

## **Hull on Estates Podcast #31**

### Contingency Fee Agreements in the Context of Estate Litigation

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Sean Graham: Welcome to Hull on Estates. You're listening to Episode #31 of our podcast series on Tuesday, October 24<sup>th</sup>, 2006.

*Welcome to Hull on Estates, a series of podcasts for the Canadian legal community dealing with issues and insights surrounding estate planning in Canada. Hosted by the lawyers of Hull and Hull, the podcast will touch on some key considerations when planning estates and Wills. Now, here are today's hosts.*

Sean Graham: Good morning David.

David Smith: Good morning Sean. Sean, I understand that you and I have discussed contingency fees in the context of estate litigation and that is the topic for today's podcast. And Sean, certainly contingency fees historically were not permitted in Ontario but are now permitted by regulation and you and I in our practice as estate litigation lawyers frequently run into the need for contingency fee agreements.

Sean Graham: No question, and Ontario, I think, was fairly late to the game on this manner of economic relationship between lawyers and clients. If I'm not mistaken, we're the last province to adopt it but in certain areas it applies quite nicely and estate litigation is one of those areas.

David Smith: And you know, Sean, I guess we should be careful not to assume that everyone is familiar with the term "contingency fee". I mean, basically, we are talking about an arrangement here where the party to litigation agrees with his or her lawyer that the lawyer's fee will be based upon some proportion of the result.

Sean Graham: Yes, and then there is the other sort of traditional method, just to distinguish the contingency is essentially where the lawyer will tend to have an hourly rate and basically bill on a periodic basis, based on the time spent. The client pays the bill and everything runs shipshape and I think most lawyers are pretty comfortable with the traditional method, but when clients are not able to fund litigation on an ongoing basis, that's where a contingency fee can really solve that problem.

David Smith: Well, you know Sean, when I hear the word "contingency" I think of risk.

Sean Graham: No question. And one of the issues with contingency fees is that the law firm tends to share the risk of the lawsuit with the client. With the other arrangement provided the client pays the bills on an ongoing basis, there is really no risk for the law firm and it's all on the client. A contingency sort of changes that equation and risk gets shared.

David Smith: But the way lawyers work on files, as I understand it, Sean, and certainly in our practice, is there's two components. There is the time the lawyer spends, which is typically given an hourly rate which will need to be reflected in the new arrangement. But what about the out-of-pocket expenses that the lawyer will incur. And we call these disbursements typically, in the manner of court filing fees, fax and telephone expenses, how are disbursements typically treated in a contingency arrangement?

Sean Graham: Well that depends on the agreement between the law firm, a lawyer and the client. The agreement can either say that the disbursements will be essentially financed or funded by the law firm until recovery, and if there is no recovery, then the law firm will be out-of-pocket. And the other arrangement, of course, is that the client needs to pay the disbursements, both on an ongoing basis and at the end of the day regardless of how the lawsuit turns out. That obviously protects the law firm from having to be out-of-pocket at the end of the day. It's one thing potentially not to recover your legal fees, but it's a lot more painful for a law firm to pay significant disbursements and not see those monies paid back by the client.

David Smith: So it would seem to me, then, Sean, that the decision as to whether or not to carry the disbursements will probably depend to some extent on how good a case the lawyers think they have when they take on a contingency arrangement.

Sean Graham: Absolutely, and the other factor, of course, is the client may not be able to afford legal fees on an ongoing basis, but disbursements, although they can certainly add up, tend to be sort of a lesser order of magnitude than the legal fees themselves. So the client may want to pay the disbursements or may agree to pay the disbursements, just not the legal fees. That's another way to solve that problem.

