IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

Reference : 2009 NBQB 198 F/C/88/08
Date : 20090714

B E T WE E N :

HER MAJESTY THE QUEEN IN RIGHT
OF THE PROVINCE OF NEW BRUNSWICK

PLAINTIFF

AND

ROTHMANS INC., ROTHMANS, BENSON & HEDGES INC., CARRERAS ROTHMANS LIMITED, ALTRIA GROUP, INC., PHILIP MORRIS U.S.A. INC., PHILIP MORRIS INTERNATIONAL, INC., JTI- MACDONALD CORP., R.J. REYNOLDS TOBACCO COMPANY, R.J. REYNOLDS TOBACCO INTERNATIONAL INC., IMPERIAL TOBACCO CANADA LIMITED, BRITISH AMERICAN TOBACCO P.L.C., B.A.T. INDUSTRIES P.L.C., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED, and CANADIAN TOBACCO MANUFACTURERS' COUNCIL

DEFENDANTS

BEFORE: The Honourable Mr. Justice Thomas E. Cyr

DATE OF HEARING: June 16-17-18, 2009

DATE OF DECISION: July 14, 2009

[18]

APPEARANCES:

Counsel for the Plaintiff	Philippe J. Eddie, Q.C. Robin Ryan-Bell
Counsel for the Defendants Rothmans Inc., Rothmans Benson & Hedges Inc.	David Hachey, Q.C. Charles D. Whelly, Q.C.
Counsel for the Defendants Altria Group Inc. and Philip Morris U.S.A. Inc.	Rodney J. Gillis Q.C.
Counsel for the Defendant Philip Morris International Inc.	Robert G. Basque, Q.C.
Counsel for the Defendant Imperial Tobacco Canada Limited	Thomas G. O'Neil, Q.C. Deborah A. Glendinning Mahmud Jamal

[15]

CYR J.:

I. INTRODUCTION

[1] This matter arises out of an action brought by the Province of New Brunswick pursuant to the *Tobacco Damages and Healthcare Costs Recovery Act*, S.N.B. 2006, c.T-7.5 for the recovery of tobacco related healthcare costs against the tobacco industry.

[2] The defendant, Imperial Tobacco Canada Limited (Imperial Tobacco) has filed a motion whereby it claims, *inter alia*, that the Attorney General of New Brunswick contracted the conduct of this action to a consortium of United States, Ontario, and New Brunswick lawyers (the "Consortium"). According to Imperial Tobacco, the Province has agreed to pay the lawyers a very large contingency fee in the event it is successful in this litigation. In this motion, (the CFA validity motion), Imperial Tobacco is challenging the constitutionality, legality, and ethical integrity of the contingent fee agreement (CFA).

[3] The following defendants, Philip Morris International, Inc., Rothmans Inc., Rothmans, Benson & Hedges Inc., Altria Group, Inc., and Philip Morris U.S.A. Inc. have joined Imperial Tobacco (collectively the defendants) by filing similar motions (CFA validity motions).

[4] In the CFA validity motions, the defendants argue that the CFA should be declared void and that the Consortium be removed because:

a) The Consortium has a disqualifying conflict of interest between its public duties as counsel for the Attorney General and its substantial private financial interests under the CFA;

b) The CFA breaches the *Law Society Act, 1996*, S.N.B. 1996, c.89 and the *Contingent Fee Rules* enacted thereunder, and, as such, is void.; and

[15]

c) The Attorney General had no constitutional authority to enter into the CFA. The CFA breaches the *Constitution Act, 1867* and the *Financial Administration Act,* R.S.N.B. 1973, c.F-11 and, as such, is void and *ultra vires* the Attorney General of New Brunswick.

II. FACTS

[5] In December 2006, the Province issued a request for proposals (RFP) for private law firms in New Brunswick and elsewhere in North America to represent it on a contingency fee basis in relation to an action to be initiated in New Brunswick against tobacco manufacturers in order to recover the costs of healthcare benefits caused or contributed to by a tobacco related wrong, in accordance to the terms of the *Tobacco Damages and Healthcare Costs Recovery Act,*

[6] Proposals received by the Province were evaluated by representatives of the Attorney General, of the Department of Health, and of the Department of Finance.

[7] On July 1st, 2007 the Attorney General of New Brunswick, on behalf of the Province, entered into a contingent fee agreement (CFA) with the law firms of Philippe J. Eddie, Q.C., Correia & Collins, Siskinds LLP, Fasken Martineau DuMoulin LLP, Bennett Jones LLP, and Richardson Patrick Westbrook and Brickman LLP (collectively the "Consortium").

[8] On March 13th, 2008 the Province issued this action against the defendants.

III. ANALYSIS

A. THE ALLEGED DISQUALIFYING CONFLICT OF INTEREST

[9] The parties are not aware of any Canadian jurisprudence which has considered the specific question of what ethical, professional standards, and public policy issues are raised, if any, when an Attorney General retains lawyers pursuant to a contingent fee agreement.

[10] I have received the expert opinions of Professor H. Patrick Glenn and Professor Lorne M. Sossin attached to their respective affidavits. Both have opined on whether any ethical, professional standards, and public policy issues arise where an Attorney General retains outside counsel pursuant to a contingent fee arrangement.

[11] Professor Glenn concludes that there are major ethical, professional standards, and public policy issues raised when an Attorney General retains outside counsel pursuant to a contingent fee agreement. On the other hand, Professor Sossin concludes that there are no major ethical, professional standards, and public policy issues raised when an Attorney General retains outside counsel pursuant to a contingent fee agreement.

(1) Role of government lawyers in civil litigation matters

[12] The defendants allege that the lawyers representing the Province have a disqualifying conflict of interest arising from their retainer by the Province pursuant to the CFA. They have made this allegation based on Professor Glenn's opinion that the consortium of lawyers has a duty to act impartially similar to that of a Crown prosecutor in criminal matters.

[15]

With respect, in my opinion, this contention fails to recognize the existence of different roles and duties of lawyers acting on behalf of governments.

[13] The term "government lawyer" has often been used to identity in-house government lawyers who are public servants who report to the Attorney General (government lawyers). It is necessary, however, to distinguish between government lawyers acting in civil litigation matters, such as in the present case, and government lawyers who conduct prosecutions on behalf of the Crown (Crown prosecutors). Moreover, it is necessary to differentiate between government lawyers and private lawyers who are retained by a government official, such as the Attorney General, to supply legal services to the Province (outside counsel). (See *Sossin Affidavit*, Exhibit B, para. 19: Motion Record, p. 280.)

[14] Government lawyers are required to act in the public interest and have duties that defer from and are additional to the ethical obligations and rules of professional conduct that apply to all lawyers. I agree with Professor Sossin when he concludes that there is a spectrum of responsibilities applicable to government lawyers in that they are subject to different obligations than those of outside counsel. (See *Sossin Affidavit*, Exhibit B, para. 20: Motion Record, p. 280.)

[15] The assertion advanced by the defendants that all government lawyers have a duty distinct from any owed by non-government lawyers to act "impartially" is, in my view, incorrect. The public interest duties applicable to government lawyers in civil litigation matters are distinct from those applicable to Crown prosecutors in that government lawyers acting in civil litigation matters are not subject to a duty of impartiality. (See *Sossin Affidavit*, Exhibit B, para. 52: Motion Record, p. 294.)

