

**COURT OF APPEAL FOR ONTARIO**

**O'CONNOR A.C.J.O., ABELLA and MacPHERSON JJ.A.**

<b>BETWEEN:</b>	)	
	)	
<b>RONALD MCINTYRE by his</b>	)	<b>Janet E. Minor and</b>
<b>estate</b>	)	<b>Sean Hanley</b>
<b>representative MAUREEN</b>	)	
<b>MCINTYRE</b>	)	<b>for the appellant</b>
	)	
<b>Applicant/</b>	)	<b>Douglas Lennox</b>
<b>Respondent in appeal</b>	)	<b>for the respondent</b>
	)	
<b>- and -</b>	)	<b>Terrence J. O'Sullivan and</b>
	)	<b>Rochelle S. Fox</b>
<b>ATTORNEY GENERAL OF</b>	)	<b>for the intervener,</b>
<b>ONTARIO</b>	)	
	)	<b>The Advocates' Society</b>
<b>Appellant</b>	)	
	)	<b>James Vigmond and</b>
<b>- and -</b>	)	<b>Brian Cameron</b>
	)	<b>for the intervener,</b>
<b>THE ADVOCATES' SOCIETY and</b>	)	<b>The Ontario Trial Lawyers'</b>
<b>THE ONTARIO TRIAL</b>	)	<b>Association</b>
<b>LAWYERS'</b>	)	
<b>ASSOCIATION</b>	)	
<b>Interveners</b>	)	<b>Heard: April 17, 2002</b>

**On appeal from the judgment of Justice Janet M. Wilson dated March 1, 2001, reported at (2001), 53 O.R. (3d) 137.**

**O'CONNOR A.C.J.O.:**

[1] This appeal raises the important question of whether lawyers and their clients are prohibited from entering into contingency fee agreements in relation to civil lawsuits in Ontario. Contingency fee agreements may take a variety of forms, but the one element common to all of them is that the client only becomes liable to pay the lawyer's fees in the event of success in the litigation.

[2] The respondent has commenced an action seeking damages against Imperial Tobacco and Venturi Inc. (the "defendants") for the wrongful death of Ronald McIntyre.

At the outset of the litigation, the respondent sought a declaration that a proposed contingency fee agreement with her lawyers is not prohibited by *An Act Respecting Champerty*, R.S.O. 1897, c. 327 (the “*Champerty Act*”). In a judgment dated March 1, 2001, Wilson J. granted the declaration, but held that in doing so she was not approving the fee structure set out in the proposed agreement. It is implicit in her reasons that the reasonableness and fairness of the fee structure did not inform her analysis of whether the proposed agreement is champertous.

[3] The Attorney General, who was named as the respondent in the application below, appeals the judgment arguing that the *Champerty Act* constitutes an absolute prohibition of all lawyers’ contingency fee agreements. For the reasons that follow, I agree with the applications judge’s main conclusion that lawyers’ contingency fee agreements are not *per se* prohibited by the *Champerty Act*. However, in my view, that does not end the analysis that is required to determine if a particular agreement is champertous. It remains to be decided whether the lawyer had an improper motive in entering into the allegedly champertous agreement. In assessing the lawyer’s motive, a court should consider, among other things, the reasonableness and fairness of the fee structure in the contingency fee agreement.

[4] In this case, the fee structure in the proposed agreement is based on a percentage of the damages that may be recovered from the defendants. The fees are not related to the amount of time spent by the lawyers, the quality of the legal services or the many other factors that would normally be taken into consideration when determining the appropriateness of a lawyer’s fees. Moreover, there is no cap or upper limit on the amount that may become owing for legal services. Because of the nature of the fee structure, it is premature at this early stage of the litigation to assess whether the fees that may become payable under the proposed agreement will be reasonable and fair. For that reason alone, I would allow the appeal and set aside the declaration that the proposed agreement does not contravene the *Champerty Act*. Given the nature of the fee structure, a determination of whether the proposed agreement is champertous will likely have to await the outcome of the underlying litigation.

## Background

[5] The respondent, the estate of Ronald McIntyre represented by his widow, Maureen McIntyre, has instituted an action against the defendants alleging responsibility for the illness and death of Mr. McIntyre, who died from lung cancer. It is alleged that Mr. McIntyre’s death was caused by smoking cigarettes manufactured and marketed by the defendant, Imperial Tobacco, and it is further alleged that the defendant, Venturi Inc., was negligent and deceitful in its marketing of a plastic cigarette attachment, used by Mr. McIntyre, by stating that the device reduces tar and nicotine from cigarette smoke.

[6] Mr. McIntyre began smoking at the age of sixteen and soon after became addicted to nicotine. In spite of efforts to stop smoking, he was unable to do so. In July 1998 he was diagnosed with lung cancer and in December 1999 he died.

[7] After her husband’s death, Mrs. McIntyre contacted the Canadian Cancer Society for advice and was eventually referred to her present lawyers, the law firm of Rochon, Genova, to represent her husband’s estate in any legal action arising from her husband’s

death. Mrs. McIntyre decided to bring an action against the defendants to recover the damages resulting from Mr. McIntyre's death. It was apparent that the proposed action would involve complex product liability allegations and likely would be vigorously defended. Mrs. McIntyre was unable to prosecute an action of this nature without the assistance of counsel.

[8] Mrs. McIntyre works in the medical records department of a local hospital and is a person of modest means. The applications judge found that she would be unable to finance the proposed litigation other than on a contingency fee basis.

[9] On behalf of her husband's estate, Mrs. McIntyre entered into a contingency fee agreement with Rochon, Genova, which agreement was made conditional upon court approval. The McIntyre estate is only liable to pay the law firm's fees in the event that the litigation is successful. If there is no recovery, then the estate and Mrs. McIntyre will not be liable for the payment of any legal fees. In the event of success, the compensation for the lawyers is based on a percentage of the damages recovered. The estate would be required to pay to the law firm 33 percent of compensatory damages, 40 percent of punitive, aggravated or exemplary damages, 100 percent of costs recovered from the defendants in the action and 100 percent of any disbursements not otherwise recovered from the defendants.

[10] Although not explicitly stated in the agreement, the law firm implicitly agrees to provide the legal services necessary to conduct the litigation and to pay the disbursements necessary to support the action.

[11] The respondent brought an application in the court below requesting three declarations:

- a) A declaration that the proposed agreement between the applicant and her solicitors does not offend the *Champerty Act*.
- b) In the alternative, a declaration that the *Champerty Act* is of no force and effect, and is contrary to the *Canadian Charter of Rights and Freedoms*, and the *Constitution Act, 1867*.
- c) In the further alternative, an order providing a constitutional exemption, allowing the respondent to retain counsel, notwithstanding the provisions of the *Champerty Act*.

[12] The respondent named only the Attorney General of Ontario as a respondent to the application in the court below. The defendants in the underlying litigation were not named as respondents and did not participate in the proceeding before the applications judge.

