement of Jared's claim.
Statute/Rules Considered	*Solicitors Act*, R.S.O. 1990, c. S.15, s 24, 28(1) *Contingency Fee Agreements*, O. Reg. 195/04, ss 2.3(ii), 2.6
Contingency Fee Agreement Breakdown	CFA provides: • 33% of any settlement recovered + HST • However, if action goes to trial, then fee is 40% of amount recovered + HST, or the amount of costs awarded by the Court, whichever counsel chooses • Or, where claim is not settled or lost at trial, plaintiff still responsible to pay all disbursements and taxes CFA does not state that client has been advised to obtain independent legal advice before signing. This settlement proposes that Jared will receive $1,427,417.00 after the deduction of $606,311.30 for fees, disbursements and taxes. Disbursements amounted to $58,207.75.
Issue/s with Agreement	***A.*** *Is the* CFA *void for failure to comply with the Solicitors Act?* ***B.*** *Is the CFA "fair and reasonable"?*
Outcome	Held: Motion dismissed. A. No. CFA is void because it does not state that "client has been advised that hourly rates may vary among solicitors and that the client can speak with other solicitors to compares rate" as required by s. 2.3(ii) of O. Reg. 195/04; and, does not provide a simple example, or any example, that shows how the contingency fee is calculated as required by s. 2.6 of O. Reg. 195/04.

	B. No. This is evidenced by client's (Eve) misunderstandings about the content of the CFA. "I order that De Rose's account for legal fees, disbursements and taxes in relation to Jared's claim be reduced by $381,311.30 to $225,000.00. I order that these funds ($381,311.30) be used to purchase a larger annuity for Jared's benefit, without changing the other terms of the annuity." (para 55)

Batalla v. St. Michael's Hospital (2016 ONSC 1513)

2016 CarswellOnt 3936, 2016 ONSC 1513, 264 A.C.W.S. (3d) 357, 81 C.P.C. (7th) 293

Date	Judgment: March 9, 2016
Parties	Mercelita Batalla, Rogelio Batalla and Aaron Jake Batalla, a minor by his Litigation Guardian, Mercelita Batalla, Primo Eroles, Calixta Eroles and Mercela Batalla, Plaintiffs St. Michael's Hospital and Dr. Filomena Mary Meffe, Defendants
Counsel	Joel P. Freedman, for Plaintiffs
Judge/s	Darla A. Wilson J.
Quick Facts	Plaintiffs alleged that attending physician and nurses were negligent during delivery of minor plaintiff and as result he had severe brain damage resulting in very limited cognitive functioning and impaired motor skills. Mediation was held in April 2014, at which time the solicitors agreed to resolve the action for the all-inclusive sum of $6,625,000, subject to court approval. Plaintiff's counsel asserted that plaintiffs signed CFA and sought to have fee approved of $1,537,223, under the agreement. Counsel for the plaintiffs served motion for approval of settlement.
Statute/Rules Considered	*Solicitors Act*, R.S.O. 1990, c. S.15, s 24. Motion brought pursuant to R. 7 of *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
Contingency Fee Agreement Breakdown	CFA executed on September 4, 2010 by Mr. and Mrs. Batalla. It provides for: • 30% of all monies received less disbursements • client to pay interest on money borrowed by counsel to pay disbursements Counsel seeks to have a fee approved of $1,537,223, per the above provision. However, counsel willing to accept 25% of the damages and interest + HST + disbursements.
Issue/s with Agreement	Is the CFA "fair and reasonable"?
Outcome	**Held:** Settlement approved for all-inclusive sum of $6,625,000, including $1,000,000 to Mr. Freedman + $130,000 in HST + $69,900 in disbursements Yes, CFA was fair at the time it was signed. However, paragraph requiring plaintiffs to pay interest on disbursements incurred was not fair. "I do not think it is fair for counsel to look to the clients for payment of interest charged by the bank for money borrowed to pay the disbursements. In this case, that amount is $4,480, which is a very small amount in light of the fee proposed to be charged." (para 54) **Followed:** *Raphael Partners v. Lam*

Murillo v Turnbull (2016 ONSC 1906)

2016 CarswellOnt 4178, 2016 ONSC 1906

Date	Heard: March 16, 2016 Judgment: March 17, 2016
Parties	Luz Gomez Murillo and Christian Moreno Gomez, Plaintiffs Max Turnbull and Custodio Moreno Romero, Defendant
Counsel	T. McKinlay, for Karl Arvai Professional Corporation R. Mitri, for Grillo Barristers
Judge/s	T.A. Heeney R.S.J.
Quick Facts	The plaintiffs retained Grillo Barristers to act for them, in both a tort and accident benefits claim stemming from a motorcycle accident in 2010. Grillo prosecuted the action through to the completion of discoveries and compliance with undertakings, and the assembly of evidence to support their claims. On August 28, 2015, they received a courtesy call from the plaintiffs, advising that they had retained new counsel, Arvai. Grillo indicated that they were prepared to forward the file upon payment of their disbursements (approx. $11 000), as well as an undertaking to protect their account for fees from any settlement or judgment. Arvai refused and demanded transfer of the file. Arvai served offer to settle agreeing to resolve all matters as proposed, but demanding costs of $11,195.66. Ultimately, consent orders were prepared to resolve matter as follows: file was transferred upon Arvai paying $4,000 disbursements to Grillo, with balance to be carried by them pending completion of file and certificate of assessment was to be set aside. Parties made submissions regarding costs of proceedings undertaken.
Statute/Rules Considered	NA
Issue/s with Agreement	"[W]hether the prior law firm can insist on payment of their disbursements from the client prior to releasing the file, when they have a written [contingency fee] retainer agreement signed by the clients that entitles the firm to payment of their fees and disbursements "forthwith" upon breakdown of the solicitor and client relationship." (para 26)
Breakdown of Contingency Fee Agreement	The contingency fee retainer was executed by the plaintiffs on September 25, 2013 with a term that entitles the firm to payment of their fees and disbursements "forthwith" upon breakdown of the solicitor and client relationship
Outcome	**Held:** No costs awarded to either side. However, judge acknowledged that if costs were to be awarded they would be in Grillo's favour. "If the case has sufficient apparent merit to warrant taking the file on, Arvai should be prepared to carry the disbursements, as they no doubt do with their many other personal injury files where they are retained on a contingent fee basis." (para 27)

APPENDIX SEVEN

CLASS ACTION DECISIONS

Smith Estate v. National Money Mart (2010 ONSC 1334)

2010 CarswellOnt 1238, 2010 ONSC 1334, [2010] O.J. No. 873, 186 A.C.W.S. (3d) 335, 94 C.P.C. (6th) 126

Date	Heard: February, 2010 Judgement: March, 2010
Parties	Plaintiff: Kenneth Smith, as an Estate Trustee of Margaret Smith, deceased; Oriet Defendant: National Money Mart; Dollar Financial Group
Counsel	For Plaintiff: Harvey T. Strosberg, Q.C., Linda Rothstein For Defendant: F. Paul Morrison, John P. Brown for Defendant, National Money Mart Company Mahmud Jamal, Jean-Marc Leclerc, Jason MacLean for Defendant, Dollar Financial Group, Inc. Terrence J. O'Sullivan, James Renihan for Class Counsel
Judge/s	Then: Perell J.
Quick Facts	Class proceeding between creditors and debtors, on payday loans, where the debtors alleged that the creditor charged a criminal rate of interest. Motion by parties in class proceeding for order approving settlement (and class counsel fees).
Statute & Rules Considered	*Rules of Civil Procedure:* R. 7.04(1), R.7.08(4); *Class Proceedings Act* ss. 17(3)-17(6), 32(2); *Criminal Code* ss.237, 347, 347(2)
Contingency Fee Agreement, Requested Fees & Settlement	"All of the law firms agreed to act on the same contingency fee basis as had been agreed between the representative plaintiffs and Sutts, Strosberg LLP" (para 5) CFA: provides for 30% of the value of the settlement. Class counsel "submit that if they were paid in accordance with the [CFA], described above, they would be entitled to a $40 million counsel fee [($10 million fee + $130,000 disbursements) times four]. They are seeking only $27.5 million." (para 114) Settlement: $120M = (27.5 cash payment made by D.) + (56.4 debt forgiveness) + (30 credits for new loans made by D.) + (3 payment to Class Proceedings fund)
Contingency Fee Issue/s	Are the settlement and legal fees fair and reasonable?
Outcome	**Held:** Motion granted in part. 11.25% [or $13.5 million] of the total $120M settlement amount. "A better version of the settlement and the one that I am approving is that Class Counsel's fee does not take up all the cash portion of the settlement and there is some repayment to the members of the Transaction Credit Group." (para 95)

Smith Estate v. National Money Mart Co. (2011 ONCA 233) – reversing in part (2010 ONSC 1334)

– see above

2011 CarswellOnt 1920, 2011 ONCA 233, [2011] O.J. No. 1321, 106 O.R. (3d) 37, 199 A.C.W.S. (3d) 1077, 276 O.A.C. 237, 331 D.L.R. (4th) 208, 3 C.P.C. (7th) 223

Date	Heard: October 25, 2010 Judgment: March 28, 2011
Parties	Kenneth Smith, as Estate Trustee of the Last Will and Testament of Margaret Smith, deceased, and Ronald Oriet (plaintiffs), Appellant Sutts, Strosberg LLP, Heenan Blaikie LLP, Paliare Roland Rothstein Rosenberg LLP and Koskie Minsky LLP, Appellants and National Money Mart Company and Dollar Financial Group, Inc. (defendants), Respondent
Counsel	Terrence J. O'Sullivan, James Renihan, for Appellants Chris Hubbard, for Money Mart (not participating in appeal) Mahmud Jamal, Jason MacLean, for Dollar Financial Group, Inc. (not participating in appeal)
Judge/s	M.J. Moldaver, R.P. Armstrong, R.G. Juriansz JJ.A.
Quick Facts	Debtors brought class action against creditors with respect to allegedly criminal rate of interest charged on "payday" loans. During trial, parties reached settlement with forgiving of outstanding loans, credits for new loans, payment of $27.5 million cash for class counsel fees and representative plaintiff's $3,000 fee, and establishment of class fund. Settlement was approved with class counsel fees reduced to $14.5 million. Class counsel appealed, seeking a fee of $20 million.
Statute & Rules Considered	*Class Proceedings Act, 1992*, S.O. 1992, c. 6, s 32(1)-(4), 33(1)-(4), 33(7)(a)-(c)
Contingency Fee Agreement Breakdown	Perell J. of ONSC fixed class counsel fees in the amount of $14.5 million ($12,806,074.94 for fees, $640,303.75 for GST and $1,053,621.31 for disbursements including GST). The disbursements included the fees of certain consultants and other counsel retained by class counsel that the appellants had requested be treated as contingency fees.
Issue/s with Agreement	A. Class counsel sought to have fees, disbursements and taxes of other counsel—who had provided their services on a contingency basis—treated as a component of the class counsel base fee rather than as disbursements. B. Class counsel also sought to have the fees of consultants—who also provided services on a contingency fee basis—increased by the multiplier the court awarded to class counsel, and to have the compensation paid to the representative plaintiff paid out of the class fund rather than out of class counsel fees.
Outcome	Held: Appeal allowed in part by providing that the compensation for the representative plaintiff be paid out of the settlement fund. Appeal dismissed on all other respects. "…the representative plaintiff's fee should be paid out of the settlement fund and not out of class counsel fees. Class counsel fees are predicated on the work that class counsel have done for the class. Allocating a part of that fee to a layperson, especially a representative plaintiff, raises the spectre of fee splitting […] $3,000 compensation for the representative plaintiff should be paid out of the settlement fund. I would vary the motion judge's order accordingly." (paras 135-, 136)

Osmun v. Cadbury Adams Canada Inc. (2010 ONSC 2752)

2010 CarswellOnt 3350, 2010 ONSC 2752, [2010] O.J. No. 2093, 189 A.C.W.S. (3d) 33, 97 C.P.C. (6th) 169
Further reasons in Osmun v. Cadbury Adams Canada Inc. (2012 ONSC 3837) – see below

Date	Heard: April, 2010 Judgement: May, 2010
Parties	Plaintiff: Osmun; Metro Enterprises Defendant: Cadbury Adams; The Hershey Company; Nestle Canada; Mars Canada; Itwal Limited
Counsel	For Plaintiff: Harvey T. Strosberg, Q.C., Charles M. Wright For Defendant: Not Listed on QL (Motion)
Judge/s	Then: G.R. Strathy J.
Quick Facts	Partial settlements were reached in class action. Settlements were approved in Ontario. Settlement included payment of $5,795,695.60 for benefit of settlement class members. Motion was brought for approval of fees and disbursements of class counsel.
Statute & Rules Considered	*Class Proceedings Act*, ss. 32(1), 32(3), 33(1), 33(4), 33(7)(c)
Contingency Fee Agreement, Requested Fees & Settlement	CFA retainer entered into on December 1, 2007 provided for either: (a) the base fee increased by a multiplier of 4, less any fees already recovered as costs, plus applicable taxes; or (b) if a settlement is reached before examinations for discovery, 30% of the settlement, less any fees already paid, plus applicable taxes. And, whether *a* or *b*: + disbursements (not already recovered by the defendants as costs) + taxes and interest Class counsel in Ontario and BC request a 25% contingency fee on this motion ($1,487,195.76 including disbursements and GST). Settlement: "The details of these proceedings are set out in my reasons on the settlement approval: *Osmun v. Cadbury Adams Canada* Inc., 2010 ONSC 2643… (a) Cadbury has paid [$5.8M]… for the benefit of settlement class members. Cadbury is also obligated to pay the costs of notice that exceed [$250k] (b) Cadbury has agreed to cooperate with the plaintiffs in pursuing their claims against the non-settling defendants;… (c)... (d)..."
Contingency Fee Issue/s	Are class counsel's requested fees fair and reasonable?
Outcome	Held: Motion granted. 25% + disbursements "It is appropriate to use other methods of measurement, such as time multiplied by hourly rate, or a multiplier, or the result, as a check against the reasonableness of the fees claimed; but, in my respectful view, courts should not be too quick to disallow a fee based on a percentage simply because it is a multiple - sometimes even a large multiple - of the mathematical calculation of hours docketed times the hourly rate... As I have noted, on a straight "time and hourly rate" basis, class counsel's charges would be [$633k], excluding disbursements. The effective multiplier being requested, therefore, is about two, which is not out of the reasonable range. That range has been expressed as being from slightly greater than one (at the low end) to four or higher in the most deserving cases" (para 31)

O'Neil v. SunOpta Inc. (2010 ONSC 2735)

2010 CarswellOnt 9129, 2010 ONSC 2735, [2010] O.J. No. 5251, 6 C.P.C. (7th) 438

Date	Heard: May, 2010 Judgement: May, 2010
Parties	Plaintiff: O'Neil Defendant: Sunopta; Bromley; Dietrech
Counsel	For Plaintiff: Michael G. Robb, Monique L. Radlein For Defendant: Steve Tenai, C. Kilby, for Defendant, SunOpta Inc. Craig Lockwood, for Defendants, Steven R. Bromley and John H. Dietrich
Judge/s	Then: W.U. Tausendfreund J.
Quick Facts	Plaintiff brought cross-border securities class action against defendants for alleged misrepresentation leading to artificial inflation of value of defendant company's shares. Parties settled action and brought motion for approval of settlement terms and class counsel fees,
Statute & Rules Considered	*Class Proceeding Act*, s.33
Contingency Fee Agreement, Requested Fees & Settlement	CFA between Canadian class counsel and representative plaintiff provided for: • 25% contingency fee • + disbursements • + taxes • and a statement that all of the above is subject to court approval Settlement: USD$11.25M
Contingency Fee Issue/s	Are class counsel’s fees fair and reasonable?
Outcome	Held: Motion granted. "I am satisfied that this Settlement represents a fair and reasonable compromise." and, "In view of the cross-border nature of this Settlement, counsel in both actions have agreed that their combined fees will not exceed 25% of the gross settlement funds of USD$11.25M. This amounts to [USD$2.8M] plus disbursements and taxes [the present Motion granted the fee payment of USD$843K]." "Mr. O'Neil, the representative plaintiff, does not object to the quantum of fees sought by Canadian class counsel, as it is consistent with the retainer agreement."

Fantl v. Transamerica Life Canada (2010 ONSC 3113)

2010 CarswellOnt 3675, 2010 ONSC 3113, 188 A.C.W.S. (3d) 967, 86 C.C.L.I. (4th) 239

Summary	Only one mention of CFA related to the cost indemnity scale: "In calculating that counsel fee, I did not include charges for fees associated with the dispute between REO and KO to be lawyer of record. In paras. 87 of my Reasons for Decision, I stated: I agree with Transamerica's submission that REO's counsel fee should not include charges for fees associated with its carriage fight with KO. It seems to me that this expenditure of effort, which did little to advance the litigation for the Representative Plaintiff or the Class is part of the risk assumed by Class Council when it takes the retainer. This expenditure is part of what may justify the contingency fee or the multiplier of a base fee, but it is not reasonable to charge a client for what it costs the lawyer to safeguard a retainer from a competitor. These costs are a risk that the lawyer assumes when he or she takes on the retainer. Viewed in the context of the public's interest, it strikes me as a bad idea to encourage and intensify carriage fights by the prospect that the winner will not only get the file but be paid something by his or her client for getting the file."

Pichette v. Toronto Hydro (2010 ONSC 4060)

2010 CarswellOnt 5399, 2010 ONSC 4060, [2010] O.J. No. 3185, 191 A.C.W.S. (3d) 47, 98 C.P.C. (6th) 96

Date	Heard: July, 2010 Judgement: July, 2010
Parties	Plaintiff: Pichette Defendant: Toronto Hydro
Counsel	For Plaintiff: Michael McGowan, Dorothy Fong, Barbara Grossman For Defendant: Alan H. Mark, Kelly Friedman, Jennifer Teskey
Judge/s	Then: Cumming J.
Quick Facts	Defendant municipal electric utilities historically charged customers so-called ‘late payment penalties’ (LPPs) of 7 or 5 per cent when utility bills were not paid by time required. Two class actions were brought alleging that LPPs were contrary to Criminal Code, which prohibits charging a rate over 60% per annum. Putative representative plaintiffs in two class actions brought motion under Class Proceedings Act, 1992 for consolidation of class actions.
Statute & Rules Considered	*Class Proceedings Act*, ss. 5, 5(1), 12, 19, 20, 24, 25, 26, 29, 32; *Criminal Code*, s.347
Contingency Fee Agreement, Requested Fees & Settlement	CFA provided for: • 25% contingency fee • + partial indemnity costs "The requested fees are about 28.5% of the total settlement amount (The inclusion of the partial indemnity costs result in the overall 28.5% figure)." (The requested fees are equivalent to a multiplier of about 4.42.) Class counsel also requests a portion of the settlement to cover disbursements and tax. Proposed settlement was $17.5 million.
Contingency Fee Issue/s	Are class counsel’s fees fair and reasonable?
Outcome	Held: Motion granted. 25% contingency fee approved, plus partial indemnity costs, so effectively 28.5% + disbursements and GST/HST

McLaren v. LG Electronics Canada Inc. (2010 ONSC 4710)

2010 CarswellOnt 6881, 2010 ONSC 4710, 192 A.C.W.S. (3d) 385

Date	Heard: August, 2010 Judgement: August, 2010
Parties	Plaintiff: McLaren Defendant: LG Electronics
Counsel	For Plaintiff: Megan B. McPhee, Khalid Janmohamed For Defendant: Kris Borg-Oliver
Judge/s	Then: Perell J.
Quick Facts	Between June 2004 and April 2005, defendants, LG Inc., manufactured and sold refrigerators in Canada. These refrigerators contained faulty capacitors that were prone to malfunction, which could cause refrigerators to overheat and catch fire. Plaintiff's refrigerator caught fire and severely damaged his home. Plaintiff brought motion to certify action as class proceeding, to amend pleading to add representative plaintiff, and to have proposed settlement approved.
Statute & Rules Considered	*Class Proceedings Act*, ss. 5, 5(1), 5(1)(a), 5(1)(b)… 5(1)(e)
Contingency Fee Agreement, Requested Fees & Settlement	No % disclosed. Plaintiff signed a CFA with Kim Orr (current class counsel) providing that "if a settlement benefits one or more class members, class counsel is entitled to fees by a lump sum, by payment out of the proceeds, or otherwise as may be directed by the court." Note: plaintiff changed class counsel once and had a CFA with former counsel (no issues with switching solicitors) Proposed settlement includes the following provisions: • LG will be responsible for payment of the legal fees of Class Counsel. It shall, subject to approval by the court, pay the legal fees, disbursements and taxes thereon of Class Counsel in the amount of $250,000.00 on an all-inclusive basis. • Class Counsel shall not request payment of any legal fees, disbursements, or taxes from Class Members.
Contingency Fee Issue/s	Are class counsel's fees appropriate as "a matter of interpretation of the settlement agreement"?
Outcome	Held: Motion granted. "The proposed settlement promotes the three policy objectives of the CPA: access to justice, judicial economy and behaviour modification." (para 33)

Waterston v. Canadian Broadcasting Corp. (2010 ONSC 4319)

2010 CarswellOnt 8028, 2010 ONSC 4319, 194 A.C.W.S. (3d) 771, 85 C.C.P.B. 1, 98 C.P.C. (6th) 364

Date	Heard: February, June, July, 2010 Judgement: October, 2010
Parties	Plaintiff: Waterston Defendant: CBC
Counsel	For Plaintiff: Anthony Guindon, Ari Kaplan For Defendant: David Stamp for Defendant Andre Claudé, Anne Sheppard, Mario Évangelisté for Moving Parties, SCRC and Messrs. Hebert and Bernard
Judge/s	Then: Pollak J.
Quick Facts	Association of pensioners with defendant corporation CBC brought action against CBC for breach of alleged collateral agreement relating to use of surplus pension funds. Action was certified as class proceeding. Union for some active employees with corporation SCRC did not intervene in certification proceeding. Class proceeding action was settled. SCRC was not party to settlement. During class proceeding action, another union filed grievance against CBC regarding collective agreement and surplus pension funds. Arbitrator allowed grievance. Parties to settlement ("parties") brought motion to approve settlement. SCRC brought cross-motion for leave to intervene and stay of proceedings.
Statute & Rules Considered	*Rules of Civil Procedure*: R. 21.01(3)
Contingency Fee Agreement, Requested Fees & Settlement	No details of CFA or counsel's fee agreement provided. The decision only once mentions that there was a CFA and does not provide and further information.
Contingency Fee Issue/s	Are class counsel's fees fair and reasonable?
Outcome	**Held:** Motion granted. "I approve the counsel fees of $325,590.40 and disbursements of $15,280.07." (para 109)

West Coast Soft Wear Ltd. v. 1000128 Alberta Ltd. (2010 ONSC 6388)

2010 CarswellOnt 9127, 2010 ONSC 6388, 7 C.P.C. (7th) 323

Date	Heard: October, 2010 Judgement: November, 2010
Parties	Plaintiff: West Coast Soft Wear Defendant: CNPC International; China National Oil & Gas Exploration; CNPC International; China National Petroleum
Counsel	For Plaintiff: Charles M. Wright; Anthony O'Brien For Defendant: Christopher Naudie; Ed Morgan
Judge/s	Then: W.U. Tausendfreund J.
Quick Facts	"In this action, … the plaintiffs seek damages for alleged insider trading by the defendants in respect of shares of PetroKazakhstan Inc. ("PKZ")."
Statute & Rules Considered	NA
Contingency Fee Agreement, Requested Fees & Settlement	CFA provided for: • 25% contingency fee • + disbursements • + taxes • provision stating that the above subject to court approval Class counsel requests fees in the amount of $2,486,156.48 plus disbursements and applicable taxes. This amount was calculated at 25% of the net settlement funds. Settlement: "Under the terms of [the settlement] agreement, the defendants provided settlement funds of [$10M] "
Contingency Fee Issue/s	Are class counsel's fees fair and reasonable?
Outcome	**Held:** Motion granted. "The fees are approved in the amount of $2,486,156.48 plus taxes and disbursements in the amount of $101,017.33." (para 45)

Serhan Estate v. Johnson & Johnson (2011 ONSC 128)

2011 CarswellOnt 40, 2011 ONSC 128, 195 A.C.W.S. (3d) 932, 79 C.C.L.T. (3d) 272, 8 C.P.C. (7th) 73

Date	Heard: December, 2010 Judgement: January, 2011
Parties	Plaintiff: Ahmad Serhan, deceased by His Trustee without a will Zein Ahmad Serhan; Beverley Gagnon, deceased, By Her Trustee without a will, Bruce Allen Gagnon Defendant: Johnson & Johnson; Lifescan Canada
Counsel	For Plaintiff: Paul Pape; Kirk Baert For Defendant: Caroline Zayid; Darryl Ferguson
Judge/s	Then: C. Horkins J.
Quick Facts	Proceeding was certified as class action in 2004, with cause of action being waiver of tort. Defendant was manufacturer of blood glucose monitoring products for diabetics, and class was all individuals in Canada, except British Columbia and Quebec, who acquired one of defendant's self-monitoring devices that had two design flaws. Problem resulting from flaws in defendant's product was rare, and there was no evidence of injury arising from flaws. Parties engaged in settlement discussions and eventually reached resolution. Settlement totalled $4 million, all of which was to be cy près distribution, as direct compensation to class was not practical. Settlement involved defendant providing devices to Canadian Diabetes Association for those unable to afford costs of self-monitoring, as well as providing funds for public awareness program to raise awareness of dangers of undiagnosed and untreated diabetes. Class brought motion for approval of settlement.
Statute & Rules Considered	NA
Contingency Fee Agreement, Requested Fees & Settlement	CFA provided for: (a) to the extent that any disbursements are not received and recovered as party and party costs, an amount equivalent to the cost of the unrecovered disbursements plus applicable taxes; and (b) the greater of: (1) 25% of the settlement funds or monetary award, plus applicable taxes; or (2) the base fee, being the number of hours times the usual hourly rates, increased by a multiplier of 3.0, plus applicable taxes. Class Counsel requests a fixed fee of $1.5M inclusive of disbursements, taxes and repayment of $24.7k owed for disbursements advanced by the Class Proceedings Fund. Settlement: "The settlement has a cash value of [$2.75M] and a product value of [$1.25M], totalling [$4M], all of which will be a cy près distribution because direct compensation to the Settlement Class is not practical."
Contingency Fee Issue/s	Are counsel’s legal fees fair and reasonable?

Outcome	Held: Motion granted. [*JB thinks it's unusual to include disbursements in the calculation*, and s.6 of *Reg* 195/04 (enabled by *SA*) prohibits the inclusion of disbursements in the CF % -- *HO thinks that ultimately class counsel was not requesting a contingency fee per the CFA, but a fixed fee so not sure if there is still a problem there*] "There were no objections to the amount sought and the representative plaintiffs support Class Counsel's fee request."

Abdulrahim v. Air France (2011 ONSC 512)

2011 CarswellOnt 403, 2011 ONSC 512, 16 C.P.C. (7th) 289, 197 A.C.W.S. (3d) 583

Date	Heard: January, 2011 Judgement: January, 2011
Parties	Plaintiff: Abdulrahim; Abedrabbo Defendant: Greater Toronto Airports Authority; NAV Canada et al.
Counsel	For Plaintiff: J.J. Camp, Q.C. For Defendant: Robert Fenn, for NAV Canada Timothy Trembley, for Air France
Judge/s	Then: G.R. Strathy J.
Quick Facts	"The details of the action, and of the settlement, are set out in my endorsement approving the settlement, which is being released this day: *Abdulrahim* ..."
Statute & Rules Considered	NA
Contingency Fee Agreement, Requested Fees & Settlement	CFA only mentioned to the following extent: "The retainer agreement between class counsel and the representative plaintiff provides for a fee of 33%." However, "Class counsel is requesting a fee of $6,225,000, plus disbursements and taxes. This is based on 30% of the settlement amount." Settlement: "the settlement was for the total sum of $20.75M, inclusive of costs."
Contingency Fee Issue/s	Is class counsel's fee fair and reasonable?
Outcome	**Held:** Motion granted. 30% "in the amount of $6,225,000.00 as well as the taxes and disbursements set out above."

Rowlands v. Durham Region Health (2011 ONSC 719)

2011 CarswellOnt 3228, 2011 ONSC 719, [2011] O.J. No. 1864, 201 A.C.W.S. (3d) 895, 20 C.P.C. (7th) 253

See further reasons in Rowlands v. Durham Region Health (2011 ONSC 719) – see below

Date	Heard: December, 2010 Judgement: February, 2011
Parties	Plaintiff: Rowlands; Durham Region health; Defendant: Regional Municipality of Durham
Counsel	For Plaintiff: Todd J. McCarthy; Sean A. Brown For Defendant: Boghosian; Catherine Virgo
Judge/s	Then: P.D. Lauwers J.
Quick Facts	Prospective class plaintiff brought action on his own behalf and on behalf of class members for damages arising out of loss by nurse of USB key containing personal health information. Plaintiff brought motion for certification of class proceeding.
Statute & Rules Considered	*Rules of Civil Procedure:* R. 1.03; *Class Proceedings Act*, ss.5, 17, 22
Contingency Fee Agreement, Requested Fees & Settlement	NA - see below
Contingency Fee Issue/s	This case is more about the indemnity scale; only one mention of CFA: "The "funding of all disbursements necessary to properly prosecute this action to a successful completion have been and will continue to be paid by Class Counsel so there are no access to justice concerns in requiring the Plaintiff to bear the costs of the Notice and Opt-out program"; this is how, Mr. Boghosian submits, Class Counsel's 25% contingency fee is justified.""
Outcome	Held: Motion granted. Certification approved.

Mortillaro v. Unicash Franchising Inc. (2011 ONSC 923)

2011 CarswellOnt 802, 2011 ONSC 923, [2011] O.J. No. 595, 16 C.P.C. (7th) 352, 197 A.C.W.S. (3d) 850

Date	Heard: February, 2011 Judgement: February, 2011
Parties	Plaintiff: Mortillaro Defendant: Unicash
Counsel	For Plaintiff: Susan S. Brown; Jody Brown For Defendant: Meagan J. Swan
Judge/s	Then: G.R. Strathy J.
Quick Facts	"This is a "payday loans" case against the defendant Planinvest Consulting Limited ("Unicash"). Unicash operated primarily in the Greater Toronto Area … [it] offered low principal, high cost consumer loans, which were designed to provide financing between paydays. The plaintiff alleges … that the total interest charged exceeded an effective annual rate of 60%, contrary to s. 347(1) of the Criminal Code." Motion to approve settlement and legal fees.
Statute & Rules Considered	NA
Contingency Fee Agreement, Requested Fees & Settlement	CFA provided for: • 25% contingency fee of the recovery • + disbursements • + taxes • with provision stating that the above is subject to the approval of the court "Class counsel asks that their fees be approved in the amount of [$55k] plus [taxes], and disbursements of [$23k] (being the actual amount expended), plus $500 for estimated ongoing disbursements (inclusive of applicable GST and HST), to be paid from the settlement fund in accordance with the terms of the settlement agreement." "The fee proposed is higher than the amount to which counsel would be entitled under that arrangement. Mr. Mortillaro agrees to the proposed fee. Class counsel's time spent in this matter has a face value of nearly [$250k]" Settlement: "Under the proposed settlement, which is subject to court approval, Unicash will forgive all unpaid payday loans owed by class members and will make a payment of [$155k], to be distributed as follows: ... It is estimated that the cy près distribution will be in the range of [$50k]"
Contingency Fee Issue/s	Are class counsel’s fees fair and reasonable?
Outcome	Held: Motion granted. (i.e. 35% + disbursements) "In my view, the proposed fee is fair and reasonable, having regard to the factors to be considered in determining a lawyer's fee as well as the goals of the C.P.A. The outcome of this litigation was dictated by circumstances beyond the control of counsel. It can be regarded as a victory in principle if not in dollars. Fee awards should be designed to encourage good lawyers to take on risky and difficult class proceedings. This was such a proceeding."