[15]

[16] This view is supported by our jurisprudence. In *R v. Boucher*, [1954] S.C.J. No. 54, the Supreme Court of Canada highlighted the *quasi* judicial functions of a Crown prosecutor in the criminal law context and specifically noted that the position held by such counsel is not that of a lawyer in civil litigation:

> **La situation qu'occupe l'avocat de la Couronne n'est pas celle de l'avocat en matière civile. Ses fonctions sont quasi-judiciaires. Il ne doit pas tant chercher à obtenir un verdict de culpabilité qu'à assister le juge et le jury pour que la justice la plus complète soit rendue. La modération et l'impartialité doivent toujours être les caractéristiques de sa conduite devant le tribunal. Il aura en effet honnêtement rempli son devoir et sera à l'épreuve de tout reproche si, mettant de côté tout appel aux passions, d'une façon digne qui convient à son rôle, il expose la preuve au jury sans aller au delà de ce qu'elle a révélé.**
>
> ***(Emphasis added)***
>
> **[…]**
>
> **It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.**
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> ***R. v. Boucher,* at pp. 4, 5.**

[17] In my opinion, the duty of impartiality of a Crown prosecutor is closely related to the prosecutorial discretion vested in the Crown prosecutor. This discretion is summarized by the Supreme Court of Canada in *Krieger v. Law Society of Alberta*, [2002] S.C.J. No. 45 as follows:

> **42 In making independent decisions on prosecutions, the Attorney General and his agents exercise what is known as prosecutorial discretion. (…)**

[15]

> **43 (…) Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence.**
>
> **(…)**
>
> **47 Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. (…)**
> ***See Krieger v. Law Society of Alberta, at paras. 42, 43, 47.***
>
> ***(Emphasis is original*)**

[18] Further, the Supreme Court of Canada noted in *Krieger* that the core elements of prosecutorial discretion include:

> **46 […] (a) the discretion whether to bring the prosecution of a charge laid by police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the *Criminal Code* […]; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether […]; and (e) the discretion to take control of a private prosecution.**
>
> ***Krieger v. Law Society of Alberta,* at para. 46.**

[19] The present action is not a criminal or *quasi*-criminal matter. Although the "public interest" is involved, the action is clearly a civil action where the Province seeks to recover its damages suffered as a result of the defendants' alleged tortious conduct. The focus, in my view, is compensatory.

[20] The core elements of prosecutorial discretion mentioned in *Krieger* are, in my opinion, directly analogous to the decision-making powers that can only be exercised by a client in a civil case. This includes the power to make decisions about commencing or continuing the action, the terms on which the action can be settled, and whether or not to appeal an adverse ruling. This is very different from the powers vested in a Crown prosecutor who has the ultimate

decision making power in the case. Understandably, the Crown prosecutor cannot be permitted to act with excessive or untempered zeal in pursuing convictions. In contrast, in a civil context such as this one, the government plaintiff retains all significant decision-making powers.

[21] Outside lawyers retained to implement the Government's decisions should conduct themselves as other lawyers engaged in a civil context. Consequently, there is no reason why the lawyer should act with any less zeal than one representing a non-governmental client.

[22] The public interest duties applicable to government lawyers in civil cases are distinct from those applicable to Crown prosecutors who must also act with impartiality.

[23] According to the jurisprudence, the Crown in civil litigation matters is to be treated in the same way as any other litigant. In *Wells v. Newfoundland*, [1999] S.C.J. No. 50 (QL), the Supreme Court of Canada affirmed that absent legislation that states otherwise, the Crown is capable of being found liable for civil wrongs and may seek to vindicate its own rights in a civil setting in the same way as a private party.

[24] Similarly, the *Proceedings Against the Crown Act*, R.S.N.B. 1973, c. P.18, which governs civil proceedings against the Crown in New Brunswick, recognizes that it is in a similar position as that of a private party in the proceedings. Subsection 14(1) reads as follows:

> **14(1) Subject to this Act, in proceedings against the Crown the rights of the parties are nearly as possible the same as in a suit between person and person; and the court may make any order, including an order as to costs, that it may make in proceedings between persons, and may otherwise give such appropriate relief as the case may require.**

[15]

[25] The distinction between Crown prosecutors and other government lawyers is codified in *An Act Respecting the Office of the Attorney General*, S.N.B. 2008, c. A-16.5, which contains a section that specifically addresses the "independence of prosecutions". Moreover, in setting out the functions of the Attorney General, the *Act* expressly provides for the obligation to "carry out such duties and exercise such powers as are attendant to the prosecution of offences by and in proceedings under statutes and regulations in which offences are created". These specific obligations are set out separately from the other distinct obligations to "conduct and regulate all litigation for and against the Crown." (See *An Act Respecting the Office of the Attorney General*, at paras. 2(d), 2(g), 4 and *Sossin Affidavit*, Exhibit B, para. 27: Motion Record, p. 283.)

[26] As well, the *Code of Professional Conduct*, approved by the Council of the Law Society of New Brunswick, highlights the distinct duties owed by Crown prosecutors who are performing prosecutorial functions. Section 13 of the Commentary under Chapter 8 sets out rules with respect to "the lawyer as a prosecutor":

> **13. (a) When acting as a prosecutor in a criminal or quasi-criminal matter it is recognized that the lawyer is fulfilling a public duty on behalf of the state. Therefore the lawyer as prosecutor**
>
> > **(i) shall commence a criminal or quasi-criminal prosecution only when satisfied that there is evidence to provide a reasonable prospect of conviction and that the public interest requires a prosecution, and**
> >
> > **(ii) shall ensure that the proceedings are carried out with fairness, including the presentation firmly but fairly of all available legal proof of relevant facts, and**
> >
> > **(iii) shall undertake the proceedings in a dispassionate search for the truth of the matter being litigated with no intent of winning or losing but rather with the intent of seeing that justice is done through a fair trial upon the merits.**

[15]

> **(b) The other provisions of this Code shall apply, all necessary changes having been made, to the conduct of the lawyer as prosecutor in a criminal or quasi-criminal matter.**

[27] The duties of the Crown prosecutor may be contrasted with those of civil litigation lawyers. Rule 8(b) explicitly provides that the civil litigation lawyer has a duty to "... ask every question, raise every issue and advance every argument that the lawyer thinks reasonably will assist the cause of the client and shall endeavour to obtain for the client the benefit of all rights, remedies, and defences authorized by law". The outside counsel representing the Government is expected to meet the same standard. Even if they are not required to act with impartiality, they must meet a high standard of professional conduct.

(2) The role of the Law Society and the *Code of Professional Conduct*

[28] In accordance with its governing legislation, the Law Society of New Brunswick has the responsibility for providing ethical and behavioural guidance to all lawyers practicing in this province and also is in charge of enforcing ethical and professional standards. The rules of the *Code of Professional Conduct* apply to outside counsel serving the Government or any other client. For example:

- Rule 3, "Commentary 2" expressly provides "that the lawyer shall maintain communication with the client when acting on behalf of the client…";
- Rule 4, "Commentary 1" provides that the lawyer's opinion to the client must be "open, undisguised, and free of conflict of interest on the part of the lawyer disclosing candidly and clearly what the lawyer honestly believes concerning the matter";
- Rule 4, "Commentary 6" provides that "the lawyer shall advise and encourage the client to settle or to compromise a contentious matter brought to the lawyer for legal advice whenever it is possible to do so on a reasonable basis";

[15]

- Rule 8, "Commentary 1" provides that "the lawyer shall advise and encourage the client to settle a contested matter brought to the lawyer by the client for assistance in resolution where the matter can be settled fairly and reasonably, rather than commence or continue court proceedings";

- Rule 8, "Commentary 3(b)" provides that "the lawyer, as an advocate for the client, shall make any reasonable effort consistent with the legitimate interests of the client to expedite the matter undertaken by the lawyer on behalf of the client".

[29] I have reproduced the full text of the aforementioned commentaries and other relevant rules and commentaries on Appendix « A » hereto attached.

[30] In addition, Rule 20 and Commentary 1 states that in all cases it is the "paramount duty" of any member of the Law Society to "serve the cause of justice" and regardless of the identity of their clients, must "uphold, encourage public respect for, and seek to improve the administration of justice and the institutions associated therewith."

(3) Role of outside counsel representing the Government in civil litigation matters

[31] Subsection 3(4) of *An Act Respecting the Office of the Attorney General*, specifically authorizes the Attorney General to retain outside counsel.

[32] As previously mentioned, I am of the opinion that the government lawyers practicing in civil litigation are not subject to the same duty of impartiality as Crown prosecutors. The same is true of outside counsel conducting a civil case.

[33] Moreover, I agree with Professor Sossin when he opines that outside counsel acting for the Province in a civil proceeding matter are not subject to the additional ethical duties imposed upon government lawyers. In my view, government lawyers remain the "guardian of the

public interest" at all times. (See *Sossin Affidavit,* Exhibit B, paras. 31-33: Motion Record, pp. 285-286.)

(4) Do contingent fee agreements raise serious conflict of interest concerns?