[13] The application was heard on December 7, 2000 and by judgment dated March 1, 2001, reported at (2001), 53 O.R. (3d) 137 (S.C.J.), the applications judge made a declaration that the proposed agreement between the respondent and her solicitors does not offend the *Champerty Act*. In addition, she held that it was premature to approve the proposed agreement and that the court should decide whether to approve any contingency fee agreement at the conclusion of the litigation. Because of the conclusion she reached, the applications judge did not find it necessary to address the alternative declarations sought by the respondent.

[14] The Attorney General appealed the judgment. On July 26, 2001, Osborne A.C.J.O. dismissed a motion by Imperial Tobacco for leave to intervene in the appeal as an added party and to adduce evidence before this court. See [2001] O.J. No. 3206 (QL). On September 14, 2001, the Advocates' Society and the Ontario Trial Lawyers' Association were granted leave to intervene in the appeal as friends of the court. Both interveners appeared on the argument of the appeal and made submissions in favour of upholding the decision of the court below.

## Issue

[15] The single issue that needs to be addressed on this appeal is whether the applications judge erred in granting a declaration that the proposed agreement between the respondent and her lawyers does not offend the *Champerty Act*. Because I conclude that it is premature to determine whether the proposed agreement offends the *Champerty Act*, it is unnecessary to address the *Charter* relief sought by the respondent.

## Analysis

[16] The *Champerty Act* has only two sections. The complete text is as follows:

1. Champertors be they that move pleas and suits, or cause to be moved, either by their own procurement, or by others, and sue them at their proper costs, for to have part of the land in variance, or part of the gains.
2. All champertous agreements are forbidden, and invalid.

[2] [17] I have divided my analysis into the following five sections:

- a) History of the *Champerty Act*;
- b) The common law of champerty and maintenance;
- c) The interpretation of s. 1 of the *Champerty Act*;
- d) Lawyers' contingency fee agreements; and
- e) Application of the law to this case.

### (a)(a) History of the *Champerty Act*

[18] The *Champerty Act* was enacted by the Ontario legislature in 1897<sup>1[1]</sup>. Section 1 is based on a provision found in an English statute which was first enacted in 1305 and

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<sup>1[1]</sup> While the text of the *Champerty Act* is not printed in the Revised Statutes of Ontario 1990, the statute, as enacted in 1897, remains in effect. See Schedule C: Table of Unconsolidated and Unrepealed Acts, R.S.O. 1990, vol. 12.

which is cited as 33 Edw.1, Stat. 2. The English statute was entitled *Statutum de Conspiratoribus* or as it came to be known, the *Statute Concerning Conspirators*. It is not clear whether the predecessor language to what became s. 1 in the *Champerty Act* was included in the *Statute Concerning Conspirators* when it was originally enacted or whether it was added at some later point in time. See *A New Abridgement of the Law by Matthew Bacon*, 7<sup>th</sup> ed., Corrected (London: A Strahan, 1832) Vol. II at 27, 29. It is apparent, however, that the section finds its origins in medieval times.

[19] The relevant section in the English statute, like the sections in several other medieval statutes, addressed abuses that were known in the common law as champerty and maintenance. Legal historians tell us that these medieval statutes were passed with a view to prohibiting particular practices that were prevalent in English medieval society. In those times, there existed a practice of assigning doubtful or fraudulent claims to Royal officials, nobles and other persons of wealth and influence who would be expected to receive a more favourable hearing in court than the assignors. Typically, these arrangements provided that the assignee maintain the action and that the proceeds of success would be shared between the assignor and assignee. Over time, as conditions in the administration of justice improved with the emergence of an impartial and independent judiciary, the circumstances that gave rise to the enactment of what is now s. 1 of the *Champerty Act* no longer existed. However, new and different abuses arose and were included within what the common law labelled as champerty and maintenance.

[20] A reprint of the *Statute Concerning Conspirators*, published in 1763 in *The Statutes at Large*, Vol. 1, prepared by Owen Ruffhead, esq., used what was then more current language than that found in the original text. When the legislature in Ontario enacted the *Champerty Act* in 1897, it incorporated as s. 1 the identical language to that found in the 1763 reprint of the *Statute Concerning Conspirators*. The Ontario legislature added s. 2, providing that all champertous agreements are forbidden and invalid.

[21] In 1967, the Parliament of the United Kingdom repealed the various medieval statutes which had until then prohibited either or both of champerty and maintenance. See *Criminal Law Act 1967*, 1967, c. 58, ss. 13(1), (2), 14. Included among the statutes then repealed was the *Statute Concerning Conspirators*. However, the *Champerty Act*, as enacted in 1897, remains in effect in Ontario.

(b)

(b) The common law of champerty and maintenance

[22] The Attorney General argues that this appeal is concerned solely with the interpretation of s. 1 of the *Champerty Act* and that the concept of champerty found in the common law is of no assistance to the proper interpretation of that section. I agree that the interpretation of s. 1 of the *Champerty Act* is at the heart of this appeal. However, for the reasons that are developed in subsection (c) below, I am of the view the common law regarding what constitutes champerty is essential to a proper interpretation of the section. For that reason, before turning to the interpretation of s. 1 of the *Champerty Act*, it is useful to briefly review the common law of champerty. In doing so, it is also necessary

to review the common law of maintenance because as I point out below, champerty is one type or a subspecies of maintenance.

[23] The doctrines of champerty and maintenance played an important role in the common law in protecting the administration of justice from a variety of real or perceived abuses. At common law, champerty and maintenance were both crimes and torts and the presence of either was capable of rendering contracts unenforceable as being contrary to public policy.

[24] The common law crimes and torts of champerty and maintenance were abolished by statute in the United Kingdom in 1967. The abolition of criminal and civil liability for champerty and maintenance, however, did not put an end to the use of the concepts in English law. The 1967 Act left open the possibility that champerty and maintenance could still render contracts unenforceable as being contrary to public policy and because of that, the English courts continued to address issues relating to the enforceability of lawyers' contingency fee agreements until they were expressly permitted by statute in 1998.

[25] In 1954, the Canadian Parliament abolished all common law crimes, including those of champerty and maintenance. However, champerty and maintenance continue to be actionable in tort in Ontario upon proof of special damages. See *Frind v. Sheppard*, [1940] 4 D.L.R. 455 (Ont. C.A.), rev'd [1941] 4 D.L.R. 497 (S.C.C.); and *Davidson Tisdale Ltd. v. Pendrick* (1997), 18 C.P.C. (4<sup>th</sup>) 164 (Ont. Ct. (Gen. Div.)) (leave to appeal); (1998), 31 C.P.C. (4<sup>th</sup>) 164 (Div. Ct.). In addition, in Ontario, the *Champerty Act* specifically provides that champertous agreements are forbidden and invalid.