Dugal v. Manulife Financial Corp. (2011 ONSC 1785)

2011 CarswellOnt 1889, 2011 ONSC 1785, [2011] O.J. No. 1239, 105 O.R. (3d) 364, 18 C.P.C. (7th) 105, 200 A.C.W.S. (3d) 35

Date	Heard: February, 2011 Judgement: March, 2011
Parties	Plaintiff/Moving Party: Dugal; Ironworkers Pension Fund Defendant: Manulife Financial et al
Counsel	For Plaintiff/Moving Party: Charles M. Wright, Michael D. Wright, Daniel Bach, Stephanie Dickson For Defendant: Patricia D.S. Jackson, Andrew Gray, for Defendant / Respondent, Manulife Financial Corporation R. Paul Steep, E.S. Block, for Defendant, Peter Rubenovitch Linda L. Fuerst, for Defendant, Domenic D'Alessandro Alexa Abiscott, for Defendants, Gail Cook-Bennett, Arthur Sawchuk
Judge/s	Then: G.R. Strathy J.
Quick Facts	"The plaintiffs claim that the defendant Manulife Financial Corporation ("Manulife"), which is a public company, made misrepresentations concerning its risk management practices in its public disclosure documents, and that this had the effect of artificially inflating the value of its stock. ... This action has not yet been certified as a class proceeding under the Class Proceedings Act, 1992, S.O. 1992, c. 6 (the "C.P.A.")." Motion by P. for approval of funding agreement as between a P. and a third-party "on any settlement or judgment in this action"
Statute & Rules Considered	*Class Proceedings Act*, s.12
Contingency Fee Agreement, Requested Fees & Settlement	This case is unusual and involves a third-party indemnity agreement between the Ps and a third-party (third-party = CFI, "an Irish corporation, which will pay any adverse costs award made against the plaintiffs, in return for a "commission""): • CFI is entitled to a commission of 7% of the amount of any settlement or judgment, after deduction of the fees and disbursements of class counsel and administration expenses. • The commission is subject to a "cap" of $5 million if the resolution occurs at any time prior to the filing of the plaintiffs' pre-trial conference brief and $10 million if the resolution occurs at any time thereafter. • CFI will pay $50,000 towards the plaintiffs' disbursements. • Class counsel are required to advise CFI of any significant issue in the proceeding, including prospects of success, strategy and quantum, and class counsel are required to respond to any reasonable request by CFI for information about the proceedings.... this agreement does not come into effect unless approved by the court."
Contingency Fee Issue/s	Is the funding agreement between the plaintiffs and CFI fair and reasonable?
Outcome	**Held:** Motion granted. "**(a)** The funding agreement helps to promote one of the important goals of the CPA — providing access to justice. That goal would be illusory if access to justice were deterred by the prospect of a crushing costs award to be borne by the representative plaintiff or counsel. In

	this sense, the agreement is beneficial to the proper administration of justice […] Just as [CFAs] have been recognized as providing access to justice, so too third party indemnity agreements can avoid the unfortunate result that individuals with potentially meritorious claims cannot bring them because they are unable to withstand the risk of loss: see McIntyre Estate at para. 55. **(b)**... (c) ... (j) "In *McIntyre Estate* ... the Court of Appeal held that a lawyer's contingent fee agreement was not per se prohibited by the Champerty Act and that it was necessary for the court to consider the reasonableness and fairness of the fee structure in the Contingency Fee Agreement. ... The court therefore concluded that it was premature to determine whether the agreement was reasonable and fair because the fee payable might prove to be unreasonable when considering the factors that courts historically take into account in fixing lawyers' fees..."

Travassos v. Tattoo (2011 ONSC 2290)

2011 CarswellOnt 3193, 2011 ONSC 2290, 19 C.P.C. (7th) 209, 200 A.C.W.S. (3d) 984

Date	Heard: April, 2011 Judgement:April, 2011
Parties	Plaintiff: Travassos (Ruben and Ana) Defendant: Moonshin Tattoo; Mason; Smith; Regional Municipality of Peel; Peel Public Health
Counsel	For Plaintiff: Todd J. McCarthy; Sean A. Brown For Defendant: Linda Phillips-Smith, for Defendants, Regional Municipality of Peel, Peel Public Health
Judge/s	Then: Perell J.
Quick Facts	Defendants CM and ES operated defendant tattoo parlour. Defendant public health department was regulation and investigating authority governing activities of defendant tattoo parlour. In March 2009, defendant public health department warned that approximately 3,000 patrons who received tattoos or piercings at tattoo parlour may have been put at risk for blood-borne infection due to non-sterile instruments or equipment. In March 2009 plaintiffs commenced class action against defendants. After action commenced parties engaged in settlement discussions culminating in formal mediation. Information for purposes of settlement discussions was that no tattoo customers tested positive for for Hepatitis B or C or for HIV. Parties arrived at proposed settlement which included compensation for uninfected persons, infected persons and contingency fee includes of GST, HST and disbursements. Parties brought motion for certification of class for purposes of settlement.
Statute & Rules Considered	*Class Proceedings Act,* ss.5(1)
Contingency Fee Agreement, Requested Fees & Settlement	30% CFA: "In March 2009, Mr. Travassos retained Flaherty Dow Elliott & McCarthy to commence a class action. He signed a contingency fee retainer agreement that stipulates a fee of 30% of the value of any settlement." Settlement Agreement included the following: • Class Counsel shall seek, with the consent of Peel, court approval of a contingency fee of $275,000.00, inclusive of GST, HST, and disbursements. • The contingency fee, if approved, shall be paid from the Uninfected Fund, thereby reducing the fund from $900,000.00 to $625,000.00. Settlement is $1.1M: (including: "Peel Region and Peel Public Health shall establish a fund of $900,000.00 (the "Uninfected Fund") […] Peel shall establish a fund of $200,000.00 (the "Infected Fund")."
Contingency Fee Issue/s	Are class counsel's fees fair and reasonable?
Outcome	**Held:** Application granted. "I approve the counsel fee [as set-out in the Settlement Agreement]. I believe that the Class Counsel have earned their fee. The fee is fair and reasonable compensation in all the circumstances." (para 34)

Robertson v. ProQuest Information & Learning Co. (2011 ONSC 2629)

2011 CarswellOnt 2923, 2011 ONSC 2629, [2011] O.J. No. 2013, 18 C.P.C. (7th) 406, 201 A.C.W.S. (3d) 345

Date	Heard: April, 2011 Judgement: May, 2011
Parties	Plaintiff: Robertson Defendant: Proquest; Cedrom; Toronto Star; Rogers Publishing; Canwest Publishing
Counsel	For Plaintiff: Kirk Baert; Celeste Poltak For Defendant: Donald A. Cameron, Christina Capone-Settimi, for Defendant, ProQuest Information and Learning LLC Wendy Matheson, Andrew Bernstein, for Defendant, Rogers Publishing Limited Ernest M. Chan, for Defendant, Cedrom-SNI Inc. Ryder Gilliland, for Defendant, Toronto Star Newspapers Ltd
Judge/s	Then: C. Horkins J.
Quick Facts	"The statement of claim alleges that the defendants breached class members' rights to their articles and literary works under the Copyright Act, … By the defendants' reproduction, distribution and communication of these works to the public in electronic media, such as online databases, without the permission of authors or the copyright holders, the plaintiff claimed the defendants had infringed the class members' copyrights." Motion to approve settlement and legal fees.
Statute & Rules Considered	NA
Contingency Fee Agreement, Requested Fees & Settlement	CFA: "The retainer agreement provides that payment of legal fees and disbursements would be contingent upon success at trial or settlement of this matter. The retainer agreement provides that legal fees are based upon the multiplication of a base fee by a multiplier to be determined by the court [value of Class Counsel's total docketed time is $1.2M]." Class counsel requests fees in the amount of $1.9 million (exclusive of taxes disbursements), equivalent to 24% or 1.7 multiplier of settlement. Settlement of $7.9M: "Under the terms of the settlement agreements, Toronto Star... have agreed to pay [$3.475M] and ProQuest has agreed to pay [$2M]. In addition, there will be the proceeds from the sale of the Postmedia shares [$2.4M] for a total of [$7.9M]."
Contingency Fee Issue/s	Is counsel’s fee fair and reasonable?
Outcome	**Held:** Motion granted. Counsel’s fees approved at the requested amount.

Baker Estate v. Sony BMG Music (Canada) Inc. (2011 ONSC 7105)

2011 CarswellOnt 15453, 2011 ONSC 7105, [2011] O.J. No. 5781, 210 A.C.W.S. (3d) 586, 31 C.P.C. (7th) 320, 98 C.P.R. (4th) 244

Date	Heard: November, 2011 Judgement: November, 2011
Parties	Plaintiffs/Moving Parties: Estate of "Chet" Baker et al. Defendant/Respondents: Sony et al.
Counsel	For Plaintiffs/Moving Parties: For Defendant: Danielle Royal, for Defendant / Respondent, Universal Music Canada Inc. Timothy Pinos, Casey M. Chisick, for Defendants / Respondents, CMRRA, SODRAC
Judge/s	Then: G.R. Strathy J.
Quick Facts	"Unfortunately… Chet Baker, an American trumpeter and jazz singer, and his heirs, ... did not receive full compensation for the use of his works by others. This was the result of a royalty and licensing system in Canada that permitted third parties, such as the defendants, Sony BMG Music (Canada) Inc. ("Sony"), EMI Music Canada Inc. ("EMI"), Universal Music Canada Inc. ("Universal") and Warner Music Canada Co. ("Warner") (collectively, the "Record Labels"), to reproduce and distribute copyrighted musical works owned or controlled by musicians or their rights holders, without having a licence to do so or without paying the royalties due to the rights holders.... This class action was brought in 2008 on behalf of artists and rights holders who had not received full compensation for the use of their works"
Statute & Rules Considered	NA
Contingency Fee Agreement, Requested Fees & Settlement	30% CFA: "Both representative plaintiffs executed contingent fee agreements that stipulated a maximum counsel fee of 30% of the amount recovered." "The fee request made by Class Counsel is approximately 15% of the gross settlement value [$7.6 million total, $6.95 million for legal fees and $87 k for taxes and disbursements] and therefore represents a significant discount of the fee to which Class Counsel is contractually entitled. The fee request is supported by both Mrs. Baker and Mr. Northey." "The fee request is opposed by the Collectives, by Universal and by [WCMC]. "WCMC takes the position that the fee is excessive in light of the services rendered by Class Counsel, when balanced against the complexity of the matter, the importance of the matter to the Class, the expectations of the Class and the effect that the fee will have on the recovery achieved by the Class." Settlement: "Under the terms of the settlement, as ultimately implemented, a total of [$46.7M] is to be paid into a settlement trust for the benefit of Class members."
Contingency Fee Issue/s	Is counsel's fee fair and reasonable?
Outcome	**Held**: Motion granted. "If class proceedings are to realize the goal of access to justice, Class Counsel must be liberally compensated to ensure that they take on challenging but difficult briefs such as this one." "If first-class lawyers cannot be assured that the Courts will support their reasonable fee requests, how can the Courts and the public expect them to take on risky and expensive litigation that can go for years before there is a resolution?"

Voutour v. Pfizer Canada Inc. (2011 ONSC 7118)

2011 CarswellOnt 14961, 2011 ONSC 7118, 213 A.C.W.S. (3d) 307, 38 C.P.C. (7th) 360

Date	Heard: November, 2011 Judgement: November, 2011
Parties	Plaintiffs: Jesse Voutour ("JV"); Eiko Voutour ("EV"); Waheed; Perotta Defendants: Pfizer
Counsel	For Plaintiffs: B.C. McPhadden, J. Rochon, I. Erez, A. Thorsen For Defendants: G. Zakaib, E. Larose
Judge/s	Then: Perell J.
Quick Facts	"Pfizer … manufactured and marketed the drugs Bextra and Celebrex ["Pfizer drugs"], which are prescription, non-steroidal, anti-inflammatory drugs ("NSAIDs"), a class of drugs used for the treatment of inflammation and associated pain… In the case at bar, the Plaintiffs allege that the drugs caused serious and life-threatening adverse reactions and that the Defendants knew or ought to have known of these risks and failed to warn Canadian consumers sufficiently or at all and failed to take appropriate steps related to the risks." Motion for approval of settlement and counsel fees.
Statute & Rules Considered	NA
Contingency Fee Agreement, Requested Fees & Settlement	The Representative Plaintiffs signed retainer agreements that all involve CFAs, but the agreements differ: A. 604-682-3377The retainer with PW: 30% of the amounts recovered or on the basis of a 3 times multiplier, whichever is higher. B. with PP, 25% of the amounts recovered or on the basis of a 3 times multiplier, whichever is higher. C. The retainers with JV and EV: 25% of the amounts recovered" As a term of the proposed Settlement Agreement Class Counsels seeks $4 million in legal fees plus disbursements of $212,068.87 plus applicable taxes. Settlement: $12 million
Contingency Fee Issue/s	Is counsels' fee fair and reasonable?
Outcome	**Held:** Motion granted. "Class Counsel have earned their fees including what amounts to a quite modest premium above their hours and hourly rates for what was difficult and high-risk products liability litigation against a formidable foe that has not admitted liability." (para 74)

Banerjee v. Shire Biochem Inc. (2011 ONSC 7616)

2011 CarswellOnt 14798, 2011 ONSC 7616, 210 A.C.W.S. (3d) 616

Date	Heard: December, 2011 Judgement: December, 2011
Parties	Plaintiff/Moving Party: Banerjee Defendants/Respondents: Shire Biochem
Counsel	For Plaintiff/Moving Party: Darcy R. Merkur, Stephen Birman Sylvie Rodrigue, for Defendants, Eli Lilly Canada Inc., Eli Lilly and Company Malcolm N. Ruby, for Defendant, Shire Biochem Inc. Christopher Hubbard, Keegan Boyd, for Defendant, Draxis Health Inc.
Judge/s	Then: G.R. Strathy J.
Quick Facts	"on behalf of residents of Canada who were prescribed a drug called "Permax"… Permax was approved for sale in Canada... and was successfully used to treat thousands of Canadians with Parkinson's disease.... The plaintiff alleged that a very small percentage of users of Permax experienced behavioural changes, broadly described as "impulse control disorders" ("ICDs"). These included compulsive gambling, hyper-sexuality, compulsive shopping and compulsive eating." This is a motion by the plaintiff, on consent of the defendants, for approval of the settlement and legal fees.
Statute & Rules Considered	NA
Contingency Fee Agreement, Requested Fees & Settlement	"the retainer agreement signed between the representative plaintiff and Class Counsel stipulates a contingency fee of 15% over and above partial indemnity costs... In addition, the retainer agreement permits Class Counsel to seek an order for a multiplier of up to four times, being applied to the fees charged, where the outcome of the litigation warrants such a multiplier." Counsel requests $762k on this motion ($812k [inclusive fees and disbursements] - $50k (disbursements) = $762k). Settlement: "the defendants will pay [$2.4M] in settlement of the claims of the Class together with a contribution of [$300k] towards costs."
Contingency Fee Issue/s	Is class counsel's requested fee fair and reasonable?
Outcome	**Held:** Motion granted. 32% **"**The proposed settlement applies a litigation risk discount of approximately 50% to the claim of each Class member, as quantified by Class Counsel. This discount reflects the fact that the outcome of the litigation is far from certain."

Simmonds v. Armtec Infrastructure Inc. (2012 ONSC 5228) and (2012 ONSC 44)

Summary	not really a case about CFA and the case is more about what happens when two competing firms are trying to sue the same P.
Minor CFA Issue	Does a difference in page length (in this case, between a five-page CFA and one-page CFA) make one agreement 'stronger' than the other? From (2012 ONSC 5228): "As noted earlier [in (2012 ONSC 44)], Thomas J. concluded that fact was of little consequence because the fee charged by class counsel is subject to court approval." (para 70)

Kidd v. Canada Life Assurance Co. (2012 ONSC 740)

2012 CarswellOnt 1064, 2012 ONSC 740, [2012] O.J. No. 506, 19 C.P.C. (7th) 378, 211 A.C.W.S. (3d) 787, 95 C.C.P.B. 73

Date	Heard: January, 2012 Judgement: February, 2012
Parties	Plaintiffs: Kidd; Harvey; Marentette; Yip; Henderson; Yeomans Defendants: Canada Life Assurance Company; Symons; Loney; Grant
Counsel	For Plaintiffs: M. Zigler, C. Godkewitsch, D.B. Williams; D. Brown, L. Sokolov; For Defendants: J. Galway, for Defendant, Canada Life Assurance Company J. Field, for Defendants, A.P. Symons, D. Allen Loney, James R. Grant
Judge/s	Then: Perell J.
Quick Facts	In 2005, David Kidd, Alexander Harvey, and Jean Paul Marentette brought a proposed class action against Canada Life Assurance Company and the other defendants. The Plaintiffs make three major claims. One claim concerns the ownership of the surplus assets of the Pension Plan. The Plaintiffs plead that amendments to the Pension Plan concerning the reversion of surplus assets to Canada Life on Plan and Fund termination are unlawful and are of no force or effect. The second claim concerns the payment out of surplus funds to certain groups of employees whose participation in the Pension Plan was terminated and who have a claim for a partial winding-up of the Pension Plan. The third claim concerns negating Canada Life's alleged entitlement to be reimbursed for expenses on behalf of the Pension Plan. The Plaintiffs plead that Canada Life should restore monies, estimated to be in excess of $41 million. Motion for approval of retainer agreement and fees
Statute & Rules Considered	*Class Proceedings Act*, s.29

Contingency Fee Agreement, Requested Fees & Settlement	Mr. Marentette retained Harrison Pensa LLP and Koskie Minksy LLP on a contingency fee basis to represent him and other class members. He signed a Retainer Agreement. Messrs. Kidd, Harvey, Mr. Yeomans and Ms. Henderson, signed identical retainer agreements. The agreements provide that: • in the event of success, Class Counsel may apply to the court for approval of a multiplier of 3.0; • commencing one year after the execution of the retainer, an additional multiplier of 0.01 would be applied for each month until judgment or settlement up to a maximum multiplier of 3.5; and • under no circumstances can legal fees exceed 25% of the total amount recovered Settlement: "the total financial benefit to Class members is estimated at [$54M], plus payment of all of their legal fees and expenses estimated at [$5M]." [Note: "After many years of negotiating, the parties reached a settlement... Untypically and perhaps without precedent, the proposed Class Members have voted for or against the settlement... There are 5,228 persons in the classes. As of ... 4,293 Class Members (82%) voted in favour of settling their claims in accordance with the Surplus Settlement Agreement."] **A.** "With the support of the class representatives, Class Counsel [Class Counsel Koskie Minsky LLP and Harrison Pensa LLP] seek court approval of a fee request in the amount of [$4.7M] plus applicable taxes and disbursements of [$61k] (less than 10% of the value of the settlement on a net basis after payment of all expenses). **B.** In another motion, Class Counsel Sack Goldblatt Mitchell LLP requests an Order: (a) approving the payment of Class Counsel's fees, taxes and disbursements in the amount of [$120k] for legal services to the Adason Representative Plaintiffs.
Contingency Fee Issue/s	Are counsels' requested fees fair and reasonable?
Outcome	Held: Motions granted. "In my opinion, considering the facts described above and the factors relevant to assessing the reasonableness of Class Counsel's fee request, there is no doubt that the retainer entered into by the representative plaintiffs should be approved and that Class Counsel's fee request should be approved and I do so in accordance with the Class Proceedings Act, 1992.

Robinson v. Rochester Financial Ltd. (2012 ONSC 911)

2012 CarswellOnt 1368, 2012 ONSC 911, [2012] 5 C.T.C. 24, [2012] O.J. No. 534, 212 A.C.W.S. (3d) 20, 27 C.P.C. (7th) 351

Date	Heard: January, 2012 Judgement: February, 2012
Parties	Plaintiff: Kathryn Robinson; Rick Robinson Defendant: Rochester Financial Limited et al
Counsel	For Plaintiffs/Moving Parties: David Thompson, Matthew G. Moloci For Defendants/Respondents: Glenn Smith, Sean O'Donnell
Judge/s	Then: G.R. Strathy J.
Quick Facts	"The action relates to a tax shelter called the Banyan Tree Foundation Gift Program, which operated in 2003-2007. It has been referred to as a "leveraged" charitable donation program because, in return for a proportionately small out-of-pocket payment, a taxpayer was purportedly entitled to ratchet-up his or her donation and to receive a charitable tax receipt equivalent to 3 1/2 times the amount of his or her cash outlay." Motion for approval of settlement and legal fees.
Statute & Rules Considered	NA
Contingency Fee Agreement, Requested Fees & Settlement	25% CFA: "Class counsel entered into a [CFA] with the representative plaintiffs that provided for a contingent fee of 25% of the total value of any settlement." "Class Counsel request approval of the payment of [$3.3M] for their fees, disbursements [of $200k] and taxes." Settlement: "… mediation… total sum of [$11M]. Approximately $7.75 million of this amount will be paid to class members in proportion to the charitable contributions they made, under a distribution plan that will be administered by class counsel. The balance will be used to pay the fees and disbursements of class counsel and the costs of administration of the settlement"
Contingency Fee Issue/s	Is counsel's requested legal fee fair and reasonable?
Outcome	**Held:** Motion granted.

Osmun v. Cadbury Adams Canada Inc. (2012 ONSC 3837)

2012 CarswellOnt 8440, 2012 ONSC 3837, 41 C.P.C. (7th) 333

Further reasons to the partial settlement reached in Osmun v. Cadbury Adams Canada Inc. (2012 ONSC 3837) – see above

Parties	Plaintiff: Osmun; Metro (Windsor) Enterprises Defendant: Cadbury Adams Canada; Hershey Company; Nestle Canada; Mars; Itwal Limited
Counsel	For Plaintiff: Charles M. Wright For Defendant: Scott Maidment, Lisa Parliament, for Defendants, Hershey Company, Hershey Canada Inc. Christopher P. Naudie, for Defendant, Cadbury Adams Canada Inc. (now Kraft Canada Inc.) Catherine Beagan Flood, for Defendant, Nestlé Canada Inc. Donald Houston, for Defendant, ITWAL Limited Matthew Milne-Smith, for Defendants, Mars Incorporated and Mars Canada Inc.
Judge/s	Then: G.R. Strathy J.
Quick Facts	Partial settlements were reached in class action. Settlements were approved in Ontario. Settlement included payment of $5,795,695.60 for benefit of settlement class members. Motion was brought for approval of fees and disbursements of class counsel. (The settlements are conditional upon approval of the courts in each of Ontario, British Columbia and Québec.)
Statute & Rules Considered	*Class Proceedings Act, 1992*, S.O. 1992, c. 6, ss 32, 33.
Contingency Fee Agreement, Requested Fees & Settlement	"The retainer agreement entered into with the plaintiffs in this action as of December 1, 2007, provides that in the event of success in the action, Ontario class counsel will be paid any disbursements (not already recovered from the defendants as costs), plus applicable taxes and interest in accordance with s. 33(7)(c) of the*Class Proceedings Act, 1992*, S.O. 1992, c. 6 (*"C.P.A.*"), plus the greater of: a. the base fee increased by a multiplier of 4, less any fees already recovered as costs, plus applicable taxes; or b. if a settlement is reached before examinations for discovery, 30% of the settlement, less any fees already paid, plus applicable taxes." "Class counsel in Ontario and B.C. request fees of $1,335,235.12 with respect to the settlement, plus disbursements of $81,231.04 and G.S.T. in the amount of $70,729.60, for a total of $1,487,195.76. The fee represents 25% of the portion of the settlement amount allocated to the Ontario and B.C. settlement classes ($5,340,940.48) and is less than the 30% permitted by the retainer agreements entered into with the plaintiffs in this action and the B.C. action." Settlement: " Hershey Canada will pay [$5.3M] for the benefit of the settlement class members and the claims against Hershey will be dismissed."
Contingency Fee Issue/s	Is class counsel's requested fee fair and reasonable?
Outcome	**Held:** Motion granted. Class counsel's fee approved in amount of $1,487,195.76.

Rowlands v. Durham Region Health (2012 ONSC 3948)

2012 CarswellOnt 8668, 2012 ONSC 3948, 217 A.C.W.S. (3d) 779

Date	Heard: July, 2012 Judgement: July, 2012
Parties	Plaintiffs: Rowlands Defendants: Durham Healh Region; Regional Municipality of Durham; Durham Health Department
Counsel	For Plaintiff: Todd J. McCarthy; Sean A. Brown; Matthew J. Stepura For Defendant: David B. Boghosian; Ward Branch; Laura Day
Judge/s	Then: P.D. Lauwers J.
Quick Facts	"... a nurse employed by the Durham Regional Health Department lost a digital memory USB key. It held the unencrypted personal and confidential information of 83,524 individuals who... received an H1N1 immunization shot at a clinic in Durham Region. The plaintiff sues on his own behalf and on behalf of the Class Members for damages arising out of the loss of the USB key, and especially in light of the prospect that the confidential information about the Class Members contained in the USB key might be used to facilitate identity theft." MOTION for approval of settlement and class counsel fees [$500k].
Statute & Rules Considered	*Solicitors Act,* s.29(2)
Contingency Fee Agreement, Requested Fees & Settlement	CFA "The Representative Plaintiff entered into [CFA] with Class Counsel. Since the inception of this claim, the retainer agreement stipulated a counsel fee of 25% of the value of any claim awarded to a Class Member. ...The promise of 25% of the value of any claim awarded to a Class Member is a motivating factor to ensure that Class Counsel remains interested and involved in the Claims Process, which will benefit claiming Class Members." Settlement Agreement provides for the payment of costs to class counsel in the additional amount of $500,000.00 inclusive of taxes and disbursements, plus 25 per cent of actual claims paid by the defendant in the future. Settlement: "Durham Region and its insurer ... not prepared to pay compensation to a Class Member in the absence of an actual financial loss." "Class Members who believe they have suffered economic harm as a result of the loss of the USB key can submit a Claim by completing the Claim Form. The Class Member must provide sufficient information to allow the Defendants to determine the harm they have suffered and to take steps to mitigate that harm."
Contingency Fee Issue/s	Is counsel's requested legal fee fair and reasonable?
Outcome	**Held:** Motion granted. $500k approved.

Krajewski v. TNOW Entertainment Group Inc. (2012 ONSC 3908)

2012 CarswellOnt 8567, 2012 ONSC 3908, 218 A.C.W.S. (3d) 757

Date	Heard: June, 2012 Judgement: July, 2012
Parties	Plaintiff: Krajewski; Brandsma; Dunbrack Defendant: Tnow Entertainment Group; Ticketmaster; Premium Inventory
Counsel	For Plaintiffs: Ward Branch, Jay Strosberg; Luciana Brasil For Defendants: Wendy Matheson; Stuart Svonkin
Judge/s	Then: Perell J.
Quick Facts	"Messrs. Krajewski, Brandsma, and Dunbrack's action concern [actions in different Canadian provinces]: (a) the primary market sale; and (b) the secondary market resale of tickets for music, sports, theatre and other events at prices that the plaintiffs allege contravene the provisions of the Ticket Speculation Act, R.S.O. 1990, c. 17... While each of the actions is based on a different [provincial] statute, the theory of the plaintiffs is the same; namely, the sale of primary and secondary market tickets to the plaintiffs and to the members of the proposed classes was contrary to the various statutes. The plaintiffs seek a number of remedies, including an injunction restraining the defendants and others from selling primary and secondary tickets at prices which contravene the statutes and damages based upon unjust enrichment and conspiracy." Motion to approve settlement and legal fees.
Statute & Rules Considered	*Class Proceedings Act*, ss.5(1), 29(2)
Contingency Fee Agreement, Requested Fees & Settlement	CFA: "[P.] signed a [CFA]. He (and each of the plaintiffs in the companion actions) agreed to a fee of 25% of the settlement amount, plus disbursements and applicable taxes. He also agreed that regardless of whether success was achieved in the Ontario Action, Class Counsel would be paid all costs recovered in the action, which as noted above is [$850k]" "Class Counsel seek an immediate payment of [$850k], plus 25 percent of each cheque that is cashed by a Settlement Class Member." Note: "Before preparing for the consent certification and settlement approval hearing, Class Counsel docketed time valued at [$1.14M]. Assuming that all of the Settlement Class Members cash their refund cheques, the projected fee would provide a multiplier of 1.1." AND "Mr. Krajewski supports the fee request, and there are no objections to the amount sought." Settlement: "Assuming that all of the Settlement Class Members cash their refund cheques (of $36 per ticket purchased), the projected recovery is [$5.03M]."
Contingency Fee Issue/s	Is counsel's requested fee fair and reasonable?
Outcome	Held: Motion granted. $850k now and 25% of each cheque cashed

Lundy v. VIA Rail Canada Inc. (2012 ONSC 4152)

2012 CarswellOnt 9152, 2012 ONSC 4152, 111 O.R. (3d) 628, 218 A.C.W.S. (3d) 21, 41 C.P.C. (7th) 347

Summary	Only mention of CFA: " In the case at bar, the proposed representative plaintiffs are Sandra Lundy, Allison Kaczmarek and Marc Couroux. The proposed representative plaintiff will have a conventional lawyer and client relationship with the lawyer of record, usually formalized by a written Contingency Fee Agreement. There may be some unconventional elements to their relationship with class counsel, such as an indemnity agreement or funding from the Law Foundation or third party funder, but the lawyer and client relationship will be governed by the traditional common law and equity that governs the relationship between a lawyer and his or her client."

Markson v. MBNA Canada Bank (2012 ONSC 5891)

2012 CarswellOnt 17304, 2012 ONSC 5891, [2012] O.J. No. 4967, 228 A.C.W.S. (3d) 335, 42 C.P.C. (7th) 202

Date	Heard: October, 2012 Judgement: October, 2012
Parties	Plaintiff: Markson Defendant: MBNA Canada Bank
Counsel	For Plaintiff/Moving Party: Margaret L. Waddell, Kirk Baert For Defendant/Respondent: Jill Lawrie, David Noseworthy
Judge/s	Then: C. Horkins J.:
Quick Facts	"The action [originally started in 2004] relates to cash advance transaction fees and related compound interest that MBNA charged and received. The fees and interest occurred when MBNA customers took a cash advance using the credit facilities accessed through their MBNA credit cards ("Cash Advances")... The plaintiff asserts causes of action for: (i) breach of contract, (ii) unjust enrichment and for restitution of criminal interest paid to MBNA Canada Bank ("MBNA"), and (iii) a declaration that MBNA has violated s. 347 of the Criminal Code, R.S.C. 1985 c. C-46." MOTION by plaintiff for approval of [A] settlement and [B] class counsel fees.
Statute & Rules Considered	*Class Proceedings Act*, s.29(2)
Contingency Fee Agreement, Requested Fees & Settlement	30% CFA: "agreement provided that fees were to be fixed at 30% of any settlement or award, subject to court approval" "Class Counsel seek approval of their fees in accordance with this agreement, in the amount of [$2.4M] (30% of [$8M]), plus applicable taxes and disbursements." Note: Under the terms of the contingency fee retainer agreement, they will receive a premium of about $500,000, or less than a multiple of 1.3 on their docketed fees. No one in the class has complained about the amount of fees." Settlement: "... MBNA will pay [$8M] into an interest bearing account, which will comprise the Settlement Fund to be paid out as follows: 1. Class Counsel's fees and disbursements, inclusive of taxes, as approved by the court, will be deducted from the Settlement Fund. [...] 4. The balance of the Settlement Fund will be divided by the number of open MBNA accounts as of November 30, 2011 where at least one Cash Advance has been taken (the "Distribution Class Members"..."
Contingency Fee Issue/s	Is class counsel's requested fee fair and reasonable?
Outcome	**Held:** Motion granted. 30% "In summary, I conclude that this settlement is fair and reasonable and in the best interests of the class as a whole."

Toronto Community Housing Corp. v. Thyssenkrupp Elevator (Canada) Ltd. (2012 ONSC 6626)

2012 CarswellOnt 14602, 2012 ONSC 6626, 44 C.P.C. (7th) 361

Date	Heard: November, 2012 Judgement: November, 2012
Parties	Plaintiff: Toronto Community Housing; Housing Services Incorporated Defendant: Thyssenkrupp Elevator
Counsel	For Plaintiffs: Linda R. Rothstein; Odette Soriano For Defendants: John P. Brown
Judge/s	Then: C. Horkins J.
Quick Facts	"The plaintiffs allege that the defendants ["TKE"] negligently designed and manufactured the sheave jammer, and then knowingly sold and installed the negligently designed sheave jammers. The plaintiffs claimed that the defendants, not the elevator owners, are liable for the costs associated with removing the sheave jammers and replacing them with an alternate emergency braking device.... The available evidence shows that class members replaced approximately 2,100 sheave jammers in elevating devices in Ontario as a result of [a] TSSA Order. The average replacement cost was $10,000 per sheave jammer [P. allege that TKE charged the owners for the preventative maintenance and should not have]" MOTION for approval of the settlement of this class action and class counsel fees.
Statute & Rules Considered	*Class Proceedings Act*, s.29(2)
Contingency Fee Agreement, Requested Fees & Settlement	CFA: 30% "Class counsel entered into a [CFA] retainer with the representative plaintiffs whereby fees were to be fixed at 30% of any settlement or award, subject to court approval." Counsel sets their fee in accordance with the CFA, in the amount of $3.5M plus applicable taxes, and $5k for future disbursements. Note: The representative plaintiffs agreed that these fees are reasonable Settlement: "The defendants have paid [$12M] into an interest bearing account, which will comprise the Settlement Fund"
Contingency Fee Issue/s	Is class counsel's fee fair and reasonable?
Outcome	**Held:** Motion granted.

