COURT FILE NO.: 00-CV-195898
DATE: 2001/03/01

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
RONALD McINTYRE by his estate representative MAUREEN McINTYRE	)	*Douglas Lennox*, for the Applicant
	)	
	)	
Applicant	)	
	)	
-and -	)	
	)	
	)	
ATTORNEY GENERAL OF ONTARIO	)	*Sean Hanley*, for the Respondent
	)	
	)	
	)	
Respondent	)	
	)	
	)	
	)	**HEARD: December 7,2000**

WILSON, J.

REASONS FOR JUDGMENT

[1] This application raises important questions with respect to the prohibition of contingency fees in Ontario as champertous.

[2] The Oxford English Dictionary, 2nd ed., Volume HI (Oxford: Clarendon Press), defines "champerty" in law at p. 8 as:

> "the illegal proceeding, whereby a party not naturally concerned in a suit enga-es to help the plaintiff or defendant to prosecute it, on the condition that, if it be brought to a successful issue, he is to receive a share of the property in the dispute"; and
>
> "a combination for an evil purpose".

[3] The applicant Maureen McIntyre (Mrs. McIntyre) is the widow and estate representative of Ronald McIntyre (Mr. McIntyre). Mr. McIntyre died from lung cancer on December 23, 1999 at the age of sixty-three. Mrs. McIntyre wishes to initiate wrongful death proceedings against Imperial Tobacco and others

with respect to her husband's addiction to nicotine and subsequent lung cancer. She is a person of modest means. Unless she can enter into some form of contingency retainer agreement with payment only if the action is successful, she will not be able to proceed with the action. The legal fees and disbursements in the proposed action will be significant. The limitation period with respect to this action is two years from the date of death. It will expire on December 22, 2001.

[4] Counsel are prepared to act on behalf of the estate so long as the proposed contingency agreement entered into between Mrs. McIntyre and the law fin-n is approved by the court.

[5] In this application, Mrs. McIntyre seeks a declaration that the proposed contingency agreement is not prohibited by *An Act Respecting Champerty,* R.S.O. 1897, c. 327 *("Champerty Act").* She relies upon the recent decision of H. Spiegel, J. in *Bergel & Edson v. Wolf (2000),* 50 O.R. (3d) 777 (S.C.J.) *("Bergel & Edson v. Wolf).* The relief sought by the applicant seeks prospective approval of the proposed contingency arrangement. I note that the case relied upon rule upon the enforceability of contingency arrangements after the case is concluded.

[6] If the proposed agreement does offend the *Champerty Act,* then she asserts in the alternative, that the *Champerty Act* offends sections 2 and 7 of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 19 82, c. 1 1 *(the Charter).*

[7] The issues raised by the applicant are:

1. What is the meaning of "charnperty" when considering the *Champerty Act?* Should the definition of champerty that has developed pursuant to the common law outside Ontario requiring the presence of the improper motive of "officious intermeddling," be adopted when considering contingency fees in the context of the solicitor-client relationship?

2. If all contingency agreements are illegal regardless of motive, then does the *Champerty Act* offend section 2 or 7 of the *Charter,* as interfering with either freedom of speech, or liberty and security of the person?

The Facts

[8] The facts for the purpose of this application are straightforward, and are not in dispute.

[9] Mr. McIntyre began smoking at the age of sixteen years, and soon after became addicted to nicotine. In spite of efforts to quit smoking, he was unable to do so. In July 1998 he was

diagnosed with inoperable lung cancer. He underwent radiation and chemotherapy treatments. He died in December 1999.

[10] Mr. McIntyre's estate is modest. Mrs. McIntyre works in a local hospital in the medical records department. She is unable to fund the proposed litigation. She contacted the Canadian Cancer Society for advice, and was eventually referred to her present counsel.

[11] Her reasons for wanting, to initiate the proposed litigation include seeking compensation for her family. Other reasons raising public policy issues are also cited:

> I believe that what happened to my husband was wrong. I wish to bring a law suit against the tobacco industry for the following reasons:
>
> (a) To educate the Canadian public, and especially children, about tobacco industry misconduct;

(b) To punish the tobacco industry for their decades of disinformation about the risks of smoking, and about the addictiveness of nicotine;

(c) To force the tobacco industry to reform itself, to be honest with consumers, and to work to develop a safer product; and

(d) To pr event the tragedy which happaned to my family from being repeated for other Canadian families.

[12] The proposed retainer agreement is conditional upon court approval. The suggested compensation for counsel from the estate provides:

(a) The Estate shall pay Rochon Genova 33% of any compensatory damages award recovered from the defendant(s) in the Action;

(b) The Estate shall pay Rochon Genova 40% of any punitive, aggravated or exemplary damages award recovered from the defendant(s) in the Action;

(c) The Estate shall pay Rochon Genova 100% of any cost awards recovered from the defendant(s) in this Action; and

(d) The Estate shall pay Rochon Genova 100% of the cost of any disbursements which are not otherwise recovered from the defendant(s) by means of a cost award in this Action.

[13] If no monies are recovered from the defendants, then the estate (and presumably the applicant) will owe nothing to the law firm.

