

CANADA / JUDGMENT

Long, Miller and Mullins v. Sawchuk

2002 BCSC 542

COURT

Supreme Court of British Columbia

DECIDED

12 April 2002

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

Source record

2002 BCSC 542

Citation:	Long, Miller and Mullins v. Sawchuk
Date:	20020412 2002 BCSC 542
Docket:	L012800 Registry: Vancouver IN THE SUPREME COURT OF BRITISH COLUMBIA IN THE MATTER OF THE LEGAL PROFESSION ACT, S.B.C. 1998, c. 9
BETWEEN:	LONG, MILLER AND NORMAN D. MULLINS, Q.C. APPELLANTS
AND:	CORINNE SAWCHUK RESPONDENT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE GOEPEL

Counsel for Appellants Long, Miller:

G.R. Long, Jr.

Counsel for N.D. Mullins, Q.C.:

In Person

Counsel for Respondent:

M. Bray, Q.C. & D. Carbol

Dates and Place of Hearing/Trial:

Jan. 28-31 & Feb 1, 2002

Vancouver, BC

INTRODUCTION

- [1] Cathlene MacKenzie died leaving an estate valued at \$4,000,000. She left her only child Corinne Sawchuk but \$10,000. Mrs. Sawchuk entered into a contingency fee agreement with Long, Miller to bring proceedings under the Wills Variation Act R.S.B.C 1996, C.490 to increase her share of the estate. Mr. Long retained Mr. Mullins to act as counsel.
- [2] After a summary trial Warren J. ordered the Will varied by increasing the bequest to Mrs. Sawchuk from \$10,000 to \$500,000. His reasons are reported at 24 E.T.R. (2d) 66. Mrs. Sawchuk gave instructions to appeal. The Court of Appeal increased Mrs. Sawchuk's bequest to \$1,000,000. The Court of Appeal reasons are found at 72 B.C.L.R. (3d) 333.
- [3] Subsequent to receiving her account for services from the solicitors, Mrs. Sawchuk retained new counsel and took out an appointment to examine the contingency agreement between herself and Long, Miller and to review the accounts of Long, Miller and Mr. Mullins. The hearing lasted seven days before a Master sitting as Registrar. The Master concluded that the contingency agreement was unreasonable and modified the agreement by reducing the contingency from 25% to 20%. The Master further held that the contingency agreement did not apply to the proceedings in the Court of Appeal and determined that the solicitors were entitled to fees of \$30,000 for the appeal. In supplemental reasons the Master held that Mrs. Sawchuk was entitled to recover double costs of the taxation subsequent to an offer to settle dated December 28, 2000. The reasons and supplementary reasons of the Master are reported at [2001] B.C.J. No. 1707 and [2001] B.C.J. No. 1899 respectively. In the result the fees charged by the solicitors were reduced from \$306,568 to \$128,000. The solicitors have now appealed.

THE WILLS VARIATION ACTION

- [4] Mrs. Sawchuk was born in 1931. She is the child of Mrs. MacKenzie's first marriage that ended in divorce in the 1930's. Her mother married Mr. MacKenzie in 1949. This marriage ended with his death in 1960. At the time of her second marriage Mrs. MacKenzie had few assets of her own. Her estate largely originated from assets she received or inherited from Mr. MacKenzie.
- [5] Besides the \$10,000 bequest to Mrs. Sawchuk and other minor legacies totalling some \$26,000, Mrs. MacKenzie divided the residue of her estate between her step-grandchildren, (the children of Mr. MacKenzie's daughter), her grandchildren (the children of Mrs. Sawchuk), and five charities.

- [6] The MacKenzie step-children, Mrs. Sawchuk's daughter, and the charities, were all separately represented by capable and experienced counsel who were well versed in estate litigation. They vigorously and diligently defended the action. No offers of settlement were forthcoming.
- [7] After discoveries, interrogatories and exchange of documents, the action proceeded to trial pursuant to Rule 18A. The solicitors had concluded that an 18A application was preferable to a full trial because at her discovery, Mrs. Sawchuk had demonstrated a tendency to provide too much information when under pressure. They believed that they would be best able to present her case by affidavits.
- [8] The solicitors prepared lengthy affidavits for the summary trial. The summary trial took place before Warren J. on September 14, 15 and 16, 1998. In the reasons for judgment dated October 23rd, 1998 Warren J. ordered the Will varied by increasing the bequest to Mrs. Sawchuk from \$10,000 to \$500,000. A supplemental hearing on interest and costs took place on February 16th, 1999. Warren J. awarded interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79 and costs on scale 4 to Mrs. Sawchuk. He found the matter to be "of more than ordinary difficulty or importance."
- [9] The action raised several difficult issues that the solicitors had to consider during the course of their retainer. Although Mrs. Sawchuk was the only potential claimant under the Wills Variation Act, there had been a long separation between herself and her mother. Mrs. Sawchuk, although she lived in relatively modest circumstances, was self-sufficient and far from destitute. Almost the entire estate came from assets that Mrs. MacKenzie had originally received from her second husband. Arguments were made at trial and on the appeal that Mrs. MacKenzie held her estate in trust for Mr. MacKenzie's grandchildren. Alternatively it was argued that that any variation in favour of Mrs. Sawchuk should come from the bequest given to her children as opposed to rateably against the entire estate. This argument had the potential of causing a rift between Mrs. Sawchuk and her own children.
- [10] The legal principles to be applied were in a state of uncertainty. The Supreme Court of Canada decision in *Tataryn v. Tataryn*, [1994] 2 S.C.R. 807 at the time the action started was of recent origin. How its principles would be applied in subsequent cases was far from clear. The solicitors were also faced with traditional arguments concerning testamentary autonomy and right of Mrs. MacKenzie to dispose of her estate as she saw fit.
- [11] A further complicating factor in the litigation was Mrs. Sawchuk herself. She was a difficult client who required considerable assistance from the solicitors throughout the course of the proceedings. Following her examinations for discovery the solicitors formed the opinion she would not make a good witness on her own behalf, which led in turn to their decision to attempt to have the matters determined by summary trial.
- [12] To bolster Mrs. Sawchuk's position the solicitors obtained a report from Dr. O'Shaughnessy that concluded that Mrs. Sawchuk suffered from difficulties characterized as "passive dependent traits" which "are lifelong and not amenable to any treatment programs". The

solicitors argued that this condition arose as a result of the adverse psychological effects of Mrs. MacKenzie's hypercriticism and disapproval of her daughter throughout their relationship. Although neither the trial court nor the Court of Appeal relied specifically on Dr. O'Shaughnessy's report, both courts were convinced by the evidence marshalled by the solicitors that Mrs. Sawchuk had been unfairly treated by her mother.

- [13] Subsequent to entering into the contingency agreement, the solicitors learned that Mrs. MacKenzie had left a written memorandum explaining her treatment of Mrs. Sawchuk in the Will. She alleged that she had not made provision for her daughter because while she had been in intensive care her daughter had taken silver, linen, clothing and Meissen china without permission. She further said her daughter had not visited her since her return from the hospital. In the course of the litigation the solicitors were able to demonstrate that the allegations were untrue. Had they been unable to do so, it is likely that the results would have been much different.
- [14] Another issue that was raised in the proceedings was the question of interest and whether or not the court's judgment varying the estate led to a monetary judgment to which the Court Order Interest Act applied. This was the subject of the supplemental reasons given by Warren J. which are reported at (1999) 26 E.T.R. (2d) 193. Opposing counsel had argued that no interest should be payable on the amounts awarded to Mrs. Sawchuk. Warren J. concluded that the award was a pecuniary judgment and it would bear interest commencing at the end of the testator's year. This decision was the subject of a cross appeal. The Court of Appeal ultimately concluded that the award was not a pecuniary judgment and the Court Order Interest Act had no application. It did agree, however, that interest was payable under the general law applicable to pecuniary legacies at the rate set by the Interest Act, R.S.C. 1985, c. I-15. As a result interest became payable under the award, albeit at a slightly lesser rate than set by Warren J.
- [15] In the Court of Appeal, Mrs. Sawchuk's entitlement to the increase found by Warren J. was not in issue. On the appeal the solicitors were able to convince the court that the legacy should be doubled from the amount awarded on the summary trial. Their successful argument was that the award should reflect that a judicious parent would recognize a moral obligation to provide for a substantially higher standard of living than Mrs. Sawchuk presently enjoyed. In this regard the Court was of the view that although \$500,000 may well have been an adequate award in many parts of Canada and indeed in other areas of British Columbia, that given the costs of living in Vancouver the award was too low to provide a "reasonably generous standard of living in an affluent part of Vancouver." In the result the sum that was awarded by the trial judge was increased to \$1,000,000, which the Court concluded was an amount "that would strike a reasonable balance between the moral obligation of the testatrix to the appellant, which the testatrix has disregarded, and her testamentary autonomy to designate other beneficiaries."