Sugar v. Kim Orr Barristers Professional Corp. (2012 ONSC 6668)

2012 CarswellOnt 14968, 2012 ONSC 6668, 222 A.C.W.S. (3d) 806

Quick Facts	This case involves a lawyer trying to claim money for work done with a law firm, but that is the extent of the CFA discussion. The most telling quote: "The Defendant understood that no one works for free, especially given Mr. Kim's view that there was no reasonable expectation that the Plaintiff would actually be joining the firm. The Plaintiff understood that class counsel do not get paid unless they are ultimately successful in winning or settling the case so that their fees can be deducted from the proceeds paid to their clients. He had himself negotiated a contingency fee retainer agreement with the Defendant for the Precious Metal case, and he was certainly aware of the basis on which the Defendant would be paid, if at all, for the Timminco, WCC, and Manulife claims."

Woods v. Redeemer Foundation (2012 ONSC 7254)

2012 CarswellOnt 16446, 2012 ONSC 7254, 224 A.C.W.S. (3d) 266, 43 C.P.C. (7th) 211

Date	Heard: December, 2012 Judgement: December, 2012
Parties	Plaintiff: Woods Defendant: Redeemer Foundation; Redeemer University College
Counsel	For Plaintiff: David Thomson For Defendant: John Downing
Judge/s	Then: Perell J.
Quick Facts	"In 1989, [Redeemer University College established a "Foregiveable loan" program where students would pay for tuition and Redeemer would issue charitable donation tax receipts in return]. By way of example, a $10,000.00 education cost per year would generate a charitable donation tax credit of approximately 29% of the "donation" amount, being $2,900.00 ... [after factoring in education tax credits, etcetera, the] net cash outlay for a $10,000.00 education cost per year was $4,250.00 [which is $3,350 less than without the Program]". The CRA then became involved, disallowing] the charitable donation tax credits for 2001 and 2002. Donors became liable for interest charges on income tax reassessments..." "Proceedings in the tax courts followed and eventually a settlement with the CRA. Mr. Wood retained Scarfone Hawkins LLP as proposed Class Counsel in an action against the Defendants." MOTION for approval of the settlement, for approval of payment of class counsel fees.
Statute & Rules Considered	*Class Proceedings Act*, s.29(2)
Contingency Fee Agreement, Requested Fees & Settlement	CFA: "... Class Counsel receive a legal fee of 30% of the value of settlement benefits available to the Class." Class Counsel requests legal fees, disbursements, and taxes in the amount of $65k all inclusive. Note: "Mr. Wood recommends the approval of the settlement. There were no objectors to the settlement." AND "It represents significantly less than Class Counsel is entitled to under the [CFA], and less than the value of time spent. There is no premium or multiplier." Settlement: "Class Counsel estimates that the value of the settlement is approximately $400,000.00, based on their being approximately 200 Class Members, with an average of $1,000.00 per year of participation in the Forgiveable Loan Program."
Contingency Fee Issue/s	Is class counsel's requested fee fair and reasonable?
Outcome	**Held:** Motion granted. "In my opinion, Class Counsel should be commended for taking on this small class action. It provided access to justice for the Class Members and a fair and reasonable settlement. The fee request should be approved."

Eidoo v. Infineon Technologies AG (2013 ONSC 853)

2013 CarswellOnt 1303, 2013 ONSC 853, 226 A.C.W.S. (3d) 26

Date	Heard: January, 2013 Judgement: February, 2013
Parties	Plaintiff: Eidoo; Cygnus Electronics Corporation Defendant: Infineon; Hynix Semiconductor; Samsung Electronics; Samsung Semiconductor; Micron; Elpida Memory
Counsel	For Plaintiffs: Jonathan J. Foreman, Robert L. Gain For Defendant: Adam D.H. Chisholm, for Micron Technology, Inc. and Micron Semiconductor Products, Inc. O/A Crucial Technologies Eric Hoaken, Emrys Davis, for NEC Corporation, NEC Corporation of America, NEC Canada, Renesas Electronics Corporation, and Renesas Electronics America, Inc. Christine Kilby, for Nanya Technology Corporation and Nanya Technology Corporation USA Eliot Kolers, for Infineon Technologies AG, Infineon Technologies Corporation and Infineon Technologies North American Corporation John P. Brown, for Hynix Semiconductor Inc., Hynix Semiconductor America Inc. and Hynix Semiconductor Manufacturing America, Inc. Christopher Naudie, for Elpida Memory Inc.
Judge/s	Then: Perell J.
Quick Facts	In the first class action Khalid Eidoo and Cygnus Electronics Corporation sue: Infineon Technologies [and about twelve others, including Samsung]... In the second class action, Mr. Eidoo and Cygnus Electronics sue: Hitachi Ltd. [and 23 others, including Mitsubishi and Toshiba] All the actions concern allegations that the Defendants conspired to fix prices in DRAM (dynamic random access memory) devices. The second action in Ontario is in effect a device to add defendants as co-conspirators to the conspiracy alleged in the first class action. The claims in the various actions are for: (a) breach of Part IV of the Competition Act, R.S.C. 1985, c. C-34; (b) civil conspiracy; and (c) tortious interference with economic interests." MOTION for approval of four partial settlements, for ancillary relief, and approval of class counsel’s fees.
Statute & Rules Considered	NA
Contingency Fee Agreement, Requested Fees & Settlement	CFA: "The Ontario Fee Agreements, which were previously approved by this Court, provide for a fee payable of up to 30% of the value of any settlement plus disbursements and applicable taxes." Class Counsels' fee at $6.99M and disbursements of $134k. "Since commencing the Proceedings, Class Counsel have docketed $4.53M worth of legal services at their regular hourly rates. They have incurred disbursements of $637k since commencing the various class actions." Settlement: "Together, the Settlement Agreements total $23.33M. This brings the total recovery to over $29M"... Plaintiffs in British Columbia, Ontario, and Québec actions entered into a settlement agreement with Elpida... Under the terms of the agreement, Elpida agreed to pay $5.75M plus interest in exchange for a full release of claims. The Elpida Settlement contained what is known as a Most Favoured Nation or MFN clause. Pursuant to its MFN clause, Elpida is entitled to a refund of portions of its settlement fund payment

	if its settlement is greater than specified settlement sums paid by certain specified co-defendants. In other words, if the Plaintiffs settle for less than the confidential thresholds, the Plaintiffs must refund the difference."
Contingency Fee Issue/s	Is class counsel's fee fair and reasonable?
Outcome	Held: Motion granted. at lower rate of 20% [absent distribution plan, 30% is not "fair and reasonable".] "it would not be in the best interests of the class members to reject these settlements because of the absence of a distribution plan." BUT "notwithstanding the absence of a distribution plan, the settlement is fair, reasonable, and in the best interests of the class as a whole." "I also approve Class Counsel's fee, but not as requested... I am awarding $4.18M, all inclusive." "A fee calculated on the basis of 30% percent of the recovery may ultimately be fair in this litigation; however, in my opinion, at this juncture of the litigation without Class Counsel having completed the work of a distribution plan, a 30% fee is not fair and reasonable. Thus, 20% of $29M [.20*29 = $5.8M] plus disbursements to date equals $6.44M. Deducting the Elpida award yields an award of $4.18M, all inclusive."

Morgan v. Sara Lee of Canada NS ULC (2013 ONSC 859)

2013 CarswellOnt 1304, 2013 ONSC 859, 228 A.C.W.S. (3d) 29

Date	Heard: February, 2013 Judgement: February, 2013
Parties	Plaintiff: Morgan Defendants: Sara Lee Corporation; Tana Canada Inc.; Hanesbrands Canada
Counsel	For Plaintiff: Geoffrey D.E. Adair, Q.C.; Ian W.M. Angus For Defendant: J.A. Prestage
Judge/s	Then: Perell J.
Quick Facts	"... Christopher Prichard, the son of a pensioner with a pension plan from the Defendants, approached Adair Morse LLP to investigate whether there was a claim against the Defendants with respect its administration of its employee pension plans." the other issue is that Adair LLP was dropped by the representative plaintiff in one of the actions (there were two class actions), but this issue was ignored. MOTIONS for, among other things: (a) the approval of a settlement in two actions under the *Class Proceedings Act*, 1992... (b) the approval of several fee agreements; and (c) the approval of Class Counsels' fees in the two class actions.
Statute & Rules Considered	*Class Proceedings Act*, s.29(2)
Contingency Fee Agreement, Requested Fees & Settlement	20% CFA: “In May 2011, thirty-two pensioners signed a contingent retainer agreement with Adair Morse LLP. The fees if the contingency was satisfied was 20% of any amount recovered over 50% of the surplus plus unrecovered disbursements and all applicable taxes.” Settlement: "Under the Settlement Agreement, all of the surplus in both pension plans, estimated to be $3.5M will be paid to the plan beneficiaries. In addition, $350k will be paid in respect of all other claims including costs... in my opinion, all of the $350k can be used to pay legal fees before encroaching on the surplus to be paid to the Class Members."
Contingency Fee Issue/s	Is class counsel’s requested fee fair and reasonable?
Outcome	**Held:** Motion granted. 12% "The aggregate legal accounts that have been approved by the Court total $415,000, all inclusive" "In all the circumstances of this case, I award Adair Morse LLP $340,000, all inclusive. I approve the retainer agreement with Mr. Morgan. As noted above, Mr. Angus claims an all inclusive fee of $109,593.05. This fee includes a multiplier of 1.5 of the base fee. In the circumstances of this case, there is no basis for any multiplier. From a risk perspective, Mr. Angus's retainer did not begin until after the settlement had been achieved. Although Mr. Angus was unofficially involved and present at the mediation session, practically speaking, he was retained by Mr. Scime for a second opinion... In all the circumstances of this case, I award Mr. Angus a fee of $75,000 all inclusive of counsel fee and disbursements and applicable taxes."

Sa'd v. Remington Group Inc. (2013 ONSC 1404)

2013 CarswellOnt 2453, 2013 ONSC 1404, 115 O.R. (3d) 627, 49 C.P.C. (7th) 206

Date	Heard: March, 2013 Judgement: March, 2013
Parties	Plaintiff: Samir Sa'd Defendant: Remington Group Inc.; Rouge Residences I Inc.; Rouge Residences II Inc.,
Counsel	For Plaintiff: Sean M. Grayson For Defendant: Michael F. Cooper
Judge/s	Then: Perell J.
Quick Facts	"Mr. Sa'd and other members of the proposed class purchased condominium units from Rouge I and Rouge II in a development in Markham, Ontario that included the Rouge Bijou Condominium Residences. Mr. Sa'd alleges that they were overcharged for development charges. There are approximately 400 class members." MOTION (a) to certify the action … (b) for approval of the Settlement Agreement ... and (c) for approval of Class Counsel's fee.
Statute & Rules Considered	*Class Proceedings Act*, ss.5, 5(1), 29(2)
Contingency Fee Agreement, Requested Fees & Settlement	CFA "25% of the total settlement fund" Settlement: "The Defendants have agreed to pay $578k to a settlement fund..."
Contingency Fee Issue/s	Is counsel’s fee fair and reasonable?
Outcome	**Held:** Motion granted. Contingency fee of 25% approved. "In my opinion, considering the facts described above and the factors relevant to assessing the reasonableness of Class Counsel's fee request, I am satisfied that Class Counsel's fee request should be approved, and I do so in accordance with the *Class Proceedings Act*, 1992."

Goodridge v. Pfizer Canada Inc. (2013 ONSC 2686)

2013 CarswellOnt 5615, 2013 ONSC 2686, 227 A.C.W.S. (3d) 941, 49 C.P.C. (7th) 342

Date	Heard: May, 2013 Judgement: May, 2013
Parties	Plaintiff: Goodridge; Davidson; Lauricella Defendant: Pfizer Inc.
Counsel	For Plaintiff: Michael J. Peerless, Matthew D. Baer For Defendant: Patricia D.S. Jackson; Nicole Martini
Judge/s	Then: Perell J.
Quick Facts	"Pfizer Canada Inc. and Pfizer Inc. manufacture Neurontin, which is a prescription anticonvulsant medication, approved by Health Canada in May 1994, for use as a therapeutic antiepileptic agent, specifically as an adjunctive therapy for seizures. In this class action on behalf of consumers of Neurontin, it was alleged that the majority of Neurontin sales were for off-label use and that Neurontin was ineffective and/or defective for these various off-label uses. It was further alleged that Neurontin can cause an increased risk of suicidal behaviour and that consumers did not receive adequate warning of this dangerous propensity of the drug. Pfizer vigorously denied that Neurontin can cause increased risk of suicidal behaviour and, in general, that the issue of whether or not antiepileptic drugs, including Neurontin, can increase the risk of suicide ideation and suicidal behaviour is controversial." MOTION for approval of the settlement and for approval of Class Counsel's fees.
Statute & Rules Considered	*Class Proceedings Act*, s.29(2)
Contingency Fee Agreement, Requested Fees & Settlement	CFAs 30% and 25%: Ms. Goodridge and Mr. Davidson executed retainer agreements. A. Ms. Goodridge's retainer with Dunn & Company provides for a legal fee of 30% of any settlement achieved, plus disbursements and applicable taxes. B. Mr. Davidson's retainer agreement with Siskinds provides for a legal fee of 25% of any settlement achieved, plus disbursements and applicable taxes." "Class Counsel is seeking to enforce the terms of the CFA entered into by Mr. Davidson [25%], the lesser of the two percentage rates.... a legal fee of $1.04M plus disbursements of $322k plus applicable taxes of ... for a total of $1.5M." Note: “Class Counsel have not received any objections to the Settlement." Settlement: Under the Settlement Agreement, the Defendants agree to pay $4.8M allocated as follows: (a) $2.6M for Eligible Claims; ... (c) $400k for Administration Expenses, including publication of notices and claims administration; and (d) $1.5M for Class Counsel Fees including legal fees, disbursements, and applicable taxes.
Contingency Fee Issue/s	Is counsel’s fee fair and reasonable?
Outcome	**Held**: Motion granted. (25% contingency fee approved)

Sorenson v. Easyhome Ltd. (2013 ONSC 4017)

2013 CarswellOnt 7898, 2013 ONSC 4017, 228 A.C.W.S. (3d) 934, 49 C.P.C. (7th) 305

Date	Heard: June, 2013 Judgement: June, 2013
Parties	Plaintiff: Sorenson Defendant: Easyhome Ltd.; Ingram; Goertz; Fregren
Counsel	For Plaintiff: Daniel E.H. Bach For Defendant: Ronald Slaght, Q.C.
Judge/s	Then: Perell J.
Quick Facts	"Mr. Sorenson... purchased 800 common shares of easyhome at a price of $11.90 per share... [He] alleges that ... easyhome's public disclosures contained material misrepresentations and omissions of material facts due to a significant employee fraud at one of its kiosks, with the result that its share price was artificially inflated to the detriment of the Class." MOTION for approval of a settlement and approval of Class Counsel's fee.
Statute & Rules Considered	*Class Proceedings Act*, s.29(2)
Contingency Fee Agreement, Requested Fees & Settlement	CFA: 25% "Mr. Sorenson... signed a [CFA] that provided that Class Counsel's compensation should be 25% of the total recovery available to Class Members obtained in the Action, plus disbursements and taxes." "Siskinds seeks approval of legal fees plus disbursements and applicable taxes in the amount of $662k, broken down as follows: (a) legal fees, $563k; (b) H.S.T. ...; and (c) disbursements (incl. taxes as applicable), $26k. Note: Siskinds LLP docketed time is in excess of $183k and disbursements are in excess of $23k, plus taxes. And, there have been no objections to the proposed settlement. Settlement: easyhome agreed to cause its insurers to pay $2,250,000.00, into the Escrow Account for the benefit of the Class...
Contingency Fee Issue/s	Is counsel’s fee fair and reasonable?
Outcome	**Held:** Motion granted. (25% contingency fee approved)

Blair v. Toronto Community Housing Corp. (2013 ONSC 4237)

2013 CarswellOnt 9409, 2013 ONSC 4237, 229 A.C.W.S. (3d) 686, 52 C.P.C. (7th) 399

Date	Heard: June, 2013 Judgement: June, 2013
Parties	Plaintiff: Blair Defendant: Toronto Community Housing Corporation; Greenwin Property Management
Counsel	For Plaintiff: M. Teplitsky, Q.C.; S. Sagle For Defendant: Peter Lukesiwicz, Deborah Templer, for Defendant, Toronto Community Housing Corporation Sarah Pottle, for Defendant, Greenwin Property Management Incorporated Rivka Birkan, for Third Party, Forensic Investigations Canada
Judge/s	Then: Perell J.
Quick Facts	"The apartment building was owned by the Defendant, Toronto Community Housing Corporation ("TCHC") and operated by the Defendant Greenwin Property Management Incorporated. After [a fire at 200 Wellesley Street East], the Defendant, TCHC, without admitting that it had been at fault offered a Compensation Plan to the tenants and after receiving independent legal advice about half of the tenants accepted the compensation offered by TCHC, which I understand to have an average value of approximately $4,000 per dwelling unit tenant. These tenants released their claims against TCHC, and they assigned to TCHC their claims against Greenwin. Ms. Blair, however, was not satisfied with the Compensation Plan. She retained the law firms of Shell Lawyers and Teplitsky, Colson LLP to commence a class action." MOTION for approval of a settlement and approval of Class Counsel's fee.
Statute & Rules Considered	*Class Proceedings Act*, s.29(2)
Contingency Fee Agreement, Requested Fees & Settlement	Ms. Blair signed a CFA but no details of the agreement are provided in the decision. “Class Counsel asks that the Court approve a total of $1,150,000 as payment of all Class Counsel legal fees. Of this amount, Class Counsel proposes that $500,000 will come from the Legal Fees and Disbursements Amount ($1.4 million) and $650,000 will come from the Claims Amount ($5.4 million).” (para 41) Settlement: provides for, "$1.4M as the full and final contribution of the Defendants to the legal fees and disbursements, including HST, including for all expenses related to the distribution of settlement funds to individual Class Members... The balance of the Claims Amount, namely $4.85M, will be distributed by Class Counsel to Class Members."
Contingency Fee Issue/s	Is counsel’s fee fair and reasonable?
Outcome	**Held:** Motion granted. Settlement and counsel’s fee approved.

Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp. (2013 ONSC 4974)

2013 CarswellOnt 11197, 2013 ONSC 4974, 117 O.R. (3d) 150, 230 A.C.W.S. (3d) 970, 55 C.P.C. (7th) 437, 6 C.C.P.B. (2nd) 82

Summary	interesting case about using third-parties to indemnify plaintiffs, but not really about CFAs. Only real discussion of CFAs:"At the outset of the proposed class action, the Pension Fund retained Koskie Minsky LLP as its lawyers, and the law firm agreed to take on the retainer pursuant to a Contingency Fee Agreement, which has been disclosed to the court in the material filed for this motion. The Contingency Fee Agreement is subject to court approval, and ultimately the court supervises and determines Class Counsel's legal fees under the provisions of the Class Proceedings Act, 1992, S.O. 1992, c.6. 12 Although Koskie Minsky was prepared to take on the risk of a contingency fee retainer, it was not prepared to agree to indemnify the Pension Fund from any adverse costs award, and thus, from the outset of the action, Koskie Minsky sought to secure funding for any adverse costs awards made against its client, the Pension Fund."

Zaniewicz v. Zungui Haixi Corp. (2013 ONSC 5490)

2013 CarswellOnt 11949, 2013 ONSC 5490, 232 A.C.W.S. (3d) 319, 44 C.P.C. (7th) 178

Date	Heard: August, 2013 Judgement: August, 2013
Parties	Plaintiffs: Zaniewicz; Clarke Defendants: Haixi Corporation; E&Y (auditors); Fengyi Cai; Manley; Ryan; Wahle; CIBC World Markets; Canaccord Genuity; GMP Securities; Mackie Research Capital
Counsel	For Plaintiffs: Charles M. Wright, Douglas M. Worndl For Defendant: Deborah Berlach, for Defendant, Zungui Haizi Corporation Margaret L. Waddell, for Defendant, Michelle Gobin Michael A. Eizenga, for Defendant, Michael W. Manley James S.F. Wilson, for Defendants, Patrick A. Ryan, Elliott Wahle, and Margaret Cornish Linda L. Fuerst, for Defendant, Ernst &Young LLP Kent Thomson, Derek Ricci, for Defendants, CIBC World Markets Inc., Canaccord Genuity Corp. (f.k.a. Canaccord Financial Ltd.) and Mackie Research Capital Corporation (f.k.a. Research Capital Corporation) and GMP Securities LP
Judge/s	Then: Perell J.
Quick Facts	"securities class action under the Class Proceedings Act... The Plaintiffs Jerzy Robert Zaniewicz and Edward C. Clarke advance common law tort claims and also statutory claims with respect to the sale of the shares of Zungui Haizi Corporation in the primary and secondary markets... The Plaintiffs are residents of Ontario. Each purchased common shares of Zungui in the primary market. Mr. Clarke also purchased common shares of Zungui in the secondary market. On August 22, 2011, Zungui issued a press release announcing that its auditor, Ernst & Young LLP ("E&Y"), had suspended its audit of Zungui's ... With that announcement, Zungui's shares immediately lost 77% of their value. Subsequently, Zungui's shares became the subject of various temporary and permanent cease trade orders, and they are now worthless." MOTION for certification for settlement purposes and approval of three settlements, in addition to other approvals around the

	settlement process.
Statute & Rules Considered	*Class Proceedings Act*, ss.26, 26(1), 29(2)
Contingency Fee Agreement, Requested Fees & Settlement	CFA: "The Retainer Agreements with the Plaintiffs provide that Class Counsel may seek a fee of up to 30% of the recovery." "Class Counsel seeks $2.25M, plus disbursements, interest on disbursements, and applicable taxes. The total request is for $2.81M." Note: "...Class Counsel had docketed time of $648,386.00, excluding applicable taxes, disbursements of $226,670.44, exclusive of applicable taxes." AND "Class Counsel is not seeking to recover, and will not return to request payment of the time and disbursements required to complete the administration of the settlement, which is estimated to be at least $50k." Settlement: "The Plaintiffs have concluded three settlements: (1) the Auditor Settlement; (2) the Zungui Settlement; and (3) Underwriter Settlement. The Auditor Settlement is for $2M. The Zungui Settlement is for $8M, and the Underwriter Settlement is for $750k... Thus, if all the settlements are approved, the settlement funds will total $10.85M plus interest before deductions for counsel fee and administrative expenses."
Contingency Fee Issue/s	Is class counsel's fee fair and reasonable?
Outcome	Held: Motion granted but with a varied "Plan of Allocation"

Glube v. Pella Corp. (2013 ONSC 6164)

2013 CarswellOnt 13746, 2013 ONSC 6164, 233 A.C.W.S. (3d) 16

Date	Heard: October, 2013 Judgement: October, 2013
Parties	Plaintiff: Glube; Terpstra Defendant: Pella Corp.
Counsel	For Plaintiffs: Joel Rochon, John Archibald For Defendants: Scott Maidment, Lindsay Lorimer, Calie Adamson
Judge/s	Then: Conway J.
Quick Facts	"This is a product liability case. In the proposed class action, the plaintiffs allege that design and manufacturing defects in Pella windows and doors allowed water to penetrate the aluminum cladding and failed to protect the surrounding wood from rot. They allege that class members suffered damage, including the cost of repairing or replacing the Pella products.... A parallel U.S. proceeding [is] underway. From the outset class counsel in the Ontario action had a relationship with the lead counsel in the U.S. proceeding, as well as with their U.S. fenestration (window and door) expert." MOTIONS approving the settlement pursuant to s. 29(2) of the *Class Proceedings Act*, and approving class counsel fees.
Statute & Rules Considered	*Class Proceedings Act*, s.29(2)
Contingency Fee Agreement, Requested Fees & Settlement	CFA: "Pella will pay class counsel, subject to court approval, legal fees in the all-inclusive amount of $650k. [disbursements = $10k]". Nature of agreement not provided beyond the $650k all-inclusive figure. "Class counsel submits that it has spent over 450 hours on the case as of September 22, 2013, representing over $250k in unbilled time, exclusive of taxes. It anticipates spending another $40k to $60k on the hearing and subsequent administration of the settlement. Disbursements are approximately $10k. That works out to a multiplier of 2.2 times counsel's base fee ... and a multiplier of less than 2 when the additional fees are included." Settlement: The Settlement Agreement contains the following principal terms: a. Eligible claimants may receive cash benefits under the settlement either through a claims process or an expedited and streamlined arbitration process. Under the former, they may receive a maximum amount of $750 per structure; under the latter, they may receive up to $6000 per structure. b. Pella will offer discounts, at various rates, to class members who repaired or replaced their windows. c. Pella will pay each of the two plaintiffs an honorarium of $5000 based on their important assistance in the investigation of the case and their roles in shepherding it forward. d. Pella will pay class counsel a class counsel fee of $650,000, which amount is inclusive of all disbursements and taxes, subject to court approval. e. Pella will pay all notice costs and the costs of settlement administration.
Contingency Fee Issue/s	Is class counsel’s fee fair and reasonable?
Outcome	Held: Motion granted. $650k paid by Pella approved.

Patel v. Groupon Inc. (2013 ONSC 6679)

2013 CarswellOnt 15030, 2013 ONSC 6679, 234 A.C.W.S. (3d) 847

Date	Heard: September, 2013 Judgement: October 20143
Parties	Plaintiff: Patel Defendant: Groupon Inc.
Counsel	For Plaintiff: Louis Sokolov, Christine Davies, Nadine Blum For Defendant: Laura K. Fric, Robert Carso
Judge/s	Then: Edward Belobaba J.
Quick Facts	"The plaintiff alleges that Groupon engaged in "unfair practices" contrary to provincial consumer protection legislation by selling Groupon vouchers with illegal expiration dates. The plaintiff further alleges that Groupon illegally required consumers to use the entire "groupon" in a single transaction, or lose any remaining balance. The proposed class action is framed in breach of contract, negligent misrepresentation, breach of consumer protection legislation and unjust enrichment. There are about one million potential class members in Canada. Shortly after the commencement of this action, Groupon changed its terms of service to clarify that the purchase value of the Groupon vouchers would not expire. However, despite these changes, Groupon did not take any steps to refund the purchase price of class members' expired groupons and continued to publish deal pages that, on their face, included an expiry date and, in the plaintiff's view, did not make clear that the expiry date only referred to the promotional value and not to the purchase value. The lawsuit, therefore, continued." MOTION for approval of the settlement agreement and approval of class counsel fees, payable by Groupon, in the amount of $235k.
Statute & Rules Considered	*Class Proceedings Act*, ss.5, 5(1), 29(2)
Contingency Fee Agreement, Requested Fees & Settlement	CFA: 20% contingency fee ("If class counsel had based their legal fees request on a 20 percent contingency, they would have arguably been entitled to $457k in legal fees.") Counsel requests approval for the lower amount of $235,000. Settlement: "The value of the overall settlement, on the most conservative measure, would thus be $2.285M ($535k plus $1.75 million in "non-monetary value.")"
Contingency Fee Issue/s	Is class counsel's fee fair and reasonable?
Outcome	**Held:** Motion granted. "the legal fees are approved but only because they are less than what would have been awarded on a contingent fee basis. […] As part of the settlement, the defendant has agreed to pay legal fees of $235,000 directly to class counsel."

Roveredo v. Bard Canada Inc. (2013 ONSC 6979)

2013 CarswellOnt 15486, 2013 ONSC 6979, 234 A.C.W.S. (3d) 845

Date	Heard: November, 2013 Judgement: November, 2013
Parties	Plaintiff: Roveredo; Premsukh Defendant: Bard Canada Inc.; Davol Inc.
Counsel	For Plaintiffs: Harvin Pitch; Colin Stevenson For Defendants: Michael Eizenga; Christiaan Jordaan
Judge/s	Then: Edward Belobaba J.
Quick Facts	"This medical-devices class action was commenced on behalf of individuals who had been implanted with certain surgical mesh products ("the Covered Products") used to repair ventral or abdominal hernias. The plaintiffs allege that the defendants failed to warn Canadian patients of the Covered Products' risk of failure which allegedly could result in serious injuries and even death... In addition to this action, three other proposed class proceedings were launched - in B.C., Alberta and Quebec." MOTION 30% for approval of the settlement agreement and for approval of class counsel fees.
Statute & Rules Considered	*Solicitors Act*
Contingency Fee Agreement, Requested Fees & Settlement	CFA 30% "Class counsel's retainer agreement provided for counsel fees of 30% on the first $20 million (subject to court approval) and the payment of all disbursements." Counsel requests approval for a 30% contingency fee per the CFA. Settlement "A national settlement has now been achieved and is conditional on this court's approval. Under the settlement agreement, the defendants will pay $1.38M into a settlement fund. After deducting legal fees, notice and administration costs ..., the balance will be paid out to class members."
Contingency Fee Issue/s	Is class counsel’s fee fair and reasonable?
Outcome	**Held:** Motion granted. (30% contingency fee approved) **“**Most judges, myself included, are prepared to approve contingency fees in the range of 20% to 25%. If more is being sought, such as the 30% herein, class counselare typically required to make further submissions justifying these additional five percentage points. Here, however, I am satisfied that the full 30%, as requested, should be approved." "It would therefore be unfair in the extreme to deny class counsel a CFA award that, by any measure, is a fraction of the legal costs that were actually and legitimately incurred." "30% contingency fee amount of $413k is therefore approved. The $184k in disbursements are also approved."

Snelgrove v. Cathay Forest Products Corp. (2013 ONSC 7282)

2013 CarswellOnt 17592, 2013 ONSC 7282, 236 A.C.W.S. (3d) 25

Date	Heard: November, 2013 Judgement: November, 2013
Parties	Plaintiff: Snelgrove Defendant: Cathay Forest Products Corp.; Ng; Perron; Wong
Counsel	For Plaintiff: Charles M. Wright; Nicholas C. Baker For Defendant: Jeremy Devereux, Jennifer Teskey, for Cathay Forest Products Corp., Luc Perron, John Duncanson and John Housser D. Gallo, for Defendants, Raymond Lo & Paul Wong
Judge/s	Then: H.A. Rady J.
Quick Facts	"This action is a class proceeding brought by and on behalf of current and former shareholders of Cathay Forest Products Corporation. Cathay is a junior forestry company incorporated under the Canada Business Corporations Act, R.S.C. 1985, c. C-44. It was involved in the development of tree plantations, sub-concession of harvesting rights and log trading in the People's Republic of China and forest harvesting operations in the Russian Federation... The plaintiff's allegations in the action include the following: Cathay's ... prospectus and the financial statements that were the subject of the February 4, 2011 restatement contained materially misleading statements about Cathay's financial statements not in accordance with Canadian generally accepted accounting principles; [...] Cathay's share price during the class period was artificially inflated. The claim pleads common law causes of action in negligence and negligent misrepresentation as well as statutory causes of action for prospectus misrepresentation, secondary market misrepresentation and oppression pursuant to the Securities Act and the Canada Business Corporations Act." Application to approve settlement agreement and for approval of class counsel fees.
Statute & Rules Considered	NA
Contingency Fee Agreement, Requested Fees & Settlement	CFA: 25% "There was a Contingency Fee Agreement by the terms of which the firm was entitled to recovery of 25% of any settlement or judgment." Settlement: "global settlement amount of $1.9M CAD"
Contingency Fee Issue/s	Is class counsel’s requested fee fair and reasonable?
Outcome	**Held:** Application granted. "the firm has agreed to reduce its percentage to approximately 21% to recognize the fact that it did not achieve precisely the level of success that it had wished. In addition, it is entitled to reimbursement for disbursements incurred."

