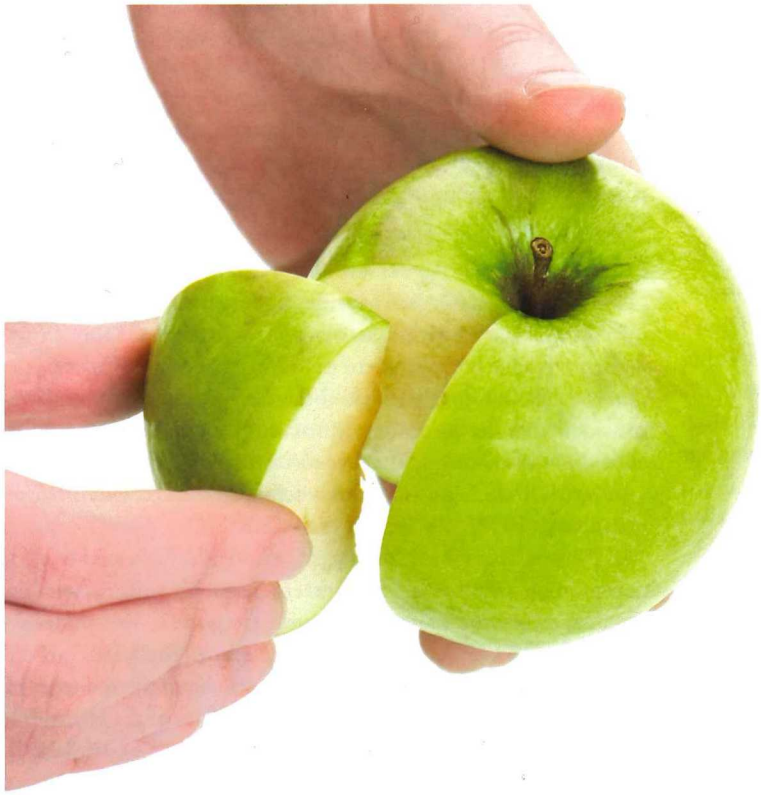
CONTINGENCY FEE AGREEMENTS



Understanding *Mide-Wilson* v. *Hungerford Tomyn Lawrenson and Nichols* 2013 BCCA 559

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INTRODUCTION

The recent decision of the BC Court of Appeal in *Mide-Wilson* v. *Hungerford Tomyn Lawrenson and Nichols* 2013 BCCA 559 ["Mide-Wilson"] is required reading for all lawyers who perform legal services under contingency fee agreements ("CFAs"). The decision not only clarifies the legal principles and factors relevant to a fee review under ss. 68 and 70-71 of the Legal Profession Act, SBC 1998, c. 9 (the "*LPA*"), but also considers the broader policy implications of CFAs, including the role CFAs play in enhancing access to justice for those clients who cannot afford to pay an hourly fee, and the need to maintain the integrity of the legal profession. While the Mide-Wilson decision is relevant to all lawyers who perform services under CFAs, it may be particularly significant for lawyers practicing in the growing area of wills and estates litigation.

CFAS GENERALLY

The use of CFAs in British Columbia is a relatively recent development. At common law, CFAs were illegal for being champertous, and the concept of a solicitor gaining "at the expense of his client, beyond the amount of the just and fair professional remuneration to which he is entitled" has historically been considered inherently incompatible with the integrity and honour of the legal profession (*Mide-Wilson* at para. 82, citing *Tyrrell v. Bank of London* (1862), 10 HL Cas. 26 at 44, 11 ER 934 at 941, *per* Lord Westbury).

CFAs have been allowed in BC since 1969, but have always been regulated and subject to court supervision in order to prevent the possibility of abuse and ensure the integrity of the legal profession is maintained. While CFAs arguably represent a type of "joint venture", in which both the client and the lawyer "will either share in the fruits of the action or suffer the defeat together", the fiduciary nature of the solicitor-client relationship and the integrity of the legal profession demand that the client's best interests and notions of basic fairness remain paramount considerations in determining the amount of a lawyer's fee. (*Anderson v. Elliott* (1998) 60 BCLR (3d) 131 (SC) per Sigurdson J. at paras. 67-68).

THE LAW APPLICABLE TO CFAS

Prior to reviewing the decisions in *Mide-Wilson*, it will be useful to briefly review the statutory framework and the case law principles that apply to the examination of CFAs and the review of the fees resulting from them.