[34] The defendants are adamant that contingent fee agreements raise conflict of interest concerns and cite the Ontario Court of Appeal decision in *McIntyre Estate v. Ontario (Attorney General),* [2002] O.J. No. 3417 (C.A.) (QL) in support of this argument. Although the court did review the historical rationale for the prohibitions against contingency fees, it concluded that contingent fee agreements are permissible in common law and are not inherently champertous.

[35] The decision in *McIntyre Estate* stands for authority that it is no longer appropriate in Ontario to assume that a contingent fee arrangement is automatically detrimental to the due administration of justice. As well, the court concluded that there is little, if any, evidence to justify fears about the potential for abuse by lawyers or damage to the lawyer/client relationship when they are acting pursuant to a contingent fee agreement.

[36] Moreover, the Ontario Court of Appeal concluded that the potential abuses, which provided the rationale for the prohibition of contingent fee agreements in the past, can be addressed by an appropriate regulatory scheme governing the conduct of lawyers and the amount of their fees. (See *McIntyre Estate,* at para. 71.)

[37] One of the jurisdictions in Canada which has already enacted an appropriate regulatory scheme is the Province of New Brunswick. For more than forty years contingent fee

agreements in New Brunswick have been found to be proper and legally enforceable. (See *Hogan v. Hello et al*, [1962] N.B.J. No. 2 (S.C.(Q.B.Div.)) (QL).)

[38] Section 72.1 of the *Judicature Act*, R.S.N.B. 1973, c. J.2, was enacted to regulate the use of contingent fee agreements and the rules and regulations relating to them were removed from the *Judicature Act* and put under the supervision of the Law Society with the enactment of the *Law Society Act*, 1996, S.N.B. 1996, c.89. (See *Law Society Act, 1996*, at s.83.)

[39] Chief Justice Drapeau commented as follows on the acceptability, legality, and enforceability of contingent fee agreements in New Brunswick in the case of *Mealey (Litigation guardian of) v. Godin*, [1999] N.B.J. No. 413 (C.A.) (QL), as follows:

> **17. In this province, unlike some others, contingency fee agreements have long been considered acceptable fee arrangements between a lawyer and his or her client in respect of contested matters, and they have frequently been the fee arrangement of choice between lawyers and victims of motor vehicle accidents. The jurisprudence that predates the enactment of s. 72.1 of the Act recognized, correctly in my view, that such an agreement, when entered into by a client not under legal disability, was proper and legally enforceable. See *Hogan v. Hello et al* (1969), 1 N.B.R. (2d) 306 (S.C.Q.B.).**

(5) Relevant U.S. case law

[40] Due to the absence of Canadian jurisprudence dealing with contingent fee agreements entered into by governments, the parties have brought to my attention a number of decisions emanating from the United States which are not binding but are, however, of a persuasive value.

[41] The case of *People ex. rel. Clancy v. Superior Court*, [1995] Cal. LEXIS 333 (S.C.) (Lexis) involved an abatement action brought in accordance with a municipal public

nuisance ordinance regulating adult bookstores. The court held that counsel was required to maintain a high degree of impartiality because the action involved a number of competing public and private interests including the public's interest in ridding the city of a dangerous condition, the landowner's interest in using his property, the landowner's First Amendment interest in selling protected material, and the public's interest in having such materials available for purchase. In addition, the court noted that the public nuisance actions shared many of the features of a criminal prosecution because the conduct in issue would most often support a misdemeanour charge. The court invalidated the contingent fee agreement in that case.

[42] Many U.S. court decisions have distinguished *Clancy*, including a recent decision of the Supreme Court of California where the court upheld a contingent fee agreement entered into between the State and outside counsel. However, leave to appeal has been granted by the Supreme Court of California with respect to this decision. (See *County of Santa Clara v. Superior Court*, [2008] Cal. App. LEXIS 498 (Lexis); petition for review granted, [2008] Cal. LEXIS 9073 (S.C.) (Lexis).)

[43] Notwithstanding, many other U.S. decisions, which have distinguished *Clancy*, were brought to my attention. In these cases, courts have refused to invalidate contingent fee agreements between Government and outside counsel for they support the view that where a government asserts a tort claim, it is appropriate for outside counsel to be retained under such an agreement.

[44] Some of the cases dealt with governments that were trying to recover healthcare costs as a result of the use of tobacco. For example, in the case of *Philip Morris Inc. et al v.*

Glendening, et al, [1998] Md. LEXIS 316 at 12 (C.A.) (Lexis) the Attorney General of Maryland had retained a private law firm and had signed a contingent fee contract to represent the State in a major tort litigation. In that case the defendants raised similar arguments as those raised by the defendants in the present motions.

[45] The court concluded in *Glendening* that there was no requirement of impartiality on the part of the lawyers retained by the State of Maryland due to the fact that the Government client had maintained the decision making authority in the civil case and that the matter did not involve constitutional or criminal implications. The court distinguished *Clancy* by underlining that the State of Maryland had retained control and oversight over the lawsuit.

[46] In the case of *City and County of San Francisco et al v. Philip Morris Inc. et al,* [1997] U.S. Dist. LEXIS 2465 (N.D. Cal.) (Lexis), the action involved an allegation of conspiracy against cigarette manufacturers and their trade associations. The plaintiff sought damages for smoking related costs and the defendants moved to disqualify the private law firm commissioned pursuant to a contingent fee agreement. The court distinguished *Clancy* and refused to disqualify the outside counsel. The following passages deserve particular attention:

> **While the contingent fee arrangement here clearly gives Lieff, Cabraser a stake in the litigation, the Court finds that this case is sufficiently distinguishable from *Clancy* to allow for the government's retention of private counsel. First, as plaintiffs explain, Lieff, Cabraser is acting here as co-counsel, with plaintiffs' respective government attorneys retaining full control over the course of the litigation. Because plaintiffs' public counsel are actually directing this litigation, the Court finds that the concerns expressed in *Clancy* regarding overzealousness on the part of private counsel have been adequately addressed by the arrangement between Lieff, Cabraser and the plaintiffs.**
>
> **The Court also finds that the civil tort nature of this action meaningfully distinguishes it from *Clancy.* This lawsuit, which is basically a fraud action, does not raise concerns analogous to those in the public nuisance or eminent domain contexts discussed in *Clancy.* Plaintiffs' role in this suit is that of a tort victim,**

> **rather than a sovereign seeking to vindicate the rights of its residents or exercising governmental powers.**
>
> ***See City and County of San Francisco et al v. Philip Morris Inc. et al, at 2-3.***
>
> ***(Emphasis added)***

[47] A number of other cases have reached similar conclusions:

- State of Rhode Island v. Lead Industries Association, Inc., [2008] R.I. LEXIS 79 (S.C.) (Lexis);
- *In Re City of San Diego v. United States District Court for the Southern District of California,* [2008] U.S. App. LEXIS 17352 (Lexis);
- *City of Grass Valley v. Newmont Mining Corporation et al.,* [2007] U.S. Dist. LEXIS 89187 (Lexis);
- *Sherwin-Williams Co. v. City of Columbus,* [2007] U.S. Dist. LEXIS 51945 (Lexis).

[48] In the present case, the Province's claim against the defendants is compensatory in nature. It does not involve a situation where the Government seeks to exercise governmental power such as in a criminal or *quasi* criminal matter. Accordingly, this is not a case where the private lawyers representing the Province must act with impartiality,

[49] Any concerns regarding the conduct of outside counsel may be addressed where the Province retains control of the case in keeping with the public interest obligations of the government lawyers. The Province may retain outside counsel through a contingent fee arrangement in the context of a civil lawsuit as long as the government lawyers remain in control of the legal proceedings. (See *Sossin Affidavit*, Exhibit B, para. 53: Motion Record, p. 294.)