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The Issue in Context

[14] A contingency arrangement is one where payment is only owed if a claim is successful, with an agreement that the lawyer shall receive a percentage of the successful claim. Historically, the courts have held, regardless of the nature of the agreement, that a contingency agreement includes one where a lawyer agrees to charge their client only in the event of success. See: *Attorneys and Solicitors Act (1870),* [1875], 1 Ch. D. 573); *and Wallensteiner v. Moir (No. 2),* [1975] Q.B. 373 (Eng. C.A.). Such an agreement is judged to be unlawful, and is therefore unenforceable. Regardless of the fairness of the arrangement, if the court concludes that the arrangement is a champertous contingency agreement, the lawyer will receive no compensation for services rendered. Compensation is precluded on either on an hourly basis or on a *quantum meruit* basis for the value of the work performed. See: *Robinson v. Cooney* (1999), 29 C.P.C. (4th) 72 (Ont. S.C.J.); *Wild v. Simpson,* [1919] 2 K.B. 544 (Eng. C.A.); *Haseldine v. Hoskin,* [1933] 1 K.B. 822 (Eng. C.A.); and *Re Trepca Mines Ltd.,* [1963] Ch. 199 (En-. C.A.).

[15] There has been an erosion of the strict application of the contingency principles and notions of champerty in recent caselaw. A finding that an agreement is champertous due to its contingent nature results in a windfall. The windfall may be to the opposing party required to pay costs, if they successfully raise the contingency issue. Alternatively, the client may receive a windfall as they will receive legal services in a successful lawsuit without being, required to pay for them. Recent cases address the inherent unfairness of the windfall, and consider access to justice. This approach includes a review of the purpose animating the legislation, consideration of the circumstances giving, rise to the contract in question, to be considered in the context of contemporary public policy. The court then decides based upon this analysis whether the contract

should be enforced. See: *Johnson v. Lazzarino* (1998), 39 O.R. (3d) 724 (Gen. Div.) *("Johnson v. Lazzarino")* aff d (999), 43 O.R. (3d) 253 (C.A.) and *Bergel & Edson v. Wolf, supra.*

[16] It appears obvious that a lawyer in this case would like to ensure that he or she would be paid if the case is successful. It is unlikely that a lawyer would be prepared to act if they could find themselves in the unenviable position of receiving no compensation for work performed at the successful conclusion of a case. As well, the lawyer could have difficulties with the Law Society, for agreeing to be paid only in the event of success.

Statutory framework

[17] *The Champerty Act* was incorporated in Ontario in 1897 and has not been amended since. It is succinct legislation which provides:

An Act respecting Champerty.

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows: -

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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. 33 Edw.1

2. All champertous agreements are forbidden, and invalid.

[18] Historically, Ontario is the only province that passed legislation with respect to champerty. All other provinces in Canada incorporated the principles opposing champertous arrangements by common law, rather than statute.

[19] Other relevant regulatory or statutory provisions which must be considered with respect to this issue are the *Rules of Professional Conduct ("Rules"),* and the provisions of the *Solicitors Act,* R.S.O. 1990, c. S. *15 ("Solicitors Act").*

The Rules of Professional Conduct

[20] Rules 2.08(3) and (4) of the *Rules* provide:

> Contingent Fees
>
> 2.08 (3) A lawyer shall not, except as expressly permitted by law, acquire by purchase or otherwise any interest in the subject-matter of litigation being conducted by the lawyer.
>
> 2.08 (4) A lawyer shall not enter into an arrangement with the client for a contingent fee except in accordance with the provisions of the *Solicitors Act* or in accordance with *the Class Proceedings Act, 1992.*
>
> [emphasis added]

[21] As of November 2000, the new *Rules* took effect. Rules 2.08 (3) and (4) are virtually the same as the old Rule 9, Commentary IO which governed contingency fees until November, 2000.

The Solicitors Act

[22] Counsel did not refer to the provisions of the *Solicitors Act* in their arguments. However, they are relevant to the inquiry.

[23] Section 16 of the *Solicitors Act* provides:

> Agreements between solicitors and clients as to compensation
>
> 16.--(I) Subject to sections 17 to 33, a solicitor may make an agreement in writing with his or her client respecting the amount and manner of payment for the whole or a part of any past or future services in respect of business done or to be done by the solicitor, either by a gross sum or by commission or percentage, or by salary or otherwise, and
>
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>
> either at the same rate or at- a .greater or less rate than that at which he or she would otherwise be entitled to be remunerated.
>
> Definitions
>
> (2) In this section, "commission" and "percentage" apply only to non-contentious business and to conveyancing.
>
> [emphasis added]

[24] According to the *Solicitors Act*, a lawyer may make an agreement in writing for payment of a "commission" or "percentage" only in "non-contentious business" or "conveyancing-" matters. Such an agreement would be subject to the checks and balances outlined in sections 17 to 33 of the *Solicitors Act*, which include mandatory review by an assessment officer, or the court, if need be to ensure the fairness of the fee arrangements. However, section 16 does permit a lawyer in contentious civil matters to enter an agreement in writing with a client for compensation either as a gross sum, or at the same rate or at a higher or lower rate than at which he or she would otherwise be entitled to be remunerated.

[25] Section 28 of the *Solicitors Act* specifically addresses the issue of contingency agreements in "contentious proceedings". It provides:

> Solicitors not to purchase any interest in litigation or to make payment dependent upon success
>
> 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.

[26] How should section 28 of the *Solicitors Act* be interpreted?

[27] Section 28 does not specifically provide that contingency agreements are illegal and unenforceable. It does provide that section 16 and following of the *Solicitors Act* do not give validity to a contingency arrangement in a contentious proceeding.