The statutory framework for both the examination of written agreements with respect to fees and disbursements, including CFAs, and the review of a lawyer's bill is found in Part 8 of the *LPA* (ss. 68 and 70, respectively). Although the examination of agreements and the review of a lawyer's bill are distinct exercises, the legal principles that apply to the two types of hearings are "not mutually exclusive, but work in concert to ensure that both the initial fee agreement and what is subsequently billed pursuant to that agreement are appropriate" (*Mide-Wilson* at para. 153, citing *Coad v. Rizk* (1999), 68 BCLR (3d) 340 (SC).

Examination of the Agreement – *LPA* s. 68

Section 68(2) of the *LPA* provides that a person who has entered into an agreement with a lawyer or law firm may apply to the registrar to have the agreement examined. Section 68(5) provides that the registrar must confirm the agreement unless the registrar considers that the agreement is unfair or unreasonable *under the circumstances existing at the time the agreement was entered into.*

In its 1990 decision in *Commonwealth Investors Syndicate Ltd. v. Laxton*, (1990), 50 BCLR (2d) 186 (CA) ["*Commonwealth No. 1*"], the BC Court of Appeal set out the two-step test for determining whether a CFA agreement is fair and reasonable. The first step – the "fairness" inquiry – requires a determination of whether the CFA was fair in the circumstances that existed *when the agreement was entered into*, which might include the consideration of factors such as lack of capacity of the client, undue influence exercised or unfair advantage taken by the lawyer, or whether any other mistake or flaw arose in the formation of the contract that would indicate the client did not understand and appreciate its contents.

Assuming the CFA is found to be fair, the second step of the two-part inquiry set out in *Commonwealth No. 1* – the "reasonableness" inquiry – required a determination of whether the CFA was reasonable with respect to the ultimate fee charged by the lawyer under the CFA, based on a review of all the ordinary factors which are involved in the determination of the amount a lawyer may charge a client *from the time the CFA was made until its termination or its completion.*

In *Commonwealth Investors Syndicate Ltd. v. Laxton* (1994), 94 BCLR (2d) 177 (CA) ["*Commonwealth No. 2*"], a second appeal in the *Commonwealth* case, the Court of Appeal considered the meaning of "reasonableness" in the context of the ultimate fee charged by a lawyer under a CFA. After considering the two-step process set out in *Commonwealth No. 1*, McEachern CJBC commented that the assessment of "reasonableness" in relation to the ultimate fee charged under a CFA required that the CFA be "reasonable in the result" (*Commonwealth No. 2* at para. 25). In his view, the court's task was to consider the principles which generally govern lawyer's fees, including the factors set out in *Yule v. Saskatoon* (1955) 1 DLR (2d) 540 (Sask. CA), and the particular considerations that apply to CFAs, such as the risks undertaken by the lawyer, the expectations of the parties and the terms of the CFA itself. The court's task is then to decide whether the CFA operated "reasonably in its context". This assessment required the

court to use the amount payable under the CFA as the "starting point" and then determine whether that amount was reasonable and maintained the integrity of the profession (*Commonwealth No. 2* at para. 47).

The *Commonwealth* cases were decided under the *Barristers and Solicitors Act*, RSBC 1979, c. 26 (the "Old Act"), the predecessor to the *LPA*. Under the Old Act, the focus of the "fairness" inquiry was the time the CFA was entered into, whereas the "reasonableness" inquiry extended from the time the CFA was entered into until its termination or completion. Under the present legislation, s. 68(5) of the *LPA*, the registrar must make both the "fairness" and "reasonableness" determinations (both parts of the two-part test set out in *Commonwealth No. 1*) with reference to "the circumstances existing *at the time the agreement was entered into*".

Although the language of the *LPA* has altered the time period under consideration with respect to the "reasonableness" inquiry, the subsequent authorities, including the decisions of the Registrar, the BC Supreme Court and the BC Court of Appeal in *Mide-Wilson*, make it clear that the two-step process outlined in *Commonwealth No. 1* remains applicable to a review of a CFA under s. 68(5). As a result of the Court of Appeal's decision in *Mide-Wilson*, it is now equally clear that the principles set out in *Commonwealth No. 2* remain relevant to the assessment of the reasonableness of the fee payable under a CFA under ss. 70-71 of the *LPA*.

If the Registrar determines the agreement is not unfair or unreasonable under the circumstances existing at the time the agreement was entered into, s. 68(5) of the *LPA* provides that the Registrar *must* confirm the agreement. If the Registrar determines the agreement is not fair and reasonable based on the *Commonwealth No. 1* test, the Registrar may cancel or modify the CFA pursuant to s. 68(6) of the *LPA*. If the CFA is cancelled, the lawyer may issue a new bill, which may be reviewed by the registrar pursuant to the provisions of s. 71 of the *LPA*.