Cannon v. Funds for Canada Foundation (2013 ONSC 7686)

2013 CarswellOnt 17784, 2013 ONSC 7686, [2013] O.J. No. 5825, 236 A.C.W.S. (3d) 24

Date	Heard: October, 2013 Judgement: December, 2013
Parties	Plaintiff/Moving Party: Cannon Defendant/Responding Party: Funds for Canada Foundation; Donations Canada Financial Trust; Appleby Services (Bermuda) Ltd.; et al
Counsel	For Plaintiff: Margaret Waddell; Samuel Marr; Andrew Lewis For Defendant: Not disclosed on Westlaw
Judge/s	Then: Edward Belobaba J.
Quick Facts	Class action settlement was approved and class members received $28.2 million. Court previously approved 25 per cent of settlement for class counsel based on precedent, but invited supplementary submissions. Application by class counsel to vary order to allow full one-third contingency fee, which amounted to $9.4 million.
Statute & Rules Considered	NA
Contingency Fee Agreement, Requested Fees & Settlement	CFA: 1/3 or 33% ($9.4M) – counsel requests an increased fee per the 1/3 allowance in their CFA Settlement: "The class members will receive about $28.2 million."
Contingency Fee Issue/s	Is counsel’s request fee fair and reasonable?
Outcome	Held: Motion granted. "The one-third contingency is not excessive because it is in line with the percentages that are charged in the personal injury area. And there is no suggestion that the $9.4M amount that class counsel will receive is unseemly or inherently unreasonable. In short, no reasons have been advanced to rebut the presumption of validity" "I reviewed several of the decisions, expecting to find persuasive reasons for capping the legal fees at say, 20 to 25 per cent and not allowing the 30 per cent or one-third that had been agreed to in the retainer agreement. What I found, instead, were well-intentioned judicial efforts to rationalize legal fee approvals by discussing arguably irrelevant or immeasurable metrics such as docketed time (irrelevant) or risks incurred (immeasurable.)

	By using these metrics, judges felt comfortable building up a reasonable legal fees award that was capped at the 20 to 25 per cent level, sometimes 30 per cent but rarely, if ever, approved at the one-third level." "What I suggest is this: contingency fee arrangements that are fully understood and accepted by the representative plaintiffs should be presumptively valid and enforceable, whatever the amounts involved. Judicial approval will, of course, be required but the presumption of validity should only be rebutted in clear cases based on principled reasons. Examples of clear cases where the presumption of validity could be rebutted include the following: (i) Where there is a lack of full understanding or true acceptance on the part of the representative plaintiff... (ii) Where the agreed-to contingency amount is excessive. I, for one, am prepared to accept that a one-third contingency is presumptively reasonable and acceptable in the class actions area because that amount that has been found to be reasonable and acceptable (and successful) in the personal injury area... (iii) Where the application of the presumptively valid one-third contingency fee results in a legal fees award that is so large as to be unseemly or otherwise unreasonable..." "But to the extent that the retainer agreement provides for a percentage-based fee approach rather than the multiplier approach, I will be one judge that will accept a fully understood one-third Contingency Fee Agreement, Requested Fees & Settlement as presumptively valid."

Urlin Rent-A-Car Ltd. v. Champion Laboratories Inc. (2014 ONSC 577)

2014 CarswellOnt 1085, 2014 ONSC 577, 237 A.C.W.S. (3d) 73

Date	Heard: January 8, 2014 Judgment: January 24, 2014
Parties	Urlin Rent-A-Car Ltd., Plaintiff Champion Laboratories Inc., Honeywell International Inc, Wix Filtration Products, Affina Group Inc., Cummins Filtration Inc., Cummins Filtration International Corp., Cummins Inc., The Donaldson Company, Baldwin Filters Inc., ArvinMeriotr Inc., ArvinMeritor Filters Operating Company LLC (f/k/a Purolator Products NA LLC, ArvinMeritor Holding Company (f/k/a Purolator Products Company LLC) and ArvinMeritor Canada, Defendants
Counsel	C. Wright, K. McGladdery Dent, for Plaintiff R. Kwinter, for Defendant, Champion Laboratories Inc. S. Forbes, for Defendant, Honeywell International, Inc. D. Kent, for Defendants, Wix Filtration Products and Affina Group Inc. P. Martin, for Defendants, Cummins Filtration Inc., Cummins Filtration International Corp and Cummins Inc. C. Chow, for Defendant, Baldwin Filters Inc. D. Houston, for Defendants, ArvinMeritor Inc., ArvinMeritor Filters Operating Company LLC (f/k/a Purolator Products NA LLC, ArvinMeritor Holding Company (f/k/a Purolator Products Company LLC) and ArvinMeritor Canada
Judge/s	H.A. Rady J.
Quick Facts	The claim alleges a price fixing conspiracy for aftermarket filters in Canada. Aftermarket filters are oil, air, fuel and transmission filters sold as replacement filters for automobiles, trucks and other vehicles. The claim was narrowed to include oil and air filters only, which account for the majority of the filters market. A parallel action is proceeding in Quebec and related claims have been made in the United States. The plaintiff seeks approval of a settlement it has reached with the defendants which resolves the litigation in its entirety, as well as for counsel's legal fees.
Statute/Rules Considered	NA
Contingency Fee Agreement Breakdown	CFA provides for: • 25% contingency fee Counsel has reduced their fee request to 19% so that when added to disbursements, the 25% level is not surpassed. Settlement reached is for $350,000 CDN.
Issue/s with Agreement	Are the proposed legal fees under the CFA fair and reasonable?
Outcome	Held: Both settlement and legal fees requests approved. Fees and disbursements are fair and reasonable, and the settlement recovery is "modest and undoubtedly disappointing to the plaintiff," but this comes with the nature of class action.

Waldman v. Thomson Reuters Canada Ltd. (2014 ONSC 1288)

– appealed in Waldman v Thomson Reuters Canada Ltd. (2015 ONCS 53) – see last row of this chart

2014 CarswellOnt 2674, 2014 ONSC 1288, 120 C.P.R. (4th) 127, 238 A.C.W.S. (3d) 303, 56 C.P.C. (7th) 81

Date	Heard: February 19, 2014 Judgment: March 4, 2014
Parties	Lorne Waldman, Plaintiff Thomson Reuters Canada Limited, Defendant
Counsel	Jordan Goldblatt, M. Edwardh, for Plaintiff Andrew Bernstein, for Defendant
Judge/s	Perell J.
Quick Facts	Class action alleged defendant infringed copyright of class members by making available without permission and for fee copies of court documents authored by class members and their law firms on Litigator. Parties signed settlement subject to court approval. Defendant agreed to make changes to copyright notices on Litigator and to terms of its contract with subscribers. Settlement agreement provided for cy-pres trust fund. Individual class members, who might opt-out, received no monetary award under settlement agreement, and signed release and granted non-exclusive license of their copyrights in court documents to defendant. Seven class members opposed settlement agreement. Class counsel brought motion for approval of CFA and for court approval of counsel fees of $825,000 all-inclusive. Class counsel's fee is paid as term of proposed settlement agreement.
Statute/Rules Considered	NA
Contingency Fee Agreement Breakdown	Class counsel (Sack Goldblatt Mitchell LLP, with assistance of Deeth Williams Wall LLP) moved for approval of the CFA with the plaintiff, Mr. Waldman for counsel fees of $825,000, all inclusive. In proposed settlement agreement Thomson settles a $350,000 cy-près trust fund to support public interest litigation. Thomson also agrees to make changes to the copyright notices on Litigator and to the terms of its contract with subscribers. The individual Class Members, who may opt-out, receive no monetary award under the Settlement Agreement, and they sign a release and grant a non-exclusive license of their copyrights in the court documents to Thomson.
Issue/s with Agreement	Class counsel contingency fee was contingent on success of settlement approval, as it was a term therein. If settlement approved then question is, is class counsel's fee "fair and reasonable"?
Outcome	Held: Motion dismissed. Settlement and agreement and thus class counsel fee not approved. No order as to costs. "It is wrong to make the payment of Class Counsel's Fee, in effect, a pre-condition to approval of the settlement agreement." (para 115) "…the court should have been afforded the option of reducing the Counsel Fee as it thought appropriate and then approving the Settlement Agreement. For settlement approval purposes, better still is the situation where the court has the option of reallocating a portion of class counsel's fee to enhance the benefits of class members." (para 118)

Appealed in (2015 ONCA 53)	Waldman v. Thomson Reuters Canada Ltd. (2015 ONCA 53) – appeal by plaintiff from judgement reported in (2014 ONSC 1288) – see above "The appellant, supported by the respondent, argues that, in any event, an appeal lies to this court under s. 6(1)(b) of the *CJA* because the order refusing to approve the settlement agreement is a final order of a judge of the Superior Court. He argues that this is a final order because, although the litigation could continue, the settlement agreement has been finally dismissed. The appellant submits that, where the approval of a settlement has been determined, substantive rights are affected. He argues that this situation is therefore different from the dismissal of a motion for summary judgment, which typically neither finally determines an issue in the litigation nor affects substantive rights." (para 18)
	Held: Appeal quashed. No costs ordered because both appellant and respondent allied in favour of ONCA's jurisdiction. "Here, although the settlement agreement was not approved, the litigation continues, and the parties cannot be said to have lost a substantive right relating to the merits of the litigation. The order is interlocutory and any appeal lies to the Divisional Court with leave." (para 23)

Slark (Litigation guardian of) v. Ontario (2014 ONSC 1283)

2014 CarswellOnt 2725, 2014 ONSC 1283, 238 A.C.W.S. (3d) 302

Date	Heard: February 25, 2014 Judgment: March 4, 2014
Parties	Marilyn Dolmage as Litigation Guardian of Marie Slark and Jim Dolmage as Litigation Guardian of Patricia Seth, Plaintiffs Her Majesty The Queen in Right of the Province of Ontario, Defendant
Counsel	Kirk M. Baert, Celeste Poltak, David Rosenfeld, for Plaintiffs Robert Ratcliffe, John Kelly, Jonathan Sydor, for Defendant
Judge/s	Conway J.
Quick Facts	Actions related to three provincially operated residential facilities for individuals with developmental disabilities were commenced. In each action, plaintiffs alleged that defendant Crown was negligent and breached its fiduciary duties in funding, operation, management, administration, supervision and control of facility. All three actions were settled and settlements approved by court. Total cash payment by Crown in settlement was $70.7 million. Class counsel sought global fee for actions in amount of $14 million, plus disbursements of approximately $1.6 million and taxes of $1.78 million. Class counsel brought motion for approval of its fees pursuant to ss. 32 and 33 of *Class Proceedings Act*.
Statute/Rules Considered	*Class Proceedings Act, 1992*, S.O. 1992, c. 6, s 29(2).
Contingency Fee Agreement Breakdown	CFA in Huronia action: – at least the sum of 3.0 and 0.01 for every month between the date of the agreement and date of settlement approval – in this case multiplied is 3.5, making class counsel entitled to fees of $15,556,016 CFAs in Rideau and Southwestern actions – 4.0 multiplier or 30% of any settlement – in this case class counsel entitled to fees of $6,185,700 for Rideau and $3,624,300 for Southwestern However, class counsel seeks only 20.68% or 19.8% (when notice and administration costs are added in) of settlement fund.
Issue/s with Agreement	Are the fees sought by class counsel fair and reasonable? (Note: they seek a lesser amount that provided for under their retainer agreements, see ‘CFA Breakdown’ above)
Outcome	Held: Motion granted. “The fees sought are well below what class counsel is entitled to recover under its retainer agreements entered into at the start of this litigation. The amount of these fees has further been approved by the litigation guardians in all three actions recently, in January 2014, after the settlement figures were known. The fees are certainly within the expectations of the class.” (para 14)

Ducharme v. Solarium De Paris Inc. (2014 ONSC 1684)

2014 CarswellOnt 3383, 2014 ONSC 1684, 238 A.C.W.S. (3d) 304

Date	Heard: March 7, 2014 Judgment: March 20, 2014
Parties	Doris Ducharme, Plaintiff Solarium de Paris Inc., Defendant
Counsel	William J. Sammon, for Plaintiff Brian C. Elkin, for Defendant
Judge/s	Robert J. Smith J.
Quick Facts	Plaintiff brought class action alleging negligence by defendant in design and manufacture of solariums. Plaintiff brought motion to settle certification order and notice to class to obtain orders with respect to costs. Defendant brought cross-motion to amend class definition, to remove representative plaintiff, and to decertify class action.
Statute/Rules Considered	NA
Contingency Fee Agreement Breakdown	NA – no details of the CFA were given
Issue/s with Agreement	Defendant expressed concern that the notice does not sufficiently inform class members of the financial arrangement. In particular, the notice sets-out that legal fees are to paid on a contingency basis, i.e. under a CFA.
Outcome	**Held:** Plaintiff's motion granted. Defendant's cross-motion dismissed **On CFA issue:** "The legal fees charged will have to be approved by the Court in any event, which will ensure that the fees charged are fair and reasonable to class members. To ensure that class members are fully informed the following sentence should be added: "*Any member of the class will be provided with a copy of the retainer agreement with the representation plaintiff on request*"." (para 22)

Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP (2014 ONSC 4118)

2014 CarswellOnt 9299, 2014 ONSC 4118, 242 A.C.W.S. (3d) 776, 31 B.L.R. (5th) 46

Date	Heard: June 26-27, 2014 Judgment: July 8, 2014
Parties	Excalibur Special Opportunities LP, Plaintiff Schwartz Levitsky Feldman LLP, Defendant
Counsel	Margaret L. Waddell, Nasha Nijhawan, for Plaintiff Tim Farrell, Jordan Page, for Defendant
Judge/s	Perell J.
Quick Facts	Plaintiff was Canadian investor, who was among 57 accredited investors under Unites States legislation for transaction refinancing American-owned hog producer in China. Accredited investors were provided with memorandum that included clean audit report prepared by defendant accounting firm. Accredited investors invested some $7.5 million before learning that producer lacked financial controls over its all-cash-business. Producer went out of business. Plaintiff brought class action against defendant for negligence and negligent misrepresentation in production of clean audit report. Plaintiffs brought motion for certification.
Statute/Rules Considered	*Class Proceedings Act, 1992*, S.O. 1992, c. 6, ss 5(1), 5(1)(a), 6.
Contingency Fee Agreement Breakdown	NA – no CFA at play but Perell J does talk a bit about CFAs in the context of his reasons denying certification, see 'Outcome'
Issue/s with Agreement	NA – see 'Outcome'
Outcome	**Held:** Motion dismissed. As part of his reasoning, Perell J commented that "… there are no significant economic barriers to litigating that would need to be overcome by a class action procedure." (para 207) and neither Excalibur nor class members in this case need a class action in order to obtain access to justice. In saying so, he states that: "There is ample her[e] for a contingency fee, and Class Counsel would not be confronted with the risks associated with obtaining certification." (para 206) **Followed:** *Combined Air Mechanical Services Inc. v. Flesch (2014 SCC 7); Hunt v. T & N plc ([1999] SCR 959); Lipson v. Cassels Brock & Blackwell LLP (2011 – Ont SCJ); Parsons v. McDonald's Restaurants of Canada Ltd. (2005 – Ont CA); Silver v. Imax Corp. (2009 – Ont SCJ)*

Hodge v. Neinstein (2014 ONSC 4503)

– see also (2015 ONSC 7345) below

2014 CarswellOnt 10316, 2014 ONSC 4503, [2014] O.J. No. 3572, 243 A.C.W.S. (3d) 537, 58 C.P.C. (7th) 37

Date	Heard: July 23-24, 2014 Judgment: July 29, 2014
Parties	Cassie Hodge, Applicant Gary Neinstein and Neinstein & Associates LLP, Respondents
Counsel	Peter I. Waldman, Andrew Stein, for Applicant Chris G. Paliare, Odette Soriano, Nasha Nijhawan, for Respondents
Judge/s	Perell J.
Quick Facts	Applicant had motor vehicle accident personal injury claim and hired respondent lawyer and law firm to prosecute her statutory benefits and tort claims. Applicant signed CFA. Litigation ended and applicant paid contingency fee. Applicant brought proposed class action proceeding on behalf of all contingency fee clients of respondents. Applicant asserted respondents fraudulently, in breach of contract and in breach of fiduciary duty contravened contingency fee provisions of *Solicitors Act* and its regulations. Applicant sought certification of application as class proceeding.
Statute/Rules Considered	Alleged breach of *Solicitors Act*, ss. 28.1(8), 28.1(9), and 15 – considered ss 23-25, 28.1(8)-(10). Also considered: *Class Proceedings Act, 1992*, S.O. 1992, c. 6, ss 5(1)(a)-(e), 6; *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R 7.08; *Contingency Fee Agreements*, O. Reg. 195/04, ss 5, 7.
Contingency Fee Agreement	Ms. Hodge signed a standard form stating: "In consideration for the professional services provided and the risks in funding all costs and disbursements by N&A, I/We do hereby understand and agree that N&A's legal fees arising from this Retainer agreement will be 25% of the damages recovered on my/our behalf, plus partial indemnity costs (which will be no more than 40% of the total recovered) plus disbursements." (para 66)
Issue/s with Agreement	**Major complaint:** alleged contravention of sections 28.1(8) and 28.1(9) of the *Act*, which prohibit, without court approval, a [CFA] that includes in the fee any amount of costs recovered by the client and that stipulates that a [CFA] subject to approval is not enforceable unless it is approved. Applicant submits that ss. 28.1(8) and 28.1(9) of the *Act* are a free-standing strict liability civil wrong. **Also, alleged breach of s. 15 of *Solicitors Act* and its regulations**: "Every conceivable contravention is alleged, including:**(a)** the Respondents not following the formalities for the formation of an enforceable [CFA]; **(b)** the Respondents not advising their clients about their rights and choices in retaining a lawyer; **(c)** the Respondents misrepresenting and deceiving the clients about their rights; and **(d)** the Respondents charging fees and disbursements that contravened the substantive provisions of the statutory regime that governs [CFA]. The Respondents are accused of contravening other provisions of the *Solicitors Act* or breaching their professional responsibilities by improperly charging disbursements and interest." (para 4)
Outcome	**Held:** Motion dismissed. Application was not certifiable as class action. While identifiable group might have been victimized by respondents, clients would have been victimized as individuals, common issues criterion was not satisfied. Class proceeding was not appropriate procedure to

	obtain access to justice for group of individual claimants without commonality other than possibility of having been victimized by same entity. Attempt to find commonality by asserting that ss. 28.1(8) and 28.1(9) of Solicitors Act was strict liability offence failed. Application satisfied cause of action criterion and breach of fiduciary duty and breach of contract claims could be certified because it was not plain and obvious that they were precluded by s. 23 of Solicitors Act and they had some evidentiary footprint. **Followed:** *Combined Air Mechanical Services Inc. v. Flesch* (2014 SCC 7); *Fischer v. IG Investment Management Ltd. (2013 SCC 69); Hunt v. T & N plc*
Additional Reasons given in *Hodge v Neinstein* (2014 ONSC 6366)	Concerning costs to judgement earlier reported: "In my opinion, I agree with Ms. Hodge that $390,000 is too high and beyond what an unsuccessful party, even one that provoked the other side with the type of allegations found in the immediate case, could fairly expect to pay. However, I think that $185,000 is too low." and, "…having regard to the factors that influence the exercise of the court's discretion as to costs, the Respondents should receive costs on a partial indemnity scale of $300,000 plus HST, plus disbursements of $28,758.45." (paras 97 and 98)
See also… (2014 ONSC 706)	In an earlier judgement in the same year, *Hodge v Neinstein* (2014 ONSC 706), class action plaintiffs brought a motion to amend litigation plan, amend notice of application, for leave to file further affidavits, and for costs and cross-examination. Hodge was largely unsuccessful on the omnibus motion and costs were ordered against her.

Hodge v. Neinstein (2015 ONSC 7345) – appeal of (2014 ONSC 4503)

2015 CarswellOnt 18937, 2015 ONSC 7345, 261 A.C.W.S. (3d) 272, 342 O.A.C. 306

Date	Heard: May 21, 2015 Judgment: December 9, 2015
Parties	Cassie Hodge, Appellant Gary Neinstein and Neinstein & Associates LLP, Respondents Law Foundation of Ontario, Intervenor
Counsel	Peter I. Waldman, Andrew Stein, for Appellant Chris G. Paliare, Odette Soriano, Denise Cooney, for Respondents Scott C. Hutchinson, Sherif Foda, for Intervenor, Law Foundation of Ontario
Judge/s	Then J., Molloy J., Lederer J.
Quick Facts	At trial court, plaintiff (Cassie Hodge) brought proposed class proceeding alleging that defendant lawyer and firm used improper contingency fee agreements and took unauthorized fees, failed to obtain court approval when required by law, and charged illegal interest rates on disbursements. Plaintiff brought application to certify action as class proceeding. Trial judge found that plaintiff pleaded tenable cause of action for breach of fiduciary duty and breach of contract, as well as for application under s. 23 of *Solicitors Act* to determine whether the contingency fee agreement was fair and reasonable. Trial judge found that plaintiff failed to establish free-standing cause of action for a strict liability claim under s. 28.1. Trial judge also ruled that there was an identifiable class capable of definition and that the plaintiff was an acceptable representative, but that the claim failed on the common issue requirement (claim would be too individualistic for class proceeding). Application was dismissed and plaintiff was ordered to pay costs of $328,758.45 to defendants. Plaintiff appealed. (See *Hodge v Neinstein* 2014 ONSC 4503)
Statute/Rules Considered	*Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5. *Criminal Code*, R.S.C. 1985, c. C-46 s. 347. (no allegation of criminal conduct in this case) *Solicitors Act*, R.S.O. 1990, c. S.15, ss. 15, 16(1), 16(2), 23-25, 28.1(1)-(11), 33(2) *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 21.01(1)(b)
Contingency Fee Agreement & Settlement Breakdown	**A.** Standard form retainer agreement (see full description at para 27, 28) • included clause stipulating that appellant pay 25% of damages recovered + any recovery for partial indemnity costs (more than 40% of amount recovered) • also included that appellant liable to pay disbursements • agreement did *not* include provision, as required under the Regulations, advising her that she was entitled to any costs recovered unless a judge ordered otherwise **B.** No application was made to a judge for approval of the agreement, as required under s. 281(8) of the *Solicitors Act* **C.** Ms. Hodge settled for an "all-in-settlement' of $150,000 in her tort claim. Ms. Hodge charged $60,326.49 in legal fees (+GST) + $48,942.37 for disbursements, leaving her with a total recovered sum of $41,906.41.
Issue/s with	Respondents used improper contingency fee agreements and took unauthorized fees,

Agreement	failed to obtain court approval when required by law, and charged illegal interest rates on disbursements **Costs plus Fees:** The appellants seek a declaration that any contingency agreement entered into by Neinstein & Associates with a client in which the firm has an entitlement to take any portion of costs in addition to a fee is unenforceable. (para 78) **Interest Recovery Charges:** including charge related to interest on disbursements incurred by the firm during the course of the litigation (average amount per client is $2000 x 6000 members of class = $12 million) (para 84-87) **Other Improper Charges:** charging clients for disbursements (para 88-90) **Referral Fees**: Ms. Hodge alleges that Neinstein & Associates improperly paid finder's fees to other firms and charged these fees to their clients. (para 91)
Outcome	**Held:** Appeal allowed. Trial judge's costs order set-aside. **Per Molloy J., Then J.:** Trial judge erred in law in interpreting the *Act*, all criteria for certification had been met and the action should have been certified as a class proceeding. Trial judge failed to consider that ss. 23 - 25 of the *Act* might not apply to contingency fee agreements that did not comply with s. 28.1, which was an arguable issue. It was also arguable that: 1) clients had right to seek declaration that contingency fee agreements were unenforceable; 2) the appropriate remedy would be disgorgement of money received by law firm in respect of invalid contingency fee agreements. Legal issues would be common to all clients within the class, and quantification of claims would be straightforward. Law firm would have to establish whether there was a valid claim to be paid fees on *quantum meruit* basis. While those counterclaims would be individual, that would not bar using class procedure to determine common claims. Class procedure would be the preferable proceeding **Per Lederer J. (dissenting in part):** The appeal should be allowed, but for different reasons. The trial judge erred in principle. It was not plain and obvious that an action which depends solely on s. 28.1 of the *Solicitors Act* cannot succeed. The cause of action should have been certified. The trial judge's interpretation of the applicable sections of the *Solicitors Act* was not necessarily wrong and the majority opinion is not necessarily correct. It is not plain and obvious that an action relying solely on s. 28.1 will inevitably fail.

Fulawka v. Bank of Nova Scotia (2014 ONSC 4743)

2014 CarswellOnt 11626, 2014 ONSC 4743, 243 A.C.W.S. (3d) 804, 69 C.P.C. (7th) 134

Date	Heard: August 12, 2014 Judgment: August 27, 2014
Parties	Cindy Fulawka, Plaintiff The Bank of Nova Scotia, Defendant
Counsel	David F. O'Connor, Louis Sokolov, J. Adam Dewar, Jordan Goldblatt, for Plaintiff / Class Martin Sclisizzi, Markus Kremer, for Defendant / Bank
Judge/s	Edward P. Belobaba J.
Quick Facts	Class action alleged employer's compensation system unlawfully deprived class members of overtime pay. Action was settled. Settlement "not only reflects well on the Bank of Nova Scotia ("Scotiabank") but is also reasonable and in the best interests of the class" (para 1). Settlement was orally approved by judge earlier and these written reasons followed…
Statute/Rules Considered	NA
Contingency Fee Agreement Breakdown	CFA retainer provided that class counsel was entitled to either 30% recovery or a 4.0 multiplier, in the event of a successful outcome. However, instead of following the CFA, the parties negotiated a settlement template that provided class members with a claims-made compensation process just described and a separate legal fees component to be paid by Scotiabank. There was some disagreement over legal fees so parties hired Stephen Goudge (retired judge of ONCA) to mediate, and if need be, to arbitrate as well. The issue did indeed go to arbitration and Goudge determined the base legal fees to be $3.8 million and then applied a 2.75 multiplier for a total legal fees award of $10.45 million. Disbursements and taxes were also to be paid by the bank.
Issue/s with Agreement	Whether or not class counsel's fee is fair and reasonable?
Outcome	**Held:** Settlement approved. "…the legal fees represent less than half of what class counsel would arguably have been entitled to under the 30 percent contingency agreement. I am therefore satisfied that the $10.45 million amount is fair and reasonable." (para 23) Additionally, a $15,000 honorarium was granted for the representative plaintiff.
Approval for revised settlement brought in (2016 ONSC 1576)	**Fulawka v. Bank of Nova Scotia (2016 ONSC 1576)** – request for approval of revised settlement and class counsel's legal fees "Unfortunately, as things turned out, the claims process did not go smoothly…" Following months of negotiation and a two day mediation in December 2015 before the Hon. George Adams, the parties agreed to a new and more streamlined payment approach and the terms of the Settlement were revised. Bank proposed to pay class counsel $2.3 million in legal fees, separate and apart from the revised settlement. **Held:** Revised settlement and class counsel's legal fees approved. Class counsel could have requested a 30% contingency recovery per the CFA retainer OR class counsel could also have insisted on the 2.75 multiplier that was applied by the arbitrator in setting the legal fees for the original settlement. Instead, they settled at $2.3 million which, for the fees portion, reflects only a 1.99 multiplier. (para 19)

Horgan v. Lakeridge Health Corp. (2014 ONSC 5209)

2014 CarswellOnt 12213, 2014 ONSC 5209, 244 A.C.W.S. (3d) 571, 69 C.P.C. (7th) 98

Date	Heard: September 9, 2014 Judgment: September 9, 2014
Parties	Michael David Horgan, Plaintiff Lakeridge Health Corporation, David J. Ross and Hak Ming Chiu, Defendants
Counsel	Jonathan Ptak, Jody Brown, for Plaintiff Barry Glaspell, for Defendant, Lakeridge Health Corporation Mary Thomson, Belinda Bain, for Defendants, David J. Ross and Hak Ming Chiu
Judge/s	Perell J.
Quick Facts	Plaintiffs tested positive for tuberculosis after being exposed to index patients at hospital. Plaintiffs alleged their infections were caused by defendants' negligence. Plaintiffs commenced two class actions ten years ago. Plaintiffs signed retainer CFAs that provided that full reimbursement of disbursements and fees were to be product of base fee and multiplier of four or contingency of 30 percent if action settled after commencement of discoveries. Parties reached settlements. Class counsel brought motion: 1) for approval of contingency fee of 30 percent on settlement (which was $510,000); 2) honorarium of $10,000 for each of representative plaintiffs; and 3) class counsel agreed to perform and assume all further costs of administration of settlement
Statute/Rules Considered	*Class Proceedings Act, 1992*, S.O. 1992, c. 6, s 29(2).
Contingency Fee Agreement Breakdown	CFA provided for full reimbursement of fees and disbursement : • either as the product of a base fee + 4.0 multiplier OR 30% of settlement Counsel seeks approval for the 30% option. The contingency fee ($510,000) amounted to less than 25% of the value of time invested by Class Counsel, which is approximately $2.5 million. The Representative Plaintiffs recommend approval of the Class Counsel Fee.
Issue/s with Agreement	Whether or not class counsel’s requested fee is fair and reasonable?
Outcome	**Held:** Motions granted. Settlement approved and Class Counsel’s fee approved.

Eidoo v. Infineon Technologies AG (2014 ONSC 6082)

2014 CarswellOnt 14546, 2014 ONSC 6082, 246 A.C.W.S. (3d) 730

Date	Heard: September 19, 2014 Judgment: October 20, 2014
Parties	Khalid Eidoo and Cygnus Electronics Corporation, Plaintiffs Infineon Technologies Ag, Infineon Technologies Corporation, Infineon Technologies North America Corporation, Hynix Semiconductor Inc., Hynix Semiconductor America Inc., Hynix Semiconductor Manufacturing America, Inc., Samsung Electronics Co., Ltd., Samsung Semiconductor, Inc., Samsung Electronics America, Inc. Samsung Electronics Canada Inc., Micron Technology, Inc. Micron Semiconductor Products, Inc. o/a Crucial Technologies, Mosel Vitelic Corp., Mosel Vitelic Inc. and Elpida Memory, Inc., Defendants
Counsel	Jonathan J. Foreman, Rob Gain, for Plaintiffs Eliot Kolers, for Defendants, Infineon Technologies AG, Infineon Technologies Corporation and Infineon Technologies North America Corporation Linda Plumpton, Jonathan Roth, for Defendants, Mitsubishi Electronic Corporation, Mitsubishi Electric Sales Canada, Inc., and Mitsubishi Electric & Electronics USA, Inc. Laura F. Cooper, Zohaib Maladwala, for Defendants, Toshiba Corporation, Toshiba America Electronics Components Inc. and Toshiba of Canada Limited Anna Tombs, for Defendants, Winbond Electronics Corporation and Winbond Electronics Corporation America
Judge/s	Perell J.
Quick Facts	Representative plaintiffs commenced two class actions in Ontario alleging defendants conspired to fix prices of dynamic random access memory (DRAM) devices. Other plaintiffs commenced companion actions in British Columbia and Quebec. Class counsel in three jurisdictions worked together, focusing attention on BC action which proceeded through discovery and preparation for trial. Settlements were reached with most defendants. Plaintiffs brought motion for: 1) approval of final four settlement agreements, which would bring aggregate recovery to $79.5 million; 2) leave to discontinue against remaining two defendants, who were impecunious; 3) approval of distribution protocol and administration protocol; 4) appointment of claims administrator and arbitrator; 5) approval of class counsel fees of $16,851,367.64 plus taxes; 6) approval of disbursements of $178,245.64 and US$2,218.93; and 7) directions concerning budget for notice to class members.
Statute/Rules Considered	*Class Proceedings Act, 1992*, S.O. 1992, c. 6, ss 29(1) and (2).
Contingency Fee Agreement Breakdown	Harrison Pensa LLP and Sutts Strosberg LLP each entered into a CFA with their respective Ontario Representative Plaintiff client, which was court approved on July 27, 2012. It provided for: • a fee payable up to 30% of the value of any settlement • + disbursements and applicable taxes Camp Fiorante Matthews Mogerman entered into a CFA with the B.C. Representative Plaintiff , which was court approved on July 26, 2012. It provided for: • a fee up to 33.33% on any settlement or compensation pertaining to the case • + disbursements and applicable taxes Class Counsel, collectively are seeking a fee of 30% of the total settlement funds. The fee

	sought is less than that permitted under the B.C. Fee Agreement and consistent with the terms of the Ontario and Québec Fee Agreements.
Issue/s with Agreement	Are class counsels' fees fair and reasonable?
Outcome	Held: Motions granted.