David Smith: Right, but of course, we've spent a little bit on time on the disbursements. That's really a bit of a side show. I mean, obviously, the meat and potatoes here is the arrangement respecting fees. And certainly there is a common notion out there, based primarily upon I think the general public's experience in terms of American media and the American influence, where there's a common perception that a contingency arrangement will see a law firm or lawyer take 33% or 1/3 of any result. Is that a common percentage that you see employed in the retainer agreement:

Sean Graham: That does tend to be the percentage used. Contingencies are somewhat novel in the estates litigation context, so I think the profession, as these cases get dealt with over time, is going to find out whether that percentage is appropriate. Theoretically I suppose the profession may gravitate to a higher percentage, I think that's unlikely. There may be a greater chance that a lower percentage might come into play. But again, the important thing about contingency fees, because 33% obviously strikes many people as, I mean, it's a third, it's a lot of percentage of the recovery, so many people may think that's too high. But I think what is important to keep in mind is that 's assuming success. A lot of these cases may not succeed, and the law firm will do a significant amount of work and get nothing. So in cases of recovery, law firms tend to get paid a fairly high

percentage, but again, there are those other cases out there that take the sort of business benefit in an entirely different direction.

David Smith: And if we're talking about the result obtained, in the context of estate litigation, I think the contingency arrangement that you would most often see would be in respect of a Will challenge, wouldn't it? Where you have a disappointed beneficiary who's cut out of, say Mom or Dad's Will, and perhaps benefits under a prior Will or on an intestacy and should that claimant be successful in the litigation, there's a certainty that if one Will is set aside and there's a financial interest under a prior Will, there then is in a sense some security for the lawyer that, at the end of the day, the estate assets will be available to fund the litigation if his or her client is successful.

Sean Graham: Yes, and the reverse is true as well. If the Will being challenged holds up and is found valid, and the client receives nothing, then the same result applies to the lawyer. And I think what we are getting at when we discuss sort of the possibility of being paid or not being paid, to me it really comes down to risk. And I'm not particularly comfortable with a contingency fee arrangement where it's virtually certain that the client is going to recover. For example, if there are two Wills and the client receives 20% of a large estate on the final Will and the entire estate on the second-last Will, then you know that the client is going to recover, or you may know, that the client is going to recover something. And you may know that you are going to get paid regardless of the result, and in that sort of scenario, I am less comfortable with a contingency fee agreement that you know you are going to recover 33% of potentially a very large number no matter what.

David Smith: And in situations where there is a certainty that the client will receive a benefit out of an estate, although not presently in funds, we typically employ an authorization and direction where the client says to the lawyer, look, I can't pay you now but I'm authorizing the estate trustee of the estate that when all is said and done, my entitlement as a beneficiary is going to go into your trust account and you and I will then agree on fees and you lawyer, have the security of knowing that money will be paid into your trust account, not in satisfaction of your fee, because I still have to agree with that fee. But at least it provides the lawyer with some security.

Sean Graham: Sure, and that, to me, is the best way to go if, again, if there is a virtual certainty of recovery. It seems to me there ought not to be a need for the lawyer to take 33% of a certain recovery if you are going to get paid either way. That way, you are also not sharing risk and for some lawyers, it's not a very comfortable position to be in, where you are essentially sharing risk with your client. Some lawyers believe that that interferes with the dispassionate advice that a client is entitled to expect.

David Smith: Well, and that's right. And it's just a reality, unfortunately, of the contingency arrangement that the lawyer inherently has some self-interest in settlement negotiations, or what have you. If the file is far along the way and a settlement offer is made that the lawyer thinks is a good settlement offer and that the client does not instruct him or her to accept, it can create some friction between the parties. And I mean I

suppose the lawyer, if he or she thinks that his or her client is not being reasonable and there is too great a risk, is the lawyer free to simply pull the plug and say, you know what, I'm into this for unbilled time, having a very significant value, I'm not prepared to take the risk anymore, you're on your own.