Review under ss. 70-71 of the *LPA*

Even if a CFA is not modified or cancelled under s. 68(6) of the *LPA*, there is no guarantee that the lawyer's fee will be calculated according to the terms of the CFA. The bill issued by the lawyer pursuant to the CFA is still subject to review under ss. 70-71 of the *LPA*, which involves a separate investigation of reasonableness, and requires an assessment of a broad range of factors, including those set out in s. 71(4) of the *LPA* and the requirements of Law Society Rule 8-1(2), which provides that a bill for fees earned under a CFA must be reasonable in the *circumstances existing at the time the bill is prepared.*

As previously stated, the Court of Appeal's decision in *Mide-Wilson* has clarified that the principles set out in *Commonwealth No. 2* remain relevant to a court's assessment under ss. 70-71 of the *LPA*. The CFA therefore remains the starting point for the assessment of a fair fee, but the dollar amount ultimately charged must not be so disproportionate to the work actually performed by the lawyer as to impugn the integrity of the profession. These

assessment principles appear to strike the balance between the "sanctity" of the CFA's terms and the provisions of s. 71(5) of the *LPA*, which explicitly states that the registrar's discretion is *not limited by the terms of the agreement.*

THE *MIDE-WILSON* DECISION

Having set out the applicable statutory principles relevant to the examination of a CFA under s. 68, and the review of a lawyer's fee under ss. 70-71 of the *LPA*, we now turn to the *Mide-Wilson* case.

Facts

The facts of the case are straight-forward. Ms. Mide-Wilson (the "Client") was the granddaughter of Jack Cewe, a successful businessman, who was the founder and principal of a group of companies engaged in gravel extraction, road construction, paving and related activities (the "Companies"). Mr. Cewe died at the age of 86, having been predeceased by his wife, his only child (the Client's mother) and his grandson. After graduating from university, the Client worked with Mr. Cewe for a number of years, but the two had a heated argument approximately 3 years prior to Mr. Cewe's death, following which the Client "left the office, never to return". The Client's evidence was that she and Mr. Cewe had reconciled and visited prior to his death.

Unbeknownst to the Client, Mr. Cewe made a number of significant changes to his estate plan in the years prior to his death, which included the execution of a new will and an alter ego trust (the "New Instruments"), pursuant to which the bulk of his business assets would devolve to his friend and advisor, Mr. George Home and his long-time companion, Ms. Alice Gibson (collectively, the "Trustees"). In his last will, Mr. Cewe left his Port Moody residence and a cash bequest of $500,000 to the Client.

The Client had always understood that Mr. Cewe intended for the Companies to remain in the family and continue operating after his death. When the Trustees commenced an action in the Supreme Court of British Columbia seeking to have Mr. Cewe's will pronounced in solemn form, the Client sought legal advice from a number of lawyers, including Hungerford Tomyn Lawrenson and Nichols (the "Firm"), with respect to the possibility of commencing an action to set aside the New Instruments on the basis of undue influence.

Prior to her initial discussions with the Firm, the Client had received advice from another lawyer that legal fees could be as high as $2 Million if the case went through to the Supreme Court of Canada. During her initial discussions with the Firm, the Client told the Firm that the value of Mr. Cewe's estate was in excess of $100 Million. The Client also made it clear that she was not interested in reaching a monetary settlement with the Trustees; her only objective was to gain control of the Companies founded by her grandfather.

Prior to entering the CFA, the Firm discussed a number of potential fee options with the Client, including straight hourly rates, a "fee for services" based on a combination of hourly rates and bonuses, and hourly rate and contingency fee hybrid and a pure contingency fee. The Firm indicated its preference would be to proceed on either an hourly rate or "fee for services" basis. However, the Client was only interested in retaining the Firm on a contingency fee basis, despite the fact she had sufficient assets to pay the Firm through a number of arrangements.

In accordance with the Client's preference, the Firm drafted a CFA and provided it to the Client, who took it home to review with her husband over the weekend. After reviewing the draft CFA, the Client requested a number of changes, which the Firm agreed to and incorporated into the CFA which was signed by the parties. The CFA provided that the Firm's fees would be 20% of any settlement entered into within the first year of the CFA being signed, 25% of any settlement entered into within the second year or one-third of any settlement or judgment obtained thereafter.

As stated in the Reasons for Judgment of Mr. Justice Goepel (at para. 41 of 2013 BCSC 374):

> The litigation was fraught with difficulties. As a granddaughter, the Client could not make a claim pursuant to the *Wills Variation Act*, RSBC 1996, c. 490. She could only succeed if she was able to set aside the New Instruments and she could only set them aside if she could establish that Mr. Cewe lacked testamentary capacity or was unduly influenced. A major hurdle was that the New Instruments had been prepared over an extended period by a leading wills and estate practitioner and executed before her.