Boudreau v. Loba Ltd. (2015 ONSC 1648) – appealed in (2015 ONSC 4877)

– see below

2015 CarswellOnt 3680, 2015 ONSC 1648, [2015] O.J. No. 1288, 252 A.C.W.S. (3d) 601

Date	Heard: December 17, 2014 Judgment: March 13, 2015
Parties	Joseph Andre Boudreau et. al., Plaintiffs Loba Limited, et. al., Defendants
Counsel	Paul K. Lepsoe, for Plaintiffs, Moving Parties Heather J. Williams, for Defendants, Responding Parties
Judge/s	Master C. MacLeod
Quick Facts	Federal public servants were led to believe they could transfer their accrued pension monies to private sector pension plan if they left public service. Defendant structured series of reciprocal transfer agreements with Treasury Board Secretariat. Minister revoked status of defendant pension plan. Minister threatened to revoke registration of CWI pension plan after plaintiff transferred her federal pension monies into plan. Lawyer was counsel for defendant at time. Lawyer provided legal advice to plaintiff at time on application for leave to appeal as well because there was commonality of interest. Lawyer was never on record and did not represent plaintiff before court. Defendant commenced action against federal government for compensation and retained plaintiff as lawyer. Parties entered into contingency agreement. Action was resolved by settlement. Plaintiff asserted entitlement to additional compensation because defendant wrongfully deducted expenses it was not entitled to deduct and plaintiff sued defendant for difference. Plaintiff claimed lawyer and law firm of record for defendant acted for her in connection with related matters, would have to be witness in proceeding, and was in conflict of interest. Plaintiff (Suzanne Boudreau) brought motion to remove lawyers (Michael Rankin and McMillan LLP) as lawyers of record for defendant (Loba companies).
Statute/Rules Considered	NA
Contingency Fee Agreement Breakdown	Plaintiffs and defendants entered into a CFA on January 23, 2006, it provided for: • plaintiffs to provide legal services at a modest hourly rate • if litigation was successful then there would be further compensation, as a percentage of the net proceeds of the litigation
Issue/s with Agreement	**Issue on the Motion:** Whether or not Mr. Rankin's involvement on behalf of Ms. Boudreau in respect of her own appeal is such as to disqualify him from acting for the Loba defendants in this action over her fees. Is this a conflict of interest that requires the defendants to retain new counsel?
Outcome	**Held:** Motion dismissed. Defendants presumptively entitled to costs. “I am not persuaded by the evidence before the court that Michael Rankin will be a necessary witness. Mr. Parent will not be calling him. While some of his services and fees charged by his law firm are undoubtedly included in the amounts charged against the proceeds of settlement, it is far from clear that the only way to prove the legitimacy of the legal fees is to call Mr. Rankin.” (para 59)

Boudreau v. Loba Ltd. (2015 ONSC 4877)

2015 CarswellOnt 11731, 2015 ONSC 4877, [2015] O.J. No. 4085, 256 A.C.W.S. (3d) 719

Date	Heard: July 9, 2015 Judgment: August 4, 2015
Parties	Joseph Andre Boudreau and Suzanne Boudreau, Plaintiffs/Appellants Loba Limited, Welton Parent Inc. and Sylvain Parent, Defendants/ Respondents
Counsel	Paul K. Lepsoe, for Plaintiffs / Appellants Heather J. Williams, for Defendants / Respondents
Judge/s	Kershman J.
Quick Facts	Defendants retained lawyer R for complex and protracted multimillion dollar tort action against federal Crown dealing with tax and pension relating proceedings. Plaintiff B, as one of former public servants, represented herself in related class action against Crown, in which defendants were named as third parties. When B applied for leave to appeal decision in class action, dealing with enforceability of same pension transfer agreement at issue in defendants' action, R provided assistance with application due to commonality of interest. R's invoice for such assistance was paid by defendants. Plaintiffs brought action against defendants, alleging that they were owed for services rendered under contingency agreement. Defendants retained R and his firm as counsel. Plaintiffs' motion to remove law firm and lawyer as counsel for defendants was dismissed, with costs. Plaintiffs appealed
Statute/Rules Considered	NA
Contingency Fee Agreement Breakdown	Appellants and respondents entered into CFA on January 23, 2006. The agreement provided that the plaintiffs would provide litigation support services and would be compensated at a modest hourly rate. The agreement also provided that there would be further compensation if Loba was successful in the litigation. This was expressed as a percentage of the value of the settlement after deducting out of pocket expenses.
Issue/s with Agreement	NA – issue did not engage with the CFA itself, but rather with privileges around the S-C relationship.
Outcome	**Held:** Appeal dismissed. There was ample evidence to find that invoice for R's work for B was directed to defendants such that it would be subject to shared privilege or that B had waived any privilege over it. B's claim for privilege was inconsistent with reliance on it to support contention that there was conflict of interest. Plaintiffs did not show that communication was intended to be confidential at time it was made. **Followed:** *Heck v. Royal Bank (1993 – Ont Div Ct); Hryniak v. Mauldin (2013 SCC 7); Karas v. Ontario (2011 – Ont Master); Mazinani v. Bindoo (2013 ONSC 4744)*

Kutlu v. Laboratorios Leon Farma, S.A. (2015 ONSC 5976)

2015 CarswellOnt 14822, 2015 ONSC 5976, 258 A.C.W.S. (3d) 476

Date	Heard: September 25, 2015 Judgment: September 28, 2015
Parties	Carleen Kutlu, Paige Towle and Rebekah Thomas, Plaintiffs Laboratorios Leon Farma, S.A., Chemo Iberica, S.A. and Apotex Inc., Defendants
Counsel	Won J. Kim, Megan B. McPhee, Alexander Zaitzeff, for Plaintiffs Christopher C. Watkins, for Watkins Law Professional Corporation
Judge/s	Perell J.
Quick Facts	In fall 2013, lawyer CW planned to commence class action against three pharmaceutical companies alleging that negligently packaged contraceptive drugs had led to unexpected and unwanted pregnancies. He approached AZ, lawyer with whom he shared office space, to handle matter. AZ, in turn, came to arrangement with KO, class action firm in Toronto, to act as lead counsel. 73 potential class members signed retainer agreements with KO and with AZ as counsel for CW's firm. In November 2014, three representative plaintiffs commenced within proposed class action against three pharmaceutical companies including A Inc and L Co in Ontario. In September 2013, however, two other representative plaintiffs had commenced class action against A Inc and L Co in Alberta with respect to same cause of action. Even though KO attended certification hearing to object, Court of Queen's Bench of Alberta, found that Alberta appropriate venue for determination of proceeding and certified multi-jurisdictional class action with national class. In within action, professional relationship between AZ and CW ended. Plaintiffs delivered Notice of Change of Lawyers to change counsel from lawyers KO and CW to lawyers KO and AZ. CW contacted clients to suggest they join Alberta action which had already been certified and had settlement approval hearing scheduled. Plaintiffs brought motion for declaration that Notice of Change of full force and effect, for injunction restraining CW from contacting any putative class member who had retained KO and AZ, and for mandatory injunction requiring CW to direct any potential class member to KO and AZ. CW brought cross-motion for order removing him as lawyer of record, injunction restraining AZ from communicating with class members who had retained him, and order relieving him of undertaking not to speak to class members pending motions. CW also sought order requiring KO and AZ to disclose financial arrangements between themselves and with class members.
Statute/Rules Considered	*Class Proceedings Act, 1992*, S.O. 1992, c. 6, s 12.
Contingency Fee Agreement Breakdown	NA – details of CFAs not provided
Issue/s with Agreement	NA
Outcome	Held: Motion dismissed. Cross-motion dismissed on terms. Current retainer agreements and CFAs with respect to any Ontario action against Laboratories Leon Farma, SA, Chemo Iberica, SA, and Apotex are rescinded. It was not in best interests of putative class members to allow uncertified class action to continue when there was alternative with right to opt out and further advanced already existing. Single class action would best achieve goals of access to justice and judicial economy. Defendants should not have to face two class actions. "Without court approval, Mr. Zaitzeff and Mr. Watkins are not entitled to claim any fee, contingent or otherwise, for any services performed or disbursements incurred to date for the Plaintiffs or any Class Member…" (para 39)

Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp. (2015 ONSC 6354)

2015 CarswellOnt 15742, 2015 ONSC 6354, 258 A.C.W.S. (3d) 680

Date	Judgment: October 15, 2015
Parties	The Trustees of the Labourers' Pension Fund of Central and Eastern Canada, the Trustees of the International Union of Operating Engineers Local 793 Pension Plan for Operating Engineers in Ontario, Sjunde AP-Fonden, David Grant, Robert Wong, Davis New York Venture Fund, Inc. and Davis Selected Advisers L.P., Plaintiffs Sino-Forest Corporation, Ernst & Young LLP, BDO Limited (formerly known as BDO McCabe Lo Limited), Allen T.Y. Chan, W. Judson Martin, Kai Kit Poon, David J. Horsley, William E. Ardell, James P. Bowland, James M.E. Hyde, Edmund Mak, Simon Murray, Peter Wang, Garry J. West, Pöyry (Beijing) Consulting Company Limited, Credit Suisse Securities (Canada), Inc., TD Securities Inc., Dundee Securities Corporation, RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd., Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated (successor by merger to Banc of America Securities LLC), Defendants Proceeding under the Class Proceedings Act, 1992
Counsel	A. Dimitri Lascaris, Daniel E.H. Bach, S. Sajjad Nematollahi, Kirk M. Baert, Jonathan Ptak, for Plaintiffs Robert Staley, Derek J. Bell, Jonathan G. Bell, for Defendants, Sino-Forest Corporation, Simon Murray, Edmund Mak, W. Judson Martin, and Peter Wang Robert Rueter, Sara J. Erskine, Jason Beitchman, for Defendant, Allen T.Y. Chan Larry Lowenstein, Geoffrey Grove, for Defendants, William E. Ardell, James P. Bowland, James M.E. Hyde and Garry J. West Peter R. Greene, Kenneth A. Dekker, David Vaillancourt, for BDO Limited Susan E. Friedman, Brandon Barnes, for Defendant, Kai Kit Poon
Judge/s	Perell J.
Quick Facts	Plaintiffs purchased securities with allegedly inflated value. Plaintiffs brought action seeking in excess of $7 billion from defendants. Plaintiffs brought successful motion for certification and for leave to bring secondary market misrepresentation claim under Securities Act. Action was settled as against SDs (settling defendants) only, with SDs agreeing to pay plaintiffs over $1.7 million in disbursements and taxes. Hearing to determine costs conducted…
Statute/Rules Considered	*Class Proceedings Act, 1992*, S.O. 1992, c. 6, s 31(1). *Courts of Justice Act*, R.S.O. 1990, c. C.43, s 131(1). *Securities Act*, R.S.O. 1990, c. S.5, ss 130.1, 138.5; *Securities Act, 1933*, 15 U.S.C. 2A, s 12(a)(2) *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rs 49, 57.01.
Contingency Fee Agreement Breakdown	It is a term of the CFAs of all of the Plaintiffs (except Davis Selected Advisers, L.P. and Davis New York Venture Fund, Inc.) that Class Counsel receive any costs recovered from the Defendants in addition to a contingency fee. Also requires Plaintiffs to pay for disbursements.
Issue/s with Agreement	NA – CFA-specific issues not engaged with at costs hearing

Outcome	**Held:** Costs awarded (see para 152 for details)
Earlier motion by trustees in (2014 ONSC 62)	Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp. (2014 ONSC 62): Motion by trustees for approval of claim and disbursement of funds. Canadian Class Counsel and Insolvency Counsel requested fees equal to 16.9% of settlement ($17,846,250.00 (exclusive of tax) for fees and $1,737,650.84 for disbursements). "…in the absence of any substantive criticism of the requested fees, I am satisfied that the requested fees and disbursements are consistent with the Retainer Agreement entered into with the plaintiffs and are fair and reasonable." (para 47) – no issues with CFA retainer or fees requested. US Class Counsel fees and disbursements also approved (20% of 10% of E&Y settlement = Cdn $2,340,000) – there was no challenge to the fees requested. **Held:** Motion granted. (Decision by Morawetz R.S.J.)

Airia Brands Inc. v. Air Canada (2015 ONSC 6367)

2015 CarswellOnt 20387, 2015 ONSC 6367, 262 A.C.W.S. (3d) 857

Date	Heard: October 14, 2015 Judgment: October 14, 2015
Parties	Airia Brands Inc., Startech.Com Ltd., and QCS-Quick Cargo Service GMBH, Plaintiffs Air Canada, AC Cargo Limited Partnership, Societe Air France, Koninklijke Luchtvaart Maatschappij N.V. dba KLM, Royal Dutch Airlines, Asiana Airlines Inc., British Airways PLC, Cathay Pacific Airways Ltd., Deutsche Lufthansa AG, Lufthansa Cargo AG, Japan Airlines International Co., Ltd., Scandinavian Airlines System, Korean Air Lines Co., Ltd., Cargolux Airline International, Lan Airlines S.A, LAN Cargo S.A., Atlas Air Worldwide Holdings Inc., Polar Air Cargo Inc., Singapore Airlines Ltd., Singapore Airlines Cargo PTE Ltd., Swiss International Air Lines Ltd., Quantas Airways Limited, and Martinair Holland N.V., Defendants
Counsel	Charles Wright, for Plaintiffs
Judge/s	L.C. Leitch J.
Quick Facts	Settlement agreements were entered into with defendants A Inc. and K Ltd.. Class counsel had undertaken litigation pursuant to retainer CFA, previously approved by court. Class counsel brought motion for order approving legal fees and disbursements to be paid from settlement funds.
Statute/Rules Considered	NA
Contingency Fee Agreement Breakdown	CFA provided for 25% of amount recovered on behalf of class. Amount of fees sought by class counsel in Ontario and British Columbia is $1,299,200, representing 25% of settlement amounts notionally allocated to Ontario and British Columbia classes for the purposes of fee approval. Representative plaintiffs approved fees and disbursements and there had been no objections.
Issue/s with Agreement	Whether or not counsel's fee was fair and reasonable.
Outcome	**Held:** Motion granted. Order approving the fees sought has been signed.

Bancroft-Snell v. Visa Canada Corp. (2015 ONSC 7275)

2015 CarswellOnt 17869, 2015 ONSC 7275, 260 A.C.W.S. (3d) 223, 80 C.P.C. (7th) 88

Date	Heard: November 19, 2015 Judgment: November 23, 2015
Parties	Jonathon Bancroft-Snell and 1739793 Ontario Inc., Plaintiffs Visa Canada Corporation, Mastercard International Incorporated, Bank of America Corporation, Bank of Montreal, Bank of Nova Scotia, Canadian Imperial Bank of Commerce, Capital One Financial Corporation, Citigroup Inc., Federation des Caisses Desjardins du Québec, National Bank of Canada Toronto Inc., Royal Bank of Canada, and - Dominion Bank, Defendants
Counsel	Reidar Mogerman, Jen Winstanley, for Plaintiffs Michael Eizenga, Chris McKenna, for Defendant, Bank of America Corporation Mike Adlem, for Defendant, Citigroup Inc. Markus Kremer, for Defendant, Bank of Nova Scotia Rob Kwinter, for Defendant, Visa Canada Corporation James Musgrove, for Defendant, MasterCard International Incorporated Vincent de l'Etoile, for Defendant, Federation des caisses Desjardins du Québec David Rankin, for Defendant, Bank of Montreal Daniel G. Cohen, for Defendant, Capital One Corporation Katherine L. Kay, for Defendant, Canadian Imperial Bank of Commerce Paul J. Martin, for Defendant, Royal Bank of Canada Paul Morrison, Christine Lonsdale, for Defendant, Toronto-Dominion Bank William McNamara, for Defendant, National Bank of Canada Inc. Edward Babin, for Objector, Walmart
Judge/s	Perell J.
Quick Facts	Plaintiffs entered into CFA with class counsel. Plaintiffs brought class actions in multiple provinces against defendants with respect to fees charged to merchants accepting payment from consumers via credit cards. To resolve carriage dispute, class counsel entered into fee-sharing agreement with law firm that brought carriage motions in two provinces Plaintiffs' class action was certified in British Columbia. Plaintiffs entered into settlement agreements with three of defendants. Plaintiffs brought motion for approval of settlements, of fee agreement with class counsel, and of class counsel's fees and disbursements
Statute/Rules Considered	*Class Proceedings Act, 1992*, S.O. 1992, c. 6, s 29(2), 32.
Contingency Fee Agreement Breakdown	On April 15, 2011, the initial plaintiff in the British Columbia action, Mary Watson signed a CFA with Branch MacMaster. (The agreement was updated on October 5, 2015 with the current representative plaintiff, Coburn and Watson's Metropolitan Home, dba "Metropolitan Home".) Also on April 15, 2011, the Plaintiffs in the Ontario action signed a CFA with Branch MacMaster and Camp Fiorante Matthews Mogerman. CFAs were also signed in the other proposed class actions. All agreements provided for: – legal fee of 30% or an amount equal to multiplying the total hours worked by counsel in accordance with their hourly rates, by a multiplier of 3.5 – payment of disbursements reasonably incurred from settlement or award

	Class Counsel seeks approval of the CFAs, and approval of payment of a counsel fee of $3,407,500 and disbursements of $384,571.95.
Issue/s with Agreement	Whether or not class counsel's fee is fair and reasonable.
Outcome	**Held:** Motion granted in part. All three settlements approved, CFA approved, and class counsel fee of $3,384,571.95 approved. However, Fee Sharing Agreement is unenforceable. "The Contingency Fee Agreements between Class Counsel and the respective Representative Plaintiffs are typical or conventional agreements common to class actions. The agreements comply with the formal requirements of the *Act*, and I approve them." (para 54) **Followed:** *McIntyre Estate v. Ontario (Attorney General) (2002) (Ont CA)*

1511419 Ontario Inc., Re (2015 ONSC 7518)

2015 CarswellOnt 20331, 2015 ONSC 7518, 262 A.C.W.S. (3d) 588

Date	Heard: November 19, 2015 Judgment: December 23, 2015
Parties	NA
Counsel	Jonathan Foreman, Lindsay Merrifield, for Ontario Consumers Class Action James Harnum (Agent), for Harrison Pensa David Mann, Robert Kennedy, for DirectCash in CCAA Proceedings Eric R. Hoaken, for DirectCash in Class Action Proceedings Peter Griffin, Matthew Lerner, for Gordon Reykdal Jeff Galway, for N. Bland Mark Polley, Eric Brousseau, for National Money Mart Company Andrew Faith, Jeff Haylock, for 1573568 Alberta Ltd. Geoff R. Hall, Stephen Fulton, for Monitor (FTI Consulting Canada Inc.) Patrick Riesterer, for Chief Restructuring Officer of the Applicants Michael Byers, for Craig Warnock Serge Khallughlian, Charles Wright, for Ad Hoc Committee of Purchasers of Applicants' Securities, including the Plaintiff in the Ontario Securities Class Action Mary Margaret Fox, for ACE Insurance Company Doug McInnis, for Axis Reinsurance Company Brendan O'Neill, Carolyn Descours, for Ad Hoc Committee of Noteholders Rebecca Wise, for Albert Mondor, Michael Shaw, Ron Chicoyne, William Dunn and Robert Gibson Ilan Ishai, for McCann Entities David Hoffner, for Monitor in Chapter 14 Proceedings
Judge/s	G.B. Morawetz R.S.J.
Quick Facts	Ontario Consumer Class Action Counsel sought approval of contingent legal fee of approximately 25 per cent of recoveries achieved in action settlements plus disbursements and applicable taxes. Fee request was valued at $2,417,625 plus taxes and disbursement

	request was for $707,387.66 inclusive. Unopposed motion was brought to approve contingency fee and disbursement request of class counsel.
Statute/Rules Considered	NA
Contingency Fee Agreement Breakdown	CFA retainer entered into by representative plaintiff Timothy Yeoman and class counsel, which provided for: – max. 30% of the recoveries achieved – + disbursements – + applicable taxes
Issue/s with Agreement	Whether or not contingency fee is fair and reasonable.
Outcome	**Held:** Motion granted.
Motion by securities plaintiffs in (2015 ONSC 7535)	**1511419 Ontario Inc., Re (2015 ONSC 7535)** – motion by securities plaintiffs for order approving fees and disbursements of class counsel in amount of $3,484,375.05 in fees plus applicable taxes and $106,177.64 in disbursements Requested fee represents 25.29% of settlement – less than CFA retainer between class counsel and plaintiffs would allow. **Held:** Motion granted. (judgement by Morawetz RSJ on same day as above) "I am satisfied that the fee requests fit within the range of reasonableness, based on comparison with other class proceedings. I accept that the **fee** award is both fair and reasonable." (para 8)

Emms v. Christian Economic Assistance Foundation (2015 ONSC 7664)

2015 CarswellOnt 18759, 2015 ONSC 7664, 261 A.C.W.S. (3d) 271

Date	Heard: December 8, 2015 Judgment: December 8, 2015
Parties	Terry Emms, Plaintiff Christian Economic Assistance Foundation and Ontario Alliance of Christian School Societies, Defendants
Counsel	David Thompson, Matthew G. Moloci, for Plaintiff Ward Branch, for Defendant, Christian Economic Assistance Foundation William Chalmers, for Defendant, Ontario Alliance of Christian School Societies
Judge/s	Perell J.
Quick Facts	Defendant registered charity developed tax credit program in which taxpayer would receive charitable donation receipt for amount of tuition paid to enroll student at private Christian school. However, Canada Revenue Agency disallowed tax credits in 2010. Plaintiff had enrolled his son in private Christian school and was one of group of taxpayers that were denied amounts claimed as charitable donations, reassessed and penalized. Plaintiff commenced proposed class action against defendants. Parties negotiated settlement under which defendants consented to certification for settlement purposes, and under which, without admitting liability, defendants agreed to pay up to $1.5 million in exchange for release of claims against them. On consent, plaintiff brought motion for certification of class proceeding, approval of settlement and approval of class counsel fee and honorarium for representative plaintiff.
Statute/Rules Considered	*Class Proceedings Act, 1992*, S.O. 1992, c. 6, ss 5(1)(a)-(e), 29(2).
Contingency Fee Agreement Breakdown	Mr. Emms entered into a CFA retainer with Scarfone Hawkins LLP on August 23, 2013. It provides for: • 30% contingency fee calculated after all expenses (including taxes and disbursements) deducted Class Counsel is asking for payment of fee $508,500 + $12,904.27 for disbursements, based on 30% of the Settlement Fund. Mr. Emms approves of the settlement and class counsel's fee request.
Issue/s with Agreement	Is class counsel's fee request "fair and reasonable," based on the factors relevant for assessing reasonableness of class counsel?
Outcome	**Held:** Motion granted. All approved.

Silver v. Imax Corp. (2016 ONSC 403)

2016 CarswellOnt 558, 2016 ONSC 403, 262 A.C.W.S. (3d) 856

Date	Heard: December 15, 2015 Judgment: January 15, 2016
Parties	Marvin Neil Silver and Cliff Cohen, Plaintiffs Imax Corporation, Richard L. Gelfond, Bradley J. Wechsler, Francis T. Joyce, Neil S. Braun, Kenneth G. Copland, Garth M. Girvan, David W. Leebron and Kathryn A. Gamble, Defendants
Counsel	Jay Strosberg, Michael Robb, for Plaintiffs Dana Peebles, for Defendants
Judge/s	Baltman J.
Quick Facts	In class action, plaintiff claimed damages from defendant and some directors on basis it misrepresented revenue, resulting in decline in share price. Claims were brought under common-law tort of misrepresentation and statutory cause of action under Ontario Securities Act by residents who purchased shares in during class period. Nine years after action was commenced, parties reached proposed settlement for $3,750,000. Class counsel sought 33% of recovery plus taxes, for total of $1,398,375 plus unbilled disbursements of $224,330. Motion by plaintiff for approval of settlement and class counsel fees.
Statute/Rules Considered	*Class Proceedings Act, 1992*, S.O. 1992, c. 6, s 29.
Contingency Fee Agreement Breakdown	CFA retainer for Siskinds LLP provided for: • 33% of total recovery • + taxes • + disbursements CFA retainer for Sutts, Strosberg provided for: • sliding scale ranging from 25% to 33% Class counsel request fees at 33% of the recovery (i.e. $1,237,500) + taxes ($160,875) + unbilled disbursements ($224,330) Note: **1)** "The request for fees at 33% plus disbursements and taxes was contained in the notice of certification, and, later, in the notice of settlement approval hearing. Both notices were widely distributed and no one objected to the fees sought. Only one class member opted out despite the public notice of the 33% contingency fee." (para 44) and **2)** "… two firms comprising class counsel have collectively docketed approximately $4,000,000 in time. That is more than the total recovery in the action. With the proposed fees class counsel will be recovering less than one third of their docketed time." (para 46)
Issue/s with Agreement	Whether or not class counsel's legal fees were "fair and reasonable" and fairly reflected the factors listed at para 41 to determine fairness and reasonableness.
Outcome	**Held:** Motion granted. Proposed settlement is fair, reasonable, and in the best interests of the class. Class counsel legal fees also approved.

AFA Livförsäkringsaktiebolag v. Agnico-Eagle Mines Ltd. (2016 ONSC 532)

2016 CarswellOnt 2169, 2016 ONSC 532, 263 A.C.W.S. (3d) 632

Date	Heard: January 20, 2016 Judgment: February 12, 2016
Parties	AFA Livförsäkringsaktiebolag, AFA Sjukförsäkringsaktiebolag, AFA Trygghetsförsäkringsaktiebolag, Kollektivavtalsstiftelsen Trygghetsfonden TSL and William Leslie, Plaintiffs Agnico-Eagle Mines Limited, Sean Boyd, Eberhard Scherkus and Ammar Al-Jound, Defendants
Counsel	Michael G. Robb, Ronald Podolny, for Plaintiffs James Doris, Luis Sarabia, Chantelle Spagnola, for Defendants
Judge/s	Edward P. Belobaba J.
Quick Facts	Securities class action, certified on consent, was settled for $17 million. Plaintiffs brought application for judicial approval of settlement agreement and legal fees
Statute/Rules Considered	*Class Proceedings Act, 1992*, S.O. 1992, c. 6, ss 5(1), 29(2). *Securities Act*, R.S.O. 1990, c. S.5, s 138.8.
Contingency Fee Agreement Breakdown	"Based on the retainer agreement, class counsel is seeking a 29.5 per cent contingency recovery which amounts to $4,094,000, plus disbursements and taxes." (para 19)
Issue/s with Agreement	Are the proposed legal fees fair and reasonable? Belobaba J notes, as he did in *Canon*, that the CFA is presumptively valid in the context.
Outcome	**Held:** Application granted with one revision: "I only ask that class counsel reduce the disbursements by $3828 for the "legal research" charge that, in my view, should not be billed as a disbursement." **Followed:** *Cannon v. Funds for Canada Foundation (2013 – Ont SCJ)*

Sheridan Chevrolet Cadillac Ltd. v. Furukawa Electric Co. (2016 ONSC 729)

2016 CarswellOnt 1571, 2016 ONSC 729, 263 A.C.W.S. (3d) 70

Date	Heard: January 28, 2016 Judgment: February 3, 2016
Parties	Sheridan Chevrolet Cadillac Ltd., the Pickering Auto Mall Ltd., and Fady Samaha, Plaintiffs and Chiyoda MFG. Co., Ltd., Chiyoda USA Corporation, and Asti Corporation, Defendants
Counsel	Charles M. Wright, David Sterns, for Plaintiffs Robert Kwinter, for Yazaki Defendants David Kent, Laura Brazil, for Chiyoda Defendants Sandra Forbes, for Denso and Techma Defendants Paul Martin, for G.S. and G.S.W. Defendants Kelly Friedman, for Hitachi Defendants Susan Freedman, for Furakawa Defendants Linda Plumpton, for Mitsubishi Defendants Suzy Kaufman, for Fujikura Defendants Neil Campbell, Allison Worone, for Sumitomo Defendants James Gotowiec, for Leoni Defendants Mel Hogg, for SY Systems Defendants
Judge/s	Edward P. Belobaba J.
Quick Facts	Y Inc. and C Co. (defendants) were suppliers of auto parts including automotive wire harness systems (AWHS), instrument panel clusters (IPC), and fuel senders. Plaintiffs commenced class actions on behalf of persons in Canada who purchased or leased auto parts supplied by defendants. Actions alleged that defendants engaged in price-fixing. Parties reached settlements in four actions, including settlement in action against Y Inc. in relation to AWHS (Y Inc. AWHS settlement). Plaintiffs brought motions for approval of these four settlements
Statute/Rules Considered	NA
Contingency Fee Agreement Breakdown	CFA retainers with class counsel provided for: • 25% contingency fee • + disbursements • + taxes
Issue/s with Agreement	NA – "As I made clear in *Cannon*, this contingency amount is presumptively valid and there is no good reason herein not to approve the legal fees" (para 16)
Outcome	**Held:** Motion granted.

Quenneville v. Volkswagen Group Canada Inc. (2016 ONSC 959)

2016 CarswellOnt 2163, 2016 ONSC 959, 263 A.C.W.S. (3d) 610

Date	Heard: February 3, 2016 Judgment: February 12, 2016
Parties	Matthew Robert Quenneville, Luciano Tauro, Michael Joseph Pare, Therese H. Gadoury, Amy Fitzgerald, Renee James, Al-Noor Wissanji, Jack Mastromattei and Jay MacDonald, Plaintiffs / Moving Parties Volkswagen Group Canada Inc., Volkswagen Aktiengesellschaft, Volkswagen Group of America Inc., Audi Canada Inc., Audi Aktiengesellschaft, Audi of America Inc. and VW Credit Canada Inc., Defendants and Merchant Law Group LLP, Responding Party
Counsel	David F. O'Connor, J. Adam Dewar, for Plaintiffs / Moving Parties Anthony Tibbs, Chris Simoes, for Responding Party, Merchant Law Group Robert Bell, for Volkswagen Defendants
Judge/s	Edward P. Belobaba J.
Quick Facts	In breach of carriage agreement and court order of December 2015 granting carriage of Ontario Volkswagen class action to consortium of eight law firms, Merchant Law Group LLP (MLG) law firm sent misleading email in January to some 9500 recipients urging them, in essence, to join MLG class action. 150 Ontario residents acted on MLG's misstatements and signed MLG retainer agreement that was attached to email. It was beyond dispute that MLG agreed not to contest carriage in Ontario. MLG's carriage motion was dismissed as abandoned and its own Ontario action was stayed. MLG agreed to send out clarifying email and agreed not to execute retainer agreements received from Ontario residents. Counsel on both sides were unable to agree on several points to be included in clarifying email. Class counsel brought motion for costs of approximately $100,000 on substantial indemnity basis.
Statute/Rules Considered	NA
Contingency Fee Agreement Breakdown	Misleading e-mail sent by MLG included an attached CFA retainer and instructions.
Issue/s with Agreement	Nothing contained in the CFA retainer was at issue in the case. It was the attachment of a retainer agreement to MLG’s e-mail (CFA or not) that was of concern in its breach of the court order.
Outcome	**Held:** Motion granted in part. Costs fixed at $40,000 payable by MLG to Class Counsel. “It is plain from the retainer agreement attached to the January 22 email that MLG intended to proceed either by way of class action or mass (individualized) litigation at its discretion.” (para 5) “MLG's breach of the Court Order is deserving of censure and condemnation and, therefore, by definition, is reprehensible. An elevated costs award is therefore justified…” (para 16)

Donohue v. Baja Mining Corp. (2016 ONSC 1569)

2016 CarswellOnt 3317, 2016 ONSC 1569, 264 A.C.W.S. (3d) 79

Date	Heard: February 18, 2016; February 19, 2016 Judgment: March 4, 2016
Parties	John Matthew Donohue, Plaintiff Baja Mining Corp., John Greenslade, Rowland L. Wallenius, Michael Shaw, Adam Wright, and PriceWaterhouseCoopers LLP, Defendant
Counsel	Jonathan J. Foreman, Stephanie Legdon, Paul Bates, for Plaintiff Laura Cooper, Sarah Armstrong for Defendants, Baja Mining Corp., Michael Shaw and Adam Wright Helen Daley, for Defendants, John Greenslade and Rowland Wallenius Michael Schafler, for Defendant, PriceWaterhouseCoopers LLP
Judge/s	L.C. Leitch J.
Quick Facts	Plaintiffs in class proceeding who acquired securities in defendant mining corporation alleged that defendants misrepresented cost of development of its primary asset. Plaintiff and defendants entered into settlement agreement that provided that certain defendants would pay $11,000,000.00 for benefit of class members. Retainer agreement with class counsel provided that class counsel could seek legal fees of 30 per cent of amount of any recovery obtained on behalf of class plus disbursements and taxes. Plaintiff brought motion for approval of settlement and class counsel fees.
Statute/Rules Considered	*Class Proceedings Act, 1992*, S.O. 1992, c. 6, ss 32, 33. *Securities Act*, R.S.O. 1990, c. S.5, s 138.3.
Contingency Fee Agreement Breakdown	Class counsel and representative plaintiff entered into a CFA, which provided for: – 30% of the amount of any recovery obtained on behalf of the class – + disbursements – + taxes – CFA also states that all of the above is only payable upon a successful outcome, settlement or judgement Class counsel seeks an order approving legal fees in the amout of $2.75 million (at a 25% rate, lower than CFA provides for) + $77,696.06 in disbursements and taxes. Notice of the proposed fee was included in the notice given to class members and there has been no objections as previously noted.
Issue/s with Agreement	Whether or not the fees requested by class counsel “fair and reasonable.”
Outcome	**Held:** Motion granted. Settlement and requested legal fees approved. Very favourable outcome achieved in settlement, and legal fee 5% lower than maximum of what class could have expected. Additionally, there had been no objections to the legal fees and the representative plaintiff endorsed them.