[28] The prohibition contained in the wording of section 28 is somewhat difficult to reconcile when considered in light of the ability to enter into agreements to charge more or less than the usual rate of remuneration confirmed in section 16 of the *Solicitors Act* in contentious cases. While the title suggests that solicitors shall not purchase an interest in the litigation, the wording the section merely stipulates that nothing in the *Solicitors Act* "gives validity" to such agreements.

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[29] H. Spiegel J. concludes in *Bergel & Edson v. Wolf, supra,* at p. 791, that section 28 does not expressly declare such agreements unlawful, but rather deals with the validity, and hence enforceability of contingency agreements:

> In my view, s. 28 does not declare that a contingency fee agreement is invalid, but only that the other provisions of the [Solicitors] Act which permit such an agreement in non-litigious matters do not "give validity" to such agreements in litigious matters. It was likely drafted out of an abundance of caution to make it clear that notwithstanding the provisions of s. 16 to ')-'), the most common examples of champertous agreements which are described in s. 28 are not to be considered valid.

[30] H. Spiegel, J. adopts the reasoning of the English Court of Appeal in *Thai Trading Co. v. Taylor,* [1998] Q.B. 781 (Eng. C.A.) *("Thai Trading Co. v. Taylor"),* which confirms that the provisions of the British *Solicitors Act 1974* do not make agreements unlawful, if they are otherwise lawful:

> In *Thai Trading Co. v. Taylor,* [1998] E.W.J. No. 237, [1998] Q.B. 785 (Eng. C.A.) Millet L. J. at 785-786 makes the following observation in relation to section 59(2) of the *Solicitors Act 1974* which has wording similar to s. 28 of the *Solicitors Act:*
>
> It should be observed at the outset that there is nothing in the *Solicitors Act 1974* which prohibits the charging of contingent fees. Section 59(2) merely provides that nothing in *the Champerty Act* shall give validity to arrangements of the kind there specified. It does not legitimize such arrangements if they are otherwise unlawful, but neither does it make them unlawful if they are otherwise lawful.
>
> [emphasis added]

[31] I would adopt these comments in construing the legal effect of s. 28 of the *Solicitors Act.* Section 28 merely makes it clear that nothing in sections 16 to 33 of the *Solicitors Act* gives validity to what would otherwise be a champertous agreement. A contingency agreement would not be rendered unlawful by s. 28. Section 28 of the *Solicitors Act* does not define what constitutes a champertous agreement.

[32] The cluster of relevant statutory and regulatory provisions therefore provide:

> 1) All champertous agreements are forbidden and invalid [the *Champerty Act]*
>
> 2) A lawyer should not, except as by law expressly sanctioned acquire an interest in litigation. Contingency arrangements are improper unless they are in accordance with the *Solicitors Act* or the *Class Proceedings Act, 1992* S.O. 1992, c. 6. [Rules 2.08(3) and (4) of the *Rules]*
>
> 3) A lawyer may charge a percentage or commission only in non-contentious business matters. A lawyer may make an agreement in contentious proceedings for compensation as a gross sum, or by salary, or by charging a greater or lower rate than her usual rate of

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> compensation. [Section 16 of the *Solicitors Act].* This section does not give validity to an agreement in a contentious proceeding that is contingent upon success, or when the compensation is a percentage of the property recovered. [Section 28 of the *Solicitors Act]*

[33] For the reasons outlined I conclude that the provisions of the *Solicitors Act,* although relevant, are not determinative of the legality of the contingency arrangement. The *Rules of Professional Conduct* are not

breached if a contingency arrangement is by law expressly sanctioned. Legality and enforceability depend upon whether the agreement is champertous.

[34] I turn therefore to consider the *Champerty Act.*

[35] An outline of the development in the notion of champerty and contingency arrangements may provide context for the policy issues in this case.

Historical Context

[36] The historic context of the *Champerty Act* is reflected in the comments by the Ontario Law Reform Commission in its *Report on Class Actions, 1982,* Vol. 3 at p. 717:

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

[37] The policy reasons for the prohibition of contingency fees between a solicitor and client were enunciated by Osborne, J. in *Stribbell v. Bhalla* (1990), 73 O.R. (2d) 748 (H.C.J.) *("Stribbell')* at page 752:

> The policy which underlies the prohibition against contingent fees is the protection of the relationship of trust between lawyer and client. In M.M. Orkin, Y7ze *Law of Costs, 2* d ed. (Aurora, Ont.: Canada Law Book, 1987), it was put this way:
>
> > The confidential relationship which exists between a solicitor and his client forbids any bargain between them whereby the solicitor is to receive a larger return out of the litigation than is sanctioned by the tariff and the practice of the courts. In particular, any agreement whereby the solicitor is to share in the proceeds of the litigated claim as compensation for his services is prohibited as being in contravention of the law relating to champerty.

[38] Osborne, J. allowed the solicitor client fees of the counsel who had pursued the medical malpractice action to be paid. He found that the solicitor was entitled to a fee above party-and-party costs, and that such a fee would not be champertous. The recovery of the counsel fees was not limited to the party and party cost award granted by the trial judge.