Despite these challenges, the Firm was able to achieve the Client's desired result within approximately 9 months of entering into the CFA, and prior to conducting examinations for discovery or document production. After obtaining an apparently favorable expert opinion with respect to Mr. Cewe's testamentary capacity, and bringing a successful motion to have the Trustee's counsel of record removed on the basis of conflict of interest, the action settled on the second day of mediation. Under the terms of the settlement, the Client obtained control of the Companies after paying the Trustees a total of $8 Million.

After the settlement concluded, the Client and the Firm met to discuss the Firm's fees, but no agreement was reached and the Client ended the solicitor-client relationship with the Firm and retained new counsel to examine the CFA. The Firm then issued a bill in the amount of approximately $17 Million, based on the $85 Million estimated value of the Companies. The Firm's time records for time expended on the matter up to the completion of the settlement indicated the Firm spent approximately 2,500 hours on the matter, which would equate to a fee of approximately $1.25 Million if the Firm's fee were calculated on an hourly basis.

The Registrar's Decision – 2011 BCSC 1440

After examining the CFA pursuant to s. 68(5) of the *LPA*, and with reference to the considerations applicable to "fairness" and "reasonableness" set out in *Commonwealth No. 1*, Registrar Sainty concluded the CFA was neither unfair nor unreasonable for the purposes of s. 68(5) of the *LPA*. She then turned to the issue of whether the bill was reasonable in light of all the circumstances,

as required by s. 71(4) of the *LPA*. In considering these factors, the Registrar noted that although the result the Firm had obtained was excellent, and the matter was "of the greatest importance" to the Client, the $17 Million amount of the bill was approximately 15 times the amount the Firm would have charged if their fees had been based on an hourly rate.

Both the Client and the Firm lead expert evidence from highly respected senior members of the profession on the review of the Firm's bill. The evidence of the Client's expert, Mr. John Hunter, QC, and the Firm's expert, Mr. Darrell Roberts, QC, is neatly summarized by Goepel J. at paras. 160 and 163 of his decision:

> [160] Mr. Hunter was of the view that the fee contemplated by the CFA would bring the profession into disrepute. He suggested that the Law Society Rules which require a lawyer to charge "reasonable fees" put a "cap" on the fees that the Solicitors could charge regardless of the terms of the contingency fee agreement. He opined that if the contingency fee agreement was cancelled a proper fee would be in the $2.5 million range...
>
> [162] Mr. Roberts did not accept that there should be any cap on the Solicitors' recovery. He opined that the fee determined under s. 71(4) of the *LPA* should closely reflect what was payable under the contingency fee agreement itself. He said that was particularly so in a case of this kind when the Client had the financial ability to pay ongoing legal fees but deliberately chose to finance the litigation on the basis of a contingency fee agreement, which put all of the risk on the Solicitors. He suggested the ultimate fee should not be even as much as $1 million less than that called for under the agreement. Otherwise, he suggested the court would simply be encouraging litigants to freely abandon their honourably made agreements, a result that he suggested was not a valid object of the provisions in the *LPA* that provide for the review of legal fee agreements.

In considering the amount of the Firm's fee, Registrar Sainty referred to the decision in *McQuarrie Hunter v. Parpatt*, 2011 BCSC 800, in which Registrar Cameron allowed a fee that represented a 100% premium on the time spent on the file to the date of settlement, after concluding that some reduction in the amount that would have been payable under the CFA in that case was necessary in order to "maintain the integrity of the profession and to arrive at a fee that is reasonable" (*Parpatt* at paras. 73-76). Registrar Sainty stated that the decision in *Parpatt* must be viewed with reference to the particular context and circumstances in that case, but generally, parties should be held to their bargains. She concluded the appropriate fee in this case was $9 Million plus taxes and disbursements. The Client appealed.

The Decision of the Chambers Judge – 2013 BCSC 374

On appeal, Mr. Justice Goepel (as he then was) agreed with the Registrar's conclusion that the CFA was neither unfair nor unreasonable at the time it was entered into. Turning to the "fair fee" analysis required by ss. 70-71 of the *LPA*, and noting that s. 71(5) of the *LPA* specifically directs that the Registrar's discretion is not limited by the term of the CFA, Mr. Justice Goepelconcluded that the Registrar had "erred in principle in the emphasis she placed on the CFA in determining the amount of the fee" (at para. 171). This conclusion was the key issue on appeal. The Firm appears to have interpreted Mr. Justice Goepel to mean that the determination of a proper fee under ss. 70-71 must be made "regardless of" the terms of the CFA, rather than that the Registrar had over-emphasized the terms of the CFA in determining the proper fee.