McIntyre (Litigation guardian of) v. Ontario (2016 ONSC 2662)

2016 CarswellOnt 6668, 2016 ONSC 2662

Date	Heard: April 25, 2016 Judgment: April 28, 2016
Parties	Sharon Clegg as Litigation Guardian of Marlene McIntyre, Representative Plaintiff of Certified Class Action Her Majesty the Queen in Right of the Province of Ontario, Defendant
Counsel	Kirk Baert, Celeste Poltak, David Rosenfeld, for Plaintiff Robert Ratcliffe, Sonal Gandhi, for Defendant
Judge/s	Edward P. Belobaba J.
Quick Facts	"This is the fourth in a series of class actions, dealing with abuses in provincial "Schedule 1" facilities, that has settled before trial. In each of the other three cases, *Huronia*, *Rideau* and *Southwestern*, Conway J. found the settlements to be fair and reasonable and in the best interests of the class." (para 1)
Statute/Rules Considered	NA
Contingency Fee Agreement Breakdown	CFA provided for: – contingency fee of up to 30% of settlement value (including notice and administration) Counsel only requests 9.67% contingency fee (i.e. $3.7 million), "They have wisely reduced their request to about 10 per cent, no doubt because of the legal **fee** payments already received from the *Huronia*, *Rideau* and *Southwestern* settlements." (para 40)
Issue/s with Agreement	Whether or not the requested fee is "fair and reasonable."
Outcome	**Held:** Both settlement and legal fees approved. "The proposed settlement before me implements the same structure and compensation template as in the other three. Given that this settlement, in essence, has already been judicially approved three times, this court could have simply approved this fourth iteration without any further discussion or explanation." (para 3)

APPENDIX EIGHT

OTHER DECISIONS

I. Aboriginal Issues/Groups

Missanabic Cree First Nation V. Ontario (2011 Onsc 5196)

2011 CarswellOnt 15345, 2011 ONSC 5196, [2011] O.J. No. 6569, 215 A.C.W.S. (3d) 814, 38 C.P.C. (7th) 385

Quick Facts	This case only mentions a CFA once and states that a CFA can *only* be applied to situations where damages may be awarded (i.e. cannot apply if the only possible remedy is a reserve): "However, these efforts have been unsuccessful. I accept that a [CFA] ... is not a viable option in this case because of the possibility that the only remedy obtained could be a reserve with no award of damages."

Fontaine V. Canada (Attorney General) (2012 ONCA 471)

– see later ONSC decision below

2012 CarswellOnt 8351, 2012 ONCA 471, [2012] O.J. No. 3019, 111 O.R. (3d) 461, 217 A.C.W.S. (3d) 780, 295 O.A.C. 127

Date	Heard: January 31, 2012 Judgment: July 4, 2012
Parties	Duboff Edwards Haight & Schachter (DEHS), Appellant Chief Adjudicator, Respondent
Counsel	Harley Schachter, for Appellant Charles Hofley, Leanne N. r, for Respondent E.F. Anthony Merchant, Q.C., for Intervener (Merchant Law Group LLP) Catherine Coughlan, Dalal Mouallem, for Intervener (Attorney General of Canada)
Judge/s	M. Rosenberg J.A., Paul Rouleau J.A., R.G. Juriansz J.A.
Quick Facts	Under national settlement agreement with respect to Crown's role in residential schools, class members could obtain compensation for serious physical or sexual abuse through independent assessment process (IAP). Law firm entered into contingency fee agreement with client for 30% of compensation awarded in IAP, which was maximum percentage permitted under agreement. When client did not seek review of fairness and reasonableness of legal fees after obtaining IAP award, IAP adjudicator undertook legal fee review on own motion and adjusted fee down to 20 per cent of compensation awarded. Law firm's appeal to chief adjudicator was dismissed, but law firm and chief adjudicator brought request for direction from administrative judge under agreement prior to law firm commencing application for judicial review. Administrative judge ruled that there was no right of appeal or judicial review from fee review decision. Law firm appealed.
Statute & Rules Considered	*Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 2(1) *Legal Profession Act*, S.M. 2002, c. 44, s. 55(5) and (7)
Contingency Fee Agreement Breakdown	In July 2006, the appellant entered into a CFA with one of its IAP clients for 30% of any compensation awarded. The client's claim was heard in April 2009 and the Adjudicator awarded $103,000. Legal fees claimed at 30% of the award were $30,900, plus applicable taxes totalling $3,708. The reported time value of DEHS' fees and disbursements when the claim hearing took place was $15,685.88. On May 25, 2009, the Adjudicator undertook a legal fee review hearing on his own

	motion. On June 30, 2009, the Adjudicator issued a ruling adjusting DEHS' proposed fee down to $20,600, plus taxes totalling $2,472. The approved fees reduced the 30% contingency fee to 20% (15% to be paid by Canada, 5% to be paid by the client). After a further hearing regarding whether GST and PST owed on a compensation award was to be paid by Canada on behalf of the claimant, the reported time value of DEHS' fees and disbursements had increased from $15,685.88 to $27,532.18.
Issue/s with Agreement	***A.*** *Are there any circumstances in which a Chief Adjudicator's decision in the fee review process is reviewable by a judge of the Superior Court?* ***B.*** *Did the Administrative Judge err in not granting the specific directions requested by the appellant?*
Outcome	**Held:** Appeal dismissed. Parties agreed to no costs orders. A fee review decision of the Chief Adjudicator in the IAP is not reviewable by way of an appeal to the Superior Court, or by way of an application for judicial review to the Superior Court. The Chief Adjudicator's decision is only reviewable by an Administrative Judge through a Request for Direction under the CAP, but such review is available only in very limited circumstances. The appellant did not establish that the Chief Adjudicator's decision reflects a failure to comply with the S.A. or the implementation orders.

Fontaine V. Canada (Attorney General) (2015 ONSC 7007)

– see earlier ONCA decision above

2015 CarswellOnt 17295, 2015 ONSC 7007, 260 A.C.W.S. (3d) 462, 80 C.P.C. (7th) 136

Date	Judgment: November 13, 2015
Parties	Larry Philip Fontaine in his personal capacity and in his capacity as the Executor of the estate of Agnes Mary Fontaine, deceased et al, Plaintiffs The Attorney General of Canada, The Presbyterian Church in Canada et al, Defendants
Counsel	E. Anthony Ross, Q.C., Katrina Marciniak, for Applicants Leona K. Tesar, for Attorney General of Canada
Judge/s	Perell J.
Quick Facts	Federal government resolved proceedings relating to Indian Residential Schools (IRS) by entering into Indian Residential Schools Settlement Agreement (IRSSA). IRSSA included common experience payments for all Aboriginal persons who attended IRS's and separate claims process for Aboriginal persons who had suffered abuse at IRS's. Claimant was 82-year-old disabled, unemployed, and impoverished Aboriginal woman who had been student at institution that was not yet recognized as IRS. Claimant brought motion for directions under IRSSA seeking advance costs award so she could pursue claims under IRSSA.
Statute/Rules Considered	*Courts of Justice Act*, R.S.O. 1990, c. C.43, s 31. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R 57.01(1).
Contingency Fee Agreement Breakdown	NA – no CFA, see 'Issue/s with Agreement' below
Issue/s with Agreement	Issue was that plaintiff could not secure CFA/s: "For the lawyers, a contingency fee arrangement was useless to ameliorate the risk of the expense of providing the unpaid legal services needed to complete the RFD. A successful Article 12 RFD would result in adding the Fort William Sanatorium School to the IRSSA's list of IRSs, but there is no money to be earned in obtaining a declaration other than the normal legal costs that goes with winning, which was far from a sure thing, because this RFD was obviously going to be strongly resisted by Canada." (para 39)
Outcome	**Held:** Motion granted. Mrs. Henry awarded costs. "In my opinion, in the special circumstances of Mrs. Henry's particular circumstances and in the special circumstances of an Article 12 RFD, it is in the public interest that Mrs. Henry have access to justice through an advance costs award." (para 96) **Followed:** *British Columbia (Minister of Forests) v. Okanagan Indian Band (2003 SCC 71)*
CFAs earlier discussed in (2015 ONSC 5431)	Fontaine v. Canada (Attorney General) – earlier in the same year, another request for directions was brought in (2015 ONSC 3611), which made no mention of contingency fee issues. However, in the additional reasons (2015 ONSC 5431), delivered two and a half months before the second request for directions (summarized above), i.e. (2015 ONSC 7007), CFAs were briefly dealt with in terms of their relation to the determination of costs. In short, Perell J found that concerns around counsel choosing or not choosing to take on risk by being retained on a CFA is "not a matter relevant to the assessment of costs" (para 40). Perell J went on to order Canada to pay costs in the amount of $50,000 to the Applicants.

Williams V. Whitefish River First Nation (2014 ONSC 1817)

2014 CarswellOnt 3426, 2014 ONSC 1817, 119 O.R. (3d) 551, 238 A.C.W.S. (3d) 731

Date	Heard: March 17, 2014 Judgment: March 20, 2014
Parties	Williams, Plaintiff Whitefish River First Nation, Defendant
Counsel	R. Aaron Detlor, for Plaintiff Stephanie Kearns, for Defendant
Judge/s	Master R.A. Muir
Quick Facts	Plaintiff was lawyer. Plaintiff provided legal services to defendant. For most part, work involved representing defendant in connection with certain land claims and claim relating to delineation of boundaries of reserve. Plaintiff alleged that he was owed $163,000.00, and defendant denied that it owed anything to plaintiff. Registrar dismissed action for delay. Action was dismissed by registrar due to failure on part of plaintiff to comply with requirements of R. 48.14 of Rules of Civil Procedure. Plaintiff brought motion for order setting aside order of registrar.
Statute/Rules Considered	*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rs 37.14(1), 48.14, 57.01(1).
Contingency Fee Agreement Breakdown	Defendant takes the position that a portion of the work undertaken for them by the plaintiff was done on a contingency fee basis, and that the Plaintiff's fee was conditional upon a successful resolution of the claims. However, the Defendant also claims that the CFA was unenforceable. (There is no explanation in the decision for either of the Defendant's claims.) In general, Defendant denies that it owes anything to the plaintiff.
Issue/s with Agreement	NA – the CFA was mentioned once to the extent described above in 'CFA Breakdown'
Outcome	**Held:** Motion granted. "The plaintiff has failed to provide a satisfactory explanation for the delay encountered with this action as a whole and in bringing this motion. However, I am satisfied that the failure to meet the Rule 48.14 deadline was a result of inadvertence on the part of his lawyer. Importantly, the plaintiff has also satisfied the key consideration of prejudice."| **Followed:** *744142 Ontario Ltd. v. Ticknor Estate (2012 – Ont Master)*

Ross V. Pinaymootang First Nation (2015 ONSC 3274)

2015 CarswellOnt 7991, 2015 ONSC 3274, 255 A.C.W.S. (3d) 873

Date	Heard: May 17, 2015; May 18, 2015; May 19, 2015 Judgment: June 1, 2015
Parties	E. Anthony Ross, Plaintiff Pinaymootang First Nation, also known as Fairford First Nation, also known as Fairford Band and Harris & Harris LLP, also known as Harris & Harris, Defendants
Counsel	Tanya Walker, Andrew Ostrom, for Plaintiff Darryl R. Buxton, for Defendant, Pinaymootang First Nation, also known as Fairford First Nation, also known as Fairford Band Douglas Christie, for Defendant, Harris & Harris LLP, also known as Harris & Harris
Judge/s	Diamond J.
Quick Facts	First nations band hired lawyer to commence proceedings against Federal Government for damages arising out of construction of water control structures – signing a CFA retainer. Lawyer joined new firm but continued to represent band. Action on behalf of band was unsuccessful, although court found Province of Manitoba was responsible for band's damages. Appeals were undertaken but settlement agreement was reached. New firm sent invoices to band, who did not pay on grounds that no relationship existed between band and new firm. Lawyer left new firm. New firm brought action against band. Band terminated original CFA retainer agreement. Band, lawyer and new firm signed memorandum of understanding. Amount of $950,000.00 was to be made payable from settlement funds forthcoming from Government of Canada, and payment of second and third tranches were essentially dependent upon further settlement funds to be obtained by band from Province of Manitoba. Band council ratified settlement for less than amount of agreement, which lawyer claimed ended settlement. Lawyer brought action against band and new firm. Two-way settlement was reached between new firm and lawyer, and three way settlement between lawyer, new firm, and band was reached regarding all proceedings for payment. Proceedings by lawyer against band were stayed under consent judgment. Band paid only first installment of settlement owing. Lawyer brought motion to lift stay imposed by consent and amend pleadings in his action.
Statute/Rules Considered	*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rs 26.01, 29.09, 59.06(1), 59.06(2)(a)-(d).
Contingency Fee Agreement Breakdown	Pinaymootang First Nation (aka Fairford First Nation) retained Ross on or about August 23, 1994, effective February 26, 1992, through a CFA retainer. Scope of retainer was to commence proceedings against Gov. of Canada and Prov. of Manitoba in Federal Court. The CFA provided for: • 9% contingency fee of any future judgement or award • if retainer were terminated, terms of the agreement provided that Ross would be compensated for services rendered to the date of termination In December 1996 Ross moved to a new firm, but with the formal agreement that the new firm has no legal or financial interest in the files belonging to Ross, which were opened prior to the relationship commencing with the new law firm (i.e. Harris). After Fairfold was unsuccessful in their claim, Harris issued a Statement of Claim against Fairford seeking, *inter alia*, payment of its outstanding fees and disbursements totalling $1,729,846.92 in December 2001. Ross commenced his own additional action, naming both Fairfold and Harris as defendants, seeking *inter alia* payment of outstanding invoices totalling $3,149,747.50, and an

	order consolidating his action with the earlier Harris action ["Ross Action"]. In or around late January 2004, Fairford terminated Ross' CFA retainer agreement and retained Robert Roddick ("Roddick") as its new counsel. By that time, Ross' docketed time had accumulated and totaled in excess of $3,500,000.00. Under the three-way settlement, Fairford was to pay the sum of $2,150,000.00 to Harris in three tranches: $950,000.00, $650,000.00 and $550,000.00. Under the two-way settlement, Ross and Harris further agreed that payment of the first $950,000.00 due under the three-way settlement, would be distributed as follows: (a) $445,594.50 to Ross; (b) $475,000.00 to Harris; (c) the balance of $29,405.50 paid in trust to the credit of the Harris Action. (see 'Quick Facts' for more)
Issue/s with Agreement	On August 11, 2005, Fairford (through Roddick) delivered trust cheques to both Ross and Harris of all three amounts contemplated under the two-way settlement agreement. The first $950,000 was fully paid on August 11, 2005. Fairford never paid the second $650,000 installment due on January 1, 2006. Fairford never paid the third $550,000 installment due on or before January 1, 2007. Issues in decision dealt with this 'fall-out', and did not engage CFA issues directly, but instead focussed on how the earlier proceedings precluded, or did not preclude Ross from taking further action against Fairfold.
Outcome	**Held:** Motion dismissed. "…there are not grounds to support an order varyig the consent judgement and.or lifting the stay of the Ross Action, Ross is therefore unable to take any further steps, other than enforcement steps, in the Ross Action." (para 93) **Followed:** *McCowan v. McCowan (1995 – Ont CA); Monarch Construction Ltd. v. Buildevco Ltd. (1988 – Ont CA)*

II. Corporate/Commercial

Heydary Hamilton Professional Corp. V. Hanuka (2010 ONCA 881)

2010 CarswellOnt 9782, 2010 ONCA 881, 196 A.C.W.S. (3d) 905, 272 O.A.C. 271

Date	Heard: November 24, 2010 Judgment: December 21, 2010
Parties	Heydary Hamilton Professional Corporation (plaintiff), Appellant Thakar Baweja, Rajiv Baweja, also known as Roger Baweja, 6369162 Canada Inc., Ben Vladlen Hanuka and Davis Moldaver LLP (Defendants), Respondents
Counsel	Douglas Elliott, Ruzbeh Hosseini, for Appellant David Silver, for Respondents (Ben Vladlen Hanuka, Davis Moldaver LLP)
Judge/s	E.A. Cronk J.A., J. MacFarland J.A., Janet Simmons J.A.
Quick Facts	On October 19, 2007, initial lawyers (appellant) were retained on CFA in franchise dispute. Initial lawyers notified former clients that negotiating terms of lease was beyond scope of retainer agreement. Successor lawyers acted for former clients regarding lease. Successor lawyers served notice of change of solicitors on initial lawyers. Invoice from initial lawyers was unpaid. Initial lawyers claimed that successor lawyers were involved in scheme to assist former clients in avoiding compensation of initial lawyers. Initial lawyers brought action against former clients and against successor lawyers for conspiracy, inducing breach of contract and unlawful interference with economic interests. Successor lawyers' motion for summary judgment was granted. Initial lawyers appealed.
Statute & Rules Considered	NA
Contingency Fee Agreement Breakdown	CFA retainer between the appellant and the former clients required that the former clients pay the appellant $50,000 up front plus 27% of any future judgment or settlement proceeds. The retainer agreement also provided that it could be terminated within 15 days of the date of the agreement, and "[t]hereafter ... only by agreement between the parties or, if required, in accordance with the Law Society of Upper Canada Rules of Professional Conduct." During the period between October 2007 and November 2009 (when successor lawyers served a notice of change of solicitors), the appellant accrued approximately $63,998.70 in recorded legal fees and actual disbursements including GST in relation to the retainer agreement.
Issue/s with Agreement	The main issue on appeal is whether the motion judge erred in striking out the appellant's claim against the successor lawyers for inducing breach of contract and intentional interference with economic interests for failing to disclose a reasonable cause of action.
Outcome	Held: Appeal dismissed with costs to the successor lawyers on a substantial indemnity basis, fixed in the amount of $8,488.25, inclusive of disbursements and applicable taxes. “We see no basis for holding that the motion judge erred in failing to grant leave to amend. The allegations made by the appellant are serious allegations of professional misconduct. No facts were pleaded that are capable of supporting those allegations.” (para 16)

Chrusz V. Cheadle Johnson Shanks Macivor (2010 ONCA 553)

2010 CarswellOnt 5896, 2010 ONCA 553, [2010] O.J. No. 3441, 191 A.C.W.S. (3d) 1106, 272 O.A.C. 1

Date	Heard: May 21, 2010 Judgment: August 16, 2010
Parties	Daniel Chrusz and Poli-Fibreglass Industries (Thunder Bay) Ltd., Appellants Cheadle Johnson Shanks MacIvor aka Cheadles LLP, Robert D. Weiler Q.C. and Petrone Hornak Garofalo Mauro, Respondents
Counsel	Roderick W. Johansen for Appellants J. Douglas Crane, Q.C. for Respondent, Petrone Hornak Garofalo Mauro John W. Erickson, Q.C. for Respondents Cheadle Johnson Shanks MacIvor
Judge/s	J. McComb J. (ad hoc), K. Swinton J. (ad hoc), and Wilton-Siegel J. (ad hoc)
Quick Facts	Clients were involved in two actions. Firm Petrone replaced Firm Cheadle as counsel for clients. Clients and Firms reached mediated Settlement Agreement (SA) regarding payment to Firms. After actions were settled and settlement funds received, clients instructed Firm P not to pay Firm C. Clients brought application for determination of rights under SA and declaration of amount payable by clients to Firms or order referring issue to assessment officer. Firm C brought cross-application for determination of rights under SA and declaration confirming amount due to it under SA. Application judge found SA was fair and reasonable and determined $177,344.18 was payable to Firm C and $300,576.67 was payable to Firm P. Clients appealed.
Statute & Rules Considered	*Solicitors Act*, R.S.O. 1990, c. S.15, ss. 4, 15, 24, 28
Contingency Fee Agreement Breakdown	Settlement Agreement provided, among other things that: **1.** the "recovery amount" in the actions would be split one-third with the lawyers and the balance to Chrusz; **2.** Cheadle and Petrone would divide the amount allocated to the lawyers on a 30/70 basis; **3.** costs in the action would be split on the basis of 50% to Chrusz and the balance apportioned 70/30 in favour of Petrone; and **4.** a consent charging order would be granted to Cheadle to secure a solicitor's lien in its favour over any proceeds of the litigation or costs and a consent order would be granted by Cheadle releasing the litigation files to Petrone.
Issue/s with Agreement	The Appellants raised the general issue of whether the Settlement Agreement was enforceable as a CFA given the provisions of the Act at the time of execution of the Agreement (i.e. pre-2010 changes to the contingency fee legislation).
Outcome	**Held:** Appeal allowed in part. Appellants ordered to pay $15,000 in costs to the Respondent (Cheadle) The application judge did not err in concluding that the Agreement was reasonable in respect of Cheadle, notwithstanding the considerations raised by the Appellants, for two reasons. First, the current rules pertaining to contingency fee arrangements do not apply retrospectively [Section 28 of the Act as it existed in 2000 did not render contingency fee agreements void *ab initio*. (para 27)]. Second, while these provisions identify considerations that should be taken into account, they must be addressed as part of an evaluation of the totality of the arrangement between Cheadle and the Appellants. The particular elements of the arrangement identified by the Appellants are not such as to render the arrangement unreasonable on their own. (para 40) Appeal allowed in part with respect to the determination of the amount of the fees owing to

	Petrone, the issue of fairness and reasonableness is remitted to the Superior Court of Justice. **Followed:** *Raphael Partners v. Lam* (2002), 61 O.R. (3d) 417 (Ont. C.A.); *Housen v. Nikolaisen* (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577

Morrison V. Morrison (2010 ONSC 6268)

2010 CarswellOnt 8701, 2010 ONSC 6268, [2011] W.D.F.L. 385, [2011] W.D.F.L. 386, [2011] W.D.F.L. 392, [2011] W.D.F.L. 394, 194 A.C.W.S. (3d) 1213

Date	Heard: October, 2010 Judgement: November, 2010
Parties	Plaintiff: Glen Everald Morrison Defendant: Theresa Calara Morrison
Counsel	For Plaintiff: Mr. G. E. Morrison for himself For Defendant: Mr. Michael H. Tweyman for Respondent
Judge/s	Then: MacKenzie J.
Quick Facts	CFA agreement discussed within the context of spousal support payments, and CFA not at issue: "The position of the applicant is quite simply that his only source of income is approximately $39,000.00 per annum from his pensions and that although he has been involved on a part-time or ad hoc basis with the Business transferred by him to his daughter, such involvement has been strictly on a pro bono basis since he was diagnosed with a form of cancer in 2008. As to the basis on which the Business generates its income, his position is that the retainer/compensation agreements entered into by the clients of the Business provide only for payment of fees on contingency basis, namely, 20% of the amount recovered on the client's behalf."

Heydary Hamilton Professional Corp. V. Baweja (2011 ONSC 2568)

2011 CarswellOnt 2877, 2011 ONSC 2568, 201 A.C.W.S. (3d) 349

Quick Facts	"On October 19, 2007 Thakar retained the Lawyers to prosecute a franchise dispute against Druxy's." MOTION to set aside an Order for Assessement. Note: not helpful for the discussion of CF%, this case is more about interpreting a particular retainer agreement.
Contingency Fee Agreement	27% contingency fee: "Thakar signed a written retainer agreement... "an initial flat fee retainer in the amount of $50,000"... [plus a] "partial contingency fee" by which Thakar would pay the Lawyers "with reference to the actual amounts actually recovered inclusive of interest, but exclusive of the initial $50,000.00 or any amount awarded...in respect of costs and disbursements (the "Recovery Amount"), twenty-seven per cent (27%) of any Recovery Amount." "The Agreement confirmed that if costs of the Action were awarded to the Clients and paid to the Lawyers they "would be deducted from any fee payable to" the Lawyers. The Agreement had the following termination provision:"
Issue/s with Agreement	"… The issue is what the Clients should be required to pay for that work." "The Lawyers are of the view that in accordance with the Agreement they are entitled to the [$50k] simply for the privilege of retaining the Lawyers and thereafter they are entitled to 27% of recovery or in the event of termination, [$50k] plus the greater of 27% of recovery or of time based fees... their position is that they are entitled to the $50,000 in addition to their time based fees for which they have rendered an account for [$64k]" "The issue is this: In the event of recovery, are the Lawyers entitled to the $50,000 retainer plus their contingency based fees of 27% of recovery or is the $50,000 retainer part of and deducted from their contingency based fees? In the event of termination before recovery (as is the case here), are the quantum meruit fees to which the Lawyers are entitled $50,000 plus their time based (or contingency based) fees or must the $50,000 be deducted from their time based (or contingency based) fees? In this Assessment the issue in dispute is whether the [$50k] retainer is to be treated as part of or in addition to the time based fees and disbursements of [$64k]"
Outcome	**Held:** Motion dismissed. "In my view, the determination of whether the Lawyers are entitled to $50,000 plus time based fees or whether the Lawyers must account for the $50,000 retainer as part of time based fees is a matter relating solely to the quantum of the account." "Given my determination that the Order for Assessment stands, section 6(4) [of the *Solictors Act*] prevents the Lawyers from claiming the fees of [$64k] as against Thakar ... in the Action without leave."

Simpson V. Bridgewater Bank (2012 ONSC 2191)

2012 CarswellOnt 5054, 2012 ONSC 2191, 18 C.L.R. (4th) 257, 215 A.C.W.S. (3d) 326

Quick Facts	This case details the interaction between a CFA agreement and indemnity costs: "The existence of a [CFA] does not affect the amount or any right or remedy for the recovery of costs payable by a third party to a client. However, the client who has entered into the [CFA] is not entitled to recover more than the amount payable by the client to the client's own solicitor under the agreement. See sections 20(1) and 20(2) of the Solicitors Act, as noted in Orkin, The Law of Costs..."" "The [CFA] between Mr. Simpson and his solicitors is that he will not be required to pay unless he is successful.... if Mr. Simpson is successful, the solicitors "... will recover based on standard billing rates plus premium for risk" in accordance with their Bill of Costs."

Indcondo Building Corp. V. Sloan (2012 ONCA 83)

– see second ONCA decision below

2012 CarswellOnt 1742, 2012 ONCA 83, 18 C.P.C. (7th) 223, 211 A.C.W.S. (3d) 811, 347 D.L.R. (4th) 119

Date	Heard: February 2, 2012 Judgment: February 7, 2012
Parties	Indcondo Building Corporation (plaintiff), Appellant Valerie Frances Sloan, David Robin Sloan and Cave Hill Properties Ltd. (defendants), Respondents
Counsel	Philip P. Healey, for Appellant P. James Zibarras, Trung Nguyen, for Respondents
Judge/s	Robert P. Armstrong J.A.
Quick Facts	Law firm for appellant was retained on contingency basis. It was accepted that appellant corporation and its principal were impecunious, and had been so found in previous motion for security for costs. Appellant had insufficient assets in Ontario to pay costs below and costs of appeal. Respondents brought motion seeking order requiring law firm for appellant to pay into court $300,000 as security for costs of action, which was dismissed as abuse of process, and also to pay into court $75,000 as security for costs of appeal. (see more detailed Facts in 2nd chart below)
Statute & Rules Considered	NA
Contingency Fee Agreement Breakdown	Details of CFA not provided, see 'Quick Facts'
Issue/s with Agreement	The respondents argue that lawyers who act on a contingency basis and who have accepted the risk of bearing the plaintiff's costs of litigation should be treated no differently than the plaintiff would be treated when it comes to the costs obligations to a successful defendant. (para 5)
Outcome	**Held:** Motion dismissed without costs. "…as a matter of principle, the lawyer who acts on a contingency fee basis is already carrying the significant risk of not being paid and, as in this case, being stuck with the costs of paying the disbursements. To add the additional burden of posting security for costs would no doubt have a chilling effect on those lawyers who might otherwise make their services available on a contingency basis — thus creating another problem for access to justice." (para 7) **Followed:** *Intellibox Concepts Inc. v. Intermec Technologies Canada Ltd.* (2005), 2005 CarswellOnt 1603, [2005] O.T.C. 310, 14 C.P.C. (6th) 339 (Ont. S.C.J.)

Indcondo Building Corp. V. Sloan (2012 Onca 502) – Appeal And Motion For Review Of (2012 ONCA 83)

– see above

2012 CarswellOnt 9030, 2012 ONCA 502, 217 A.C.W.S. (3d) 540, 22 C.P.C. (7th) 22, 293 O.A.C. 392, 352 D.L.R. (4th) 235, 91 C.B.R. (5th) 324

Date	Heard: March 14, 2012 Judgment: July 18, 2012
Parties	Indcondo Building Corporation (plaintiff), Appellant Valerie Frances Sloan, David Robin Sloan and Cave Hill Properties Ltd. (defendants), Respondents – brought this motion
Counsel	P. James Zibarras, Trung Nguyen, for Appellant Philip P. Healey, Miranda Spence, for Respondents
Judge/s	S.T. Goudge, Robert J. Sharpe, R.G. Juriansz JJ.A.
Quick Facts	Impecunious plaintiff was judgment creditor of defendant David Sloan (DS). DS allegedly fraudulently conveyed or preferred certain property to others to defeat plaintiff's claim. Plaintiff brought action to set aside allegedly fraudulent or preferential conveyances ("2002 action"). DS subsequently became bankrupt, 2002 action was stayed by operation of *Bankruptcy and Insolvency Act* and plaintiff proved claim in bankruptcy. DS was subsequently discharged, and obtained Act order dismissing 2002 action. Plaintiff then retained counsel on contingency basis to pursue derivative trustee action against bankrupt and related defendants said to be recipients of fraudulent or preferential conveyances pursuant to s. 38 of Act ("2008 action"). DS brought motion to dismiss 2008 action as abuse of process as, inter alia, res judicata of 2002 action. Motion was granted, 2008 action was dismissed and plaintiff appealed. Defendant brought motion for order compelling counsel for plaintiff to post security for costs of appeal and of proceedings below personally (see above chart). Motion was dismissed and now the defendant has brought a motion for review. (Thus, there are two matters dealt with in this decision: 1) motion for review brought by defendant; and 2) appeal.)
Statute & Rules Considered	*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s 38, a 178(2) *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 61.06
Contingency Fee Agreement Breakdown	NA – see Indcondo Building Corp. v. Sloan (2012 ONCA 83) above
Issue/s with Agreement	NA – see Indcondo Building Corp. v. Sloan (2012 ONCA 83) above (Appeal itself not directly relevant to CFA.)
Outcome	**Held:** Appeal allowed and motion to review dismissed. "The appellant is entitled to its costs for the motion and in this court, including the review of the order of Armstrong J.A. and the appeal itself." (para 34) Goudge J.A. agreed with reasons of Armstrong J.A. to dismiss motion (see chart above), a successful motion would have required that the appeal be deemed "frivolous" per Rule 61.06… which clearly was not the case (per Goudge J.A.) given that it was allowed.
Additional Reasons in *Incondo Building Corp v Sloan* (2012 ONCA 619)	Additional reasons relating to costs of judgement reported in this decision were delivered by S.T. Goudge J.A., Robert J. Sharpe J.A., R.G. Juriansz J.A. (same judges as on this appeal/motion) on September 21, 2012.