[39] The need for the legislature to address the issue of contingency fees was clearly flagged by Osborne, J. in *Stribbell, supra,* at pp. 754-5:

> While I think it would be preferable were contingent fees or arrangements resembling contingent fees something that is addressed by the Legislature, I am nonetheless satisfied that plaintiffs' counsel has proceeded properly in dealing with this issue as has been done here. I recognize that, at least for now, the Legislature seems to have proceeded on the basis of a policy to provide legal services to those of modest means publicly and directly by way of legal aid, rather than privately and indirectly by allowing contingent fees. A gap, however, remains. Mr. Stribbell is not eligible for legal aid, but at the same time, Mr. Stribbell does not earn a sufficient income to pen-nit him to finance this kind of litigation. I think in these circumstances the court is entitled to intervene. Justice requires that deserving actions be prosecuted by competent counsel and competent counsel are entitled to be paid a

reasonable fee for the value of the work done.
[emphasis added]

[40] The question of contingency fees raises visceral responses.

[41] Historically, contingency fees were precluded for the sound public policy reasons precluding maintenance and champerty. Maintenance and champerty were common law crimes in Canada until the 1953-54amendments to the *Criminal Code*. However, the cut and thrust of the civil litigation landscape has changed over the years. Often the playing field is not level. Complex litigation is out of the financial reach of most Canadians. The legal aid system has serious financial constraints. There are issues with respect to access to justice.

[42] The importance of the access to justice issue with respect to contingency fees is squarely addressed by Justice Cory in *Coronation Insurance Co. v. Florence,* [1994] S.C.J. No. 116 (QL) *("Coronation Insurance Co. v. Florence")* at para. 14:

> The concept of contingency fees is well established in the United States although it is a recent arrival in Canada. It's *[sic]* 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
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>
> Canadians. Anything less would be to preserve the courts facilities in civil matters for the wealthy and powerful.

[43] *In Coronation Insurance Co. v. Florence,* the defendants had entered into a contingency arrangement with their counsel. The defendants were unsuccessful, but costs were awarded against the successful insurers due to their conduct. Notwithstanding the contingency arrangement, the Supreme Court upheld the award of costs awarded in favour of the defendants.

[44] These cases confirm that there is tension between promoting access to justice to litigants, while retaining the integrity of the trust relationship between solicitor and client. Both competing values are fundamental to a civil justice system.

[45] Today, Ontario is the only province in Canada that apparently precludes all contingency fee arrangements as champertous.

[46] All other provinces in Canada now regulate contingency fees for civil cases to achieve a balance between these two competing values. The regulation balances the need for access to justice while providing safeguards to minimize potential conflicts of interest between solicitor and client resulting from the contingency fee arrangement. The regulation ensures that the contingency fee is fair and reasonable, while ensuring that litigation is not being stirred up for an improper motive. The mechanism for the control of contingency fees across Canada is through the relevant Law Society Rules of Professional Conduct, and in some provinces through the equivalent to our *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[47] A chronological history of when other provinces began acceptance and regulation of contingency fees beginning with Manitoba in 1890, and ending with Newfoundland in 1986 coupled with an overview of the mechanism for regulation is summarized as Appendix I.

[48] Ontario appears to be at odds with the rest of Canada.

[49] This situation is particularly anomalous, as it is recognized that unregulated contingency arrangements in some form or another are widely used in practice in Ontario. This gap between the theory and the reality is bluntly recognized by H. Spiegel, J. in his decision *Bergel & Edson v. Wolf, supra,* at p. 795:

> In Ontario, the *Class Proceedings Act*, S.O. 1992, c. 6, does provide for agreements for payment of fees and disbursements only in the event of success. Mr. Orkin submits that virtually the entire personal injury bar in Ontario has operated on a *de facto* contingency basis for many years. I think that anyone who disputed that submission would be guilty of willful blindness. There is no evidence that the "professional degradation" and the pernicious practices which Chancellor Boyd attributed to the "American ambulance chasers" have resulted.
>
> [emphasis added]

[50] The Advocates' Society in its October/November 2000 edition of The Advocates' Brief (Volume 12, No. 3) candidly confirms the present covert arrangements with respect to

contingency fees: "this really is an access to justice issue and much preferable to the now hit and miss and hidden arrangements of which we all have knowledge."

[51] Most jurisdictions in the United States had accepted contingency fees by the mid-19th century. Conditional fee agreements have been permitted in Britain since 1999, as a result of legislative chances. Prior to the legislative changes, there were developments in the common law opening, the door in a limited way to conditional fee agreements. See, for example, *Singh v. Observer Ltd*., [1989] 3 All ER 777 Eng. C.A.), and *Thai Trading Co. v. Taylor*.

[52] All recent reports considering the issue of contingency fees have recommended the introduction of contingency fees in civil litigation, subject to legislative regulatory control to ensure no improper motive, and to ensure that fees are fair and reasonable. The following, reports beginning in 1988 have recommended the regulated use of contingency fees in Ontario:

1. Canadian Bar Association - Ontario, *Opening Doors or Stirring Up Strife - The Implementation of Contingent Fees in Ontario (March* 15, 1988);

2. The Law Society of Upper Canada ' *Report of the Special Committee on Contingency Fees,* (May 27, 1988);

3. The Law Society of Upper Canada, *Report of the Special Committee on Contingency Fees,* (February 28, 1992);

4. Ontario Civil Justice Review, *Supplemental and Final Report* (November, 1996); and

5. The Law Society of Upper Canada, *Report from Society's Representative on Joint Committee on Contingency Fees* (June 23, 2000).]