- [16] Attached to these reasons is Appendix J of the solicitor's brief which was filed at the taxation and captures in part the scope of the work carried out by the solicitors. The affidavit filed on behalf of Mrs. Sawchuk at the summary trial contained some 39 pages of text followed by 38 exhibits. All of the parties put forth numerous authorities for consideration. The Appeal Books were some 764 pages in length.

THE RETAINER

- [17] Mrs. Sawchuk met with Mr. Long shortly after her mother's death. They had known each other for some time socially. At the meeting they discussed Mrs. MacKenzie's Will and Mr. Long advised Mrs. Sawchuk that she should consider bringing an action under the Wills Variation Act..
- [18] National Trust obtained Letters Probate on August 22, 1996. On August 27, 1996 Mr. Long forwarded to Mrs. Sawchuk, for her consideration, the proposed contingency fee agreement. Mrs. Sawchuk could not afford to proceed on a fee for service basis. On September 3, 1996 Mr. Long commenced the Wills Variation action on behalf of Mrs. Sawchuk. On September 10, 1996 Mrs. Sawchuk signed the contingency fee agreement. The agreement was as follows:

RE: WILLS VARIATION ACT

IN RESPECT TO THE ESTATE OF CATHLENE ISABEL MACKENZIE, DECEASED

1. Long, Miller shall act as my solicitors in respect of the above noted cause of action for a fee of twenty-five (25%) percent of the total gross recovery plus G.S.T. and P.S.T. taxes.
2. For the purposes of this Agreement "total gross recovery" shall mean the following:
 - (a) any amount paid as a result of a Court judgment or by settlement and interest;
 - (b) any amount of amounts paid to me or to my solicitors before settlement or judgment.
3. I will be responsible for reimbursing Long, Miller for expenses they have incurred in prosecuting my cause of action upon rendering of accounts for such expenses. Long, Miller may employ such counsel or experts to help prosecute the claim provided Long, Miller pay for such expertise out of their fee and it shall not be chargeable against me. Long, Miller agree to use their best efforts to recover such expenses and any such recovered expenses will be credited back to Long, Miller in addition to the total gross recovery.
4. In the event that I instruct Long, Miller to appeal any Court Judgment I receive, then a further fee shall be negotiated between myself and Long, Miller for expenses incurred in such appeal.
5. If I discharge Long, Miller as my solicitors then Long, Miller shall have the right to render and I agree to pay a reasonable bill for professional services rendered.

6. If Long, Miller discharges me as a client and refuses to act further for me then NO FEE SHALL BE PAYABLE to Long, Miller for services rendered in my cause of action. However, I will continue to be responsible to Long, Miller for expenses they have incurred on my behalf.
7. I acknowledge that I have the right to have the terms of this contract reviewed by a Judge of the Supreme Court of British Columbia under Section 78 of the Legal Professions Act which states that a person who has entered into an agreement with a member for the payment of legal services, including a contingency agreement, may within ninety days after the agreement was made or the retainer between the solicitor and the client was terminated, by either party, apply to the Registrar to have the agreement reviewed, whether or not the person has made payment to the member under the agreement.

DATED at Maple Ridge, British Columbia, this 10 day of September 1996.

[19] The contingency fee agreement provided for fees calculated at 25% of recovery. It also provided for the employment of counsel, with fees to be paid by Long, Miller. Mr. Long retained Mr. Mullins to act as counsel. Between Mr. Long and Mr. Mullins it was agreed that Mr. Mullins would be entitled to one-half of the contingency fee if the action was successful and would receive nothing if the action failed.

[20] At the time that the contingency fee agreement was entered into Mr. Long had not given any detailed consideration to the potential outcome of the litigation. He was not aware of the memorandum that Mrs. MacKenzie had left outlining her reasons for limiting Mrs. Sawchuk's share of her estate. He does not appear to have given consideration as to the amounts that Mrs. Sawchuk might recover in the litigation or the time and effort that might be involved in the action. He had, at the initial meeting with Mrs. Sawchuk, formed the opinion that the bequest, in light of the size of the estate, was an insult.

[21] Mr. Mullins' initial view of the litigation was also favourable. In a letter to Mr. Long of October 17, 1996 he wrote:

Prima facie it looks as though it should be easy to persuade a Court that Mrs. MacKenzie failed in her maternal duty to her daughter when she left her a paltry \$10,000 out of a \$4 million estate. However, considering the many and diverse interests involved in the action we cannot be complacent.

It is clear from the balance of the letter that Mr. Mullins has begun to consider various issues with which he would have to contend during the course of the litigation.

[22] After the trial judgment was handed down consideration was given to the question of appeal. In that regard Mr. Mullins wrote Mr. Long on October 27, 1998. In the letter he said in part as follows:

I have looked over the retainer fee agreement made between you and Corinne.

It is clear from clause 4 that the basic agreement is limited to carrying the case through trial to judgment but not to the Court of Appeal or Supreme Court of Canada.

...

If we take the appeal, what new fee and expense arrangement should we make? Paragraph 4 says that in the event of an appeal "a further fee shall be negotiated...for expenses incurred in such appeal." It seems to me we should not subsume the appeal fees into the trial retainer. She still doesn't have enough money to pay for the appeal so should we make another contingency such as an increase to 35% over all, or 25% for the trial plus 25% of any increase by the Court of Appeal over the \$500,000, plus, in all cases, disbursements and expenses?

[23] On November 2, 1998 Mr. Mullins wrote to Mrs. Sawchuk concerning the appeal. In regards to the question of fees for the appeal he said as follows:

...

- (b) Obviously the trial contingency cannot simply be applied to the appeal since that could result in my doing a lot of work for nothing. Assuming we tried to keep down costs by having only one lawyer on the appeal, a suggested solution is as follows:

There would be no contingency fee for the appeal. Whether the appeal is won or lost, I would want to be paid an hourly rate of \$300 for all work done on the appeal plus disbursements made by me. Large disbursements such as the filing fee and cost of appeal books would have to be paid in advance by you. I suggest a deposit of not less than \$4,000. If the appeal is successful these disbursements would be recovered on your behalf as would any costs awarded by the CA.

- (c) Your potential worst scenario exposure if the CA set aside the trial judgment and ordered costs against you is that you would owe Roy Long and me nothing for the trial but you would owe me my total bill for the appeal and you would owe a lot of costs to the other parties. These could be over \$3,000 each times three parties or something in the neighbourhood of \$10,000.

