

Judge-Made Contingency Fees

By Albert S. Frank, LL.B.

Every year the notices come in the mail, telling me that legislation is on the way to legalize contingency fees in Ontario, the only province in Canada that does not yet allow them. Somehow, though, the years go by and the legislation never arrives. I throw the notices in the garbage and continue practicing as usual.

Now, however, it seems that the Courts – perhaps tired of waiting for the legislature to do the job – might be allowing contingency fees. In a decision released on September 25, 2000, Justice Spiegel of the Superior Court of Justice ruled that the contingency agreement in issue was not champertous. Why? Because an agreement to finance litigation in exchange for a share of its proceeds does not by itself constitute an “officious intermeddling” that encourages a person to enforce rights he or she might not otherwise have been disposed to enforce.

The decision was *Bergel & Edson v. Wolf* (2000), 50 O.R. (3d) 777. The contingency agreement in question was not only not champertous, it was also not contrary to the *Solicitors Act* or the *Rules of Professional Conduct*. So it was not unenforceable for illegality. This is a sharp departure from the

old law summarized in *Legal Ethics* by Orkin, published in 1957, and upheld as recently as 1999 in *Robinson v. Cooney* (1999), 29 C.P.C. (4th) 72 (Ont. Gen. Div.).

Will *Bergel* lead to the common use of contingency fees?

We shall have to see whether it is followed or rejected in later decisions. Assuming it is followed, the question is whether the *Bergel* approach will be an attractive basis for contingency fee agreements. Personally, I have doubts.

Clients, of course, love the idea of contingency agreements. Their risk is reduced because the lawyer takes on much of the risk. They do not have to finance the litigation – which they might not be able to afford. With the possible exception of disbursements, the lawyer is providing the financing.

But why should the lawyer take on the risk? Who wants to put time, effort, and money into a case only to go unpaid because, for example, the other side goes bankrupt? The

lawyer must be confident of getting a good fee for a good result.

A "good fee" must be substantially higher than a normal fee. It would not be enough for the lawyer to get the same fee as the case would generate on a non-contingency basis. The fee must compensate the lawyer for taking on the risk.

Nor is it enough that the fee be large enough that, taking into account the occasional unsuccessful case, the lawyer averages out to the same fees that would be generated on a non-contingency basis. This fails to take compensate for the very real negative effects of contingency agreements on the lawyer's cash flow, credit resources, and nerves.

To motivate lawyers to make contingency agreements there must be a set of rules under which lawyers who do contingencies can expect, if reasonably successful in their litigation, to earn significantly more than if they did not do contingencies. Otherwise, only reckless or desperate lawyers would be interested.

The problem with *Bergel* is that it provides no such assurance. In that case the judge said that even though there was a contingency agreement the court could review the lawyer's fee. The judge then reviewed the fee, and allowed only about 56% of it.

This approach will hardly inspire the lawyers of Ontario. If they lose a case, they get no fee. If they win a case, the client can challenge the fee and the court can reduce it. Why should lawyers take on both sets of risks? How could lawyers afford to?

A lawyer could spend years working on a case, with no cash flow, laboriously proving the facts necessary for victory. The client then says "Why should I have to pay such a high fee for justice? The lawyer had no real risk. Just read the trial judge's decision and you'll see how obvious it was that I was right. [And let's not talk about my lawyer's cash flow and credit line.]"

In hindsight, every victory looks like a sure thing.

So the lawyer's good work in making the client's case clear and strong, is turned

against the lawyer. The lawyer is then into a fight over the fee, which could be reduced. Of course, if the case is lost nobody will set aside the contingency agreement to allow the lawyer a fee anyway.

Ontario needs a system like Alberta had when I practiced law there in the early 1980s. Contingency agreements would be filed with the court and open to review. If the agreement is reasonable then, even if it results in a big fee in the particular case, the court simply approves the agreement. Only if it were unreasonable would the court disregard it and review the fee.

Without such a system, the efforts of the courts or the legislature in making contingencies legal would, practically speaking, be wasted effort.

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