[53] The groups involved in preparing the recent report released by the Law Society of Upper Canada were provided with copies of the motion material. They take no position with respect to this application, but reiterate the recommendations for legislative regulation of contingency fees in accordance with their report.

[54] The Canadian Bar Association - Ontario, report *Opening Doors or Stirring Up Strife - The Implementation of Contingent Fees in Ontario (March* 15, 1988), makes the observation at pp. 11-12 that the fears with respect to the introduction of contingency fees are more illusory than real:

> Perhaps the major concrete fact that this province has to deal with is that all of the other Provinces and Territories in Canada permit contingent fee contracts in varying forms and with varying, controls. Their experience would certainly seem to indicate that many of the fears and concerns that gave rise to the original prohibition of contingency fees in Canada are

> unrealistic in terms of modem Canadian society and the practice of law in that society.

Developments in the Common Law

[55] I turn to consider what constitutes champerty.

[56] The analysis may be best approached in two stages. The first is to review a contemporary approach to determining the question of legality. The second is to consider the meaning of champerty as it relates to contingency fees in today's legal landscape.

[57] In *Johnson v. Lazzarino,* Sharpe J. endorses what he calls a "modem" approach in determining whether a statutory prohibition renders a contract illegal. This case dealt with the prohibition of contingency, percentage arrangements for accountants charging their clients. It interpreted the provisions of the rules of professional conduct governing accountants. Such rules did not explicitly make a contingency fee unenforceable. Sharpe, J. allowed the accountant's fees to be paid, even though contingency arrangements were not permitted at the time the arrangement had been entered into. Subsequently, the rules precluding contingency fees changed.

[58] Sharpe, J. states at pa-e 727 of *Johnson v. Lazzarino, supra:*

The modem approach is to examine the statutory provision, to analyze its purpose and to determine whether enforceability of the contract is affected.

[59] He cites with approval the following passage from *Still v. M.N.R.* (1997), 154 D.L.R. (4th) 229 (F.C.A.) at p. 249, per Robertson J.A.:

> Professor Waddams [The Law of Contracts, 3rd ed., 1993] suggests that where a statute prohibits the formation of a contract the courts should be free to decide the consequences (at 372). I agree. If legislatures do not wish to spell out in detail the contractual consequences flowing from a breach of a statutory prohibition, and are content to impose only a penalty or administrative sanction, then it is entirely within a court's jurisdiction to determine, in effect, whether other sanctions should be imposed. As the doctrine of illegality is not a creature of statute, but of judicial creation, it is incumbent on the present judiciary to ensure that its premises accord with contemporary values

[60] The Court of Appeal in *Johnson v. Lazzarino* (1999), 43 O.R. (3d) 253 adopts the contemporary approach to determine legality: the Court "looks to the purpose animating the statute which is said to have been violated, and the circumstances under which the particular contract was made and then asks whether it would be contrary to public policy to enforce the contract: *Beer v. Townsgate I Ltd.* (1 997), 3 6 O.R. (3d) 13 6 (C.A.)".

[61] The English courts too have considered a contemporary approach to the question of contingency fees between solicitors and their clients. Lord Mustill in the 1993 House of Lords decision, *Giles v. Thompson*, [199')] 3 All E.R. 321 (H.L.) *("Giles v. Thompson")* outlines the historical purpose of maintenance and champerty to control those that "traffic in litigation". He emphasized the need for the law of maintenance and champerty to be capable of adapting to changed circumstances, by looking back to the public policy reasons for their development. He states at p. 360:

> The law on 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

[62] He states at p. 351 that the law of champerty preventing contingency fees for solicitors survives nowadays, so far as it survives at all, largely as a rule of professional conduct".

[63] He further states at p. 360 that, to determine whether the proposed contingency arrangement is offensive, the Court must consider two questions. First, it is necessary to consider whether the transaction bears the marks of unlawful champerty, and secondly, the court must inquire whether the contract is validated by the existence of a legitimate interest in the person supporting the action distinct from the benefit he seeks to derive from it.

[64] The two step test may be distilled into two questions. Is there present in the proposed contingency arrangement the element of officious intermeddling for an improper motive? Is there a legitimate policy reason for allowing the contingency agreement to be recognized and enforced by the court?

[65] The English test is specific to contingency agreements with lawyers, but the test dovetails consistently with the test enunciated in *Johnson v. Lazzarino.* It is the presence of officious intermeddling that is the targeted evil in a contingency fee arrangement. The circumstances of the formation of the contract will be relevant to determining, whether there is "officious intermeddling". Public policy issues then must be considered.

Officious Intermeddling and Champerty

[66] What is the relationship between "officious intermeddling" and champerty?

[67] There is a long line of cases in the common law requiring the presence of "officious intermeddling" for an arrangement to be found to be champertous.

[68] Counsel for the Attorney General urges that any developments in the common law do not apply to solicitors, as "champertors" is a defined term in section I of the *Champerty Act.* He suggests therefore that any development in the common law with respect to the meaning of champerty" has no application when considering the *Champerty Act.*

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[69] The notion of "officious intermeddling" is not a recent concept. Prior to the introduction of the *Champerty Act*, the courts had recognized officious intermeddling as an element of champerty. In *Fischer v. Kamala Naicker (I* 860), 19 E.R. 495; VIII Moore Ind. App. 170, the Privy Council noted at p. 187:

> The Court seem very properly to have considered that the champerty, or, more properly, the maintenance into which they were inquiring, was something which must have the qualities attributed to champerty or maintenance by the English law: it must be something against good policy and justice, something tending to promote unnecessary litigation, something that in the legal sense is immoral, and to the constitution of which a bad motive in the same sense

is necessary.