[24] On November 4, 1998 a meeting took place that was attended by Mrs. Sawchuk, her husband, and the solicitors. It is the solicitor's position that Mrs. Sawchuk agreed at that meeting that the contingency agreement would apply to the appeal. Mr. Sawchuk gave evidence that at the November 4, 1998 meeting Mr. Mullins mentioned that in a case such as Mrs. Sawchuk's he would set a rate of \$300 an hour for his work. Mr. Sawchuk also testified that there was no discussion of a contingency fee at the meeting. Mrs. Sawchuk did not give evidence before the Master. The outcome of the November 4 meeting was never reduced to writing. A new contingency agreement was never prepared.

[25] On November 8th Mrs. Sawchuk forwarded to Mr. Mullins some questions concerning the appeal and in particular what the legal costs would be to file the appeal and hopefully negotiate a settlement. In a letter dated November 9, 1998 Mr. Mullins advised that his rate would be \$300 per hour to file the appeal. The appeal was filed on November 17, 1998.

THE LEGISLATION

[26] At the outset of the retainer the governing legislation was the Legal Profession Act, R.S.B.C. 1996, c. 255. By the time of the taxation that legislation had been repealed and replaced by the Legal Profession Act, S.B.C. 1998, c. 9. Although there are some formatting and grammatical changes between the Acts, there are no material changes which are relevant to this proceeding. For ease of reference I will refer to the sections of the new Act.

[27] The sections relevant to this appeal are:

64 (1) In this Part:

"agreement" means a written contract respecting the fees, charges and disbursements to be paid to a lawyer for services provided or to be provided and includes a contingent fee agreement;

"bill" means a lawyer's written statement of fees, charges and disbursements;

"contingent fee agreement" means an agreement that provides that payment to the lawyer for services provided depends, at least in part, on the happening of an event.

...

65 (1) A lawyer or law firm may enter into an agreement with any other person, requiring payment for services provided or to be provided by the lawyer or law firm.

...

66 (1) Section 65 applies to contingent fee agreements.

(2) The benchers may make rules respecting contingent fee agreements, including, but not limited to, rules that do any of the following:

- (a) limit the amount that lawyers may charge for services provided under contingent fee agreements;
- (b) regulate the form and content of contingent fee agreements;
- (c) set conditions to be met by lawyers and law firms making contingent fee agreements.

...

68 (2) A person who has entered into an agreement with a lawyer may apply to the registrar to have the agreement examined.

(5) On an application under subsection (2), the registrar must confirm the agreement unless the registrar considers that the agreement is unfair or unreasonable under the circumstances existing at the time the agreement was entered into.

- (6) If the registrar considers that the agreement is unfair or unreasonable under the circumstances existing at the time the agreement was entered into, the registrar may modify or cancel the agreement.
- (7) If an agreement is cancelled under subsection (6), a registrar
 - (a) may require the lawyer to prepare a bill for review, and
 - (b) must review the fees, charges and disbursements for the services provided as though there were no agreement.
- (8) A party may appeal a decision of the registrar under subsection (5) or (6) to the court.

...

69 (1) A lawyer must deliver a bill to the person charged.

...

70 (1) Subject to subsection (11), the person charged or a person who has agreed to indemnify that person may obtain an appointment to have a bill reviewed before

- (a) 12 months after the bill was delivered under section 69, or
- (b) 3 months after the bill was paid, whichever occurs first.

...

71 (1) This section applies to a review or examination under section 68(7), 70, 77(3), 78(2) or 79(3).

- (2) Subject to subsections (4) and (5), the registrar must allow fees, charges and disbursements for the following services:
 - (a) those reasonably necessary and proper to conduct the proceeding or business to which they relate;
 - (b) those authorized by the client or subsequently approved by the client, whether or not the services were reasonably necessary and proper to conduct the proceeding or business to which they relate.
- (3) Subject to subsections (4) and (5), the registrar may allow fees, charges and disbursements for the following services, even if unnecessary for the proper conduct of the proceeding or business to which they relate:
 - (a) those reasonably intended by the lawyer to advance the interests of the client at the time the services were provided;
 - (b) those requested by the client after being informed by the lawyer that they were unnecessary and not likely to advance the interests of the client.
- (4) At a review of a lawyer's bill, the registrar must consider all of the circumstances, including

- (a) the complexity, difficulty or novelty of the issues involved,
 - (b) the skill, specialized knowledge and responsibility required of the lawyer,
 - (c) the lawyer's character and standing in the profession,
 - (d) the amount involved,
 - (e) the time reasonably spent,
 - (f) if there has been an agreement that sets a fee rate that is based on an amount per unit of time spent by the lawyer, whether the rate was reasonable,
 - (g) the importance of the matter to the client whose bill is being reviewed, and
 - (h) the result obtained.
- (5) The discretion of the registrar under subsection (4) is not limited by the terms of an agreement between the lawyer and the lawyer's client.

72 (1) Costs of a review of a lawyer's bill must be paid by the following:

- (a) the lawyer whose bill is reviewed, if 1/6 or more of the total amount of the bill is subtracted from it;
 - (b) the person charged, if less than 1/6 of the total amount of the bill is subtracted from it;
 - (c) a person who applies for a review of a bill and then withdraws the application for a review.
- (2) Despite subsection (1), the registrar has the discretion, in special circumstances, to order the payment of costs other than as provided in that subsection.

[28] Pursuant to section 66 of the Act the Benchers under the Law Society Rules have made rules respecting contingent fee agreements. The rules include limitations on the amount, in certain cases, that can be charged by way of a contingency fee and the form and content of contingent fee agreements. Rule 8-1 is as follows:

8-1 (1) A lawyer who enters into a contingent fee agreement with a client must ensure that, under the circumstances existing at the time the agreement is entered into,

- (a) the agreement is fair, and
 - (b) the lawyer's remuneration provided for in the agreement is reasonable.
- (2) A lawyer who prepares a bill for fees earned under a contingent fee agreement must ensure that the total fee payable by the client
- (a) does not exceed the remuneration provided for in the agreement, and
 - (b) is reasonable under the circumstances existing at the time the bill is prepared.

THE ACCOUNTS

[29] While the matter was under appeal, an agreement was reached amongst the parties to the litigation to allow an advance to be paid to Mrs. Sawchuk's daughter, Kathleen Foster, who was in some financial difficulty. As part of the agreement, Mrs. Sawchuk received the \$490,000 awarded at trial and in turn agreed to limit her claim on the appeal to 75% of the estate.

[30] In anticipation of this payment to Mrs. Sawchuk, Mr. Mullins prepared two accounts. One account, dated April 30, 1999, was in regards to the appeal and calculated on the basis of \$300 per hour. It was for the sum of \$18,228.60 inclusive of taxes plus disbursements. A second account was prepared for the trial based upon one-half of the agreed contingency. This account was for the sum of \$69,825.00 inclusive of taxes.

[31] On May 17, 1999 he wrote to Mr. Long as follows:

May 17, 1999

G. Roy Long, Jr., Esq.

Long, Miller,

Barristers and Solicitors,

Suite 400, United Kingdom Building,

409 Granville Street,

Vancouver, B.C.

V6C 1T2

Dear Roy:

Re: Sawchuk v. National Trust, et al

I enclose a copy of my account to Corinne Sawchuk for services related to the trial phase of her case. You will see that my disbursements total \$1,409.42. I am sure I incurred other out-of-pocket expenses in 1996 and 1997 because, in part, my landlord at that time did not give me a breakdown by name of expenses in its monthly billing. Anyway, that is not Corinne's fault.

Last Friday I left with you a copy of my bill to Corinne for the appeal phase up to April 30, 1999. You will recall one of her complaints to me was that I had not billed her in that regard and she assumed all or virtually all of her funds from National Trust were substantially consumed by me. I would like to have that bill paid at this time.

Consequently, the amount owing to me is made up as follows:

Trial account

\$71,234.42

Appeal account

to April 30

20,243.27

Total

\$91,477.69

Yours truly,

"Norman D. Mullins"

Norman D. Mullins, Q.C.