Rbc Life Insurance Co. V. Janson (2013 ONSC 3154)

2013 CarswellOnt 8593, 2013 ONSC 3154, 116 O.R. (3d) 264, 229 A.C.W.S. (3d) 851

Quick Facts	Only mention of CFA: "It should have come as no surprise that RBC Life balked at paying an account provided by a firm it did not retain and calculated on the basis of a contingency arrangement not previously disclosed to or accepted by RBC Life. No description was provided of the services rendered except the statement in the accompanying correspondence that the firm had acted for Mr. Janson "through three appeal levels (Claims, Appeals, Tribunal) and continue to do so." As noted, despite the wording of the policy, RBC Life offered to contribute $6,500 towards costs in May, 2011 notwithstanding the fact that the law firm did not provide a summary of the services rendered and time expended until fifteen months later.20 "

Stojanovic V. Bulut (2014 ONSC 672)

2014 CarswellOnt 1025, 2014 ONSC 672, 237 A.C.W.S. (3d) 868

Date	Heard: November 29, 2013 Judgment: January 29, 2014
Parties	Miodrag Stojanovic, Plaintiff (Responding party) Nikola Bulut (aka Nicolas Bulut), Steven Bulut, Marko N. Bulut, 1091369 Ontario Inc. and 1112618 Ontario Inc., Defendants (Moving parties)
Counsel	J. Kleiman, for Plaintiff / Responding Party P. Jervis, for Defendant / Moving Party
Judge/s	Master C. Albert
Quick Facts	Defendants asked court to order plaintiff to post security for costs of $217,918.35 and to submit to further examination for discovery. Plaintiff was resident of Belgrade in State Union of Serbia and Montenegro. In action plaintiff sought to recover $1,368,923 that he claimed he paid in kind by providing equivalent value in pulp products to Serbian government corporation to satisfy guarantee. He claimed to have guaranteed funds given by corporation to defendant NB. He hoped to recover money by forcing sale of land registered to defendant numbered company in Ontario. Principal of numbered company was defendant SB, son of NB. Plaintiff alleged that NB fraudulently transferred assets to his son to prevent plaintiff from realizing on his Serbian judgment, and brought motion for security of costs.
Statute/Rules Considered	*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rs 56.01(1)(a) and (1)(e).
Contingency Fee Agreement Breakdown	MS entered into a CFA with Mr. Genereaux, which provided for: • 30% contingency fee
Issue/s with Agreement	The Buluts allege that the CFA between the plaintiff, MS and Mr. Genereaux makes Mr. Genereaux a litigation creditor and creates an obligation on the part of Mr. Stojanovic to obtain the funds to post security for costs from Mr. Genereaux to fund Mr. Stojanovic's litigation. "The issue is whether a lawyer who accepts a deferred fee arrangement should be required to post security for costs." (para 41)
Outcome	**Held:** Motion granted. On CFA issue: "In my view a lawyer who accepts such a fee arrangement is not a commercial creditor. Rather, such a lawyer is providing access to justice to litigants who may not otherwise have sufficient liquidity to participate in time consuming and costly litigation. It would not be good policy for the court to provide a disincentive to lawyers willing to take cases on a contingency basis and risk an unsuccessful result." (para 41) "Having found that Mr. Stojanovic has no assets in Ontario and is neither impecunious nor in an involuntary position of financial hardship, and further finding that his claim does not have a strong chance of success, THIS COURT ORDERS THAT Mr. Stojanovic pay into court security for costs…" (para 57)

Hames V. Greenberg (2014 ONSC 245)

2014 CarswellOnt 664, 2014 ONSC 245, 237 A.C.W.S. (3d) 649, 23 B.L.R. (5th) 117

Date	Heard: December 13, 2013 Judgment: January 20, 2014
Parties	Richard Hames, R. Hames Family Trust and BHCC Services Inc., Applicants Stanley Greenberg, S. Greenberg Family Trust, Zvia Wered, Josip Zaborski, J. Zaborski Family Trust, Sabatino Cipro, S. Cipro Family Trust, 1327519 Ontario Inc., Residential Energy Savings Products Inc. and Consumer's Choice Home Improvements Corp., Respondents
Counsel	L. Munro, for Applicants M. Klaiman, for individual Respondents J. Levitt, for corporate Respondents
Judge/s	D.M. Brown J.
Quick Facts	Shareholders Hames (H), Greenberg (G), Zaborski (Z), and Cipro (C) and their respective trusts held shares in corporation that owned two subsidiaries. H was allegedly excluded from all corporate matters including payouts when he announced his intention to retire. H and his trust commenced action against other shareholders, their trusts, corporation, and subsidiaries for relief from oppression. H and his trust brought motion for order requiring corporation to pay interim costs
Statute/Rules Considered	*Business Corporations Act*, R.S.O. 1990, c. B.16, ss 248, 248(4), 249(4).
Contingency Fee Agreement Breakdown	Greenberg filed an affidavit deposing that Hames once told him that he had "a special arrangement with Lerners wherein they had agreed to accept payment at the end of the case, rather than requiring payment on an ongoing basis for fees incurred". (para 57) Greenberg thought Hames meant a contingency fee arrangement. Hames denied making any such statements and deposed: "My retainer agreement with Lerners LLP is not now and never has been on a contingency fee basis. I am required to pay all legal fees and expenses, as they are incurred." (para 57)
Issue/s with Agreement	NA – the only mention of contingency fees in the lengthy decision is in paragraph 57 – which I have recreated above. There were no contingency fee issues per se and the above was developed any further later in the judgement.
Outcome	**Held:** Motion granted in part. Interim costs awarded to Hames. **Followed:** *Alles v. Maurice (1992 – Ont Gen Div)*

Siskinds Llp V. Canadian Imperial Bank Of Commerce

– not a traditional CFA under Solicitors Act – likely not relevant for your purposes but included just in case

2014 CarswellOnt 7133, 2014 ONSC 3211, [2014] O.J. No. 2548, 241 A.C.W.S. (3d) 592

Date	Heard: January 22, 2014 Judgment: May 28, 2014
Parties	Siskinds LLP, Plaintiff Canadian Imperial Bank of Commerce, Defendant
Counsel	E. Cherniak, Q.C., J. Squire, for Plaintiff P. LeVay, J. Safayeni, for Defendant
Judge/s	D.M. Brown J.
Quick Facts	Parties entered into agreement pursuant to which plaintiff would collect debts owing to defendant and would receive percentage of amounts collected (agreement). Part of the work the plaintiff completed for the defendant was work on “opposition files”, essentially files on which an opposition to a *BIA* discharge had been filed and which might require court attendances. CIBC paid Siskinds a contingency fee on "opposition files". Section 15(d) of agreement included clause stating that that if agreement was terminated, plaintiff could invoice defendant for services performed up to date of termination (disputed clause). Plaintiff's interpretation of disputed clause was that it entitled plaintiff to be compensated in respect of payments made by debtors after termination date. Defendant's interpretation of disputed clause was that plaintiff was only entitled to fees on payments received up until termination date. Defendant terminated agreement. Plaintiff commenced action claiming compensation based on its interpretation of disputed clause. Plaintiff brought motion for partial summary judgment, and defendant brought cross-motion for summary judgment dismissing action.
Statute/Rules Considered	NA
Contingency Fee Agreement Breakdown	CIBC paid Siskinds a contingency fee on "opposition files", ranging from 30% all inclusive to 35% plus costs plus taxes, depending upon the file. CIBC also paid Siskinds a 10% contingency fee on all payments received, prior to the termination date of June 30, 2011, on the Siskinds Files.
Issue/s with Agreement	NA – see ‘Outcome’
Outcome	**Held:** Motion dismissed; cross-motion granted. “I see little if any resemblance between the work performed by Siskinds under the 2008 Business Agreement and that performed by lawyers under traditional [CFAs] because Siskinds performed largely clerical, administrative debt monitoring and collection work using non-legal staff under its agreement with the CIBC.” (para 58)

Hervé Pomerleau Ontario Inc. V. Ottawa (City) (2014 ONSC 1496)

2014 CarswellOnt 2727, 2014 ONSC 1496, [2014] O.J. No. 1040, 238 A.C.W.S. (3d) 312

Date	Judgment: March 7, 2014
Parties	Defendant counsel not named in decision.
Counsel	David Elliott, Christopher McLeod, for Plaintiff Ronald Caza, Alyssa Tomkins, for Defendant
Judge/s	Albert Roy J.
Quick Facts	Defendant successfully defended plaintiff's action. Defendant submitted that costs should be awarded on substantial indemnity basis because of repeated allegations of bad faith on part of plaintiff toward defendant. Parties made submissions regarding costs
Statute/Rules Considered	*Courts of Justice Act*, R.S.O. 1990, c. C.43, s 131. *Solicitors Act*, R.S.O. 1990, c. S.15, s 20(2). *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rs 49,, 49.10, 57, 57.01.
Contingency Fee Agreement Breakdown	Fee agreement provided for: • blended rate of $171/hour • if costs awarded by the Court were in excess of the blended rate, excess would be shared by counsel and Defendant
Issue/s with Agreement	**An ancillary issue to the main costs disagreement:** Is the fee agreement a CFA? Counsel for the Defendant asserts that it is.
Outcome	**Held:** Fixed costs awarded (see paras 14-15 for details) **"**Plaintiff's language may well have been exaggerated and colorful but I made no findings that the Plaintiff conducted the litigation in a reprehensible or outrageous manner." (para 3) **On fee agreement:** "I disagree with counsel that this is a contingency agreement. Nor would I categorize it as Plaintiff counsel has a risk premium which have been referred to in the Supreme Court of Canada decision in *Walker v. Ritchie* [citation removed] and usually involves counsel representing an impecunious Plaintiff." **Followed:** *Dunstan v. Flying J Travel Plaza (2007 – Ont SCJ); Mantella v. Mantella (2006 – Ont SCJ); Wasserman, Arsenault Ltd. v. Sone (2000 – Ont SCJ)*

Evans Sweeny Bordin Llp V. Zawadzki (2015 ONSC 869)

– see ONCA decision below

2015 CarswellOnt 2872, 2015 ONSC 869, 250 A.C.W.S. (3d) 696

Date	Heard: February 5, 2015 Judgment: February 6, 2015
Parties	Evans Sweeny Bordin LLP, solicitors Joseph Zawadzki, Frenchmen's Creek Estates Inc. and 550075 Ontario Inc., clients
Counsel	Mr. Michael Bordin, for Solicitors Mr. William L. Roland, for Clients
Judge/s	J.A. Ramsay J.
Quick Facts	Three invoices for legal services were referred to an assessment officer by order of a judge. The assessment officer made a report on December 10, 2013. The assessment officer allowed $268,354.13 of $812,543.91 in fees. He added pre-judgment interest of $29,333.87. He deducted $4,691.86 for fees already paid and $47,870.62 for costs of the assessment. His final certificate, then, required the clients to pay $245,125.52. The clients submit that the fees should be further reduced. The solicitors accept the $268,354 for fees, but submit that the assessment officer should not have disallowed the $500,000 bonus that was provided for in a written CFA. Motion by solicitors and clients opposing confirmation of assessment officer's report.
Statute/Rules Considered	*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R 54.09.
Contingency Fee Agreement Breakdown	Of the approximately $800,000 in fees submitted for assessment, $500,000 were payable under a CFA, which provided for a bonus of $500,000 if appeal was granted (appeal was granted).
Issue/s with Agreement	**A.** Did the assessment officer have the jurisdiction to decide on the validity of the CFA? **B.** If yes, was the assessment officer's conclusion unreasonable?
Outcome	**Held:** Report of assessment officer varied (see para 35 for details) **A.** "…assessment officer can decide the validity of a [CFA] only if the question is referred to him, and that an assessment officer has no jurisdiction to decide whether such a contract is fair and reasonable. In the case at bar, nothing to do with the [CFA] was referred to the assessment officer. He acted without jurisdiction." (para 12) "Under the order of Tucker J., the entire amount is now payable." (para 16) **B.** Yes. "The assessment officer's conclusion was unreasonable. I would have set it aside on that ground if I had thought that he had jurisdiction." (para 34) **Followed:** *Girao v. Bogoroch & Associates (2012 ONSC 2495); Williams (Litigation Guardian of) v. Bowler (2006) (Ont SCJ)*

Evans Sweeny Bordin Llp V. Zawadzki (2015 ONCA 756)

– SEE ONSC DECISION ABOVE

2015 CarswellOnt 16984, 2015 ONCA 756, 127 O.R. (3d) 510, 259 A.C.W.S. (3d) 380, 342 O.A.C. 160, 393 D.L.R. (4th) 399, 80 C.P.C. (7th) 1

Date	Heard: October 20, 2015 Judgment: November 9, 2015
Parties	Joseph Zawadzki, Frenchmen's Creek Estates Inc. and 550075, Appellant Evans Sweeny Bordin LLP, Respondent
Counsel	William L. Roland, for Appellant Michael Bordin, for Respondent
Judge/s	E.E. Gillese, P. Lauwers, David Brown JJ.A.
Quick Facts	Pursuant to CFA, land owners and developers ("owner" – now appellant) agreed to pay solicitors a bonus of $500,000 in the event their appeal from final order of foreclosure was granted. The appeal was granted and solicitors (now respondent) rendered account for just over $700,000, including the bonus. Owner obtained order to assess account, assessment officer reduced amount, and held that CFA was *not* fair or reasonable. Both parties moved to oppose confirmation of assessment officer's report. Motions judge held that assessment officer lacked jurisdiction to consider fairness and reasonableness of fee agreement and concluded that agreement was fair and reasonable. Owner appealed.
Statute & Rules Considered	*Solicitors Act*, R.S.O. 1990, c. S.15, s 3. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 54.09(5)
Contingency Fee Agreement Breakdown	On October 17, 2007, the parties entered into a CFA governing the appellants' retainer of the respondents, to represent them in an appeal of their initial failed application for relief from foreclosure. Under the CFA, the appellants agreed to pay the respondents "the full sum of all legal fees and all disbursements incurred by the Law Firm." And that, "In the event that the appeal is granted, the Law Firm shall be paid $500,000...The above amounts shall be due and payable to the Law Firm within 60 days of the granting... of the appeal." The appeal was granted by order of the ONCA dated February 6, 2008. The respondents rendered an August 7, 2008 account to the appellants for $700,307.96, which included the $500,000 bonus.
Issue/s with Agreement	**A.** Was the CFA fair and reasonable? **B.** And, did the assessment officer have the jurisdiction to make determinations of the fairness and reasonableness of the CFA?
Outcome	**Held:** Appeal dismissed. Appellants ordered to pay the respondents $11,000 in costs (including disbursements and HST) The motions judge correctly found that the assessment officer lacked jurisdiction to consider the fairness and reasonableness of the contingency fee agreement. The record before the motions judge enabled him to assess fairly the agreement, and there is no basis for appellate intervention in his conclusion that the agreement was fair and reasonable.

G M Textiles Inc V. Sidhu (2016 ONSC 2055)

2016 CarswellOnt 4377, 2016 ONSC 2055

Date	Heard: September 30, 2013; January 2, 2014; January 3, 2014; January 28, 2014; June 30, 2014; July 2, 2014; July 3, 2014; July 4, 2014; April 13, 2015; April 14, 2015; April 16, 2015; April 30, 2015; January 26, 2016; March 1, 2016; March 9, 2016 Judgment: March 23, 2016
Parties	G M Textiles Inc., Gurdev Singh Grewal, and Mohinder Singh Matharoo, Applicants Fateh Singh Sidhu, et al, Respondents
Counsel	M. Solmon, F. Damji, for Applicants M. Simaan, for Respondents
Judge/s	Robert B. Reid J.
Quick Facts	Applicants invested and loaned money to several Popeye's franchise businesses. The corporate respondents were the operating companies and companies which had leasehold interests in the businesses. Mr. Fateh Singh Sidhu was the principal of the companies and was in charge of running the businesses. On June 14, 2012, all the legal proceedings were settled and Minutes of Settlement were executed. A final judgment was granted on July 20, 2012 for approximately $1.7 million for the applicants against the respondents. Prior to the execution of the Minutes of Settlement, a number of court orders were made, some of which continued in force. Applicants brought two motions to the court seeking findings of contempt against the respondents, and in particular against Fateh Singh Sidhu, as a result of his breaches of these court orders.
Statute/Rules Considered	*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rs 57.01, 60.05, 60.09, 60.11, 60.11(5).
Contingency Fee Agreement Breakdown	Counsel for the applicants worked under a CFA, which provided for "a significant increase in the billed hourly rate in the event of success" (para 68). The CFA was not court approved.
Issue/s with Agreement	CFA was only at issue in the final determination of costs awarded against the respondents.
Outcome	**Held:** Motions granted. Reid J: "I found that Fateh Singh Sidhu was in contempt as a result of numerous failures to comply with multiple terms of six orders of this court" (para 2). And, since the "…contingency fee agreement has not been approved in advance by the court. I do not consider it appropriate to impose that obligation on the respondents [in the determination of costs]." (para 68) Respondents ordered to pay applicants $369,644.26 (inclusive of HST and disbursements). **Followed:** *Sussex Group Ltd. v. Fangeat (2003 – Ont SCJ)*

III. Employment Issues

Loreto V. Little (2010 ONSC 755)

2010 CarswellOnt 916, 2010 ONSC 755, [2010] O.J. No. 679, 185 A.C.W.S. (3d) 230

Date	Heard: January/February, 2010 Judgement: February, 2010
Parties	Plaintiff: Loreto Defendants: Little; Morello; Segreto; Vettese; Borello; Miranda; Sawczak; Morello, Vettese, Segreto LLP
Counsel	For Plaintiff: Jonathan Speigel for Plaintiff For Defendants: Enzo Di Iorio, Melissa Mackovski
Judge/s	Then: Edward Belobaba J.
Quick Facts	Termination of an employee at a firm, and what amount of compensation the terminated employee was entitled to, given that most of the firm's employees were billed through CFAs.
Statute & Rules Considered	NA
Contingency Fee Agreement	30% CFA: "The legal fee was 30% of the total amount recovered less disbursements which had to be paid in any event by the client. If the retainer was terminated by either LLM or the client … the client agreed to pay for the time that had been spent on the file to date at the prevailing hourly rates..."
Issue/s with Agreement	NA – CFA was not considered
Outcome	NA – CFA was not considered

Tossonian V. Cynphany Diamonds Inc. (2015 ONSC 766)

– additional reasons relating to costs of judgement in (2014 ONSC 7484)

2015 CarswellOnt 1283, 2015 ONSC 766, 249 A.C.W.S. (3d) 43

Date	Judgment: February 3, 2015
Parties	Razmig Tossonian, Plaintiff Cynphany Diamonds Inc., o/a Symphony Diamonds, Defendant
Counsel	Andrew Wray, Christian Vernon, Niiti Simmonds, for Plaintiff William Chalmers, for Defendant
Judge/s	Graeme Mew J.
Quick Facts	Plaintiff commenced application for wrongful dismissal. At trial it was concluded that plaintiff did not have fixed term contract of employment, but that he was dismissed and was entitled to two months' notice of termination. Plaintiff was awarded damages of $13,520 plus pre-judgment interest, which were within monetary jurisdiction of Small Claim Court. Parties made submissions regarding costs.
Statute/Rules Considered	NA
Contingency Fee Agreement Breakdown	CFA had not been produced
Issue/s with Agreement	Issue regarding CFA was that it had not been produced and defendants argue that this is “essential evidence” lacking regarding the costs equation.
Outcome	**Held:** Plaintiff awarded partial indemnity costs of the trial (fixed at $88,450.98 – inclusive of disbursements and HST + $3,500 for costs of the motion) “Counsel have not directed my attention to any case in which the disclosure of a contingency fee agreement has been held to be a pre-requisite of a plaintiff's entitlement to recover partial indemnity costs of a proceeding. In the circumstances, the fact that the plaintiff had a contingency fee agreement with his lawyers is not a sufficient reason for not awarding him costs in this case.” (para 17)

IV. Estates/Trusts

Krentz Estate V. Krentz (2011 ONSC 1653)

2011 CarswellOnt 1651, 2011 ONSC 1653, [2011] O.J. No. 1124, 199 A.C.W.S. (3d) 1025, 66 E.T.R. (3d) 132

Judge/s	Then: Turnbull J.
Quick Facts	"Roman Krentz (Roman) must have been a wise man. He recognized that appointing one or more of his four children to administer his estate would widen the existing estrangement among his children... When the Trustees moved to pass the accounts of the estate, a series of simmering issues bubbled to the surface."
Statute & Rules Considered	N/A - See "Contingency Fee Agreement" section
Contingency Fee Agreement	The Judge in this case was merely analogizing contingency fee retainers to a trustee of an estate, to decide what would be required of an estate trustee: "In recent years, the legislature has had to deal with an analogous situation with respect to contingency fees in various forms of civil actions, including class actions and personal injury claims. Strict requirements to validate such agreements have been included in relatively recent amendments to the regulations enacted under the Solicitors' Act, R.S.O. 1990, c.S. 15. ... Unfortunately, similar provisions have not been included in the Trustee Act, R.S.O. 1990 c.T. 23 to deal with situations where the solicitor will have a "contingent" interest in the estate. Compensation for a lawyer who is counsel and a Trustee is notionally similar to the lawyer acting on a contingency fee retainer in that ..."

Mcpeake V. Cadesky And Associates (2013 ONSC 6237)

2013 CarswellOnt 14926, 2013 ONSC 6327, 233 A.C.W.S. (3d) 360

Quick Facts	Action related to allegations of professional negligence against lawyer and firm of chartered accountants related to formation and constitution of family trust for plaintiff. In 2006, parties reached agreement that plaintiff would issue notice of action and then adjourn action sine die. Plaintiff's lawyer obtained different order for extension to February 2007 to serve and file statement of claim. Plaintiff's lawyer still understood that action was suspended. In 2007, action was administratively dismissed for delay but plaintiff's lawyer did not become aware that action had been dismissed until 2011. Plaintiff brought motion to reinstate action. (Motion was granted.)
Summary	Two mentions of CFA: "The withdrawal of funding meant that McPeake would have damages regardless of the outcome, as indicated above (in the form of either increased taxes or contingency fee)… It appears as if neither the Tax Court proceeding nor the rectification application had been started by the time Dawe's client decided to stop funding Rachert in June 2007. On July 12, 2007, Rachert wrote again to the Defendants stating that McPeake had retained him on a contingency fee basis and that his fees would form part of the damages claimed in the Ontario action."

Vitale V. Martin (2014 ONSC 2396)

2014 CarswellOnt 5472, 2014 ONSC 2396, 100 E.T.R. (3d) 152, 240 A.C.W.S. (3d) 57

Date	Heard: February 18-21, 24-28; April 2, 4, 2014 Judgment: April 16, 2014
Parties	Myrna Winnifred Vitale, Applicant Joanne Martin, Estate Trustee of the Estate of Salvatore Vitale and in her Personal capacity, Filippo Vitale and Giuseppina Vitale, Respondents
Counsel	A. Saji, for Applicant / Respondent Joanne Martin, Estate Trustee of the Estate of Salvatore Vitale, Respondent, for herself Filippo Vitale, Giuseppia Vitale, Respondents, for themselves J. Webster, for A. Saji
Judge/s	Peter B. Hambly J.
Quick Facts	Wife was married to deceased. There were two major assets in deceased's estate, which were his home and RSP's as well as life insurance. Subject to general term permitting sale of assets to pay debts, deceased left house to wife and her children. Wife brought application for dependant's relief under Succession Law Reform Act. Estate brought application for directions, including order for sale of house to pay debts and income tax on RSP. Following mediation, parties allegedly entered into settlement, with wife agreeing to pay estate $95,000 in return for title to house, which would be transferred to wife subject to current mortgage. Wife did not sign minutes of settlement. Issue arose as to whether parties entered into settlement agreement.
Statute/Rules Considered	*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rs 1.04(1), 2.01(1), 49.09.
Contingency Fee Agreement Breakdown	Details of CFA not given beyond: “Mr. Saji has acted for Myrna without charging her anything with the expectation of taking his fees out of whatever she may receive in these proceedings” (para 33)
Issue/s with Agreement	Main issue in case was whether or not parties entered into a settlement agreement. And, flowing from that, what legal fees are available to Mr. Saji.
Outcome	**Held:** Legal fees issues deferred to assessment officer, but with the following statement: “I would not think that Mr. Saji would be entitled to any fees from Myrna for his work at this trial since he accepted a retainer to take a case to trial that I have found had already been settled. I leave that to whatever Mr. Saji can work out with his client and to the assessment officer.” (para 35) “This case is an illustration of the perils of contingency fees because the lawyer has a financial interest in the outcome of the case.” (para 34)

Spiteri Estate V. Canada (Attorney General)

2014 CarswellOnt 14831, 2014 ONSC 6167, 246 A.C.W.S. (3d) 769

Date	Heard: October 6, 2014 Judgment: October 23, 2014
Parties	Christopher Spiteri, as Estate Trustee of the Estate of Tessa Spiteri et. al., Plaintiffs The Attorney General of Canada et. al., Defendants
Counsel	C. Katie Black, for Plaintiffs Miriam Vale Peters, for Defendant, Hay Agnieszka Zagorska, for Defendant, Attorney General of Canada
Judge/s	Master MacLeod
Quick Facts	Deceased purported to change beneficiary of employer pension from ex-husband to mother, for benefit of her children. Unbeknownst to deceased, employer rejected her change of beneficiary form. After deceased's death, death benefit was paid to ex-husband, who refused to pay it to deceased's estate or children. Estate trustee brought action against employer and ex-husband. Estate's counsel was retained on a CFA (Caza Saikaley LLP). Action was settled on terms discontinuing action against ex-husband without costs and that employer would pay death benefits to estate. Estate and deceased's ex-husband brought motions for costs of settled action.
Statute/Rules Considered	*Courts of Justice Act*, RSO 1990, c. C.43, s 131. *Rules of Civil Procedure*, RRO 1990, Reg. 194, R 20.04(2)(b), 57, 57.01(1)(a)-(g), 57.01(7), 58
Contingency Fee Agreement Breakdown	CFA provided: • 20% of recovery in the event of a successful outcome • disbursements and applicable HST to be paid on an ongoing basis • in the event the retainer terminated by the client prior to resolution of the claim, then hourly rates apply, which are "contingency rates", higher than the firm's normal hourly rates to account for risk of contingency fee work
Issue/s with Agreement	What is the relevance of the actual fee charged to the client pursuant to the CFA to the appropriate amount to be paid by the defendant Attorney General to the plaintiff estate as costs award?
Outcome	**Held:** Estate's motion granted. Ex-husband's motion dismissed. It would not be appropriate to use 60% of the "contingency rate" because it incorporates a risk premium that is not relevant here, and is only provided for in the CFA for when the client terminate their counsel's services. "I fix the amount to be paid by the Attorney General as partial indemnity costs at $49,162.11 inclusive of HST and disbursements. There will be no costs of the motion." (para 70) **Followed:** *Boucher v. Public Accountants Council (Ontario)* (2004) (Ont CA); *McLean v. Knox* (2012) (Ont SCJ); *Moore v. Getahun* (2014) (Ont SCJ); *Walker v. Ritchie* (2006 SCC 45)

V. Other /Unclear

Sun V Pomes (2012 Onsc 3031) – Motion To Extend Time For Appeal

– see (2013 ONSC 508) below

2012 CarswellOnt 6342, 2012 ONSC 3031

Date	Heard: May 22, 2012 Judgment: May 23, 2012
Parties	Jia Ke Sun (plaintiff), Moving Party Dr. Regis Pomes and Hospital for Sick Children, Altaf M. Khan, Respondent on Motion
Counsel	Jia Ke Sun, for himself No one for Altaf M. Khan
Judge/s	Aston J.
Quick Facts	Order was made in the Superior Court of Justice proceeding in which Dr. Sun is the plaintiff and Dr. Pomes and the Hospital for Sick Children are named as defendants, but the order in question relates to a dispute between Dr. Sun and his former solicitor Altaf Khan. When Dr. Sun brought a motion to add a defendant in the Superior Court of Justice proceeding, solicitor Khan brought a motion the same day to be removed as Dr. Sun's solicitor of record. Dr. Sun disputed provision requiring law firm acting for defendant to reissue cheque drawn in favour of plaintiff and ordering that new cheque be drawn in favour of lawyer. Order required Sun to pay additional $390 to lawyer to receive delivery of file. Order required court file to be charged for solicitor's lien for one-third amount against any settlement of judgment. Plaintiff brought motion to extend time for appealing and for leave to appeal. Plaintiff claimed plaintiff never received motion material from lawyer until day in court and copy of notice of motion and supporting material were handed to plaintiff after decision was made. Plaintiff was not asked for submissions on any of issues now challenged. (unclear what the nature of the underlying claim is.)
Statute & Rules Considered	*Courts of Justice Act*, R.S.O. 1990, c. C.43, s 19(1)(a) *Solicitors Act*, R.S.O. 1990, c. S.15, s 28.1(8), 28.1(12) *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rs 15.04(2), 15.05(b), 16.03, 62.02
Contingency Fee Agreement Breakdown	NA – see **Sun v Pomes (2013 ONSC 508) chart below**
Issue/s with Agreement	NA – see **Sun v Pomes (2013 ONSC 508) chart below** Aston J. lacked jurisdiction to set-aside but stated… " I have reviewed the motion record of Mr. Khan. It is quite obvious on its face that there is nothing contained in that record to establish a contingency fee agreement that would be enforceable under the *Solicitors Act*. In particular, the prescribed regulations for form, content and enforceability found in Ontario Regulation 195/04 "contingency fee agreements", authorized and promulgated pursuant to s. 28.1(12) of the *Solicitors Act*, have not been met. Furthermore, the specific section of the *Solicitors Act* that Mr. Khan was trying to identify for Justice Allen, s. 28.1(8), only authorizes judicial approval of contingency fee agreements "arising as a result of an award of costs" (as is the case here) on a *joint* application to a judge by the solicitor and the client. A solicitor cannot unilaterally apply for approval. In short, s. 28.1(8) — incorrectly cited as s.

	28(8)(b) in the handwritten endorsement — was a red herring." (para 12)
Outcome	Held: Order granted "(i) extending the time for perfection of Dr. Sun's appeal by 60 days from today's date, if necessary; and (ii) granting leave to appeal paragraphs 2, 3 and 4 of the order of Allen J. dated November 21, 2011, if necessary." (para 14)

Sun V Pomes (2013 ONSC 508)

– see other ONSC decision above

2013 CarswellOnt 999, 2013 ONSC 508, 228 A.C.W.S. (3d) 266

Date	Heard: January 21, 2013 Judgment: January 21, 2013
Parties	Jia Ke Sun (plaintiff), Appellant Dr. Regis Pomes and Hospital for Sick Children, Altaf M. Khan, Defendants
Counsel	Jia Ke Sun, for himself Mr. Khan, also for himself
Judge/s	Herman J., Lederer J., Ray J.
Quick Facts	Order was made requiring Bennett Jones, the lawyers acting for the defendants in the main action, to pay the $28,815 costs award to Mr. Khan instead of to Dr. Sun. The order also required Dr. Sun to pay $390 to Mr. Khan to receive the solicitor's file and created a lien in Mr. Khan's favour for one-third of any future settlement or judgment. Individual plaintiff (Mr. Sun) appealed. See more detail in 'Quick Facts' in Sun v Pomes (2012 ONSC 3031) above. (unclear what the nature of the underlying claim is.)
Statute & Rules Considered	*Solicitors Act*, R.S.O. 1990, c. S.15, s 28.1(8)
Contingency Fee Agreement Breakdown	See 'Quick Facts'
Issue/s with Agreement	**A.** Individual defendant (Mr. Khan), admittedly, failed to serve motion in accordance with *Solicitors Act*. **B.** Individual defendant also failed to make joint application for approval of CFA. **C.** And, Dr. Sun did not have an opportunity to address the issues at the hearing of the motion.
Outcome	**Held:** Appeal allowed with costs awarded to Dr. Sun in the amount of $250 Any payments made to individual defendant to be paid to plaintiff.

