FOR DECISION

SEVENTH REPORT OF THE ADVERTISING & FEE ARRANGMENTS ISSUES WORKING GROUP

INTRODUCTION: SEEKING ACCESS TO JUSTICE, FAIRNESS AND REASONABLENESS

1. In this seventh report to Convocation, the Advertising and Fee Arrangements Issues Working Group ("Working Group")[1] reports its recommendations to date to enhance the operation of contingency fees in Ontario.[2]

2. The Working Group recommendations in the motion below (at paragraph 13) are rooted in the Law Society's statutory duties, including its duties to act to "facilitate access to justice for the people of Ontario"[3], "maintain and advance the cause of justice and the rule of law"[4] and act in a manner that protects the public interest.[5]

3. Until 2002, the law in Ontario prohibited contingency fees. This changed with the decision of the Court of Appeal in *McIntyre Estate* which was followed by amendments to the *Solicitors Act*.[6]

4. The Court of Appeal in *McIntyre Estate* made clear that the reason for the change permitting contingency fees was the need for access to justice. As the Court said at para. 55, "**many individuals with meritorious claims are simply not able to pay for legal representation unless they are successful in the litigation.**"[7]

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[1] The Advertising & Fee Arrangements Issues Working Group is providing this interim report on its work. Since it was established in February 2016, the Working Group has been studying current advertising, referral fee and contingency fee practices in a range of practice settings, including real estate, personal injury, criminal law and paralegal practices, to determine whether any regulatory responses are required with respect to them. The history of the Working Group can be found on the Law Society's website at https://www.lsuc.on.ca/advertising-fee-arrangements/. The Working Group is chaired by Malcolm Mercer. Working Group members include Jack Braithwaite, Paul Cooper, Jacqueline Horvat, Michael Lerner, Marian Lippa, Virginia Maclean, Jan Richardson, Jonathan Rosenthal, Andrew Spurgeon and Jerry Udell. Benchers Robert Burd and Carol Hartman served on the Working Group until August, 2016.

[2] As noted in the Next Steps section below, there are certain remaining areas related to the operation of contingency fees in Ontario that the Working Group continues to explore.

[3] *Law Society Act,* R.S.O. 1990, c.L.8, s.4.2(2).

[4] *Ibid.* s.4.2(1).

[5] *Ibid.* at s.4.2(3).

[6] *McIntyre Estate v. Ontario (Attorney General)*, 61 OR (3d) 257; 218 DLR (4th) 193; [2002] O.J. No. 3417. The *Solicitors Act* was amended in 2002. The amendments came into effect in 2004.

[7] Emphasis added.

5. The Court of Appeal quoted with approval the earlier decision of Justice Cory[8]:

> **The concept of contingency fees** is well established in the United States although it is a recent arrival in Canada. Its aim **is to make court proceedings available to people who could not otherwise afford to have their legal rights determined.** This is indeed a commendable goal that should be encouraged. . . . Truly litigation can only be undertaken by the very rich or the legally aided. **Legal rights are illusory and no more than a source of frustration if they cannot be recognized and enforced. This suggests that a flexible approach should be taken to problems arising from contingency fee arrangements, if only to facilitate access to the courts for more Canadians. Anything less would be to preserve the courts facilities in civil matters for the wealthy and powerful.**

6. In deciding to permit contingency fees, the Court of Appeal concluded that fees which were unfair or unreasonable were not legally permitted.[9]

7. In *Raphael Partners*, the Court of Appeal elaborated the requirement that contingency fees be fair and reasonable. As the Court said in para. 37, "[t]he fairness requirement … is concerned with the circumstances surrounding the making of the agreement and whether the client fully understands and appreciates the nature of the agreement that he or she executed". The fairness requirement addresses the situation when a contingency fee agreement is entered into.[10]

8. As to reasonableness, the Court of Appeal said at para. 50 that "[t]he factors relevant to an evaluation of the reasonableness of fees charged by a solicitor are well established. They include the time expended by the solicitor, the legal complexity of the matter at issue, the results achieved and the risk assumed by the solicitor …". The reasonableness requirement addresses whether the fee charged is reasonable knowing how the case has turned out.

9. Of course, fairness and reasonableness will never be assessed unless the client has obtained recovery. That assessment necessarily considers the risk that recovery might not have been achieved or not to the same extent. Assessing the original risk of non-recovery can be difficult when it is being viewed after the fact when ultimately there has been a recovery.

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[8] *Coronation Insurance Co. v. Florence*, [1994] S.C.J. No. 116 at para. 14 (emphasis added). Justice Cory was then a trial judge. He was subsequently appointed to the Court of Appeal and ultimately to the Supreme Court of Canada.