- [32] Mr. Long then prepared a reconciliation for Mrs. Sawchuk. It showed payments to Mr. Mullins of \$91,477.69 which included the appeal account of April 30 of \$20,243.27. Long, Miller's account including disbursements was \$70,790.37. These amounts were paid from the funds received and the balance of \$327,812.49 was paid to Mrs. Sawchuk.
- [33] Following the Court of Appeal proceedings, the solicitors received a further \$612,638.11 representing the increase ordered by the Court of Appeal inclusive of interest on the entire \$990,000 recovered. Additional accounts were then rendered.
- [34] Mr. Mullins prepared accounts dated January 14 and February 17, 2000 in relation to the appeal. The January 14, 2000 account was for fees inclusive of taxes in the sum of \$9,952.20. The fee component was calculated on the basis of \$300 per hour. The February 17, 2000 account, which was stamped "Draft" was for fees inclusive of taxes in the sum of \$4,206.60. It was also calculated on the basis of \$300 per hour. The February 17 account included projected time for the recovery of costs. Unlike what he had done following the trial, Mr. Mullins did not prepare a contingency fee account for the appeal.
- [35] Mr. Long prepared an account dated February 18, 2000 in the sum of \$88,777.24 that included taxes plus \$51.31 in disbursements. This account was based on one-half of 25% of the additional proceeds received. Mr. Long also prepared an accounting for Mrs. Sawchuk's approval. In the accounting, Mr. Long credited Mr. Mullins with both a share of the contingency fee and the hourly rate bills Mr. Mullins had prepared. Mrs. Sawchuk signed and approved the accounting and received her cheque for the balance. The accounting was as follows:

SAWCHUK, CORINNE

FILE #20,703

Judgment

\$1,000,000.00

Interest

112,638.11

Total

\$1,112,638.11

Less:

Legal Fees (25% of 1,112,638.11)

278,159.53 plus Costs

Norman Mullins, Q.C.

139,079.77

GST

9,735.58

PST

9,735.58

Disbursements

1,409.42

Appeal Costs

35,485.09

195,445.44

Long Miller

139,079.77

GST

9,735.58

PST

9,735.58

Disbursements

1,016.68

159,567.61

TOTAL RECOVERY FOR MRS. SAWCHUK

\$757,625.06

Paid to date:

Corinne Sawchuk

10,000.00

327,812.49

337,812.49

Balance owing 419,812.57

Norman Mullins

91,477.69

Balance owing 103,967.75

Long Miller

70,790.37

Balance owing 88,777.24

\$500,080.55

\$612,557.56

500,080.55

612,557.56

\$1,112,638.11

*Income Tax is payable on interest only

Accepted and Approved this 18th day of February, 2000.

[36] Pursuant to the reconciliation, Mrs. Sawchuk's ultimate recovery was the sum of \$757,625.06. The fees received by Mr. Mullins, included in addition to one-half of the 25% contingency, the amounts he had billed on an hourly basis for the appeal.

[37] At the taxation Mr. Mullins testified that the hourly rate accounts had been charged in error and he resiled from the position that there was ever an intention that Mrs. Sawchuk pay for the appeal on that basis. In the course of the hearing before the Master the solicitors consented to an order that the monies paid on an hourly basis for the appeal be paid back to Mrs. Sawchuk.

- [38] Mr. Long's time sheets indicated he spent 150 hours on this matter through to October 1998. Mr. Long did not keep time sheets during the appeal, but estimated that he spent approximately 25 hours working on it. Mr. Mullins did not keep time sheets other than in regard to the appeal. His records indicate he spent approximately 88 hours on the appeal.

THE TAXATION

- [39] On April 27, 2000 Mrs. Sawchuk, through her new counsel, took out an appointment to examine the agreement between Long, Miller and Corinne Sawchuk and review the accounts of Long, Miller and Norman Mullins. The taxation came on for hearing on March 12, 2001. There were seven sitting days concluding May 10, 2000. The Master delivered written reasons on August 21, 2000. Mr. Long and Mr. Mullins both gave evidence before the Master. The solicitors called as part of their case, Mrs. Sawchuk's husband and son. Counsel for Mrs. Sawchuk tendered an opinion prepared by David Roberts, Q.C. who was cross-examined on that opinion. Mrs. Sawchuk, although she was present throughout the hearing, was not called as a witness.
- [40] The Master, after referring to *Commonwealth Investors Syndicate Ltd. v. Laxton* (1990), 50 B.C.L.R. (2d) 186 (C.A.) and *Randall v. Hope* (1996), 7 C.P.C. (4th) 166 (B.C.S.C.), concluded that the contingency fee agreement was fair but unreasonable in light of the situation known at the time it was executed. The Master held there was a likelihood of a substantial award with no risks as to recovery from the estate. She accepted the position put forward by counsel for Mrs. Sawchuk that the agreement ought to be modified to provide for a fee of 20%. The Master said she agreed with Mr. Roberts' opinion that 20% was the top end of an appropriate fee at the time the agreement was entered into.
- [41] In regards to the appeal the Master reviewed the evidence surrounding the question as to whether or not the appeal was to be done on the basis of the initial contingency fee agreement. She noted that an hourly fee arrangement had been proposed and discussed with the client. She also noted that there was nothing in writing confirming a contingency fee for the appeal. The Master concluded that the solicitors had failed to establish that the contingency agreement had been renewed for the appeal.
- [42] Having concluded that no contingency fee existed for the appeal she proceeded to assess the account on a quantum meruit basis. She concluded that \$30,000 was an appropriate fee for the appeal.
- [43] A further hearing took place subsequent to the delivery of the Master's reasons. In that hearing the client submitted that the contingency fee should be applied to the base figure of \$490,000 without reference to the interest that was ultimately paid on that amount. The Master accepted that submission.
- [44] The client at the supplemental hearing also sought double costs from the date of her formal offer to settle the proceedings for repayment of \$146,718.75. As a result of the taxation Mrs. Sawchuk was entitled to be repaid the sum of \$203,642.56, which sum included interest in

the amount of \$16,481.70. The solicitors did not challenge the Master's right to award double costs but submitted that she should exercise her discretion against double costs given that the "intransigent and malicious attitude of the client made it futile for the solicitors to attempt to respond in any meaningful way to the offer." The Master did not accept the solicitor's submission and awarded double costs.

ISSUES ON APPEAL:

[45] The appeal raises the following issues:

1. Did the Master err in finding the contingency agreement unreasonable and reducing the contingency from 25% to 20%?
2. Did the Master err failing to apply the percentage contingency to interest recovered as a result of the trial judgment?
3. Is the account of the solicitor subject to review pursuant to section 71 of the Legal Professions Act. If yes, what is the proper fee for the solicitor's services?
4. Did the Master err in failing to find that the Appeal was governed by the contingency fee contract?
5. Did the Master, having found that the contingency fee agreement did not apply to the appeal, have jurisdiction to assess the Court of Appeal fees on a quantum meruit basis?
6. Did the Master err in awarding \$30,000 on a quantum meruit basis for the appeal?
7. Did the Master err in awarding double costs of the taxation proceedings?

DID THE MASTER ERR IN FINDING THE CONTINGENT FEE AGREEMENT UNREASONABLE?

[46] In Commonwealth the Court of Appeal held that the review of the contingency contract was a two-step process. The initial step was to determine whether the agreement was fair in the matter in which it was obtained. The second step was whether the agreement was reasonable with respect to the amounts owing under it. In this case the Master found that the agreement was fairly obtained and that decision is not challenged on this appeal. The Master went on to find that the agreement was unreasonable and modified the contract by reducing the contingency to 20%.

[47] In Commonwealth the court held that the investigation of reasonableness extended from the time of making the contract until its termination or completion. All of the ordinary factors that were involved in the determination of the amount a lawyer may charge were to be considered. The purpose of the inquiry was to determine whether the ultimate fee charged by the lawyer was reasonable.