[26] Although the type of conduct that might constitute champerty and maintenance has evolved over time, the essential thrust of the two concepts has remained the same for at least two centuries. Maintenance is directed against those who, for an improper motive, often described as wanton or officious intermeddling, become involved with disputes (litigation) of others in which the maintainer has no interest whatsoever and where the assistance he or she renders to one or the other parties is without justification or excuse. Champerty is an egregious form of maintenance in which there is the added element that the maintainer shares in the profits of the litigation. Importantly, without maintenance there can be no champerty: *Findon v. Parker* (1843), 11 M. & W. 675 at 682, 152 E.R. 976 at 979 (Exch.); *Fischer v. Kamala Naicker* (1860), 8 Moore Ind. App. 170 at 187 (J.C.P.C.); *Newswander v. Giegerich* (1907), 39 S.C.R. 354 at 359, 362-63; *Colville v. Small* (1910), 22 O.L.R. 33 at 34 (H.C.), aff'd 22 O.L.R. 426 (Div. Ct.); *Neville v. London Express Newspaper Ltd.*, [1919] A.C. 368 at 378-79, 382-83 (H.L.); *R. v. Goodman*, [1939] S.C.R. 446 at 449, 453-54; *Monteith v. Calladine* (1964), 47 D.L.R. (2d) 332 at 342 (B.C.C.A.); *S. v. K.* (1986), 55 O.R. (2d) 111 at 118, 121 (Dist. Ct.); and *Smythers v. Armstrong* (1989), 67 O.R. (2d) 753 at 756-57 (H.C.J.). See also *Giles v. Thompson*, [1993] 3 All E.R. 321 at 357 (H.L.).

[27] The courts have made clear that a person's motive is a proper consideration and, indeed, determinative of the question whether conduct or an arrangement constitutes maintenance or champerty. It is only when a person has an improper motive which motive may include, but is not limited to, "officious intermeddling" or "stirring up strife", that a person will be found to be a maintainer.

[28] In *Buday v. Locator of Missing Heirs Inc.* (1993), 16 O.R. (3d) 253 (C.A.) at 267-68, Griffiths J.A. quoted with approval the following extract from *Monteith v. Calladine*, *supra*, at 342:

It would appear, therefore, that champerty is maintenance plus an agreement to share in the proceeds, and that while there can be maintenance without champerty, there can be no champerty without maintenance. There must be present in champerty as in maintenance an officious intermeddling, a stirring up of strife, or other improper motive. [Emphasis in original.]

[29] Similarly, Fogarty D.C.J. in *S. v. K.*, *supra*, at 117, summarized the need for an improper motive as follows:

I must conclude that the motive of the party who interests himself in the suit of another is most relevant to determine whether maintenance is made out. If the motive is genuine and arises out of concern for the litigant's rights, it is not maintenance. Similarly if that interest of such party arises genuinely from an interest in the outcome, it is not maintenance and this is not restricted to blood relationships. ...

[30] The English courts also routinely held that champerty and maintenance require the element of an improper motive. See *Neville v. London Express*, *supra*, at 378-79, 382-83, 411-12, 414-15; *In re Trepca Mines Ltd. (No. 2)*, [1963] 1 Ch. 199 at 219-20 (C.A.); *Giles v. Thompson*, *supra*, at 328-29, 332 (C.A.); and at 360 (H.L.); and *Thai Trading Co. v. Taylor*, [1998] Q.B. 785 at 786-90 (C.A.).

[31] In the same vein, the courts have allowed exceptions to what constitutes champerty or maintenance when there has been the presence of a justifying motive or excuse: *Galati v. Edwards Estate* (1998), 27 C.P.C. (4<sup>th</sup>) 123 (Ont. Ct. (Gen. Div.)); *S. v. K.*, *supra*; *Goodman*, *supra*; *Stribbell v. Bhalla* (1990), 73 O.R. (2d) 748 (H.C.J.); and *Buday*, *supra*. Lord Denning M.R. in *Trepca Mines*, *supra*, said the following at 219:

Maintenance may, I think, nowadays be defined as improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse. At one time the limits of "just cause or excuse" were very narrowly defined. But the law has broadened them very much of late ... and I hope they will never again be placed in a strait waistcoat.

[32] The fundamental aim of the law of champerty and maintenance has always been to protect the administration of justice from abuse. However, over time, that which has been considered to be champerty and maintenance has evolved. As they have done with many other common law concepts, the courts have shaped the rules relating to champerty

and maintenance to accommodate changing circumstances and the current requirements for the proper administration of justice. In *Giles v. Thompson, supra*, at 360, Lord Mustill described this process as follows:

As Steyn LJ has demonstrated, the law of maintenance and champerty has not stood still, but has accommodated itself to changing times: as indeed it must if it is to retain any useful purpose. ... I believe that the law on maintenance and champerty can best be kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants.

[33] It is interesting to note that when addressing issues of champerty and maintenance, the courts have had little regard to the definitions and prohibitions found in the *Champerty Act* in Ontario or in the medieval statutes relating to champerty and maintenance in England. Moreover, when the courts have referred to those statutes, they have not interpreted them in a manner that would restrict or cut down the scope of what was considered necessary to constitute champerty and maintenance at common law. In *Buday, supra*, at 267, Griffiths J.A. stated:

Whatever its historical origin, the authorities, both English and Canadian, have consistently treated champerty as a form of maintenance requiring proof not only of an agreement to share in the proceeds but also the element of encouraging litigation that the parties would not otherwise be disposed to commence. I recognize that the 1897 statute respecting champerty does not speak of officious intermeddling but the term champerty used in the statute has always by definition been regarded as a species of maintenance. [Emphasis added.]

[34] In summary, I discern the following four general principles from a review of the common law of champerty and maintenance:

- Champerty is a subspecies of maintenance. Without maintenance, there can be no champerty.
- For there to be maintenance the person allegedly maintaining an action or proceeding must have an improper motive which motive may include, but is not limited to, officious intermeddling or stirring up strife. There can be no maintenance if the alleged maintainer has a justifying motive or excuse.
- The type of conduct that has been found to constitute champerty and maintenance has evolved over time so as to keep in step with the fundamental aim of protecting the administration of justice from abuse.
- When the courts have had regard to statutes such as the *Champerty Act* and the *Statute Concerning Conspirators*, they have not interpreted those statutes as cutting down

or restricting the elements that were otherwise considered necessary to establish champerty and maintenance at common law.

[35] The above constitute the general principles relating to champerty and maintenance found in the common law. Historically, the courts applied these principles very strictly to contingency fee agreements between lawyers and clients, holding that such agreements were *per se* champertous without the need to show a specific improper motive. I discuss the evolution of the case law as it relates to contingency fee agreements in subsection (d) below.