[15]

(6) The degree of control exercised by the Province in this case

[50] The request for proposals (RFP) for external legal services issued by the Attorney General on December 15, 2006 provided *inter alia* as follows:

- The Attorney General of New Brunswick was seeking proposals from qualified law firms or consortiums of law firms in New Brunswick and elsewhere in North America to provide legal representation and advice to the Province on a contingency fee basis including payment of necessary disbursements in relation to their intended legal action pursuant to the terms of the *Tobacco Damages and Healthcare Costs Recovery Act;*

- The RFP contained rating criteria and mandatory requirements that could cause the proposals to be rejected;

- The proposals were evaluated by an evaluation committee comprised of representatives of the offices of the Attorney General, Department of Health, and Department of Finance;

- All qualifying proposals had to meet all the mandatory requirements set out in the RFP and had to contain all of the required contents specified;

- The evaluation ranking of any proposal would be determined solely at the discretion of the Province;

- The primary criterion for the evaluation was that the arrangement between the lawyers and the Province had to be in the form of a contingent fee agreement;

- The extent to which the proposals demonstrated an intimate familiarity with the issues and challenges involving in bringing legal action against tobacco manufacturers would also be a primary criterion for evaluation;

- A signed statement confirming that the components were free from any conflict of interest in pursuing the litigation was a mandatory requirement;

- The financial component of the proposal had to contain a breakdown based on the contingency fee for different litigation milestones set by the Province and identified in the RFP.

[51] Moreover, the CFA expressly stipulates elements of control by the Province pertaining to this litigation.

[15]

[52] For example, paragraph 1 provides that "the lawyers agree to act in the best interest of the client in performing legal services with respect to the matter, including making every effort to reach a settlement.

[53] Paragraph 3 of the CFA stipulates as follows:

> **3. Notwithstanding section 2, the Lawyers shall keep the Client fully informed at all times of the status of this Matter, including steps to be taken in any legal proceeding, and shall not finalize any settlement without the approval of the Client, or take any significant steps in the legal proceedings, including the retention of experts, without also obtaining the Client's approval.**

[54] Section 10 of the CFA specifies that the Province of New Brunswick may settle the matter without the knowledge or participation of the lawyers

[55] Section 13 of the agreement states that the lawyers are prohibited from initiating proceedings without the expressed written directions of the client.

[56] In addition, as part of the financial requirements, the agreement explicitly adds in paragraph 16(a) that the lawyers have to supply the Province, on a regular basis, a report detailing the hours and rates spent on the matter along with other costs and disbursements incurred. The relevant portion of paragraph 16(a) of the CFA reads as follows:

> **16. For the purposes of subsection of 8(1) of this Agreement;**
>
> **(a) the Lawyers agree to provide the Client on a regular basis, and at least four times per year, with a report that shows the time spent, the applicable hourly rates, the calculated fee that would be applicable on billing if an account were to be rendered, costs, disbursements, interest, taxes and other charges that have been incurred by the Lawyers in providing services in relation to this Matter …**

[15]

[57] The aforementioned provisions of the CFA must be considered in conjunction with the sworn evidence of Mr. Spinney where, in his affidavit, he expressly confirms the following:

- He is "the in-house lawyer with day-to-day responsibility for overseeing and controlling the conduct of the … litigation …";
- The Province has retained William A. Anderson, Q.C. "to act as in-house counsel to support, oversee, direct, and coordinate this litigation … Mr. Anderson has been engaged by the Province to have on-going significant involvement in all matters relating to this litigation;
- The lawyers report directly to and "take their instructions for all matters" from Mr. William A. Anderson Q.C. or Mr. Clyde Spinney, Q.C.;
- The Province "retains absolute control of this litigation and has continued on-going control of its conduct";

See *Spinney Affidavit,* paras. 3-4-8: Motion Record, pp. 232-233.

(Emphasis added)

[58] The evidence has convinced me that the relationship between the Consortium and the Province is one which greatly exceeds a mere reporting obligation, as alleged by the defendants. The wording of the CFA and the evidence of Mr. Spinney make it clear, in my view, that the Province is taking a lead in this case. The Province has demonstrated that it retains control of the proceeding in the context of the contingent fee arrangement and that Mr. Spinney's evidence confirms that the Province's role is consistent with the public interest's obligations owed by the Attorney General to ensure that the Province of New Brunswick remains accountable for the conduct of the litigation. The Province has kept control of the litigation and the CFA is consistent with the public interest obligations of the government lawyers involved in supervising this litigation. In my opinion, the lawyers representing the Province in this case are

able to function under the Attorney General's direction. (See *R v. W.R.D.*, [1994] M.J. No. 209 at para. 13, (C.A.) (QL).)

(7) Access to justice

[59] An access to justice policy must have been considered when the Province decided to permit its citizens to contract for legal services by way of a contingent fee agreement.

[60] This case is unprecedented and involves one of the largest civil lawsuits ever filed in the Province of New Brunswick.

[61] Some of the defendants involved in this matter have retained the largest law firms in the province and some of them have retained lawyers from outside the province in order to help them proceed with this litigation.

[62] From the outset, the Province sought legal representation from qualified law firms or consortiums of law firms in New Brunswick and elsewhere in North America to provide legal representation and advice in this case.

[63] I am informed by counsel that similar ongoing litigation conducted in the Province of British Columbia has cost the province in excess of $12 million in legal fees for the services of outside counsel. As one of Canada's smallest provinces, New Brunswick has a population which is lesser than that of the national capital region. The Province has decided not to expend such large sums of money in order to proceed with this litigation choosing instead to retain legal services with the use of a contingent fee agreement.

[15]

[64] Access to contingent fee agreements exists for individuals in this province and such an arrangement is available, in my view, when the Province of New Brunswick puts forward a claim for its citizens collectively.

(8) Disposition regarding the alleged conflict of interest

[65] For the aforementioned reasons, I have come to the conclusion that the members of the Consortium do not have a disqualifying conflict of interest between their public duties as counsel for the Attorney General and their private financial interests under the CFA, as alleged. Accordingly, I deny the declaration sought by the defendants in their CFA motions.

B. DOES THE CFA BREACH THE LAW SOCIETY ACT, 1996 OR THE CONTINGENT FEE RULES?

[66] The defendants allege that the CFA breaches the *Law Society Act, 1996*, by retaining foreign lawyers engaged in the unauthorized practice of law and by failing to comply with the *Contingent Fee Rules.*

(1) U.S. counsel are members of the Law Society of New Brunswick and have been issued Foreign Legal Consultant Permits

[67] Subsection 33(5) of the *Act* authorizes the Council to the Law Society to permit an individual, who is qualified to practice law in a country other than Canada or in an internal jurisdiction of that country, to practice in New Brunswick the law of that country or internal jurisdiction, provided that the individual has complied with and continues to abide by the rules.

[68] The *Foreign Legal Consultant Rule*s distinctly authorize foreign legal consultants to practice the law of their own jurisdiction in New Brunswick.

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[69] Further, the Rules provide that a person may act as a foreign legal consultant in New Brunswick if he or she is a holder of a valid permit.

[70] Messrs. Patrick, Rowell, Lofstead, and Evans of the law firm Richardson, Patrick, Westbrook & Brickman of South Carolina, U.S.A. have all been granted permits to act as foreign legal consultants in New Brunswick pursuant to the *Law Society Act, 1996*. Consequently, they are authorized to practice law of their own jurisdiction in this province.

[71] Once the Law Society has issued a permit to an applicant to act as a foreign legal consultant, that individual is a "member" for purposes of Part 14 of the *Law Society Act, 1996* which regulates contingent fee agreements. Subsection 83(1) of the *Act* provides that a member may enter into an agreement in writing including a contingent fee agreement.

(2) Are the U.S. lawyers practicing law in the Province of New Brunswick in contravention of the *Law Society Act, 1996 and its Regulations*?

[72] The defendants argue that the CFA does not restrict the U.S. lawyers to the law of their own jurisdiction and that they are practicing law in contravention of the *Law Society Act, 1996 and its Regulations.*

[73] The defendants are multinational corporations, some of which are based in the U.S. and Europe. This is a case that has implications beyond the boundaries of the Province of New Brunswick.

[74] While U.S. law is not directly relevant to this action, there is a role for the foreign legal consultants to play which does not involve the practice of New Brunswick law. The U.S. lawyers who have signed the CFA are said to have extensive experience in cases against the

tobacco industry in the United States. The RFP itself contemplated that non-Canadian lawyers could properly play a role in the litigation. Furthermore, the *Foreign Legal Consultant Rules* expressly authorize foreign legal consultants to practice law of their own jurisdiction in New Brunswick provided that they have complied with and continue to obey the Rules made under section 17 of the *Law Society Act, 1996.*

[75] The defendants rely on press releases, reported public statements, and news articles in order to substantiate their claim that the American lawyers have in fact practiced law in New Brunswick in contravention of the *Act and its Regulations*. The defendants are adamant that these constitute clear evidence that the U.S. lawyers are practicing New Brunswick law.