[48] In *Commonwealth* the Court of Appeal was critical of two earlier Supreme Court trial decisions (*Re MacFarlane* (1975), 1 W.W.R. 764 (B.C.S.C) and *Usipuk v. Jensen* (1986), 3 B.C.L.R. (2d) 283 (S.C.)) in which trial judges had held that before a contingency contract was signed the lawyer must give the client some prediction of the work involved and the expected result. The Court stated at p. 199:

To require a lawyer to investigate the case and give a reasonable prediction of the results before the contract is signed in our opinion casts an unfair burden on the lawyer, could postpone the legal advice to the client at a time when needed, and makes perfectly clear contingency fee contracts which were completely understood by the client at the time of signing, liable to be set aside. The wrong assessment by the lawyer on incomplete information from the client might have obliged the lawyer to perhaps bear much financial risk in the interim; and because the assessment was wrong, the client could get from the lawyer services rendered on a completely different fee basis with different considerations motivating the parties.

[49] *Commonwealth* was decided under the terms of the Barristers and Solicitors Act, R.S.B.C. 1979 c. 26. Section 99 of that legislation provided as follows:

99(1) Notwithstanding any law or usage to the contrary, a member of the society may contract, in writing, with a person as to the remuneration to be paid him for services rendered or to be rendered to the person in lieu of or in addition to the costs which are allowed to the member.

99(2) The person who has so contracted with a member of the society, or the representative of the person, may apply by motion or petition to the Supreme Court. If the court does not consider the contract fair and reasonable, it may either modify the contract or order the contract to be cancelled, and the costs, fees, charges and disbursements for the business done to be taxed in the same manner as if no contract had been made.

[50] Prior to the decision in *Commonwealth* the legislation was changed with the introduction of the predecessor to the present s. 68(5). Under the present legislation the registrar determines whether the agreement is unfair or unreasonable. The time for that determination is when the contingency contract was entered into.

[51] In *Waldock v. Bissett* (1992), 67 B.C.L.R.(2d) 389 (C.A.) Southin J.A. queried whether the test for interference with the bargain made between a solicitor and client may be different under the two enactments. In *Randall*, Levine J. (as she then was) held that the two step process outlined in *Commonwealth* was still applicable to a review of a contingency agreement. She indicated that both fairness and reasonableness are to be determined at the time that the agreement is entered into. She acknowledged that this may change some of the questions asked, but not the matter to be determined. Fairness still involves the mode of obtaining the contract and reasonableness still involves the amount of the fee.

[52] On a review of an agreement under s. 65(5) the registrar must confirm the agreement unless the registrar considers the agreement "unreasonable" at the time it was made. The New Oxford Dictionary of English defines "unreasonable" as "beyond the limits of acceptability or

fairness". In my opinion, once it is determined that a contract has been fairly entered into, a registrar should be most reluctant, other than in an obvious case, to find a contract upon which the parties have relied to govern their relationship, to be unreasonable. The registrar should only do so if satisfied that the contract is beyond the limits of acceptability or fairness.

- [53] In determining whether an agreement is beyond the limits of acceptability a registrar should apply with great caution the criteria by which a legal fee will ultimately be assessed. Applying such criteria at the outset of the retainer to find an agreement unreasonable can very easily lead to an unjust result. It will be the rare case that the course that litigation will take will be known at the outset. It will often be most difficult to know, at the time the contingency agreement is signed, with any degree of certainty how complex an action may become, whether liability will be issue, the amount that may be recovered, the risk to the law firm or the time it will take to bring the action to conclusion. As noted in *Commonwealth* it would cast an unfair and unrealistic burden on a solicitor to investigate a case in detail before entering into a contingency contract.
- [54] An analysis of reasonableness, based on the criteria used to determine legal fees, if applied at the outset of the case, will in many cases, be little more than a speculative exercise that runs the risk that an otherwise valid contract will be set aside without consideration of what in fact has taken place during the course of the retainer. Such a result is the antithesis of what was intended by *Commonwealth*.
- [55] There will, of course, be cases in which the agreement is unreasonable on its face, such as *Randall*, or cases when at the time that the contingency agreement is entered into there will be sufficient knowledge concerning the litigation and surrounding circumstances that the registrar hearing the matter will be able to safely determine whether or not the contingency agreement is beyond the limits of acceptability. Examples of such cases may include agreements in regards to appeals such as *Spraggs & Co. Law Corporation v. Lopushinsky*, [2002] B.C.J. No. 444 (S.C.) or personal injury cases in which there is evidence of a serious injury and no liability issue such as *Kay v. Randell*, [1997] B.C.J. No. 797 (S.C. Reg.).
- [56] It is also to be remembered that when an agreement is not cancelled or modified under s. 68(6), it does not necessarily follow that the lawyer will in fact be paid pursuant to the terms of the contract. The lawyers account still remains subject to a review pursuant to s. 70 which review will determine whether the ultimate fee is in fact reasonable.
- [57] In this case the Master concluded that the contingency agreement was unreasonable. In coming to that conclusion the Master commented on the various criteria mentioned in the *Randall* decision. In considering that criteria she concluded the contract was unreasonable in light of the situation known at the time it was executed. She noted in particular there was a likelihood of substantial reward with no risk as to recovery from the estate. She also noted that the solicitors were not required to carry disbursements. Instead of cancelling the contract she chose to modify the contingency by reducing it to 20%. In doing so she appears

to have accepted the opinion of Mr. Roberts that 20% is the top end of the fee appropriate.

- [58] With respect I cannot agree with that conclusion. When the contract was signed little was known for certain as to the course this litigation would take. That is not at all uncommon in litigious matters. What was known was that the solicitors would have to muster evidence of the relationship between Mrs. Sawchuk and her mother --- a relationship which lasted some sixty years. What that evidence would reveal and how it would be marshalled and sifted would only become known to the solicitor as they proceeded with the action. At the outset it appeared likely that there would be a favourable outcome, but it was not possible to predict with any certainty the amount that a court might award or how long it might take to resolve the action. Although there was no risk that a judgment would not be satisfied there was no assurance of the amount that would be recovered. Although the solicitors were not required to carry disbursements, they would not see any remuneration for their efforts unless and until funds were paid to their client. I do not believe that a 25% contingency fee could, at that time this contract was entered into, be considered beyond the limits of acceptability.
- [59] I am fortified in this conclusion by the Master's decision to modify the contract by reducing the contingency from 25% to 20%. If a 20% fee is considered reasonable it is difficult to classify a fee based on a 25% recovery as being beyond the limits of acceptability, particularly when you do not know the actual fee that will be generated by the percentage chosen. See: *Sandbeck v. Glasner & Schwartz* (1989), 39 B.C.L.R. (2d) 69 (C.A.).
- [60] I have reached the conclusion that the Master erred in modifying this contingency agreement. In my opinion this agreement was neither unfair nor unreasonable in the circumstances existing at the time the agreement was entered into and the registrar should have confirmed the contract.

DID THE MASTER ERR IN FAILING TO APPLY THE PERCENTAGE CONTINGENCY TO INTEREST RECOVERED AS A RESULT OF THE TRIAL JUDGMENT?

- [61] In the supplemental hearing the client argued that the contingency fee agreement should be calculated using the base figure of \$490,000 without including the interest awarded on that sum. The Master accepted that submission. On the appeal the solicitor for the client abandoned that position. He acknowledged that although the Court of Appeal varied the rate of interest, the entitlement to interest was established at the trial level. In the result I am satisfied that the solicitors are entitled as an additional fee to 25% of the interest generated on the \$490,000. As the \$490,000 was received some months prior to the payment of the balance of the amounts awarded by the Court of Appeal, counsel were unable to tell me at the hearing the exact amount of interest that had been generated on that sum. They did advise that it would be a simple calculation and they should be able to agree on the amount without difficulty. Based upon material I have seen I expect that the impact will be to increase the fee between \$12,000 - \$14,000.