### (c) The interpretation of s. 1 of the *Champerty Act*

[36] The Supreme Court of Canada has described the modern approach to statutory interpretation as follows:

Today, there is only one principle or approach, namely, the words of an Act are to be read in the entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at 41, adopting the words of Elmer Driedger in *Construction of Statutes* (2d ed. 1983) at 87.

[37] I start the analysis of s. 1 of the *Champerty Act* by noting again that the section is based on a provision that is hundreds of years old and upon the precise wording that was developed at least 240 years ago. Because of the antiquity of the language, this court should exercise some caution in attaching too much weight to the literal meaning of the words used. Clearly, the task of interpreting words from another era when some language may have been used differently than it is today can present difficulties not present when interpreting statutes enacted in modern times. Common sense suggests that when analyzing a provision from another era, like s. 1 of the *Champerty Act*, a court should pay particular regard to the context within which the provision was enacted and to the underlying aim of the legislation. This is particularly so where the language used is unfamiliar or awkward to the modern reader.

[38] Let me then turn to the language used in s. 1 of the *Act*. The Attorney General submits that the language in s. 1 is clear and unequivocal, defining a champertor as one who moves a lawsuit or causes to move a lawsuit and in exchange receives a portion of the recovery. This language, it is argued, applies to a lawyer who is a party to a contingency fee agreement like that proposed in this case and who assists the plaintiff in bringing the action in exchange for fees to be paid from the recovery in the action. Because the language is clear, it is submitted, there is no reason to resort to the common law for assistance in interpreting who should be considered a champertor within the meaning of s. 1. The importance of this last point, from the Attorney General's standpoint, is that the common law requirement for champerty and maintenance that there be an improper motive is not explicit in the words of s. 1 of the *Champerty Act*. Nor, the Attorney General argues, is it open from the language in the section for an alleged champertor to raise as an answer that there was a justifying motive or excuse.

[39] The effect of the Attorney General's argument is that the *Champerty Act* would create a different and more expansive class of champertors than that known to the common law. Even though one may not have an improper motive, that person would nonetheless be caught within the prohibition in the *Champerty Act* if he or she moved or caused to be moved an action in exchange for part of the recovery.

[40] In my view, the Attorney General's argument must fail for two reasons. First, I do not agree that the language in s. 1 is clear and unequivocal. Moreover, the argument completely ignores the context in which the *Champerty Act* was enacted by the Ontario legislature in 1897.

[41] There are two aspects of the language used in s. 1 that, in my view, are neither clear nor unequivocal. The first is the use of the words "move ... or cause to be moved" to describe the conduct that renders one a champertor. *The Oxford English Dictionary*, 2d ed., prepared by J.A. Simpson & E.S.C. Weiner, (Oxford: Clarendon Press, 1989) Vol. X at 31-34, provides many different meanings for the word "move", some of which would buttress the Attorney General's position that the word applies to a lawyer who provides legal services to a client bringing a suit or action with nothing more. For example, the definition of "move" includes "to plead (a cause or suit) in court and bring (an action at law)". Other meanings found in the dictionary, however, support an interpretation that the word "move" in s. 1 is intended to capture more than simply providing assistance to a party in an action. "Move" is also defined to mean "to stir up or excite, to provoke" or "to urge a person to do something", concepts which incorporate aspects of what was in 1897 and continues to be required at common law for maintenance and champerty – officious intermeddling or other improper motive. The many definitions of the word "move" found in the dictionary simply make the point that "move" can have more than one meaning, some of which could make sense in the context of s. 1 of the *Champerty Act*.

[42] In addition, I do not accept the Attorney General's submission that the language in s. 1 clearly excludes a consideration of the motive of an alleged champertor. It seems to me that the use of the preposition "for", preceding the words "to have ... part of the gains", leaves open an argument that one should examine the motive for which the alleged champertor is seeking to become involved in the litigation. Such an examination of motive is in keeping with the historical requirements for a finding of champerty. One can envision an argument that the existence of a justifiable motive or purpose for moving a lawsuit in addition to the motive of recovering part of the gains should take an alleged champertor outside the reach of the section. I put this point no higher than indicating that the use of the word "for" in s. 1 leaves open arguments in support of more than one interpretation of the section.

[43] Moreover, I am satisfied that the context within which the *Champerty Act* was enacted in 1897 argues strongly in favour of the use of the common law in interpreting the meaning of s. 1 of the *Act*. In 1897, the concepts of champerty and maintenance were well developed and entrenched in the common law. At the time, champerty and maintenance were considered to be both crimes and torts at common law, and by 1897 the courts had for centuries been applying common law principles to the conduct of alleged wrongdoers. Because of the illegality of champertous behaviour, the common law also considered champertous agreements to be unenforceable. Against this background, the Ontario legislature adopted the aged language now found in s. 1 to

define who would be considered a champertor. Significantly, that section had been on the statute books in England for hundreds of years and there does not appear to be anything in the jurisprudence that predated the enactment of the *Champerty Act* holding that the section created a different class of champertors than that known at common law.

[44] The available record does not disclose why the Ontario legislature enacted the *Champerty Act* in 1897, nor why it chose to adopt what was even at that time aged language to define who would be considered a champertor. However, it seems logical to conclude that the legislature by using existing, longstanding language, rather than carefully crafting a new legislative provision, did not intend to render a fundamental change to the existing concept of champerty.

[45] It is a settled principle of statutory interpretation that where the legislature intends to change the common law, it must do so expressly and in clear and unequivocal terms. Fauteaux J. stated the rule in *Goodyear Tire and Rubber Company of Canada Limited v. T. Eaton Company Limited*, [1956] S.C.R. 610 at 614, as follows:

[A] Legislature is not presumed to depart from the general system of the law without expressing its intentions to do so with irresistible clearness, failing which the law remains undisturbed.

Cumming J. (ad hoc) for this court expressed the same rule as follows in *Bayer Aktiengesellschaft v. Apotex Inc.* (1998), 82 C.P.R. (3d) 526 at 536:

It is generally presumed that the legislature does not intend to change existing law or to depart from established principles, policies or practices, unless expressly indicated. In other words, there is a general presumption against the implicit alteration of the law, the converse being that it is presumed the common law will not be displaced unless legislation provides an explicit instruction to that effect; ...

[46] I am satisfied that the interpretation of s. 1 of the *Champerty Act* calls for the application of the principle that a legislature is presumed not to have intended to change existing law unless otherwise expressly indicated. Because there is no language in the *Champerty Act* that evidences a clear legislative intention to displace what were in 1897 well established and broadly applied principles relating to champerty, I approach the interpretation of s. 1 on the basis that the legislature did not intend to render the fundamental change to the existing law of champerty urged by the Attorney General. In my view, the language of s. 1 and the context in which it was enacted fall well short of establishing such a clear legislative intention. For these reasons, I conclude that s. 1 of the *Champerty Act* should be interpreted as incorporating the common law requirements relating to who should be considered a champertor.