[emphasis added]

[70] This test, considered many years ago, reflects the spirit of what has been labeled "officious intermeddling". The common law requirement of officious intermeddling, or improper motive, existed as an element of champerty prior to the introduction of the *Champerty Act.*

[71] It is a recognized principle of statutory interpretation that for an Act to effectively oust the common law, it must clearly and explicitly do so. As outlined in *Halsbury (36 Hals.,* 3' ed., p. 412, para. 625):

> Except in so far as they are clearly and unambiguously intended to do so, statutes should not be construed so as to make any alteration in the common law or to change any established principle of law.

[72] Section 1 of the *Champerty Act* does not specifically eliminate the common law requirement of officious intermeddling. It follows, therefore, that the common law prerequisite should continue to apply when considering section 1 of the *Champerty Act.*

[73] There have been recent developments in the common law.

[74] The English cases reiterate that the policy underlying the law of maintenance requires the presence of officious intermeddling as described by Moulton L.J. in *British Cash and Parcel Conveyors Ltd. v. Lamson Store Service Co. Ltd., [* 1 908] 1 K.B. 1006 at 1014. See: Schiemann L.J. in *Geraghty & Co.* v. Awwad, [2000] 1 All E.R. 608 (C.A.) *("Geraghty & Co. v. Awwad")* (at pp. 614-5) and Mustill L.J. in *Giles v. Thompson, supra,* at p. 357:

> It is directed against wanton and officious intermeddling with the disputes of others in which the [maintainer] has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse.
>
> [emphasis added]

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[75] The English notion that champerty is a form of maintenance, which requires officious intermeddling was recognized by Griffiths J.A. of the Ontario Court of Appeal in *Buday v. Locator of Missing Heirs Inc. (I* 993), 16 O.R. (3d) 257 *("Buday")* at p. 267:

> 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.

(76) These comments apply to an agreement to establish ownership to an estate. H.Spiegel, J. *Bergel & Edson v Wo4f,* adopted and followed the ratio in *Buday,* when considering the solicitor Client relationship.

[77] It is the suggestion of counsel for the Attorney General that the test of "officious

intermeddling" applies generally to contingency arrangements, such as one affecting heirs as considered in *Buday,* but that this test ought not to apply to the unique trust relationship that exists between solicitor and client. Counsel suggests that *Bergel & Edson v. Wolf,* is wrongly decided.

[78] This logic however does not appear to be consistent with development of the common law in England.

[79] Prior to England passing legislation in 1999 recognizing the regulated use of conditional fees, the courts in England through the common law began recognizing the potential benefit of such arrangements.

[80] *In Thai Trading Co. v. Taylor, supra,* Millett L.J. noted at p. 789 that it cannot be contrary to public policy to agree to charge a client only in the case of success:

> ... there is nothing improper in a lawyer acting in a case for a meritorious client who to his knowledge cannot afford to pay his costs if the case is lost: see *Singh v. Observer Ltd., [* 1 989] 3 All ER 777; *A Ltd. v. B Ltd.,* [1996] Ch.D. 65. Not only is this not improper; it is in accordance with current notions of the public interest that he should do so.

[81] I note that the Court of Appeal in *Geraghty & Co. v.* Awwad disagrees with the conclusions reached in *Thai Trading Co. v. Taylor.* At the time of the *Geraghty & Co. v. Awwad* decision, legislation governing the, limited use of conditional fees had been passed. It fell short of permitting widespread use of such agreements. In these circumstances, the Court concluded that the relaxing of the prohibition by legislation should not be interpreted by the court as a *carte*

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blanche with respect to any contingency agreement. The conclusion of the English Court of Appeal in *Geraghty & Co. v.* Awwad must be considered given the circumstances of the case and the status of the legislative amendments. In *Geraghty & Co. v.* Awwad, no limitation period would expire resulting in a claimant being denied the right to sue if the court failed to consider the validity of a contingency agreement. The facts and circumstances of this case are quite different.

[82] The recent decision of Cullity J. in *Robinson v. Cooney* (1999), 29 C.P.C. (4^{th}) 72 (Ont. S.C.J.) is in conflict with the conclusions reached by H. Spiegel, J. in *Bergel & Edson v. Wolf* Although Cullity, J. refuses to allow counsel compensation in light of the contingency fee arrangement, he notes at pa-e 80 that if legislative changes are not made, that judicial intervention may be required:

> It is possible that, if legislative changes are not made, courts will at some future time, consider whether public policy still requires the complete exclusion of *quasi-contractual* remedies of solicitors who enter into agreements of the kind provided to the client in this case
>
> In any such review the implications of the comments made in *Buday v. Locator of Missing Heirs .Inc. (1* 993), 16 O.R. (3d) 257 (Ont. C.A.), at pp. 267-8 as well as the discussion in Maddaugh and McCamus, *The Law of Restitution (I* 990), at pp. 366374, would need to be considered. Such changes in the law would, I believe, best be left to the legislature but, if they are to be implemented judicially, this should be done only after the issues and competing policy considerations have been fully argued. No submissions were made to me on the question.
>
> [emphasis added]

[83] The issues were fully argued before H. Spiegel, J. They have also been fully argued

before me.