[76] As well, they argue that the general wording of the CFA confirms their belief that the U.S. lawyers are practicing law in New Brunswick. Although additional wording was added to the CFA, it uses language found in the form provided by the Law Society.

[77] The wording regarding the work to be performed by the lawyers is expressed in general terms and does not provide in detail the work to be conducted by each individual lawyer and/or group of lawyers who are members of the legal team and who have signed the CFA. The defendants contend that the language pertaining to the legal services to be rendered must be applied equally to all lawyers who have signed the CFA, and that by doing so, the general wording therein constitutes clear evidence that the U.S. lawyers are practicing law in New Brunswick.

[78] The RFP expressly contemplated that the primary criterion of evaluation for the lawyers to be considered was the extent to which the proposal demonstrated a familiarization

with the issues and challenges involved in bringing legal action against tobacco manufacturers. Accordingly, the RFP contemplated the retainer of lawyers in New Brunswick and elsewhere in North America. Consequently, even before the CFA was signed, the evidence is clear that the Province was looking for expertise with issues involving legal action against tobacco manufacturers. Understandably, this type of expertise may not be readily available in New Brunswick or elsewhere in Canada.

[79] The record confirms that the U.S. lawyers, who have signed the CFA, have obtained permits from the Law Society authorizing them to act as foreign legal consultants pertaining to this case.

[80] In my view, attributing specific roles to each one of the lawyers who have signed the CFA by making reference to its general wording does not prove that the U.S. lawyers are in any way in violation of the *Act and its Regulations.* Moreover, reference to hearsay, contained in newspaper releases and other publications, do not prove that the U.S. lawyers are practicing New Brunswick law.

[81] The defendants are adamant that the U.S. lawyers are playing an integral role in these proceedings and equate their role with those performed by other counsel representing the Province. It is true that the U.S. lawyers are part of the team representing the Province, yet the record clearly confirms that they are not solicitors of record. Only the lawyers legally authorized to practice law in the Province of New Brunswick are solicitors of record.

[82] The CFA does not authorize and should not be read as authorizing the foreign legal consultants to do more than they are permitted to do by virtue of the permits they have

obtained from the Law Society. In my opinion, there is no evidence that the foreign legal consultants are doing anything other than what they are permitted to do by virtue of their permits.

(3) Other alleged violations of the *Law Society Act, 1996*

[83] Further, the defendants argue that the CFA is in violation of the *Law Society Act, 1996 and its Regulations* in three respects:

- Firstly, that subsection 83(1) of the *Act* provides that only members of the Law Society may enter into a contingent fee agreement and that the U.S. lawyers were not members of the Law Society of New Brunswick when they signed the CFA;
- Secondly, that the CFA was not approved by a reviewing officer pursuant to subsection 83(7) of the *Act* within 90 days after the agreement was made; and
- Thirdly, that the wording of the CFA is in violation of the subsection 83(6) of the *Act* in that it includes a provision that allows the lawyers to be paid both a fee based on a proportion of the amount recovered and costs awarded to the client by order of a court or by settlement of the matter.

[84] According to the defendants, these non-compliances render the CFA void.

(4) U.S. lawyers were not members of the Law Society of New Brunswick when they signed the CFA

[85] The record discloses that when the U.S. lawyers undertook the necessary steps in order to obtain their foreign legal consultant permits, the Council of the Law Society of New Brunswick had not yet approved the forms for such an application to be made. The forms were approved on the 11th day of July 2008 and permits were obtained six weeks later on August 29, 2008 after the CFA was entered into. Consequently, the U.S. lawyers were not members of the

Law Society of New Brunswick when they signed the CFA. Subsection 83(1) of the *Act* provides that only members of the Law Society may enter into a contingent fee agreement.

(5) <u>The contingent fee agreement and the reviewing officer</u>

[86] Although much of the terminology utilized in the CFA is similar to the form prescribed by the Law Society, its wording varies from the prescribed form. Subsection 3(2) of the *Contingent Fee Rules* permits a contingent fee agreement to diverge from the form prescribed by the Law Society on condition it is approved by a reviewing officer.

[87] The record shows that although the CFA was signed on July 1st, 2007, it was not approved by a reviewing officer before April 21st, 2009.

[88] In his decision, the reviewing officer concludes that the lawyers, who are parties to the CFA, are "members" within the definition of section 2 of the *Law Society Act, 1996.*

[89] After having carefully reviewed the CFA, as well as the circumstances surrounding its creation, the reviewing officer concludes as follows:

> **11. (…) The agreement provides for a staged contingency fee in intended litigation against various tobacco companies and related entities, to recover health care costs incurred or to be incurred by the Client on behalf of all residents of New Brunswick who have received medical treatment as a result of the harmful effects of tobacco use or other tobacco related wrongs.**
>
> **(…)**
>
> **14. The agreement is the result of a public solicitation process undertaken by the Client. On December 15, 2006 the Client issued a Request for Proposals for External Legal Services Relating to Tobacco Damages and Health Care Costs Recovery ("RFP"). The RFP included provisions whereby the Client was not obligated to accept any proposal made. The Client was entitled to negotiate with proponents. One of the Client's primary criteria for evaluation of proposals was the proposed contingency arrangement. The deadline for submissions was January 31,**

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> **2007. The Client had legal counsel during the ensuing five months, prior to signing the present agreement.**
>
> **15. I find that the July 1, 2007 contingent fee agreement between the Lawyers and the Client is consistent with the provisions of section 83 of the Act. In all respects, the contingent fee agreement satisfies the requirements of section 83 of the Act. I am satisfied that in all of the circumstances, the contingent fee agreement is not unfair or unreasonable under the circumstances existing at the time the agreement was entered into.**
>
> **See *Decision of Reviewing Officer*, dated April 21, 2009, Exhibit 1-B.**

[90] The wording of subsection 83(7) of the *Law Society Act, 1996* is as follows:

> **83(7) A person who enters into a contingent fee agreement under subsection (1) may, within ninety days after the agreement is made or the retainer between the member and client is terminated, apply to a reviewing officer to have the agreement reviewed, notwithstanding that the person has made payment to the member under the agreement.**
>
> ***(Emphasis added)***

[91] As previously mentioned, the application was not made within 90 days after the agreement was signed and in this regards the reviewing officer concludes as follows:

> **6. The contingent fee agreement is dated July 1, 2007. The application for review is dated March 31, 2009. The application has been made following expiry of the 90-day time limit prescribed in subsection 83(7) of the Act. In separate correspondence to me, the Client and the Lawyers waived compliance with the 90-day time period. I therefore accept that I have jurisdiction to review the contingent fee agreement.**

[92] The wording of paragraph 5(1)(a) of the CFA was taken from Form 1 prescribed in the *Contingent Fee Rules.* The defendants argue that the form approved by the Law Society is inconsistent with subsection 83(6) of the *Law Society Act, 1996* in that it allows the lawyers to be paid both a fee based on a proportion of the amount recovered and costs awarded to the client. The Province concedes that the wording in paragraph 5(1)(a) of the CFA does contravene the

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prohibition stated in subsection 83(6), however, adds that any transgression emanates from the use of the form prescribed by the Law Society.

(6) What are the effects of the non compliances?

[93] The legislation does not specify the consequences of any contravention of subsections 83(1), 83(6), and 83(7) of the *Act*. Furthermore, subsection 83(7) of the *Act* states that a person may apply to a reviewing officer within 90 days after the agreement is made.