Sean Graham: If the retainer agreement allows for it, and I want to stress that for contingency agreements, there's an absolute requirement that they be in writing. And so lawyers will be taking great care drafting those agreements. You cannot, in my view, withdraw if you are going to prejudice the client's case. So, for example, if that offer you described, a good offer in the lawyer's view but not in the client's view, is made one day before a trial and the lawyer gets extremely frustrated with the client for being stubborn in the lawyer's view, then you can't leave the client in the lurch. And in my view, you would need to go forward. But under normal circumstances, where there is not an urgent need for the lawyer, in a very timely fashion, then I think that as long as the contingency agreement allows for you to withdraw, then you can.

David Smith: And in that sense, it's not a whole lot different than any other relationship between solicitor and client. Although if the solicitor is on the record and the client is not willing to terminate the retainer, the lawyer's only remedy in that case would be to bring a motion for removal of solicitor of record, correct?

Sean Graham: Exactly. Now I think you have that problem in any retainer, but with a contingency fee, because you are not getting paid essentially until the end of the day, the lawyer and the client get drawn into a relationship and a lot of work will have been done. So the lawyer may need to walk away from a lot more in a contingency fee situation than in another situation. But again, that's part of the risk that law firms take on when they want to represent clients who may have good cases, but may not be able to afford high legal fees on an ongoing basis.

David Smith: Right. Now Sean, obviously we don't have sufficient time today to fully explore contingency fees. I mean this is a topic which can get quite complex when we get into the details about the essential elements of the retainer agreement. But I wonder just in closing if you could just give some broad stroke commentary about what typically, what elements you typically need to see in a contingency agreement for it to be binding.

Sean Graham: Oh sure. There's a regulation to the *Solicitor's Act* which the *Solicitor's Act* deals with relationships between lawyers and their clients in the province of Ontario. And there is a regulation to that Act, an addendum of sorts, that deals specifically with contingency fee agreements. And I think that it reflects the fact that these are new agreements and that the public can make the profession a tiny bit antsy about the agreements. So the regulation forces lawyers essentially to make perfectly clear to the clients that there are other options. I'll give you a few of the requirements and maybe another podcast might deal with some of the others. But just to be brief, lawyers need to, first of all, enter into a written agreement as I think I have already said. But that written agreement needs to say that the client has been told about the other options of financial agreements, including hourly rate retainers. That hourly rates vary among different

solicitors and that the client is free to go speak with other solicitors whose hourly rates may be lower than the one they are retaining. The client then has to go on and say that being aware of the alternatives, nonetheless the client wants to go ahead with this particular law firm, and with a contingency agreement. The client also has to be told that all of the usual protections and controls with respect to retainer agreements, and oversight by the Law Society of Upper Canada and the courts, are available on a contingency fee arrangement just like with any other.

David Smith: So just so I'm clear on that, Sean, there is a common notion out there, and it's a correct notion, that clients are free to assess or tax as it's sometimes called, their lawyer's accounts. Do they still have that entitlement in a contingency arrangement?

Sean Graham: They do, but the usual parameters of that assessment will be a little bit different. The usual assessment will essentially say, what was the result, how many hours did it take to get there. Was the hourly rate reasonable? Was this hour needed, was that hour needed, and then there may be little deductions here and there. With a contingency fee agreement, my suspicion, although I don't think there's a lot of experience with assessments of these agreements, my suspicion is that it will be a more global approach that's taken. And so the percentage will be weighed against, the percentage recovery will be weighed against, the full amount recovered, the difficulty of the matter. So in some senses, it's the same as the usual assessment. But I don't think it will be quite as detail-oriented.

David Smith: We'll have to just see where the profession goes, I suppose, over the course of time. Sean, thanks very much for your time today dealing with this. And we'll look forward to discussing perhaps a different issue on our next podcast.

Sean Graham: Thank you too, David.

*This has been Hull on Estates with the lawyers of Hull and Hull. The podcast you have been listening to has been provided as an information service. It is a summary of current legal issues in estates and estate planning. It is not legal advice and you are reminded to always talk with a legal professional regarding your specific circumstances.*

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