[84] It appears clear that the conclusion reached by Griffiths, J.A.. in *Buday,* that champerty requires an element of officious intermeddling for an improper motive is consistent with all the developments in the common law.

[85] I agree with H.Spiegel, J's conclusion in *Bergel & Edson v. Wo4f, supra* at p. 790 that it is a prerequisite that there be the presence of officious intermeddling, imputing an improper motive for an agreement to be champertous. He adopts the approach of Griffiths, J.A. in *Buday, supra:*

> There certainly is no evidence to suggest that the client was encouraged by the terms of the retainer agreement, or by any other conduct of the solicitor to enforce a right which she would not otherwise have pursued. Indeed, I think it can be safely assumed by the quantum and the timing, of the settlement that the claim was a genuine one which would have been advanced by the client even in the absence of a contingency fee arrangement. I am therefore of the view that there was no evidence upon which the assessment officer could have made a finding that the solicitors stirred up the client to litigate a claim which

> she would not otherwise have been disposed to enforce. It follows, therefore, that the assessment officer erred in principle in finding that the retainer agreement was champertous.

[86] I agree with the two step procedure suggested by Lord Mustill in *Giles v. Thompson. First* the court must determine whether the transaction bears the marks of unlawful champerty due to the presence of the prerequisite element of "officious intermeddling". Secondly, the court must determine whether counsel has a legitimate social policy interest in pursuing the claim, distinct from benefits in the form of fees.

[87] Based upon the affidavit of Mrs. McIntyre, I conclude that there is no stirring up of litigation by the proposed contingency arrangement. She has been seeking counsel on her own initiative through various channels. For financial reasons, she can only pursue the proposed litigation with payment to her counsel if the claim is successful. A contingency arrangement is the only one that will permit access to the judicial system. Certainly it appears that a contingency arrangement promotes access to the judicial system in what inevitably will prove to be a difficult case. I conclude that there is no officious intermeddling.

[88] Turning, to the second criterion, it appears that the implications of a claim against the tobacco industry may have widespread effects. The claim may perhaps have an effect upon the health care system, or with respect to the education of young people. I conclude that there is a legitimate public, as well as private interest in allowing claims such as this one to be pursued. I reiterate the comments of Justice Cory in *Coronation Insurance Co. v. Florence, supra,* at para. 14: "Legal rights are illusory and no more than a source of frustration if they cannot be recognized and enforced".

[89] For these reasons, I conclude that the proposed arrangement is not champerty in law.

[90] Historically the reservation about applying the principles of common law to the relationship between solicitor and client made sense. They do not make sense today. Acain I quote the powerful words of Cory, J. in *Coronation Insurance v. Florence, supra,* at para. 14 when he says "...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 Court's facilities in civil matters for the wealthy and powerful".

[91] The public and litigants alike would be much well protected by a system that recognized the limited use of contingency fees in an arrangement that would promote access to justice in a

manner that is fair and reasonable for both litigants and their counsel.

[92] It is clear from the variety of reports that have been prepared by various bar organizations previously outlined, that the question of contingency fees in Ontario has been under consideration for many years. Counsel for the Attorney General indicated in general terms that the issue of contingency fees is being considered by the Attorney General, but without any specific time frame.

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[93] 1 conclude that the preferred approach to the contingency fee issue is for legislative changes to be introduced to establish regulation respecting the form, content and manner of proceeding for such agreements.

[94] In this case, however, the limitation period will expire on December 22, 2001. Understandably, until the legality of the retainer is clarified to ensure that counsel will receive fair and reasonable compensation, counsel is not prepared to proceed with the claim. Mrs. McIntyre has already experienced considerable delay in locating a lawyer willing to act, and in bringing this application. In my view it is not reasonable to expect Mrs. McIntryre to wait almost another year for possible legislation. In light of the uncertain time frame, and to avoid a further delay, it is appropriate for the court to provide interim safeguards to protect both the applicant and her counsel pending legislation. This approach will allow Mrs. McIntyre to retain counsel, and will allow her counsel to have assurances of being fairly paid if the case is successful.

[95] The applicant seeks approval of the proposed contingency agreement. In my view it is premature to approve the contingency arrangement as requested by counsel at this stage at the proceedings. I note that the proposed arrangement is on the high end of the compensation scale, having regard to the legislation and caps in place across Canada, as outlined in Appendix I. As well, the suggested compensation includes both a percentage of the claim, as well as payment for any costs awarded to a successful party. In light of the comments of Cory, J. in *Coronation Insurance v. Florence, supra,* at para. 17, it appears that there may be a potential problem of
double recovery.

[96] 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.

[97] I would suggest the following guidelines for contingency fees in this civil case until regulatory legislation is passed:

1) That it is not contrary to public policy for a lawyer to enter into a contingency agreement with Mrs. McIntyre and the estate to be paid only if the claim is successful.

2) The contingency arrangement must be governed by the principles of what is fair and reasonable determined at the conclusion of the case, having regard to the usual factors that apply in assessing a solicitors account. As outlined in Appendix I, the principles of fairness, and reasonableness is a feature of many of the provincial statutory provisions guiding the court in determining a fair fee. The suggested level of remuneration in this case may or may not be fair and reasonable, depending upon the outcome of the case.

3) The presence of an executed agreement is an important factor in assessing what is fair and reasonable, but cannot oust judicial discretion. Counsel should be well rewarded for assuming risks and promoting access to justice. The counsel fee in a contingency arrangement will be greater than the usual hourly rate. The contingency fee should still

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however be governed by the principles of what is fair and reasonable in the circumstances of the case.