[94] The *Law Society Act, 1996* does, on occasion, specify the effects of a violation of one of its provisions. For example, the consequences of a violation of subsection 83(5) are specifically provided for in the *Act.* Subsection 83(5) provides distinctly that a contingent fee agreement is void with respect to legal services relating to child custody or access, to a matrimonial dispute or to a criminal or *quasi*-criminal case unless it is approved by the court. No such language is utilized regarding subsections 83(1), 83(6), and 83(7) of the *Act.*

[95] Moreover, subsections 3(2) and 3(3) of the *Contingent Fee Rules* state that a contingent fee agreement may vary from Form 1 and provide for the procedure to be followed and the payment to be made in order to have the contingent fee agreement examined by the reviewing officer. There is no explicit consequence provided for in the event the contingent fee agreement has not been approved by a reviewing officer. On the other hand, subsection 2(5) of the *Contingent Fee Rules* specifically provides that a contingent fee agreement which has not been approved is void. There is no such legislative direction in the case of section 3 of the *Contingent Fee Rules.*

[15]

[96] In the case of *Nova Scotia Union of Public Employees v. Halifax Regional School Board* (2001), 195 N.S.R. (2nd) 97 (C.A.), the court concluded that the legislation clearly spelled out the consequences of the illegality and that the illegal provision was to have no force or effect. In that case, the court had no choice but to follow the legislative direction. However, Mr. Justice Cromwell, as he then was, addresses the issue of illegality where no such legislative direction exists. The following passages are of interest:

> **20 Contracts may be "illegal" in several different senses of the word. Common law illegality includes, for example, contracts which are in restraint of trade or involve the commission of a criminal offence or a tort. Statutory illegality may be based on the breach of a myriad of regulatory provisions, prohibiting activities ranging from the sale of ungraded apples to the performance of services by unlicensed persons: see S.M. Waddams, The Law of Contracts (4th, 1999) at para. 572. The traditional rules are that all illegal contracts are unenforceable and money or property transferred on the strength of them cannot be recovered. However, courts have increasingly sought to avoid the injustice which sometimes flows from the strict application of these rules.**
>
> **21 We are here concerned with statutory illegality. Cases of statutory "illegality" fall into two main categories. The first consists of situations in which the statute giving rise to the "illegality" specifies its consequences for the contract; the second consists of situations in which the statute does not do so. In his treatise The Law of Contracts (4th, 1999), Professor S.M. Waddams observes at paras. 562-563:**
>
> > **In some cases, the statute itself specifies the consequences of illegal agreements … In such cases, the legislature has directed its mind to the consequences of the illegality and made provision.**
> >
> > **Far more often, however, the statute makes no provision for the consequences of an illegal agreement … Here the courts, it is suggested, have themselves to decide the consequence.**
>
> **22 Where the statute does not specify the consequences of the contracts "illegality", the courts must determine whether the "illegality" makes the contract unenforceable. (…)**
>
> ***(Emphasis added)***

[97] In the case of *Still v. M.N.R.* (1997), 154 D.L.R. (4th) 229 (Fed. C.A.) a more modern approach to the common law doctrine of the illegality was applied. Mr. Justice Robertson, as he then was, states:

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(…)

48 In conclusion, the extent to which the precepts of the common law doctrine of illegality are ill-suited to resolving the issue at hand provides the impetus for this Court to chart a course of analysis which is reflective of both the modern approach and its public law milieu. In my opinion, the doctrine of statutory illegality in the federal context is better served by the following principle (not rule): where a contract is expressly or impliedly prohibited by statute, a court may refuse to grant relief to a party when, in all of the circumstances of the case, including regard to the objects and purposes of the statutory prohibition, it would be contrary to public policy, reflected in the relief claimed, to do so.

(…)

57 Undoubtedly, there will be a few who would prefer to see the classical model of the illegality doctrine applied to the issue at hand. Admittedly, that approach promotes certainty in the law and ease of administration, at least for the Unemployment Insurance Commission. But a uniform approach, while convenient, carries with it the risk of undue rigidity. There are occasions, and this is one, where certainty must give way to flexibility, as Lord Mansfield would surely agree. If I am wrong, it is open to Parliament to amend the legislation.

(Emphasis added)

[98] In this case, the *Law Society Act, 1996* does not specify the consequences of a violation of subsections 83(1), 83(6), and 83(7). The legislature has not directed its mind to the effects of the non-compliances and has not made provisions accordingly. In a case, such as this one, where the statute does not specify the effects of a violation of one or more of its provisions, I must determine whether the non-observances make the CFA void or otherwise unenforceable.

[99] The CFA is an agreement between the Province of New Brunswick, as the client, and its lawyers under the terms of the specific wording of the CFA.

[100] The preamble of the *Act* states that it is desirable, in the interest of the public and the members of the legal profession, to continue the Law Society of New Brunswick as a body corporate for the purposes of advancing and maintaining the standard of legal practice in the province and of governing and regulating the legal profession.

[15]

[101] Although the U.S. lawyers were not members of the Law Society at the time the CFA was signed, the CFA surely implicitly provided that the U.S. lawyers, as other lawyers from outside New Brunswick, would undertake the necessary administrative requirements in order to comply with the provisions of the *Act*. The record confirms that they have received permits as foreign legal consultants and they are, since obtaining these permits, members of the Law Society of New Brunswick. This was specifically considered and taken in consideration by the reviewing officer in his decision.

[102] Furthermore, the CFA was approved by a reviewing officer named by the Law Society once the parties to the CFA had waived the requirement that it be done within 90 days of the signing of the agreement pursuant to subsection 83(7) of the *Act.*

[103] Moreover, any non-compliance with subsection 83(6) of the *Act*, as it relates to the remuneration of the lawyers, emanates from the wording of the form prescribed by the Law Society. Consequently, it would make no sense whatsoever to declare the CFA void because the form prescribed by the Law Society is in violation of the statute. The reason why the terminology was utilized to comply with the requirements established by the Law Society by using their form.

[104] As previously mentioned, the purpose of the *Law Society Act, 1996* is for advancing and maintaining the standard of legal practice in the province for the benefit of the public and members of the legal profession. This takes place under the direction of the Law Society of New Brunswick. The U.S. lawyers are now members of the Law Society. The CFA has been approved by a reviewing officer, and it has been filed with the Law Society of New

Brunswick. In my opinion, any violation of subsections 83(1), 83(6), and 83(7) of the *Act* is not contrary to public policy and, in light of all the circumstances, does not render the CFA void or otherwise unenforceable.

(7) Disposition regarding whether the CFA breaches the *Law Society Act, 1996* and the *Contingent Fee Rules*

[105] For the aforementioned reasons, I conclude that there is no evidence that the foreign legal consultants are doing anything other than what they are permitted to do by virtue of their permits. Further, that any violation of subsections 83(1), 83(6), and 83(7) of the *Law Society Act, 1996* does not render the CFA void or otherwise unenforceable.

(8) Does the CFA violate the *Constitution Act, 1867 and/or the Financial Administration Act ?*

[106] The following sections of the CFA deal with the fees, costs, charges, disbursements, interests, and taxes to be paid by the Province to the lawyers for their services:

> **Contingency Fees and Lawyers' Compensation**
>
> **4(1) In consideration of the legal services to be performed by the Lawyers for the Client under this Agreement, the Client agrees to pay to the Lawyers in accordance with a staged contingency fee, as follows:**
>
> **Stage 1: In the event that a settlement is reached with any of the Intended Defendants at any point during Stage 1 of the litigation, the Lawyers shall be paid a fee of 12% of such settlement, which rate will apply, for greater clarity, at commencement of retainer up until the Statement of Claim has been issued.**
>
> **Stage 2: In the event that a settlement is reached with any of the Intended Defendants at any point during Stage 2 of the litigation, the Lawyers shall be paid a fee of 18% of such settlement, which rate will apply, for greater clarity, upon issuance of the Statement of Claim, and which rate will continue to apply through all examinations for discovery**

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through pre-trial proceedings. The completion of Stage 2 is defined as the service of the trial record by the plaintiff.

Stage 3: **In the event of settlement of the litigation at any point during Stage 3 of the litigation, the Lawyers shall be paid a fee of 20% of such settlement, which rate will apply, for greater clarity, through, and to the close of trial including the calling of evidence and closing arguments, and where applicable, any discussions surrounding resolution of the litigation;**

Stage 4: **In the event of settlement of the litigation at any point during Stage 4 of the litigation, the Lawyers shall be paid a fee of 22% of such settlement, which rate will apply, for greater clarity, through the final resolution of all appeals.**

(a) The Lawyers shall be paid, in accordance with Section 5, all disbursements and taxes directly incurred on behalf of the Client in recovering damages; and

(b) all taxes imposed by law on fees for legal services.