IS THE ACCOUNT OF THE SOLICITOR SUBJECT TO REVIEW PURSUANT TO SECTION 71 OF THE LEGAL PROFESSIONS ACT. IF YES, WHAT IS THE PROPER FEE FOR THE SOLICITOR'S SERVICES.

[62] In this proceeding the client, by notice of appointment, sought both an examination of the agreement and a review of the accounts. The existence of the contingency fee contract does not bar a review under s. 70 once the registrar has completed the examination under s. 68 and found that the agreement is not unfair or unreasonable. See *Coad v. Rizak* (1999), 68 B.C.L.R. (3d) 340 (S.C.).

[63] In the case at bar, the Master, having completed the s. 68 examination of the agreement, should have then proceeded to review the accounts pursuant to s. 70 in order to determine whether the fees billed under the agreement were appropriate. It does not appear from the Master's reasons that she conducted such a review. Although I could send this matter back to the Master for a review, in the circumstances of this case, where I have a complete record of the proceedings and more than 12 hearing days have already been spent, I think it just that I fix the amount of the bill.

[64] Pursuant to Part 8-1 of the Law Society Rules the lawyer who prepares a bill for fees earned under a contingency fee agreement must ensure that the total fee is reasonable under the circumstances existing at the time the bill is prepared. In discussing the two-step inquiry, the court in *Commonwealth* said at 198:

The second inquiry, assuming the contract is found to be "fair" involves an investigation of the "reasonableness" of the contract. On this investigation, extending from the time of the making of the contract until its termination or its completion, all of the ordinary factors which are involved in the determination of the amount a lawyer may charge a client are to be considered...

[65] In a second appeal in the *Commonwealth* case, *Commonwealth Investors Syndicate Ltd. v. Laxton* (1994), 94 B.C.L.R. (2d) 177 (C.A.) ("Commonwealth No. 2"), the court dealt with the meaning of "reasonableness". McEachern C.J.B.C. said at para. 25:

I take the foregoing to mean that a contingency fee agreement under the old regime had to be reasonable in the result. This brought into play the well established principles which generally govern the fixing of a lawyer's fee such as those stated in *Yule v. Saskatoon (City)* (1955), 1 D.L.R. (2d) 540 (Sask. C.A.), and, of course, those further considerations that apply only to contingency fees. These include at least the risk there being no recovery at all and the expectation of a larger fee based upon the results that would be appropriate in non-contingency cases.

[66] After reviewing the arguments of counsel and the Yule criteria McEachern C.J.B.C. continued at para. 46-47:

While the Yule principles furnish useful categories to consider in a matter of this kind, I am not persuaded that the "Registrar's" process asserted by Mr. Nathanson is the proper way to determine the reasonableness of a fee in a case of this kind. That process lacks relevance in the context of a case where both judgment, audacity and legal skill, which were obviously required, must be measured against an agreed formula. Furthermore, the process suggested by Mr.

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

Instead of making such an assessment, I believe this Court, particularly, must remember its task. This is not to fix a fee either by a reconsideration of all the evidence and the application of judgment or arbitrarily, however one characterizes such a process, but rather to decide whether the agreement operates reasonably in the context. All the circum-stances must be considered, including the Yule factors, the risks and expectations, and the terms of the bargain which is the subject matter of the inquiry. With all this in mind, the court must then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession? In other words, I think the amount payable under the contract is the starting point for the application of the court's judgment.

[67] Although Commonwealth No. 2 dealt with reasonableness in context of section 99(2) of the Barristers and Solicitors Act I believe it sets out the appropriate criteria which a registrar should follow in reviewing contingency fee contracts pursuant to s. 70 of the present legislation.

[68] In reviewing the criteria we would note that this was a deceptively complex piece of litigation. Although at first blush it would seem that the client was bound to succeed, a review of the various legal issues raised in the course of this litigation (see paras. 4-16) makes it clear that a successful end result was anything but assured. The solicitors had to marshal evidence over an extended period of time. They had to show that the abominable treatment of Mrs. Sawchuk by her mother would justify the court in departing from Mrs. MacKenzie's stated wishes. They had to overcome specific allegations raised against Mrs. Sawchuk which may have justified Mrs. MacKenzie's actions. They had to deal with legitimate claims of the MacKenzie step-children that at a minimum any monies paid to Mrs. Sawchuk should be taken from the bequest made to her own children. As can be seen from the Appendix and the number of authorities cited by all parties, the law in this area, certainly prior to this decision, was far from clear. Although there was every possibility to believe that the lawyers would have some success in the action, the amount that might ultimately be recovered was far from certain.

[69] The solicitors overcame the various obstacles placed in their path and received an excellent result for their client. That they were able to convince the court of the mistreatment of their client by her mother is a tribute to their skill as counsel. Although it was certain that if the solicitors succeeded in the litigation there would be recovery, the amount that might be recovered could not be known in advance of judgment.

- [70] The extent and character of the services provided were excellent. The amount involved was considerable. The case had factual complexities and the legal principles were not clear. Although neither of the solicitors had extensive experience in Wills Variation Act matters they were both experienced senior lawyers whose character and standing in the profession was not challenged. The case was of great importance to the client both monetarily and because she wanted to clear her name from the libels of her mother. The result obtained was a good one.
- [71] In relation to the time spent on this matter I note that the registrar concluded that at least 200 hours would be required. Taking Mr. Mullins billing rate of \$300 an hour, a time based fee of \$60,000 would have been generated. Mr. Roberts opined that when the likelihood of establishing liability is no less than 50%, it is common to double the hourly fee in considering the reasonableness of a contingency contract, and then use that amount as a basis of the percentage fee given the likely award.
- [72] In opining the \$98,000 was the appropriate fee in this case Mr. Roberts had estimated that no more than 150 hours of time would be required. It is clear from his cross-examination that Mr. Roberts, in the limited time that he had to prepare his opinion, was not aware of all of the issues before the solicitors. It was found by the Master that 200 hours would have been appropriate amount of time to spend on this file. Using Mr. Roberts' formula that would create a fee of \$120,000 for services provided in this proceeding.
- [73] Mathematical formulas are only a tool for considering whether the end result is appropriate. Given the small difference between the amounts that would be generated pursuant to Mr. Roberts formula and a fee based on the recovery of 25% of \$500,000 plus interest, I find that such a fee by the solicitors is appropriate in the circumstances of this case.
- [74] In the result the lawyer's fee for the trial will be approximately \$135,000. To paraphrase McEachern C.J.B.C. in Commonwealth No. 2, I find nothing unreasonable or threatening to the integrity of the profession of a fee of \$135,000 for the skilful recovery of more than \$500,000.

DID THE MASTER ERR IN FAILING TO FIND THAT THE APPEAL WAS GOVERNED BY THE CONTINGENCY FEE CONTRACT

- [75] The solicitors submit that the Master erred in failing to find that the contingency agreement was extended to cover the appeal. A retainer should generally be constructed as terminating upon the entry of judgment and taxation of costs at the trial level. A retainer for an appeal is reasonably treated as a separate contract. See: *Ladner Downs v. Crawley* (1987), 14 B.C.L.R. (2d) 357 (S.C.).
- [76] That this contingency fee contract was limited to the trial was recognized in the contingency agreement itself. Paragraph 4 reads:

In the event that I instruct Long, Miller to appeal any court judgment I receive, a further fee shall be negotiated between myself and Long, Miller for expenses incurred in such appeal.