Mr. Justice Goepel agreed with Registrar Cameron's comment in *Parpatt* that there "is a point when the differential between the work done and the fees payable under the [CFA] must be adjusted to maintain the integrity of the profession" and "in such circumstances the terms of the [CFA] must be sacrificed to ensure the client pays no more than a proper fee" (at para. 173). After finding that the amount the Registrar had certified - $9 Million, as opposed to approximately $1.25 Million in time recorded by the Firm – was excessive and would call into question the integrity of the profession, he concluded that a fee of $5 Million was appropriate in the circumstances.

The Firm appealed the order of Mr. Justice Goepel and sought to have the Registrar's certificate reinstated. The Client cross appealed, seeking a quantum meruit assessment of the appropriate fee at $2.5 Million.

The Court of Appeal's Decision - 2013 BCCA 559

In Reasons written by the Madam Justice Newbury (Madam Justice Neilson and Mr. Justice Willcock concurring) both the appeal and the cross appeal were dismissed. The key issues on appeal were whether Mr. Justice Goepel had erred in holding that *Commonwealth No. 2* no longer sets out the law to be applied in assessing the fee payable on a review under ss. 70-71 and in holding that s. 71(5) of the *LPA* mandates that the proper fee be determined by the registrar without regards to the terms of the CFA. The Court of Appeal addressed these issues in its Reasons at para. 71:

> In response to the Firm's argument that the chambers judge erroneously distinguished and set aside *Commonwealth No. 2*, counsel for the Client contended that the Firm was mischaracterizing the judge's approach to s. 71(5) and that he must have meant only that the provision "mandates that *all* of the criteria under s. 71(4) be taken into account in assessing whether the result of a bill under a [contingent fee agreement] must be adjusted to maintain the integrity of the profession." This may be correct, but if and to the extent that the judge intended to suggest that a registrar must determine the proper fee "regardless of" the terms of a fee agreement, he was in error. Section 71(5) states merely that the registrar's discretion is *not*

> *limited by* the terms of such an agreement, not that those terms are irrelevant or not to be considered. I see the provision as intended to prohibit terms in a fee agreement that purport to exclude or diminish the applicability of the *Yule* factors. One could not provide in a fee agreement, for example, that the skill required on the part of the solicitor should not be considered in a review under the Act.

After clarifying these points, and agreeing that the Registrar's over-emphasis on the sanctity of contract warranted court intervention, the Court of Appeal saw no reason to interfere with Mr. Justice Goepel's determination that the proper fee was $5 Million in light of all the statutory and other factors to be considered, including the work actually done by the firm.

In its decision, the Court of Appeal confirmed that the principles from *Commonwealth No. 2* remain highly significant to a fee review under ss. 70-71 of the *LPA*. Accordingly, the terms of the CFA remain the starting point for a court's assessment of a fair fee, but that assessment must balance the interests of holding parties to their bargains and ensuring that a lawyer's ultimate fee is not so disproportionate to the work actually undertaken as to impugn the integrity of the legal profession.

CONCLUSION

The summary of the Court of Appeal's decision includes the following passage:

> Lawyers are not venture capitalists, and there exists a risk that the amount payable under a [CFA] will be arbitrarily high, particularly where the underlying assets recoverable (and therefore the fee payable) may fluctuate greatly. In this case too, the value was not a function of the work done by the Firm. If the estate had been worth $200 Million, the Firm would, under the agreement, be entitled to a fee of $40 Million. There was an aspect of arbitrariness to such a result. (emphasis added)

While the huge amount of the fee that would have been payable under the terms of the CFA in *Mide-Wilson* will likely distinguish that case from the vast majority of cases in which legal services are provided under CFAs, the underlined passage above suggests that the decision in *Mide-Wilson* may be particularly significant for estate litigators performing work under CFAs in large estates cases.

If an estates litigator and a personal injury lawyer were both to obtain early multi-million dollar settlements for their respective clients under CFAs, does the passage above suggest the fee to which the estates litigator would be entitled under the CFA is more likely to threaten the integrity of the profession than the fee payable to the personal injury lawyer? It remains to be seen whether subsequent cases will make such a distinction. What is clear as a result of *Mide-Wilson* is that maintaining the integrity of the profession will continue to an important factor for the court's consideration in reviewing fees under ss. 70-71 of the *LPA*. V