[47] Furthermore, I am satisfied that interpreting s. 1 of the *Champerty Act* in this manner is consistent with and promotes the fundamental object of the legislation. The overriding purpose of the common law of champerty has always been to protect the

administration of justice from abuse by those who wrongfully maintain litigation. Its origins are rooted in a policy directed to ensuring a fair resolution of disputes and protecting vulnerable litigants from abuse. The protection afforded by the common law is advanced by looking to the propriety of the motives of those who become involved in litigation. By examining motives, one can more readily separate abusive practices from those that are justified or even beneficial to the proper administration of justice. Like the common law, the aim of the *Champerty Act* was no doubt to protect the administration of justice from abuse. It is not apparent from the historical record, nor does the Attorney General now argue, that there were abuses not caught by the common law to which the *Champerty Act* was specifically directed. It seems clear, therefore, that an interpretation of the *Champerty Act* that is consistent with the common law principles relating to champerty would also be harmonious with and promote the aim of the legislation.

#### (d) Lawyers' contingency fee agreements

[48] As an alternative argument, the Attorney General submits that if this court concludes that s. 1 of the *Champerty Act* should be interpreted in a manner consistent with the common law requirements for champerty, then it should apply the case law that holds that lawyers' contingency fee agreements are *per se* champertous and there is, therefore, no need to establish a specific improper motive. The motive can be inferred from the very nature of the agreement itself.

[3] [49] There is no question that for many years the courts in Ontario and in England repeatedly held that lawyers' contingency fee agreements were champertous and, as a result, unenforceable. In *Re Solicitor* (1907), 14 O.L.R. 464 at 465 (H.C.), Chancellor Boyd expressed the then commonly held view as follows:

[T]he confidential relation between lawyer and client forbids any bargain being made by which the practitioner shall draw a larger return out of litigation than is sanctioned by the tariff and the practice of the Courts. Especially does the law forbid any agreement for the lawyer to share in the proceeds of a litigated claim as compensation for his services. Such a transaction is in contravention of the statute relating to champerty, and it is also a violation of the solemn engagement entered into by the barrister upon his call to the Bar.

[50] Similarly, in England Lord Denning described the prohibition on lawyers' contingency fees as follows, in *Wallersteiner v. Moir* (No. 2), [1975] Q.B. 373 at 393-94 (C.A.):

English law has never sanctioned an agreement by which a lawyer is remunerated on the basis of a 'contingency fee,'

that is that he gets paid the fee if he wins, but not if he loses. Such an agreement was illegal on the ground that it was the offence of champerty. ...

It was suggested to us that the only reason why 'contingency fees' were not allowed in England was because they offended against the criminal law of champerty: and that, now that criminal liability is abolished, the courts were free to hold that contingency fees were lawful. I cannot accept this contention. The reason why contingency fees are in general unlawful is that they are contrary to public policy as we understand it in England.

See also *Trendtex Trading Corporation v. Credit Suisse*, [1980] 1 Q.B. 629 (C.A.); *Hughes v. Kingston Upon Hull City Council*, [1999] Q.B. 1193 (Eng. Div. Ct.); *Robinson v. Cooney* (1999), 29 C.P.C. (4<sup>th</sup>) 72 (Ont. Ct. (Gen. Div.)); and *Awwad v. Geraghty & Co.*, [2000] 1 All E.R. 608 (C.A.).

[51] A review of the jurisprudence relating to champerty reveals two concerns that fuelled the courts' intolerance for these types of agreements. The first was the apprehension that lawyers, realizing that they would only be paid if an action were successful, would be tempted to resort to a host of unethical practices in order to ensure success and, therefore, payment of their fees. In *Trepca Mines, supra*, at 219-20, Lord Denning expressed this concern as follows:

The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses.

[52] The second concern prompting courts to fear the use of contingency fee agreements was the perceived need to protect the relationship of trust between lawyer and client. The fear was that if a lawyer's compensation was tied to recovery in the litigation, a lawyer might be tempted to conduct an action to further his or her own best interest rather than that of the client. More indirectly, clients might be concerned that this was in fact the case and question the strength of the lawyer's commitment to the clients' interests. In either event, the concern was that the relationship of trust between lawyer and client would be damaged.

[53] There is reason to question whether the contingent nature of a fee agreement, by itself, is the significant threat to professional ethics that was feared at common law. It is interesting to note that while historically these concerns about the potential for abuse by lawyers or damage to the lawyer-client relationship were frequently expressed, there is little, if any, evidence to show that the fears were well-founded. Although the lack of evidence may be attributable to the fact that contingency fee agreements were considered

to be illegal and therefore not broadly used, we do know that for years lawyers have acted in what they considered to be meritorious cases for clients of modest means with the realization, if not the express agreement, that they would only be paid in the event of success. See, for example, *Bergel & Edson v. Wolf* (2000), 50 O.R. (3d) 777 at 795 (S.C.J.); and *Finlayson v. Roberts* (2000), 136 O.A.C. 271 at para. 24 (C.A.). Lawyers acting in these “informal” arrangements were no doubt subject to some of the same temptations as those who formally agreed to be paid only in the event of a success. However, there is no evidence to indicate that lawyers who have acted in informal arrangements of this nature have performed to a lower ethical standard than those who were paid regardless of outcome.

[54] In addition, we have the benefit of the experiences of the many jurisdictions that have enacted legislation permitting regulated contingency fee agreements. This court was not shown any evidence to show that lawyers in these jurisdictions, properly regulated, are more likely to engage in the types of abuse to the administration of justice that were once feared to be the result of contingency fee agreements.

[55] There can be no doubt that from a public policy standpoint, the attitude towards permitting the use of contingency fee agreements has undergone enormous change over the last century. The reason for the change in attitude is directly tied to concerns about access to justice. Over time, the costs of litigation have risen significantly and the unfortunate result is that many individuals with meritorious claims are simply not able to pay for legal representation unless they are successful in the litigation. In this regard, Cory J. made the following comments about the importance of contingency fees to the legal system in *Coronation Insurance Co. v. Florence*, [1994] S.C.J. No. 116 at para. 14:

The concept of contingency fees is well established in the United States although it is a recent arrival in Canada. Its aim is to make court proceedings available to people who could not otherwise afford to have their legal rights determined. This is indeed a commendable goal that should be encouraged. ... Truly litigation can only be undertaken by the very rich or the legally aided. Legal rights are illusory and no more than a source of frustration if they cannot be recognized and enforced. This suggests that a flexible approach should be taken to problems arising from contingency fee arrangements, if only to facilitate access to the courts for more Canadians. Anything less would be to preserve the courts facilities in civil matters for the wealthy and powerful.