- [77] Subsequent to the trial, Mr. Mullins in his letter to Mr. Long of October 27, 1998, clearly recognized that the retainer agreement was limited to carrying the case through to trial. On November 2, 1998 he wrote to Mrs. Sawchuk concerning the appeal and pointed out that the trial contingency could not simply be applied to the appeal since that might result in his doing work for which he would not be paid. The proposal contained in his letter suggests that there be no contingency fee for the appeal and whether the appeal would be won or lost, he would be paid \$300 per hour for all work done on the appeal.
- [78] The solicitors suggest that at the meeting of November 4, 1998 it was agreed that the contingency contract would be extended and apply to the appeal. There is however no written confirmation that such arrangements were made, nor was a new contingency agreement executed.
- [79] During the course of the appeal Mr. Mullins kept track of his time on an hourly basis and when the initial \$490,000 was received he submitted his account for the appeal to Mr. Long and requested it be paid from that advance. After the appeal had been successfully concluded Mr. Mullins prepared further accounts based on an hourly basis.
- [80] At the hearing before the Master Mr. Mullins explained that these accounts were prepared in order that Mr. Long and/or Mrs. Sawchuk would know what the cost would be on an hourly basis. I cannot accept that explanation. If there was an agreement that the appeal would proceed by way of a contingency the explanation does not make sense. There would be no reason to prepare accounts on an hourly basis. Further, in his letter of May 17, 1999 to Mr. Long, he insisted that the interim account be paid out of Mrs. Sawchuk's advance of the trial judgment. If the appeal was being done by way of a contingency agreement there would be no entitlement to payment at that time.
- [81] In addition to the evidence that was before the Master I had before me a letter from Mr. Long to Mr. Mullins dated March 8, 2001, some four days prior to the commencement of the taxation. The letter reads as follows:

Norm,

If you recall, I stated that I would donate my time on the appeal and not charge if we lost. I insisted Corinne agree to pay your fees if we lost. It was "ify", read your letter of November 2, 1998.

- [82] The letter was inadvertently included in material handed up to me by the solicitors at the start of the hearing. When I first read the letter I had thought it formed one of the exhibits at trial. When it became clear to me that it was not I brought the letter to the attention of counsel and inquired as to what if anything I should do with the letter.

- [83] Mr. Bray asked that it be marked as an exhibit to form part of the evidence before me. My initial reaction to that suggestion was that the letter was a privileged communication that had been inadvertently disclosed and thereby remained privileged. Mr. Mullins, however, agreed that the letter should be marked as an exhibit and considered by me. Accordingly I have given consideration to the letter in relation to this issue. It is consistent with all other written documentation that the appeal was to be done on the basis of an hourly fee.
- [84] To support their position that a contingency fee had been orally agreed, the solicitors submit an adverse inference should be drawn from the failure of Mrs. Sawchuk to give evidence. There was no obligation upon Mrs. Sawchuk to testify. Mrs. Sawchuk was present throughout the proceedings and the solicitors could have called her to testify. See: Helm v. Pattie (1998), 52 B.C.L.R. (3d) 81 (C.A.). They did in fact call her husband. His evidence was that at the November 4th meeting the discussion was that Mr. Mullins would bill his fees on an hourly basis.
- [85] The Master found that the solicitors had failed to establish that the contingency fee agreement would apply to the work done on the appeal or that a new contingency agreement was made. I agree. The correspondence and the accounts prepared by Mr. Mullins lead to no other conclusion than the appeal was to be done on a fee for service basis.

DID THE MASTER, HAVING FOUND THE CONTINGENCY AGREEMENT DID NOT APPLY TO THE APPEAL, HAVE JURISDICTION TO ASSESS THE COURT OF APPEAL FEES ON A QUANTUM MERUIT BASIS

- [86] The solicitors argue that the Master was without jurisdiction to tax the account on a quantum meruit basis. They say that a registrar's powers under section 68 are limited to either modifying or cancelling the contingency fee agreement. That argument, however, does not take into consideration the decision in Coad. In this case the client asked for both an examination of the fee agreement (s. 68) and a review of the accounts (s. 70). The solicitors had prepared an account for their services in the Court of Appeal and the Master had jurisdiction to review that account under s. 70 and determine an appropriate fee for the services rendered.

DID THE MASTER ERR IN AWARDING \$30,000 ON A QUANTUM MERUIT BASIS FOR THE APPEAL

- [87] The standard of review I must apply is whether the Master was wrong as a matter of principle or, alternatively, that her findings clearly wrong. See: Robertson and Co v. Kozler, [2000] B.C.J. No. 2402 (S.C.). The Master thoroughly reviewed the various criteria that are to be considered. She found that the matter was not straight forward, that the amount involved was substantial and that the outcome was of great importance to the client. She also recognized a good result had been obtained. She found that it would be reasonable to spend 100 hours on the appeal. She had before her Mr. Roberts' opinion that the appeal could have been done by capable and experienced counsel, who have been counsel at trial, for \$18,000

to \$20,000.

- [88] During the course of the hearing I expressed some concern that the award made by the Master, given her conclusion that 100 hours was a reasonable amount of time to spend on the appeal, did not properly take into account the success of the outcome. Upon reflection, however, and giving consideration to Mr. Roberts opinion, I have come to the conclusion that in all the circumstances, I cannot say that the Master was clearly wrong in her determination that \$30,000 was an appropriate fee.
- [89] I think the Master's decision that \$30,000 was an appropriate fee for the appeal can also be supported on an alternative basis. I am satisfied based on the correspondence and actions of Mr. Mullins that he agreed to do the appeal for \$300 per hour. Having agreed to perform the services on an hourly basis, it is not open to the lawyer to subsequently look for an additional sum to reflect success. See: *Campney and Murphy v. Arctic Installations (Victoria) Ltd.* (1994), 86 B.C.L.R. (2d) 226 (C.A.).

DID THE MASTER ERR IN AWARDING DOUBLE COSTS FOR THE TAXATION PROCEEDINGS

- [90] On December 20, 2000, some three months prior to the hearing of the taxation, the client offered to settle the proceedings on the basis the solicitors return to her \$146,718.75. The offer to settle was in the following form:

No. L001138

VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE LEGAL PROFESSION ACT, S.B.C. 1998, C. 9

BETWEEN:

LONG, MILLER and NORMAN D. MULLINS, Q.C.

SOLICITORS

AND:

CORINNE SAWCHUK

CLIENT

OFFER TO SETTLE

TO: Messrs. Long Miller

AND TO: Norman Mullins, Q.C.

The client, CORINNE SAWCHUK, offers to settle this proceeding on the following terms:

Payment of the sum of One Hundred Forty Six Thousand, Seven Hundred Eighteen Dollars and Seventy-Five Cents (\$146,718.75) (including PJI of \$4,218.75 at the date hereof)

And costs in accordance with Rule 37(22) and (37).

DATED at Vancouver, B.C. the 20th day of December, 2000.

[91] As a result of the proceeding before the Master the client was entitled to be repaid the sum of \$203,642.56. As a result of my earlier findings the solicitors entitlement has increased by approximately \$40,000. This result will still lead to a repayment to Mrs. Sawchuk in excess of the amount that she offered to settle the proceedings.

[92] The solicitors did not raise before the Master whether Rule 37 applied to the taxation of solicitor's accounts under the Legal Professions Act. That issue was raised on the appeal.

[93] In considering this issue the following provisions of the Rules of Court must be considered.

Rule 1

(8) In these rules, unless the context otherwise requires,

...

"action" means a proceeding commenced by writ of summons;

...

"court" means the Supreme Court of British Columbia and, where a master has jurisdiction, includes a master of the Supreme Court;

...

"defendant" includes a defendant by way of counterclaim;

...

"petitioner" means a person who commences a proceeding by petition;

"plaintiff" means a person who commences an action and includes a plaintiff by way of counterclaim;

...

"proceeding" means an action, suit, cause, matter, appeal or originating application;

RULE 37

(1) In this rule

"defendant" includes "respondent";

...