(…)

6(2) **In the event that costs under the Rules of Court are awarded against the Client in any legal proceeding, the payment of all such costs is the full responsibility of the Client and not the Lawyers.**

7(1) **Upon the settlement of this Matter, or upon the completion of any legal proceedings in which the Client recovers judgment, the Lawyers shall provide the Client with an account in writing separately setting out the amounts recovered for special and other damages, and for costs, charges, disbursements and taxes, and showing the amounts charged to the Client under this Agreement and the balance payable to the Client.**

7(2) **Upon approval by the Client of the account under subsection 7(1) the Lawyers may deduct the total amount owing to the Lawyers and pay the balance to the Client, or as the Client directs.**

(…)

9(2) **If the Lawyers withdraw under subsection 9(1) because of cause created by the Client, the Lawyers are entitled to recover from the Client fees on the basis of the Lawyers' normal hourly rates for such matter, and for disbursements and taxes, to which the Lawyers would be entitled if there was no contingent fee agreement, and the Lawyers' bill may be enforced as under subsection 8(2).**

10. **If the Client undertakes to settle this Matter without the knowledge or participation of the Lawyers, the Client shall pay to the Lawyers the fees agreed under section 4(1) based on the final recovery received by the Client.**

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> **11. <u>The Lawyers make no warranty or representations concerning the successful outcome of this Matter,</u> or that the Lawyers can recover any amount for disbursements and taxes that will be incurred on behalf of the Client. Any statements of the Lawyers in this regard are statements of opinion only, based on the Lawyers' best judgment of the issues.**
>
> **(…)**
>
> ***(Emphasis added)***

[107] The wording of the aforementioned excerpts from the CFA was taken from Form 1 "contingent fee agreement" prescribed under the *Contingent Fee Rules*.

[108] Section 53 of the *Constitution Act, 1867* provides that Bills for appropriating any part of the public revenue shall originate in the House of Commons. This provision applies to the provinces by virtue of section 90 of the *Constitution Act, 1867*.

[109] Section 53 recognizes that only legislatures have authority to tax and to spend. In the decision of *Kingstreet Investment Ltd. v. New Brunswick,* [2007] 1 S.C.R. 3, Mr. Justice Bastarache, as he then was, states that the constitutional limitations on the Crown to spend are equal to the State's power to raise revenue:

> **24 If the constitutional rule requiring the Crown to only spend public funds under legislative authority has sufficient weight to compel recovery of an unauthorized expenditure by the Crown, notwithstanding the principles of unjust enrichment, then it is difficult to understand a common law bar to the recovery of unconstitutionally imposed taxes. Presumably, <u>the constitutional limitations on the Crown's power to spend are of equal importance as the constitutional limitations on the Crown's power to raise revenue. In my view, these principles are really two sides of the same coin.</u>**
>
> **See *Kingstreet Investment Ltd. v. New Brunswick,* at para. 24; see also *Confédération des syndicats nationaux v. Canada (Attorney General),* [2008] 3 S.C.R. 511, paras. 81-82.**
>
> **(*Emphasis added)***

[15]

[110] Subsections 23(1), 23(2) and section 61 of the *Financial Administration Act* read as follows:

> **23(1) All public money shall be deposited to the credit of the Province in such banks, trust companies or credit unions as may be designated by the Minister.**
>
> **(…)**
>
> **23(2) Every person who collects or receives public money**
>
> **(a) shall deposit such public money to the credit of the Province, and**
> **(b) shall keep a record of receipts and deposits, as prescribed by regulation.**
>
> **61 Subject to any other Act, no transfer, lease or loan of property of the Province is to be made except in accordance with regulations.**

[111] Section 38 of the *Financial Administration Act* expressly contemplates the Province entering into contracts that will require payments of public money in future years, by providing that contracts with the Province are deemed to include a term that any such payment will be contingent upon an appropriation in that year. Section 38 reads as follows:

> **38(1) No contract is to be made by which money is to be paid during the fiscal year in which the contract is made unless there is a sufficient unencumbered balance in the applicable appropriation.**
>
> **38(2) Every contract**
>
> ***(a)* made by the Province after the coming into force of this section, and**
>
> ***(b)* providing for payment of public money,**
>
> **is deemed to contain the following term:**
>
> **No payment is to be made by the Province under this contract in any fiscal year unless an appropriation against which the payment is to be charged is made in that fiscal year.**
>
> ***(Emphasis added)***

[112] The defendants argue that the CFA involves an appropriation and the payment of public money and they contend that the CFA contravenes the *Constitution Act, 1867* and the *Financial Administration Act*.

[113] However, there is no need for an appropriation at this time nor could there be one. No settlement has been reached or judgment rendered. There is no basis upon which the amount of an appropriation could be determined until such settlement and/or judgment is obtained.

[114] Furthermore, any control of public money, expressed in subsections 23(1) and 23(2) of the *Financial Administration Act* must be read in the context of paragraph 38(2)(b) which clearly directs a deemed term to be read into the contract.

[115] The actual terms of the CFA specify that the Province agrees to pay, only in the event that a settlement is reached, an amount provided for in subsection 4(1) of the CFA. Moreover, the agreement expressly specifies that payment to the lawyers will occur only after the Province has approved the account under subsection 7(1). In the event that there is no contingency fee paid, subsection 8(1) requires an amount to be determined by a reviewing officer of the Law Society. In all instances, there may be a payment if certain events occur and there is always the possibility that no sum will be recovered through settlement and/or judgment as a result of this litigation.

[116] No amounts are payable to the Province until the lawyers' accounts are approved. All sums received would be held in trust for the benefit of the Province pending the required approval. Pursuant to the wording of subsection 38(2) of the *Financial Administration Act*, if there is a settlement or judgment in the future that requires the payment of public money to the

lawyers, an appropriation may take place at that time. Subsection 38(2) explicitly specifies that the contract is deemed to contain such a proviso. Therefore, this is a matter that will be dealt with, if required, between the lawyers and the Province and is clearly contemplated for in the *Act*. Nothing precludes the Province of New Brunswick from making an appropriation in the fiscal year in the event a judgment is awarded or a settlement is reached and a contingency fee then becomes payable in accordance with the terms of the CFA. The wording of subsection 38(2) unequivocally contemplates the payment of such sums in the future and requires that an appropriation, against which the payment is to be charged, is to be made in the fiscal year the payment is made.

[117] The defendants argue that section 61 of the *Financial Administration Act* has been contravened because the CFA involves the assignment of a cause of action, thus involving a transfer of property of the Province to the lawyers pursuant to the provisions of section 61 of the *Act*. The CFA is the sole agreement between the Province and the consortium of lawyers. Nothing in the CFA provides for the conveyance of property or disposition of the Province's cause of action, in whole or in part. The Province of New Brunswick retains the cause of action and control over the proceedings. It may terminate the Consortium at any time and pay fees and disbursements and no contingency fee if it so wishes to do so. Furthermore, section 10 of the CFA expressly permits the Province to settle this matter without the knowledge or participation of the Consortium.