[56] Perhaps the most striking evidence of the change in attitude towards the use of contingency fee agreements is found in the fact that every Canadian province and territory other than Ontario has enacted legislation or rules of court to permit and regulate

the use of contingency fees. Manitoba, for example, has authorized such fees since 1890, while most of the other provinces have permitted them for at least 25 years.<sup>2 [2]</sup>

[57] Typically, when legislation has been enacted to permit contingency fee agreements, the legislature also has enacted regulations governing their use. The regulatory schemes vary from jurisdiction to jurisdiction. British Columbia, for example, imposes a ceiling on the percentage of the recovery that a lawyer may receive in certain types of proceedings. Most other jurisdictions impose no such restrictions. All of the provinces require that contingency fee agreements be in writing and many jurisdictions require such agreements to be filed in court. In addition, each Canadian jurisdiction provides a mechanism by which the client may seek a review of the lawyer's fee, similar to the scheme that now exists in Ontario under the *Solicitors Act*, R.S.O. 1990, c. S.15. The applications judge in this case laid out the various regulatory provisions comprehensively in an appendix to her judgment.

[58] In the United States, as early as the mid-nineteenth century, the Supreme Court expressly authorized the use of contingency fees. See *Wylie v. Coxe*, 15 How. 415 (1853). Contingency fees in the United States (in both federal and state courts) are now regulated by a combination of professional conduct rules and statutes. Most states base their rules on the American Bar Association's *Model Rules of Professional Conduct*, which impose some limitations on the use of such fee arrangements. The American regulations include required terms for contingency fee agreements and an obligation that fees be reasonable. Some states have placed caps on the percentage of the amount recovered that a lawyer may charge. Some states prohibit or restrict contingency fees in family law and/or criminal matters. See for example, *The Lawyer's Code of Professional Responsibility* (Albany: New York State Bar Association, 2002), DR (Disciplinary Rule) 2-106 - Fee for Legal Services.

[59] In England and Wales, the *Courts and Legal Services Act 1990*, 1990, c. 41, s. 58, authorized the use of "conditional fees", under which lawyers may recover their normal fees plus a success "uplift", *i.e.*, an increase in their fees, up to a maximum of 100 percent, based on the chance of winning, except in family law proceedings. The 1990 statute authorized the Lord Chancellor to make Orders specifying the proceedings in which conditional fee agreements lawfully could be made. The first such Order was made in 1995, permitting such fee agreements in personal injury and insolvency proceedings, as well as for cases before the European Commission and the European Court of Human Rights. The availability of conditional fees was expanded to include all civil proceedings in 1998. Moreover, with the passage of the *Access to Justice Act 1999*, 1999, c. 22, courts also may order that a successful litigant recover the success fee and insurance from the losing party. That statute also allows a party to be funded by a trade union or other prescribed group, and authorizes such a group to recover from the opponent a sum in recognition of that liability.

[60] Lawyers in all Australian jurisdictions are permitted to charge clients on a speculative fee basis, *i.e.*, they are paid their normal fees only in the event of success.

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<sup>2 [2]</sup> Family law cases are generally excluded from such legislation and in the discussion that follows, my comments about the advantages of contingency fee agreements are intended to apply to civil actions other than family law matters.

See *Clyne v. Bar Association of New South Wales* (1960), 104 C.L.R. 186 (H.C.); and *In the Marriage of Sheehan Husband and Sheehan Wife* (1990), 13 Fam. L.R. 736 at paras. 82, 88, 101 (Aust. Fam. Ct.). In addition, several Australian states, namely New South Wales, Victoria, South Australia and Queensland, have authorized the use of “uplift” fees (in which the lawyer receives, in addition to his or her usual fee, an agreed flat amount or percentage uplift of the usual fee, if successful) in certain types of cases. See, for example, *Legal Profession Act 1987* (NSW), s. 187(2), (3), (4); *Legal Practice Act 1996* (Vic.), s. 98; *Professional Conduct Rules* (S. Aust.), r. 8.10; and *Barristers’ Rules* (Qld.), r. 102A(d). Contingency fee arrangements are, however, prohibited in family and criminal law cases. Tasmania prohibits the charging of uplift fees by barristers: *Rules of Practice 1994* (Tas.), r. 92(1). In the Northern Territory and Western Australia, uplift fee agreements may amount to champerty at common law.

[61] While the Ontario legislature has not enacted legislation permitting contingency fee agreements for all civil actions, it has recognized the advantages of these types of agreements for class action proceedings. In 1992, the legislature enacted the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 33(1), which expressly permits and regulates contingency fee agreements for class proceedings. In enacting this legislation, Ontario has recognized the overriding importance of ensuring access to justice for those who have claims arising in the context of a class of injured victims. There is no apparent reason why a policy that favours contingency fee agreements for class actions would not apply equally to litigation brought by individuals.

[62] The change in public policy favouring the use of contingency fee agreements to facilitate access to justice is not only found in legislation. In Ontario in recent years, there have been repeated calls for reform to permit and regulate contingency fee agreements. Since 1975, there have been several studies or reviews of the competing policy considerations relating to contingency fee agreements. Overwhelmingly, those studying the issues have recommended that, for reasons of promoting access to justice, contingency fee agreements should be permitted.

[63] The Law Society of Upper Canada first formally supported a scheme of regulated contingency fees in 1988 and has reaffirmed that position in 1992 and again in 2000. In 1997, the Ontario Legal Aid Review recommended that the Ontario government introduce legislation that would allow contingent fee arrangements for lawyers in Ontario. The report noted that, over recent years, legal aid certificate coverage had been eliminated for most civil litigation matters and that permitting contingency fee agreements would be an important step in addressing the resulting difficulty. See Ontario Legal Aid Review, *A Blueprint for Publicly Funded Legal Services* (Toronto: Ministry of the Attorney General, 1997) Vol. 1 at 218-25. Most recently, in 2000, the Attorney General’s Joint Committee on Contingency Fee, which was comprised of representatives of the Law Society of Upper Canada, the Advocates’ Society and the Canadian Bar Association - Ontario, again recommended that, for purposes of increasing the access to justice, Ontario expressly permit contingency fees, *i.e.*, a percentage of the amount recovered in legal proceedings, except in criminal and quasi-criminal cases, and in family law proceedings. The *Joint Committee Report* [unpublished, 2000] stated:

One way to make justice more accessible is to provide a flexible approach to the payment of legal services by permitting contingency fees. Contingency fees are advantageous for middle class litigants because they shift most of the risk of litigation from a client to a lawyer. Under a contingency fee agreement, the lawyer finances the litigation for the client while a case is pending. As a result, middle class clients, who are generally risk averse, do not have to commit to pay an unpredictable amount for their lawyer's services and are then able to turn to the justice system to seek redress for their injuries. ...

A variety of controls and safeguards can be imposed to regulate contingency fees to protect consumers, avoid abuse and prevent over-charging by lawyers, including: restrictions on the area of practice to which contingency fees can be applied, restrictions on clients, regulation of the lawyer's remuneration, review of the contingency fee contract, filing the contract with the court and regulating the form and content of the contract.