Cookish V. Paul Lee Associates Professional Corp. (2013 ONCA 278)

– see additional reasons in (2013 ONCA 425) below

2013 CarswellOnt 5070, 2013 ONCA 278, [2013] O.J. No. 1947, 227 A.C.W.S. (3d) 1181, 305 O.A.C. 359, 39 C.P.C. (7th) 227

Date	Heard: January 14, 2013 Judgment: April 30, 2013
Parties	Paul Lee Associates Professional Corporation (respondent), Appellant Kathleen Cookish (applicant), Respondent
Counsel	Tanya A. Pagliaroli, for Appellant David S. Wilson, for Respondent
Judge/s	Doherty, Laskin, Blair JJ.A.
Quick Facts	Respondent client was represented by appellant law firm for long-term disability claim. Client signed what lawyer called standard contingency fee agreement, after first meeting with firm. Firm negotiated settlement of claim for client. 11 months after settlement, client informed law firm that she would seek accounting of bill. Client did not indicate issue with nature of retainer as contingency fee, but only challenged amount. On this understanding, firm consented to order requiring hearing with assessment officer (upon order by Corrick J. of the Superior Court). At assessment, new counsel for client raised issue of validity of retainer, to which firm responded that matter should be referred to Superior Court. Over objections of client, assessment officer adjourned hearing. Firm moved to have consent order set aside, but was unsuccessful. Firm appealed from consent order and failure to set order aside.
Statute/Rules Considered	*Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 90, 90(3) *Solicitors Act*, R.S.O. 1990, c. S.15, 3, 3(a), 4, 4(1), 6, 6(4), 6(5), 11, 18, 23, 24, 26-28, 28.1, 30 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rs 1.03(1), 54.01, 54.02, 55
Contingency Fee Agreement & Settlement Breakdown	Appellant firm negotiated settlement for respondent for a total settlement of $285,000 + $44,000 in costs and disbursements. Respondent received a net recovery of $237, 120, after deduction of the retainer amount.
Issue/s with Agreement	**Was the parties' agreement a CFA? Can an assessment officer make that determination?** At the heart of the dispute was a difference of opinion over the validity of the retainer agreement as a valid CFA. Appellant argued that assessment officer did not have jurisdiction to deal with the matter given this added layer of difficulty, needed to go to a judge instead (per s. 28.1 of the *Solicitors Act*).
Outcome	**Held:** Appeal allowed. Orders of motion judge and Corrick J. set-aside. Matter remitted to a judge of the Superior Court to hear the application for assessment. Costs awarded to appellant. Legislation placed matter of review in power of judge, not assessment officer, who has more limited powers. Although not a strict requirement, it was preferable that a judge determine the initial issues over what kind of agreement the retainer was, and refer matters of quantum to assessment officer afterwards if necessary. Issues of fairness and reasonableness of agreement were within knowledge of judge, more so than that of assessment officer. Jurisprudence supported proposition that if retainer was in dispute, matter was to be referred to judge.

Cookish V. Paul Lee Associates Professional Corp. (2013 ONCA 425)

– additional reasons to (2013 ONCA 278) – see above

2013 CarswellOnt 8517, 2013 ONCA 425, 229 A.C.W.S. (3d) 352

Date	Heard: January 14, 2013 Judgment: June 21, 2013
Parties	Kathleen Cookish (applicant), Respondent Paul Lee Associates Professional Corporation (respondent), Appellant
Counsel	Tanya A. Pagliaroli, for Appellant David S. Wilson, for Respondent
Judge/s	H. Doherty J.A., John Laskin J.A., R.A. Blair J.A.
Quick Facts	Client retained law firm pursuant to CFA. Law firm negotiated settlement of claim for client, who subsequently sought accounting of bill. Law firm consented to order requiring assessment hearing. Client's new counsel raised issue of validity of retainer. Assessment officer adjourned hearing. Law firm's motion to have consent order set aside was unsuccessful. Appeal by law firm was allowed
Statute & Rules Considered	NA
Contingency Fee Agreement Breakdown	NA
Issue/s with Agreement	NA
Outcome	“After considering the submissions, we fix costs of the appeal, including costs of the previous motion to quash, in favour of the appellant in the amount of $10,000 inclusive of disbursements and all applicable taxes… We confirm as well that, since the consent order of Corrick J. was set aside, including the costs order made by her against the appellant, any monies paid on account of that costs award must be returned.” (paras 3-4)

Miller, Canfield, Paddock And Stone Llp V. Bdo Dunwoody Llp (2015 ONSC 4806)

– see ONCA decision below

2015 CarswellOnt 16539, 2015 ONSC 4806, 260 A.C.W.S. (3d) 168

Date	Heard: July 27, 2015 Judgment: August 7, 2015
Parties	Miller, Canfield, Paddock and Stone LLP, Plaintiff BDO Dunwoody LLP, Defendant
Counsel	Myron W. Shulgan, Q.C., for Plaintiff James Thomson, for Defendant
Judge/s	Pamela L. Hebner J.
Quick Facts	Two members of defendant accounting and tax firm were charged with criminal offences. Charges were dismissed at preliminary hearing. Defendant funded cost of defence, exceeding $3 million. Defendant retained plaintiff law firm to bring action against Crown and others, seeking damages for wrongful prosecution. Parties entered into CFA. Defendant's action, alleging various causes of action was dismissed on summary judgment, except for claim for misfeasance in public office. Plaintiff did not have counsel capable of prosecuting appeal and recommended outside counsel. Parties disagreed over whether outside counsel's fees were disbursement payable by defendant or were plaintiff's responsibility to cover. Appeal was substantially successful, and defendants' claims were resurrected. Plaintiff submitted account to defendant in amount of $427,891.57. When account was not paid, plaintiff commenced action. Defendant brought motion for summary judgment dismissing action.
Statute/Rules Considered	*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R 20.04(2).
Contingency Fee Agreement Breakdown	Retainer agreement (CFA) struck between BDO and MCPS in April 2007 provided for: • 25% contingency fee of gross recovery of any damages, costs or re-judgement interest recovered • interim billing of client for disbursements in excess of $5,000, “from time to time” CFA included provision stating that client could have fee set-out in agreement reviewed by judge, and for the client’s right to terminate services, but that client would be liable to pay for services up until that point on based-on time spent on the case.
Issue/s with Agreement	**A.** Can the legal fees for the appeal be charged to BDO as "disbursements" within the meaning of the CFA? **B.** Was the CFA breached by MCPS? (I.e. The CFA requires MCPS to "act on our behalf in any and all proceedings against the informants, the DOJ, the CRA and their servants, agents and employees ...". MCPS suggests that "proceedings" does not include appeals. **C.** Did the breach of the agreement amount to repudiation and, if so, what options were available to BDO? **D.** Is BDO obligated to pay anything to MCPS on account of fees and disbursements?
Outcome	**Held:** Motion granted. Action dismissed. **A.** “In my view, MCPS cannot refer any of the work it agreed to do under the retainer agreement with BDO to another firm, then pay that firm as a disbursement. To include fees for any step as a disbursement would be inconsistent with the [CFA] reached between the parties.” (para 15)

	B. The appeal is a breach of the retainer agreement. “Proceedings” does include appeals. **C.** “the breach of contract on the part of MCPS was a substantial breach such as would justify future non-performance of BDO's obligations. The breach constituted a repudiation of the [CFA] on the part of MCPS.” (para 27) **D.** No. “BDO is not obligated to pay anything to MCPS on account of fees and disbursements as MCPS, as the repudiating party cannot enforce any of the terms of the agreement against BDO.” (para 36) **Followed:** *Guarantee Co. of North America v. Gordon Capital Corp.[1999] 3 SCR 423; 968703 Ontario Ltd. v. Vernon (2002) (Ont CA)*

Miller, Canfield, Paddock And Stone, Llp V. Bdo Dunwoody Llp (2016 ONCA 281)

– see ONSC decision above

2016 CarswellOnt 5970, 2016 ONCA 281

Date	Heard: April 15, 2016 Judgment: April 21, 2016
Parties	Miller, Canfield, Paddock and Stone, LLP (plaintiff), Appellant BDO Dunwoody LLP (defendant), Respondent
Counsel	Myron W. Shulgan, for Appellant James P. Thomson, for Respondent
Judge/s	John Laskin J.A., C.W. Hourigan J.A., David Brown J.A.
Quick Facts	Appellant law firm acted for respondent company (BDO) under a CFA. CFA allowed for firm to demand fees for services provided, if retainer was terminated. BDO terminated retainer, and firm delivered its account to company. BDO took the position that the Law Firm's refusal to accept responsibility for appeal counsel's fees amounted to a repudiation of the CFA (retainer). On June 19, 2012, BDO wrote the Law Firm to advise that BDO accepted the repudiation and directed the Law Firm not to take any further steps on behalf of BDO. BDO brought motion for summary judgment to dismiss the Law Firm's action to collect its fees. Motion was granted. Law firm appealed
Statute & Rules Considered	NA
Contingency Fee Agreement Breakdown	Under the CFA (dated April 30, 2007): • Law Firm agreed to act on behalf of BDO "in any and all proceedings" BDO intended to commence against certain defendants • contained a provision entitled "Termination of Legal Services," which provided that the client, BDO, had the "right, with or without cause, to cancel" the Law Firm's services • In that event, BDO agreed it would be "responsible to protect and pay the value of all services to date," and the retainer agreement specified how the value of services would be calculated. On April 15, 2014, the Law Firm rendered an invoice to BDO in the amount of $427,891.57 for the value of the services rendered to the date of termination of the retainer agreement. (no dispute about the amount)
Issue/s with Agreement	Whether or not the Law Firm’s refusal to accept responsibility for appeal counsel's fees amounted to a repudiation of the CFA.
Outcome	**Held:** Appeal allowed. Costs awarded to the Law Firm in the amount of $10,000, inclusive of disbursements and HST, and its costs of the motion below in the amount of $20,000, plus disbursements and HST. “…the motion judge did not apply the proper principle of law to her interpretation of that contract. A repudiatory breach of a contract does not, in itself, bring an end to a contract. Rather, it confers upon the innocent party, such as BDO, the right of election to treat the contract at an end.” (para 6) “We grant judgment in favour of the Law Firm in the amount of $427,891.57, together with pre-judgment interest.” (para 8)

Guest V. Fletcher (2016 ONSC 2623)

2016 CarswellOnt 6035, 2016 ONSC 2623

Date	Heard: March 11, 2016 Judgment: April 20, 2016
Parties	Christopher Stephen Guest, Appellant Beverley Evelyn Fletcher and Michael Patrick Fletcher, Defendants
Counsel	Appellant, for himself Eric Lavictoire, for Defendants
Judge/s	R. Smith J.
Quick Facts	The appellant, Christopher Guest is a lawyer who seeks leave to appeal the decision of Laliberté J. dismissing his claim for costs against his former clients. The motion judge exercised his discretion and refused to award Mr. Guest any costs because he found that he purchased his clients' interest in their action, which breached section 28 of the *Solicitors' Act*, s. 4. He found that the agreement whereby Mr. Guest acquired his clients' right to claim for damages against the vendors, in return for abandoning his claim against them for fees of approximately $15,000, was void ab initio. Mr Guest made motion for leave to appeal.
Statute/Rules Considered	*Solicitors' Act*, 2002, c. 24, Sched. A, S. 4, s 28 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R 62.04(4) -- sets out the grounds on which leave to appeal may be granted *Contingency Fee Agreements*, O. Reg. 195/04, ss 1, 2(10), 3.1, 4(4) *Insurance Act*, R.S.O. 1990, c. I.8 , s 152
Contingency Fee Agreement Breakdown	Mr. Guest submits that his unsigned retainer agreement with the Fletchers qualifies as a CFA and allowed him to recover 100% of the amount they recovered in their cause of action against the Vendors as legal fees, in return for foregoing his claim against them for fees of $15,000. Mr. Guest submitted that he sent letters to the Fletchers but acknowledged that his clients never signed an agreement with him containing any such terms. (para 27)
Issue/s with Agreement	**A.** Can a lawyer acquire a right of subrogation in his or her clients' action (and receive 100% of the damages recovered therefrom as legal fees)? **B.** Is this agreement between Guest and his clients an illegal CFA? **C.** Is this agreement prohibited by s. 28 of the *Solicitors' Act*?
Outcome	**Held:** Motion for leave to appeal dismissed. **A.** Mr. Guest is not an insurer as defined under the *Insurance Act* and he has not made any payment to his clients to indemnify them for a loss they suffered. As a result, Guest could not acquire any right of subrogation to bring an action in the name of his clients where he is not an insurer' but rather their lawyer, and where he never indemnified the Fletchers for any damages suffered. **B.** Agreement and minutes of settlement between Guest and his clients is *not* a CFA. It does not comply with requirement under the CFA Regulation, as it was unsigned, it did not clearly state it was a CFA, and the client no longer retained rights to make "critical decisions regarding the conduct of the matter"—i.e. the right not to proceed with the claim or to discontinue it (in contravention of ss. 1, 2(10), 3.1, 4(4)). **C.** Yes. "Whether the agreement was illegal or void *ab initio* was not essential to exercise of his discretion. I find that there is no reason to doubt the correctness of the motion judge's decision to dismiss Mr. Guest's claim for costs as being very unfair and in breach of s. 28…" (para 32) **Followed:** *Koliniotis*

APPENDIX NINE

Contingency Fee Retainer Agreement[31] [32] [33]

[Firm Name[34], Address[35], Telephone Number[36], ~~Email~~]

[Date][37]

[Client Name] [38]

[Client Address][39]

[Client Telephone Number][40]

Re: Accident of [date of accident]

Part 1: Our Services

Legal services covered by this contract

[**Firm Name and/or Lawyer Name**] is being retained by the client to provide the following services and to represent the client in respect to injuries, losses and damages resulting from a [**type of accident**] which occurred on or about [**date**].[41]

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[31] *Contingency Fee Agreements*, O. Reg 195/04, "1(1)(a) For the purposes of section 28.1 of the Act, in addition to being in writing, a contingency fee agreement, (a) shall be entitled "Contingency Fee Retainer Agreement"…

[32] *Solicitors Act*, s.28.1(1) "A solicitor may enter into a contingency fee agreement with a client in accordance with this section."

[33] *Solicitors Act,* s.28.1(4) "A contingency fee agreement shall be in writing."

[34] *Contingency Fee Agreements*, O. Reg 195/04, s.2.1 "2. A solicitor who is a party to a contingency fee agreement shall ensure that the agreement includes the following: 1. The name, address and telephone number of the solicitor and of the client."

[35] Contingency Fee Agreements, O. Reg 195/04, s.2.1

[36] Contingency Fee Agreements, O. Reg 195/04, s.2.1

[37] *Contingency Fee Agreements,* O. Reg 195/04 "1(1)(b) For the purposes of section 28.1 of the Act, in addition to being in writing, a contingency fee agreement,… (b) shall be dated; and…

[38] Contingency Fee Agreements, O. Reg 195/04, s.2.1

[39] Contingency Fee Agreements, O. Reg 195/04, s.2.1

[40] Contingency Fee Agreements, O. Reg 195/04, s.2.1

[41] s.2.2 A statement of the basic type and nature of the matter in respect of which the solicitor is providing services to the client."

Your role as client

You understand the importance of giving us all the facts and of being totally honest with us. We can only do our best job if we have your trust and are fully informed.

In particular, we ask you to give us all information you have, or have access to, which could help us in working on your lawsuit. We need copies of all letters and documents relating to the accident; medical reports; physiotherapy records; income tax records; paycheque stubs; and medical, drug, and parking receipts. If necessary, we will ask you to give us written authorization to obtain this information from other parties.

You retain the right to make all critical decisions regarding the conduct of your claim.[42]

Sole Representation

We will be representing solely you in this matter. Our representation of you does not include the representation of related persons or entities, such as family members; friends; the individuals or entities that are shareholders, directors or officers of a corporation, its parent, subsidiaries or affiliates; partners of a partnership or joint venture; or members of a trade association or other organization. In acting for you, we are not acting for or taking on any responsibilities, obligations or duties to any such related persons or entities and no lawyer-client or other fiduciary relationship exists between us and any such related persons or entities.

[Multiple Clients – Optional in the alternative if not sole representation]

Representing Multiple Clients with Apparent Same Interest (Joint Representation)

As you know the following **[party/parties]** are involved with you in this matter and you and they have asked us to represent all of you:

[name(s)]

We have discussed with you the principles we must follow of undivided loyalty. No information received from one of you as a part of the joint representation can be treated as confidential as between all of you. If we should receive information from one of you which we are instructed to keep confidential as between all of you, we will have to stop acting for all of you.

We have discussed these matters with you and have concluded that, at least at present, each of your individual interests in this matter are the same. The areas in which these individual interests may diverge in the future are:

[describe]

[42] *Contingency Fee Agreements*, O. Reg 195/04, s.2.10 "A statement that informs the client that the client retains the right to make all critical decisions regarding the conduct of the matter."

If we agree to act for one of you in a matter separate from this one, and we receive confidential information from that separate matter that is relevant to this matter, and the client in that separate matter wishes to keep it confidential, then

[Lawyer when drafting agreement must choose (i) or (ii) following]

(i) the information must not be disclosed to the other in this matter. This means we must withdraw from the joint representation.

or

(ii) the information must be disclosed to each of you in this matter and we may continue to act jointly for both of you.

Other conflicts may arise that cannot as yet be foreseen. A conflict of interest occurs when what is best for one of our clients somehow is not best for or hurts another of the firm's clients. At the present time we can represent all of you. However, if it later becomes apparent that there is a conflict, we confirm each of your instructions to attempt to resolve this conflict. If a successful resolution cannot be accomplished in a timely way or at all, or if our attempts to resolve the issue cause us ethical concerns, we will have to withdraw from representing all of you.

[if applicable] We confirm your agreement that if a contentious issue between you and

_____ arises, we may continue to advise _____

about the contentious matter and that I we will refer you to another lawyer or paralegal.

Our billings will name and be sent to all of you and each client is responsible for payment of the entire amount. You will need to decide between you how our accounts will be divided.

Part 2: Our Fees, Expenses, and Billing Arrangements

Our fee is a percentage and contingent on a favourable settlement or trial outcome

We have explained to you that you have the option of retaining a lawyer other than by a contingency fee agreement.[43]

There are two main ways a lawyer can bill you:[44]

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[43] *Contingency Fee Agreements,* O. Reg 195/04, s.2.3(i) "A statement that indicates, i. that the client and the solicitor have 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"

[44] *Contingency Fee Agreements,* O. Reg 195/04, s.2.3(i)

ithout court approval, and thus le. the client must prove that the ch were quite tever way the lawye nts, and the court22822822822822822822822822

Option 1 — by charging an **hourly** fee for work done;

Option 2 — by charging a **percentage** of the amount of money awarded in a settlement or court judgment; or, *alternatively*, by accepting court ordered costs as the fee.[45]

We have explained that hourly rates may vary among lawyers and that you can speak to other lawyers to compare rates.[46]

You have asked us to charge you fees based on a percentage of the amount of money awarded to you in a settlement or court judgment, or by accepting court ordered costs as the fee, whichever is greater (option 2). We agree.[47]

You acknowledge and understand that all the usual protections and controls on retainers between a lawyer and client, as defined by the Law Society of Upper Canada and the common law, apply to this contingency fee agreement.[48]

The disadvantage of choosing a percentage arrangement (option 2) is that you may end up paying us more in legal fees than if we were to charge you an hourly fee for work done (option 1). This could happen if we are fortunate in favourably settling your lawsuit quickly.

There are also advantages to choosing a percentage fee. First, if we cannot settle your case or if you lose at trial, then you would only have to pay our disbursements. You would not have to pay us any fees. Second, if we go to trial and win, the percentage fee may be less than an hourly fee if we have spent a significant amount of time on the trial.

The contingency fee is to be paid to us contingent on a settlement or trial verdict.[49]

Percentage based on work done

Our percentage fee will be less if your claim is settled than if it goes to trial. If it is settled, the fee will depend on the stage at which the lawsuit is settled. Our percentage fee will be:

1. **[___, for example, 20]% of the damages awarded** if we settle your claim before the *examination for discovery* (*Steps in a Lawsuit* explains this step)
2. **[___, for example, 25]% of the damages awarded** if we settle your claim during or after the examination for discovery and at least 90 days before trial
3. **[___, for example, 30]% of the damages awarded** if we settle your claim less than 90 days before trial or during trial, but before the court judgment

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[45] *Contingency Fee Agreements,* O. Reg 195/04, s.2.5. "A statement that sets out the method by which the fee is to be determined…"

[46] *Contingency Fee Agreements,* O. Reg 195/04, s.2.3(ii) "that the client has been advised that hourly rates may vary among solicitors and that the client can speak with other solicitors to compare rates,"

[47] *Contingency Fee Agreements,* O. Reg 195/04, s.2.3(iii). "that the client has chosen to retain the solicitor by way of a contingency fee agreement, and"

[48] *Contingency Fee Agreements,* O. Reg 195/04, s.2.3(iv) "that the client understands that all usual protections and controls on retainers between a solicitor and client, as defined by the Law Society of Upper Canada and the common law, apply to the contingency fee agreement."

[49] *Contingency Fee Agreements,* O. Reg 195/04, s.2.4 "A statement that explains the contingency upon which the fee is to be paid to the solicitor."

4. **[___, for example, 33-1/3]% of the damages awarded** if your claim does not settle and is decided by a trial.

For the purposes of calculating our percentage fee, any amount awarded in respect of costs and disbursements is excluded.[50]

You understand that we will not recover more in fees than you recover in damages or receive through a settlement.[51]

Costs

If we successfully settle your claim or win at trial, we will seek a sum of money called *costs* from the Defendant(s). If our fee is calculated as a percentage of the settlement or court judgment, you will receive the full amount of these costs since these costs are not included in the calculation.[52]

You understand that unless ordered otherwise by a judge[53], you are entitled to receive any costs contribution or awarded to you, on a partial or substantial indemnity scale.[54] [55]

If, on the other hand, you are liable to pay costs, you are responsible for paying any costs contribution or award, on a partial or substantial indemnity scale.[56]

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[50] *Contingency Fee Agreements,* O. Reg 195/04, s.2.5 "… 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."

[51] *Contingency Fee Agreements,* O. Reg 195/04, s.3.1 "If the client is a plaintiff, a statement that the solicitor shall not recover more in fees than the client recovers as damages or receives by way of settlement."

[52] *Contingency Fee Agreements,* O. Reg 195/04, s.2.5 "… 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."

[53] *Solicitors Act, s.*28.1(9) A contingency fee agreement that is subject to approval under subsection (6) or (8) is not enforceable unless it is so approved.

[54] *Solicitors Act*, s.28.1(8) 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, unless,
(a) the solicitor and client jointly apply to a judge of the Superior Court of Justice for approval to include the costs or a proportion of the costs in the contingency fee agreement because of exceptional circumstances; and
(b) the judge is satisfied that exceptional circumstances apply and approves the inclusion of the costs or a proportion of them.

[55] *Contingency Fee Agreements,* O. Reg 195/04, s.3.3(i) "A statement that explains costs and the awarding of costs and that indicates, i. that, unless otherwise ordered by a judge, a client is entitled to receive any costs contribution or award, on a partial indemnity scale or substantial indemnity scale, if the client is the party entitled to costs, and…"

[56] *Contingency Fee Agreements,* O. Reg 195/04, s.3.3(ii) "that a client is responsible for paying any costs contribution or award, on a partial indemnity scale or substantial indemnity scale, if the client is the party liable to pay costs."

Disbursements57

In addition to our percentage fee or court-ordered costs as our fee, you agree to pay all disbursements, even if we cannot settle your claim or lose at trial.

Minor disbursements

We will charge you for the minor ongoing disbursements that we have to pay. Some of these disbursements are: long distance telephone calls; photocopying costs; costs to deliver documents to court or the other lawyers; faxes; court filing fees (which the court charges to keep an official record of court documents); and, necessary land or company registry searches (for example, to find out the proper name of the defendant).

If we successfully settle your claim or win at trial, the settlement or court judgment most likely will require the Defendant(s) to reimburse you for some of these disbursements.

Major disbursements

We may have to hire other people such as court reporters, expert witnesses, accountants, and property appraisers to help us with your lawsuit. If we need to hire these people, we will first discuss the matter with you. We usually ask you to pay these major disbursements in advance, or we will have the bill sent directly to you to pay. Again, please pay these bills within 30 days. After 30 days we will begin charging interest at **[XX]**% per annum.

Also, as with the minor disbursements, if we successfully settle your claim or win at trial, the settlement or court judgment most likely will require the Defendant(s) to pay you costs to reimburse you for some of these disbursements.

First Charge

We have first charge on any funds received in regards to disbursements or taxes as a result of a judgment or settlement of the claim, subject to section 47 of the *Legal Aid Services Act, 1998.*

HST

In addition to our legal fees and disbursements, you agree to pay any Harmonized Sales Tax (HST) that we must charge you.

Example of Contingency Fee Calculation58

To illustrate how our percentage will be determined, we offer the following sample calculation. A claim settles before examinations for discovery for the following amounts paid as a lump sum:

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[57] *Contingency Fee Agreements,* O. Reg 195/04, s.3.2 "A statement in respect of disbursements and taxes, including the GST payable on the solicitor's fees, that indicates, i. whether the client is responsible for the payment of disbursements or taxes and, if the client is responsible for the payment of disbursements, a general description of disbursements likely to be incurred, other than relatively minor disbursements, and ii. that if the client is responsible for the payment of disbursements or taxes and the solicitor pays the disbursements or taxes during the course of the matter, the solicitor is entitled to be reimbursed for those payments, subject to section 47 of the Legal Aid Services Act, 1998 (legal aid charge against recovery), as a first charge on any funds received as a result of a judgment or settlement of the matter."

[58] *Contingency Fee Agreements,* O. Reg 195/04, s.2.6. "A simple example that shows how the contingency fee is calculated."

Damages	$100,000.00
Costs	$10,000.00
Disbursements	$10,000.00
HST (on costs and disbursements)	$ 2,600.00
Total (lump sum payment from defendant)	$122,600.00

Since the claim settled before examinations for discovery, our fee would be 20% of the damages including interest awarded to the client. The client receives the total amount of the costs. The invoice delivered to the client would look like this:

Fee of 20% x $100,000.00 damages	$	20,000.00
Disbursements (reimbursed by defendants)	$	10,000.00
Other Disbursements (not paid by defendants)	$	300.00
HST (on fee and disbursements totaling $30,300)	$	3,939.00
Sub-total	$34,239.00	

The client would then receive ($122,600.00 - $34,239.00 =) $88,361.00

You have the right to ask the Superior Court of Justice to review and approve our bill if payment of fees and disbursements is by way of this contingency agreement. Should you wish to do so, you may apply to the Superior Court of Justice for an assessment of the bill within six months of its delivery.[59]

Billing Arrangements

You agree and direct that all funds claimed by us for legal fees, costs, taxes and disbursements shall be paid to us in trust from any judgment or settlement money. We will then deduct our fee, any HST, and any unpaid disbursements, and give you the balance.[60]

Structured Settlements

Instead of a lump sum payment, some claims are paid out by way of a structured settlement. A structured settlement will pay you tax-free payments at set time intervals for a period of time. If your claim is paid out by way of a structured settlement, our contingency fee is calculated and paid in lump

[59] *Contingency Fee Agreements*, O. Reg 195/04, s.2.8 "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 and that includes the applicable timelines for asking for the review."

[60] s.3.4 "If the client is a plaintiff, a statement that indicates that the client agrees and directs that all funds claimed by the solicitor for legal fees, cost, taxes and disbursements shall be paid to the solicitor in trust from any judgment or settlement money."

sum based on the total damages award at the time of settlement.[61]

Part 3: Dealing with Each Other

Ending the relationship

By you

You are free to end our services before your case is completed by writing us a letter or note. If you do, you agree to pay our disbursements and an hourly fee based on the actual time spent up to the date of ending those services.[62]

Our hourly fee depends on which lawyer or assistant helps with the work. I will be the main lawyer responsible for your case, but some work may need to be done by a more senior lawyer, and other work can be done equally well by a more junior lawyer. There are also many services, such as gathering information and preparing routine documents, that our *paralegal* assistant is well qualified to perform. A paralegal works under the supervision of a lawyer, but may not give legal advice. Our paralegal can serve you at a lower cost than one of our lawyers can.

If you end our relationship, our hourly fee will be based on these rates:

My rate	$**[amount]** per hour
[senior lawyer's] rate	$**[amount]** per hour
[junior lawyer's] rate	$**[amount]** per hour
[paralegal's] rate	$**[amount]** per hour

If a lawsuit has already commenced, you will take the appropriate steps under the *Rules of Civil Procedure to* file and serve a Notice of Change of Lawyers or a Notice of Intention to Act in Person. If you do not do so within 30 days, we will bring a motion to remove ourselves as lawyers of record and charge you a flat rate of **$1,000.00**.

By us

Subject to our obligations to you to maintain proper standards of professional conduct, we reserve the right to terminate our services to you for good reasons which include, but are not limited to:

1. if you fail to cooperate with us in any reasonable request;
2. if our continuing to act would be unethical or impractical; or
3. did not pay our bills on time without making other arrangements for payment.

Again, you agree to pay our disbursements and an hourly fee for our legal services up until the time we stopped acting for you.

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[61] *Contingency Fee Agreements,* O. Reg 195/04, s.2.7 "A statement that outlines how the contingency fee is calculated, if recovery is by way of a structured settlement."

[62] *Contingency Fee Agreements,* O. Reg 195/04, s.2.9 "A statement that outlines when and how the client or the solicitor may terminate the contingency fee agreement, the consequences of the termination for each of them and the manner in which the solicitor's fee is to be determined in the event that the agreement is terminated."

[If the client is a minor or person under disability include the following section:

Minors or Persons under Disability

If you are a party under disability as defined under the Rules of Civil Procedure, you, as represented by a litigation guardian, must have the contingency fee agreement reviewed by a judge before the agreement is finalized or as part of the motion or application for an approval of a settlement or a consent judgment under Rule 7.08 of the *Rules of Civil Procedure*.

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 or consent judgment under Rule 7.08 of the *Rules of Civil Procedure*. Any money payable to a person under disability under an order or settlement shall be paid into court unless a judge orders otherwise under Rule 7.09 of the *Rules of Civil Procedure*.]

Confidentiality

As your lawyers, we have to share relevant information about your case with the Defendant(s) and the court. But unless we need to share this information as part of our work, all information you give us will be kept confidential between us. Your information will be collected, used and disclosed for the sole purpose of providing our services to you in accordance with our Privacy Policy.

You confirm communication via the following is confidential and consent to me/our firm contacting you at:

[client address]

[client home number]

[client cell number]

[client email]

No guarantee of success

We will work with you towards your desired outcome. However, all legal actions are subject to many possible variables such as the demeanour and recollection of witnesses, the availability of substantiating documents and other evidence, and the evidence marshalled by the other side - all of which affect the decision of a judge or jury. Accordingly, we cannot guarantee that your desired result will in fact be achieved. For us to work towards your desired outcome, it will be necessary for you to abide by the terms described in this agreement. Remember that all lawsuits involve risks and uncertainties in the law, the facts, and the evidence.

Part 4: Signing this Contract

This contract contains the whole agreement between us about our relationship with each other and our legal fees and disbursements. It will not be changed unless we both agree and sign any changes. It will legally bind anyone such as heirs or legal representatives who replace either you or us, but it does not legally bind other lawyers who might act for you if you decide to end our relationship.

If you want us to proceed on the basis described above, please **sign both copies of this agreement in the space provided and return one copy to us** in the enclosed self-addressed envelope. If there is anything you do not agree with, or if there is anything you would like to discuss before signing, please write or call us.

_____	_____
Lawyer's signature[63]	Date
_____	_____
Witness[64]	Date
_____	_____
Client's signature[65]	Date
_____	_____
Witness[66]	Date

[63] *Contingency Fee Agreements*, O. Reg 195/04 "1(1)(c) For the purposes of section 28.1 of the Act, in addition to being in writing, a contingency fee agreement,… (c) shall be signed by the client and the solicitor with each of their signatures being verified by a witness.

[64] *Contingency Fee Agreements*, O. Reg 195/04 "1(1)(c) For the purposes of section 28.1 of the Act, in addition to being in writing, a contingency fee agreement,… (c) shall be signed by the client and the solicitor with each of their signatures being verified by a witness.

[65] *Contingency Fee Agreements*, O. Reg 195/04 "1(1)(c) For the purposes of section 28.1 of the Act, in addition to being in writing, a contingency fee agreement,… (c) shall be signed by the client and the solicitor with each of their signatures being verified by a witness.

[66] *Contingency Fee Agreements*, O. Reg 195/04 "1(1)(c) For the purposes of section 28.1 of the Act, in addition to being in writing, a contingency fee agreement,… (c) shall be signed by the client and the solicitor with each of their signatures being verified by a witness.