"offer to settle" means an offer to settle under subrule (2);

"plaintiff" includes "petitioner";

. . .

- (2) A party to a proceeding may deliver to any other party of record a written offer in Form 64 to settle one or more of the claims in the proceeding in the terms specified in the offer.
- (7) If an offer is delivered less than 7 days before the trial commences, subrules (23) to (29) do not apply but the court may, in exercising its discretion as to costs, consider the offer and the date that it was delivered.
- (11) No statement of the fact that an offer to settle has been made shall be disclosed to the court, or jury, or set forth in any document used in the proceeding, until all questions of liability, and of the relief to be granted, other than costs, have been determined.
- (21) If an offer is accepted, the court may incorporate any of its terms in an order.
- (22) If an offer is accepted,
 - (a) if the offer was made by the plaintiff, the plaintiff is entitled to costs, or
 - (b) if the offer was made by the defendant, the plaintiff is entitled to costs assessed to the date the offer was delivered to the plaintiff, and the defendant to costs assessed from that date.
- (23) If the plaintiff has made an offer to settle a claim for money, and it has not expired or been withdrawn or been accepted, and if the plaintiff obtains a judgment for the amount of money specified in the offer or a greater amount, the plaintiff is entitled to costs assessed to the date the offer was delivered and to double costs assessed from that date.
- (24) If the defendant has made an offer to settle a claim for money and the offer has not expired or been withdrawn or been accepted,
 - (a) if the plaintiff obtains judgment for the amount of money specified in the offer or lesser amount, the plaintiff is entitled to costs assessed to the date the offer was delivered and the defendant is entitled to costs assessed from that date, or
 - (b) if the plaintiff's claim is dismissed, the defendant is entitled to costs assessed to the date the offer was delivered and to double costs assessed from that date.
- (27) Notwithstanding subrules (23) to (26), the court may award costs, or double costs, up to, or from, a time later than the date of delivery of the offer to settle, if it is satisfied that the offer could reasonably have been accepted only at a time later than the date of delivery.
- (33) A party under disability may make, withdraw or accept an offer to settle, but the acceptance of an offer made by or to such a party is subject to approval by the court under Rule 6(14).

- [94] In *Boe v. Waters* (1998), 24 C.P.C. (4th) 252 B.C.S.C. Reg.) Master Horn found that he had the power to award double costs. He based his decision on Rule 37(2) that indicates that a party to a proceeding may make an offer under Rule 37. A "proceeding" includes a review of a solicitors bill under the Legal Professions Act. See: *Holmes Greenslade v. Starcom International Optics Corp.* (1997), 49 B.C.L.R. (3d) 159 (S.C.). Master Horn did not consider any of the other provisions of Rule 37.
- [95] The difficulty is that although a taxation is a proceeding, only offers made under Rule 37 by plaintiffs or defendants trigger double costs. While for the purpose of Rule 37 those terms are expanded to include petitioners and respondents, the parties to a taxation under the Legal Professions Act do not fall under any of those categories. The proceedings are between solicitor and client, not plaintiff and defendant.
- [96] In the context of Rule 37 this is of more than academic concern. The operation of the rule is dependent upon whether or not the offer is made by a plaintiff or defendant. The consequences of accepting or failing to accept an offer differ depending whether it is the plaintiff or defendant who made the offer. In the taxation of a legal account there is no plaintiff, there is no defendant.
- [97] Several of the provisions of Rule 37 give jurisdiction to the court to make orders. I refer in particular to Rules 37(7),(11),(21),(27)and(33). These provisions are integral to the operation of the rule. A registrar does not have the jurisdiction of the court and when masters are sitting as registrars they have the jurisdiction of registrars and do not fall within the definition of "court." See: *Aydin & Co. v. Schaber* (2000), 49 C.P.C. (4th) 77 (B.C.S.C.). Accordingly on a taxation neither a registrar nor a master can make any of those orders found in Rule 37 which are reserved to a court.
- [98] Because only plaintiffs or defendants can make offers under Rule 37 and only the court can make certain orders required by the rule, I am of the opinion that Rule 37 does not apply to taxations under the Legal Profession Act and accordingly the Master in this case was without jurisdiction to make an order for double costs.
- [99] I am also of the opinion that an award of double costs would be contrary to the provisions of section 72 of the Legal Profession Act. That section sets out, subject to special circumstances, that the awarding of costs of a taxation depend upon whether or not more than 1/6th of the total account is subtracted. Although an offer to settle might constitute special circumstances that could be considered in awarding costs, such an offer does not in itself trigger double costs.
- [100] If Rule 37 is to be grafted on to this legislative scheme, a client who is successful in taxing off more than 1/6th of a solicitors account might still face an order for double costs if the solicitor in the course of the taxation made an offer to settle for an even lesser sum. That is indeed what occurred in *Boe v. Waters* when the client was successful in taxing off more than 1/6th of the bill and still was forced to pay double costs. To allow lawyers whose accounts are taxed down more than 1/6th to recover double costs of the taxation because of

an offer to settle is in my opinion contrary to the stated legislative intention. If the Rules Committee or the Legislature believes that double costs should become a feature of a taxation under the Legal Profession Act it is open to them to amend the rule or legislation. Until that occurs the registrar's jurisdiction as set out in Aydin is limited to awarding only party and party costs with respect to legal profession review hearings. The client is entitled to the costs of the taxation on scale 3.

COSTS

[101] The solicitors have succeeded on the appeal to the extent that the fees for the work in relation to the trial have been increased by approximately \$40,000 and the order for double costs of the taxation has been overturned, albeit on a ground not argued before the Master. The solicitors, however, have failed to increase their fee in relation to the proceedings in the Court of Appeal and the end result remains less favourable than the offer to settle that was made prior to the taxation. Given the divided success I would order that each side pay their own costs of the appeal.

SUMMARY

[102] In summary I have allowed the appeal to the extent that I have found the contingency fee of 25% was not unreasonable at the time that the contract was entered into. I have further held that the fee generated by the 25% contingency is reasonable. The solicitor is entitled to that contingency both on the \$490,000 awarded at trial and interest earned on that sum. In regards to the Court of Appeal proceedings I have dismissed the appeal challenging the fee of \$30,000 set by the Master. I have allowed the appeal from the order for double costs of the taxation.

"R.B.T. Goepel, J."

The Honourable Mr. Justice R.B.T. Goepel

APPENDIX

APPENDIX "J"

DIMENSIONS OF DOCUMENTS

TRIAL

1. Corinne Sawchuk Affidavit 39 pages text 38 exhibits
- 2 Interrogatories (3 parties) 9 pages 54 questions
3. Reed reply to Interrogatories 11 pages
4. Hill reply to Interrogatories 8 pages
5. Rogers reply to Interrogatories 18 pages

6. Sawchuk Discovery transcript 125 pages
7. Foster Discovery transcript 68 pages
8. Rogers Discovery transcript 58 pages
9. Foster Argument 13 pages
10. Charities Argument 32 pages
11. Sawchuk Authorities 30 cases
12. Charities Authorities 27 cases
13. Carphin Authorities 11 cases and statute
14. Trial Brief 29 pages
15. Closing Trial Brief 11 pages
16. Chambers Brief re interest and costs 9 pages

APPEAL

17. Appeal Book (4 volumes) 764 pages
18. Supplementary Appeal Book 12 pages
19. Sawchuk factum 27 pages
20. Sawchuk Memorandum re costs 4 pages
21. Carphin factum 25 pages
22. Carphin Memorandum re costs 3 pages
23. Foster factum 4 pages
24. Charities' factum 5 pages
25. Ross Field factum 28 pages

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/02/05/2002bcsc0542.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/long-miller-and-mullins-v-sawchuk-2002>

Prepared on 29 October 2026 · Esheria