[64] In recent years, the courts have also begun to recognize the benefits of providing increased access to the courts flowing from the use of contingency fee agreements. Some courts have softened the traditional approach of precluding recovery of fees by lawyers where there has been a contingency fee agreement and have instead focused on the need of an improper motive to render an agreement unenforceable. See *Stribbell v. Bhalla*, *supra*; *Thai Trading*, *supra*; and *Bergel & Edson*, *supra*. These cases are part of the normal process by which the common law adjusts to emerging circumstances and experiences. I recognize, however, that even in recent years not all courts have adopted this approach and some courts have continued to follow the traditional approach of finding that contingency fee agreements are *per se* champertous. See for example, *Robinson v. Cooney*, *supra*; *Hughes v. Kingston*, *supra*; and *Awwad*, *supra*.

[65] The important point to be drawn from the recent jurisprudence is that the common law regarding contingency fee agreements has begun to evolve so as to conform to the widely accepted modern public policy norms recognizing the significant advantages in permitting contingency fee agreements in some circumstances. It is not surprising that all courts have not, at a single point in time, accepted the shift in attitude in favour of these types of agreements. The development of the common law most often is an evolutionary and incremental process rather than the result of a single defining judgment.

[66] The Attorney General's argument is not that sound public policy does not favour contingency fee agreements for all civil proceedings, nor that contingency fee agreements do not provide significant advantages in promoting access to justice. The Attorney General also does not argue that the types of abuses that underlie the negative views the courts historically took to these types of agreements cannot be managed within the existing regulatory framework. Rather, the Attorney General contends that any change in the law relating to champerty in Ontario must come from the legislature, not the courts.

[67] I disagree with this argument. As set out above, I conclude that s. 1 of the *Champerty Act* embodies the common law principles relating to who is a champertor. The development of the common law is, of course, a matter for the courts. While it is clearly open to the legislature of Ontario to reform the law of champerty as it relates to contingency fee agreements, I am satisfied that it is also appropriate for the courts to address this issue as part of their function in developing the common law.

[68] There are well-established principles governing judicial reform of the common law. An important reason why courts change the common law from time to time is to ensure that it stays in step with the evolution of society. One of the advantages of the common law is its flexibility – the capacity of the courts to address and accommodate changed needs in societal circumstances. See *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842 at 871. I recognize, however, that when considering changes to the common law, courts must exercise caution. Changes must always be weighed against concerns about certainty and fairness. As a result, changes in the common law are generally incremental in nature, often resulting from a need to fill a gap in the law or to address an unfairness from an existing rule.

[69] In my view, the current circumstances in the administration of justice in Ontario are such that the courts should take a fresh approach to the application of the common law to contingency fee agreements.

[70] I am persuaded that the historic rationale for the absolute prohibition is no longer justified. The common law of champerty was developed to protect the administration of justice from abuse, one aspect of which involved the protection of vulnerable litigants. Within that broad framework, the courts historically held that contingency fee agreements were *per se* champertous. But, as examples from other jurisdictions amply demonstrate, the potential abuses that provided the rationale for the *per se* prohibition of contingency fee agreements can be addressed by an appropriate regulatory scheme governing the conduct of lawyers and the amount of lawyers fees.

[71] Currently, in Ontario the *Solicitors Act* provides a comprehensive process for reviewing and assessing the reasonableness of lawyers' accounts. The *Rules of Professional Conduct* contain a complete set of standards for regulating lawyers' ethical behaviour and the complaints and discipline process of the Law Society of Upper Canada provide accessible means by which those standards can be enforced. While many of the jurisdictions that have enacted legislation permitting contingency fee agreements have enacted specific regulations to govern their use, I am satisfied that the basic regulatory framework necessary to address potential abuses in the use of contingency fee agreements is presently in place in Ontario.

[72] I am also of the view that the advantages to the administration of justice from permitting properly regulated contingency fee agreements in the form of increased access to justice are compelling. Indeed, there is a strong case to be made that the continuation of a *per se* prohibition against contingency fee agreements actually tends to defeat the fundamental purpose underlying the law of champerty – the protection of the administration of justice and, in particular, the protection of vulnerable litigants. In my view, it is no longer necessary or desirable to deem contingency fee agreements *per se* champertous. Neither the contingent nature of a fee agreement, nor the fact that the lawyer's fees may be paid from the recovery in an action, without more, ought to

constitute an improper motive or officious intermeddling for purposes of the law of champerty.

[73] I am comfortable that this conclusion is consistent with the reasonable evolution of the common law in this area of the law. Some courts already have reached similar conclusions.

[74] Further, the proposed change is not made in a vacuum. The effects of permitting contingency fee agreements have been thoroughly studied in Ontario and the experiences of the many jurisdictions that permit such agreements are well documented. As a result, this court has the benefit of a very broad base of information in assessing the potential advantages or disadvantages in developing the common law along the lines I propose. Moreover, because the issues surrounding contingency fee agreements relate to the administration of justice, a court is in as good a position as anyone to assess the ramifications of an evolution of the law in this area.

[75] To be clear, I am not suggesting that contingency fee agreements can never be champertous. Rather, I conclude only that contingency fee agreements should no longer be considered *per se* champertous. The issue of whether a particular agreement is champertous will depend on the application of the common law elements of champerty to the circumstances of each case. A court confronted with an issue of champerty must look at the conduct of the parties involved, together with the propriety of the motive of an alleged champertor in order to determine if the requirements for champerty are present.

[76] When considering the propriety of the motive of a lawyer who enters into a contingency fee agreement, a court will be concerned with the nature and the amount of the fees to be paid to the lawyer in the event of success. One of the originating policies in forming the common law of champerty was the protection of vulnerable litigants. A fee agreement that so over-compensates a lawyer such that it is unreasonable or unfair to the client is an agreement with an improper purpose – *i.e.*, taking advantage of the client. See *Thai Trading, supra*, at 788, 790. The applications judge in this case dealt with this concern as follows, at 157:

The suggested compensation may or may not be fair and reasonable, depending upon the outcome of the litigation in light of the difficulty of the case, as well as the time and expenses incurred. Counsel should be well rewarded if the litigation is successful, for assuming the risk and costs of the litigation. The compensation however should not be a windfall resembling a lottery win.

[77] I agree with these comments.

#### (c)(e) Application of the law to this case

[78] The applications judge granted a declaration that the proposed fee agreement does not violate the *Champerty Act*. The proposed agreement provides for payment to the respondent's lawyers of a fee in the amount of 30 percent of compensatory damages recovered, 40 percent of punitive damages, costs recovered in the action and any unrecovered disbursements. Depending on the amount recovered in the underlying action, the fees to be paid to the lawyer could be enormous. The lawyers who drafted the agreement provided an example of the potential fees which totalled over \$9,000,000. While the amount of the damages on which the example is based may or may not be

realistic, the example does make the point that unacceptably large fees could become payable under the agreement.