[118] The defendants have brought to my attention the case of *Larocque v. Canada (Minister of Fisheries and Oceans)* (2006), 270 D.L.R. (4th) 552 (Fed. C.A.) where the federal Minister of Fisheries and Oceans had hired fishers to survey snow crab stocks for the

Department and agreed to remunerate the fishers by licensing them to fish and sell a certain quota of snow crab. The Court determined that since the Minister lacked legislative authority to grant the license, it was *ultra vires* the Minister and void. The Court stated:

> **(…)**
>
> **[12] However, in my opinion, that is not where the problem — or its solution — lies. The debate was tainted by asking only whether the manner of remunerating the ship was "purely accessory to the true object of the licence", which was scientific research. Rather, what should have been asked was whether the Minister had the power to remunerate a service provider in that manner. It is the Minister's finance power that is at issue, well before his power to issue fishing licenses.**
>
> **[13] It is accepted, as the Supreme Court of Canada put it in *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12, 142 D.L.R. (4th) 193, that "Canada's fisheries are a 'common property resource', belonging to all the people of Canada" and that "it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest" (at pages 25 and 26). They do not belong to the Minister, any more than does their sale price. Also, when the Minister decided to pay a contracting party with the proceeds of sale of the snow crab, he was paying with assets that did not belong to him. Paying with the assets of a third party is, to say the very least, an extraordinary act that the Administration could not perform unless so authorized by an act or by duly enacted regulations. Such an act, on its very face, is like an expropriation of fishery resources or a tax on them for the purposes of funding the Crown's undertakings.**
>
> **[14] The judge properly understood the strange situation in which the Minister had put himself when he sought an enabling power in the *Fisheries Act.* He did not find any there. And it was then, in my opinion, that he erred in law. As the Act was silent, according to him, it would therefore not prohibit the Minister to act in such a way. But it is precisely because the Act is silent that one should refer to the statutes and regulations of general application in matters of contracts and payments from public funds, to verify whether the Minister had the power to do what he did.**
>
> **[15] It is accepted, in public law, that any disbursement of public funds must be authorized by legislation. The disbursement process must actively adhere to a specific administrative procedure to ensure compliance with the rules designed to ensure monitoring of the Crown's expenditures. One must be able to verify the jurisdiction of a party who makes a financial undertaking, the existence of unencumbered funds before the contract is entered into, as well as a sufficient balance upon its payment. (…)**
>
> ***(Emphasis added)***

[15]

[119] The decision in *Larocque* may be distinguished from the present case in that the Minister's payment to the contracting party with the proceeds of sale of the snow crab had taken place in the absence of an authorization by legislation. In this case, no payment will be made to the Consortium until certain events happen in the future which includes an appropriation in accordance with subsection 38(2) of the legislation.

(9) Disposition regarding whether the CFA breaches the *Constitution Act, 1867* and the *Financial Administration Act*

[120] For the aforementioned reasons, I conclude that the CFA does not breach the *Constitution Act, 1867* and the *Financial Administration Act* and, consequently, the defendants' motions that I declare the CFA void and *ultra vires* the Attorney General are hereby dismissed.

IV. SUMMARY

[121] I have ruled:

- That the members of the Consortium do not have a disqualifying conflict of interest between their public duties as counsel for the Attorney General and their private financial interest under the CFA. Accordingly, I have denied the declaration sought by the defendants in their CFA motions;

- There is no evidence that the foreign legal consultants are doing anything other than what they are permitted to do by virtue of their permits. Any violation of subsections 83(1), 83(6), and 83(7) of the *Law Society Act, 1996* does not render the CFA void or otherwise unenforceable;

- The CFA does not breach the *Constitutional Act, 1867* and the *Financial Administration Act*. Accordingly, the defendants' motions that I declare the CFA void and *ultra vires* Attorney General are hereby dismissed;

Accordingly, the defendants' motions, whereby they request a declaration that the CFA is void and that the Consortium be removed, are hereby dismissed.

V. COSTS

[122] At the conclusion of this hearing, I was informed by counsel representing the Province that they withdrew their claim for costs. Hence, the parties shall bear their own costs.

DATED at Edmundston, New Brunswick this 14th day of July 2009.

THE HONOURABLE MR. JUSTICE THOMAS E. CYR
Judge of the Court of Queen's Bench of New Brunswick

APPENDIX « A »

LAW SOCIETY
OF NEW BRUNSWICK

CODE OF
PROFESSIONAL
CONDUCT

APPLICATION AND INTERPRETATION

Liberal interpretation

The provisions of this Code shall be interpreted in a liberal rather than in a restricted manner, the underlying bias being in favour of the protection of the public interest, of the administration of justice, and the institutions associated therewith and of the high standards of the legal profession.

CHAPTER 1
INTEGRITY

RULE

The lawyer shall discharge with integrity every duty owed by the lawyer to the administration of justice and its institutions, clients, other lawyers, the legal profession and the public, and shall adhere to the principle of integrity in the non-professional life of the lawyer.

CHAPTER 3
QUALITY OF SERVICE

COMMENTARY

(…)

Examples of unacceptable conduct by lawyer

4. The following examples of conduct that falls below the standards prescribed by this Rule are illustrative but are not exhaustive:

(a) failure to keep the client reasonably informed during the currency and following the completion of a matter;

(b) failure to answer reasonable requests from the client for information;

(c) unexplained failure to respond to the telephone or other communication of the client;

(d) failure to keep appointments with the client without explanation or apology;

(e) informing the client that something will happen or that some step will be taken by a certain date, then letting the date pass without follow-up or explanation;
(f) failure to answer within a reasonable time a communication that requires a reply;
(g) doing the work in hand but doing it so belatedly that its value to the client is diminished or lost;
(h) slipshod work, such as mistakes or omissions in statements or documents prepared on behalf of the client;
(i) failure to maintain office staff and facilities, including computer and other equipment, adequate to the practice of the lawyer;
(j) failure to inform the client of proposals of settlement, or to explain them properly;
(k) withholding information from the client or misleading the client about the position of a matter in order to cover up the fact of neglect or mistakes;
(l) failure to make a prompt and complete report to the client when the work is finished or, if a final report cannot be made, failure to make an interim report where one might reasonably be expected;
(m) self-induced disability, for example from the use of alcohol or drugs, which interferes with or prejudices the professional legal services of the lawyer to the client;
(n) rudeness[5].

CHAPTER 4
ADVISING CLIENTS

RULE

The lawyers shall be honest and candid when advising the client.

COMMENTARY

(…)

Priority of duties
18. In fulfilling duties to the client and to others pursuant to this Code the lawyer shall uphold the prior and superior duties owed by the lawyer to the court system and to the administration of justice and the institutions associated therewith[21].

CHAPTER 6
CONFLICT OF INTEREST BETWEEN CLIENTS

COMMENTARY

(…)

Organizations

5. The lawyer who is retained or employed by an organization to provide legal services to the organization represents the organization acting through its duly authorized constituents; and in dealing with the directors, officers, employees, members, shareholders or other constituents of the organization the lawyer shall make clear that it is the organization that is the client of the lawyer, especially when the interests of the organization are adverse to those of the constituents of the organization with whom the lawyer is dealing. The lawyer who is acting for an organization may also act for any of the directors, officers, employees, members, shareholders or other constituents of the organization subject to the provisions of this chapter relating to conflict of interest[9].

CHAPTER 8
THE LAWYER AS ADVOCATE

RULE

(a) As an officer of the court the lawyer shall treat the court before which the lawyer appears as an advocate for the client with candour, fairness, courtesy and respect[1].

(b) When engaged as an advocate for the client the lawyer shall represent the client resolutely, honourably and within the limits of the law[2]. Within those parameters the lawyer shall ask every question, raise every issue and advance every argument that the lawyer thinks reasonably will assist the cause of the client and shall endeavour to obtain for the client the benefit of all rights, remedies and defences authorized by law[3].

COMMENTARY

(…)

Lawyer's role in adversarial proceedings

3. (a) The role of the lawyer as an advocate for the client is openly and necessarily partisan, and accordingly the lawyer is not obliged (save as required by law, under paragraph (c)

hereof or by Commentaries 7 and 10(viii) in this chapter) to assist an adversary or to advance matters derogatory to the cause of the client[6].

The lawyer as prosecutor

13. (a) When acting as a prosecutor in a criminal or quasi-criminal matter it is recognized that the lawyer is fulfilling a public duty on behalf of the state[25]. Therefore the lawyer as prosecutor

(i) shall commence a criminal or quasi-criminal prosecution only when satisfied that there is evidence to provide a reasonable prospect of conviction and that the public interest requires a prosecution[26], and

(ii) shall ensure that the proceedings are carried out with fairness, including the presentation firmly but fairly of all available legal proof of relevant facts[27], and

(iii) shall undertake the proceedings in a dispassionate search for the truth of the matter being litigated with no intent of winning or losing but rather with the intent of seeing that justice is done through a fair trial upon the merits[28].

(b) The other provisions of this Code shall apply, all necessary changes having been made, to the conduct of the lawyer as prosecutor in a criminal or quasi-criminal matter[29].

CHAPTER 20

THE ADMINISTRATION OF JUSTICE

RULE

The lawyer shall uphold, encourage public respect for and seek to improve the administration of justice and the institutions associated therewith[1].

COMMENTARY

The paramount duty of the lawyer

1. The paramount duty of the lawyer is to serve the cause of justice[2].