4) Any contingency arrangement should be approved by the Court at the conclusion of the litigaiton. I note that this safeguard is a feature of the contingency arrangements in the *Class Proceedings Act, 1992.*

5) Mrs. McIntyre should be encouraged to obtain meaningful independent legal advice from an experienced practitioner in this line of work about the fairness and reasonableness of an agreement prior to executing a contingency agreement.

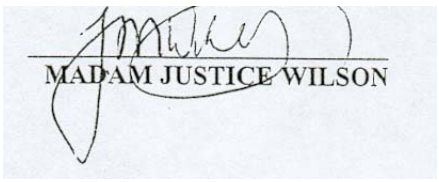
6) There must be a mechanism by which Mrs. McIntyre can discharge her counsel, ensuring that both litigant and counsel are fairly- treated if there are difficulties in the relationship down the road.

[98] These comments apply to this civil case only. They are intended to provide guidance only until legislation is passed. They are not intended to apply to family or criminal cases. This reflects the practice across Canada, and is consistent with the various reports recommending the regulated use of contingency fees in civil cases only.

[99] Although I have considered the *Rules of Professional Conduct* to provide context to the issues raised, this ruling is limited to an interpretation of the statutory provisions of the *Solicitors Act*, and to the *Champerty Act.*

[100] In light of the applicants' success with respect to their first argument, it is not necessary or appropriate for me to consider the interesting *Charter* issues raised.

[101] I thank counsel for their helpful and courteous submissions. In light of the novelty of the issue raised, in my view it is appropriate that there be no order as to costs.



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Appendix 1
Historic Summary of Contingency Fee Legislation in Canada

Province/Territory	Permitted	Applicable Legislation	Contingency Fee Caps
Manitoba	1890	Law Society Act, R.S.M. 1987, c. L100, Section 58; Code of Professional Conduct, The Law Society of Manitoba,	No cap, Chapter 11 of the Code states: “It is not improper for the lawyer to enter into an arrangement with

		Chapter 11, Section 11	the client for a contingent fee, provided such fee is fair and reasonable…"
Quebec	1968	Code of Ethics of Advocates, An Act Respecting the Barreau du Quebec, R.S.Q., c.C-26, Section 3.08 Bar Act, Quebec, By Law 1, Articles 86 and 87	- Fixed, percentage fees in "collection matters"; - Fee not to exceed 30% in non-collection matters
Alberta	1969	Rules of Court, Province of Alberta, Rules 613-626; Code of Professional conduct, Law Society of Alberta, Chapter 13	No cap percentage explicitly stated. The Statement of Principle in the Code states: "A Lawyer's fee must not exceed a fair and reasonable amount."
Nova Scotia	1972	Legal Ethics and Professional Conduct Handbook, Nova Scotia Barristers' Society, Section 12.11; Civil Procedure Rules, Province of Nova Scotia, Subsections 63.17- 63.20; Regulations, Nova Scotia Barristers' Society, Sections 51A (1) and 51B (3)	No cap
New Brunswick	1973	Judicature Act, R.S.N.B. 1973, c.J-2, Section 72.1 (3); Professional Conduct Handbook, The Law Society of New Brunswick, Part E	No cap

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		Law Society Act, S.N.B. 1986, Subsection 34(2)	
Saskatchewan	1975	Rules, Law Society of Saskatchewan, Part 18	No cap, however, Rule 1501. (2) (a) states: "A member who enters into a contingent fee agreement shall ensure that the agreement is fair and the member's remuneration provided for in the agreement is reasonable, under the circumstances existing at the time the contract is entered into."
British Columbia	1979	Legal Profession Act, S.B.C. 1987, c.25, Section 78; Rules, Law Society of British Columbia, Part A or Part 12	- 33.3% in a claim for wrongful death or personal injury related to the use or operation of a motor vehicle; - 40% for any other claim

			for wrongful death or injury
Prince Edward Island	1977	Rules of Court, Supreme Court of Prince Edward Island, Section 57	No cap, although Rule 57.09 (2) (e) states: "The agreement shall contain a statement that reasonable contingent compensation is to be paid for the services, and the maximum amount or rate which the compensation is not to exceed, after deduction of all reasonable and proper disbursements."
Northwest Territories	1979	Rules of Court, Supreme Court of the Northwest Territories, Sections 653-663	No cap
Yukon 1980	1980	Legal Profession Act, S.Y. c.100, Section 68; Code of Professional Conduct, The Law Society of Yukon, Sections 10-13	No cap
Newfoundland	1986	Rules of Court, Province of Newfoundland, Section 55	No cap, although Rules 55.17 (2)(d) and (e) state: "The agreement shall contain a

			Statement of the contingency upon which the compensation is to be paid, and, whether and to what extent the client is to be liable to pay compensation otherwise than from amounts collected by the solicitor; and a statement that reasonable contingent compensation is to be paid for the services, and the maximum amount or rate which the compensation is not to exceed, after deduction of all reasonable and pro0per disbursements."
Ontario	Not permitted except under the Class Proceedings Act	Professional Conduct Handbook, The Law Society of Upper Canada, Rule 9 (Rules 2.08 (3) and (4), as of November, 2000); Solicitors Act, R.S.O. 1990, c.S.15, Section 28	N/A