[79] The fee structure in the proposed agreement is related to the amount of money that is recovered on behalf of the respondent. The fee structure has no relationship to the amount of time spent by the lawyers, the quality of the services provided, the level of expertise of the lawyers providing the services, the normal rates charged by the lawyers who provide the services, or the stage of the litigation at which recovery is achieved. Under the terms of this agreement, the respondent would be obliged to pay the lawyers the same amount of fees if the litigation is settled early in the process as she would if the same amount of money was recovered after a lengthy trial and appeal. In addition, the agreement raises the prospect of double recovery for the lawyers – fees from the respondent as well as costs recovered from the defendants in the action. There is no way of telling at this point whether the fees that would be paid to the lawyers under this proposed agreement would be reasonable and fair. When an agreement like this one is structured so that the fees are based on a percentage of the recovery, the determination of whether the fees are reasonable and fair will normally have to await the outcome of the litigation.

[80] I have concluded in subsection (d) above that contingency fee agreements do not *per se* contravene the *Champerty Act*. However, in my view, contingency fee agreements that provide for the payment of fees that are unreasonable or unfair are agreements that have an improper motive and come within the prohibition in the *Act*. Because it is premature to address the issue of the reasonableness and fairness of the proposed agreement, it is my respectful view that the applications judge should not have granted the declaration sought by the respondent.

[81] I want to address three other matters that were touched on during the arguments of counsel. The first relates to the criteria that should be used in assessing the reasonableness and fairness of fees in a contingency fee agreement. Contingency fee agreements have been expressly permitted by statute in many jurisdictions. Often, the authorizing legislation has also provided for a regulatory regime that addresses the manner in which the propriety of contingency fees may be determined. See for example, the *Class Proceedings Act*, s. 33(1).

[82] Ontario, of course, does not have legislation specifically directed at regulating non-class action contingency fee agreements. Until such legislation is passed, the regime in the *Solicitors Act* for assessing lawyers' accounts will apply. When assessing a contingency fee arrangement, the courts should start by looking at the usual factors that are considered in addressing the appropriateness of lawyer-client accounts. See *Cohen v. Kealey & Blaney* (1985), 10 O.A.C. 344 at 346 (C.A.).

[83] In addition, I see no reason why courts should not also consider compensation to a lawyer for the risk assumed in acting without the guarantee of payment. This is, of course, where the discussion becomes controversial. Some argue that allowing a lawyer to be compensated for the risk assumed increases the concerns about the abuses that historically the law of champerty aimed to prevent. However, I do not think that that needs to be the case. The emphasis here should be on the reasonableness and fairness of the compensation to the lawyer for assuming the risk. Many jurisdictions that have expressly approved contingency fee agreements have set out the criteria for addressing the amount of compensation that will be permitted. Indeed, Ontario has done so in the

*Class Proceedings Act*. In these instances, one element giving rise to compensation is often the acceptance of risk and an assessment of the level of risk involved.

[84] That said, I want to sound a note of caution about the potential for unreasonably large contingency fees. It is critical that contingency fee agreements be regulated and that the amount of fees be properly controlled. Courts should be concerned that excessive fee arrangements may encourage the types of abuses that historically underlay the common law prohibition against contingency fee agreements and that they can create the unfortunate public perception that litigation is being conducted more for the benefit of lawyers than for their clients. Fairness to clients must always be a paramount consideration.

[85] Notwithstanding my conclusion that contingency fee agreements should no longer be absolutely prohibited at common law, I urge the government of Ontario to accept the advice that it has been given for many years to enact legislation permitting and regulating contingency fee agreements in a comprehensive and co-ordinated manner. There are obvious advantages to having a regulatory scheme that is clearly and specifically addressed in a single legislative enactment. There is no reason why Ontario, like all the other jurisdictions in Canada, should not enact such a scheme. Again, I wish to make clear that this comment is not intended to apply to family law matters, where different factors apply.

[86] The second matter I wish to briefly address is the effect of the *Solicitors Act* of Ontario on the disposition of this appeal. I start by noting that the underlying application does not raise the question whether the proposed agreement breaches the *Solicitors Act* and, strictly speaking, it is not necessary to comment on the effect of that *Act* on the issues raised in this case. However, for completeness, I think a few comments are warranted.

[87] Section 28 of the *Solicitors Act* reads as follows:

28. Nothing in sections 16 to 33 gives validity to a purchase by a solicitor of the interest or any part of the interest of his or her client in any action or other contentious proceeding to be brought or maintained, or gives validity to an agreement by which a solicitor retained or employed to prosecute an action or proceeding stipulates for payment only in the event of success in the action or proceeding, or where the amount to be paid to him or her is a percentage of the amount or value of the property recovered or preserved or otherwise determinable by such amount or value or dependent upon the result of the action or proceeding.

[88] I agree with the applications judge and others who have observed that this section and other similarly worded sections do not prohibit contingency fee agreements. See *Bergel & Edson, supra*, at 791-92; and *Thai Trading, supra*, at 785. The section says nothing more than contingency fee agreements are not permitted by the *Solicitors Act* if they are not otherwise permitted.

[89] Finally, I want to address the *Rules of Professional Conduct* of the Law Society of Upper Canada. Again, the application that underlies this appeal does not call for a determination whether the proposed agreement contravenes these *Rules*. Because this argument was not fully developed on the appeal, I think the issue of the application of those *Rules* is better left for another occasion. That said, the *Rules of Professional Conduct* and the complaints and disciplinary regimes of the Law Society clearly have a role to play in ensuring that lawyers who enter into contingency fee agreements follow the ethical and professional standards set out in the *Rules*, so that the abuses feared in the past do not become a reality in the future.

## **DISPOSITION**

[90] For the reasons above, I would allow the appeal and set aside the judgment of the court below. Rather than dismissing the application brought by the respondent, I would stay that application on the basis that it is premature.

[91] As to costs, the respondent has achieved substantial success on the central issues raised by the application and on this appeal. The applications judge determined in the exercise of her discretion that, because of the novelty of the issue raised, this was a case in which there should be no order as to costs for the proceeding before her. I would not interfere with that decision.

[92] However, I would order that the appellant pay to the respondent 80 percent of the costs of this appeal on a partial indemnity basis. If the parties are unable to agree upon the amount of the costs, the respondent shall deliver a bill of costs, together with any submissions in writing within 30 days of the release of this judgment. The appellant shall have 7 days from the date of receiving such submissions to make written submissions in response.

[4] [93] I would make no order with respect to the costs of the interveners.

**RELEASED: “SEP 10 2002”**

**“DOC”**

**“Dennis O’Connor A.C.J.O.”**

**“I agree R.S. Abella J.A.”**

**“I agree J.C. MacPherson J.A.”**

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