[9] Section 24 of the *Solicitors Act* expressly authorizes the court to declare contingency fee agreements to be void if not fair and reasonable.

[10] *Raphael Partners v. Lam* (2002), 61 OR (3d) 417; 218 DLR (4th) 701 ["*Raphael Partners v. Lam*"].

10. The Working Group proposes reforms that are grounded in the underlying principles of access to justice, fairness and reasonableness. The proposed reforms are designed to achieve better transparency so that fairness and reasonableness are better achieved. The proposed reforms are designed to ensure that access to justice is not obstructed.

11. After significant consultation and deliberation, the proposed reforms do not include caps on contingency fees. Caps are not an effective way of better ensuring fairness and reasonableness. Available empirical evidence indicates that caps cause lawyers who rely on contingency fees to stop representing certain clients and to handle fewer cases generally. The principal effect of caps is to limit access to justice. There are better ways to address excessive contingency fees as the proposed reforms demonstrate.

12. The Working Group proposed reforms, described below:

    a. Regulate in a manner that facilitates access to justice, which is the underlying rationale for permitting contingency fees in Ontario;

    b. Safeguard to ensure that fees are clear, fair and reasonable by introducing new transparency measures at the outset of the retainer and in the final reporting to the client;

    c. Enhance the transparency of contingency fees to facilitate consumer searches for contingency fee arrangements;

    d. Enhance public and client understanding of contingency fee arrangements; and

    e. Simplify the calculation of contingency fees to enhance consumer protection.

MOTION

13. **That Convocation approve the following reforms for contingency fees in order to facilitate access to justice while ensuring that contingency fees paid are fair and reasonable:**

    a. **Scope of Contingency Fee Reforms**

    Any changes to the contingency fee regime should not apply in all contexts. They should apply to individuals and small businesses. They should not apply:

    i) In the class action context;

    ii) When the client is a sophisticated entity (such as a sizeable corporation); or

    iii) Where the court has approved the contingency fee agreement ("CFA") or the ultimate contingency fee.

    b. **Transparency Requirements**

    In cases involving individuals and small businesses, a series of transparency and reporting measures to be implemented, comprised of the following requirements:

    i) Disclosing the maximum percentage charged: Licensees charging contingency fees will be required to post the maximum percentages that they charge on their website or, if they do not have a website, otherwise disclose this maximum to potential clients when they first contact the licensee.

    ii) A mandatory standard form contingency fee agreement;

    iii) A mandatory client "Know Your Rights" document, which must be provided to the consumer by licensees prior to the client entering into a contingency fee agreement, and which will inform consumers of their rights and responsibilities; and;

    iv) Mandatory disclosure requirements when the contingency fee is ultimately charged to the client, comprised of:

    A. A clear breakdown of the total amount of a settlement or award, the net amount that will actually be received by the client, itemized and clearly identified disbursement costs, legal fees and taxes;

    B. A statement explaining the reasonableness of the fee in light of the requirement in the *Solicitors Act* that fees be reasonable and the factors established by the Court of Appeal in determining whether contingency fees are reasonable, namely the time expended working

on the matter, the legal complexity of the matter, the results achieved and the risk assumed by the licensee including the risk that the matter would not have been successful.[11]; and

C. A statement that the client has the right to assess the account.

c. **Recommend amendments to the *Solicitors Act* regarding Contingency Fees**

i) Amend section 28.1 of the *Solicitors Act* as follows:

A. A CFA may provide that an award of costs or costs obtained as part of a settlement[12] may be included together with all other amounts recovered by the client in the total amount based on which the contingency fee is calculated; and

B. A CFA may provide that for matters where the merits of the matter are adjudicated[13], the licensee can elect between receiving either:

I. The agreed CFA amount; or

II. An amount equal to full indemnity determined based on the amount awarded by the court against the defendant for legal costs. Where only partial indemnity costs are awarded, full indemnity costs would be deemed to equal the partial indemnity costs awarded together with a gross-up equal to two-thirds of the partial indemnity costs awarded. The gross-up shall not exceed one-half of the contingency fee that the licensee would otherwise be able to charge under their CFA.

ii) Contingency fees for paralegals should be regulated under the *Solicitors Act* in the same way as for lawyers.

d. **Licensees should be asked on their Annual Reports for information on the average contingency fees actually charged by area of practice (or other questions as may be determined to be appropriate) which information would then be aggregated and publicly disclosed.**

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[11] *Henricks-Hunter v. 814888 Ontario Inc. (Phoenix Concert Theatre)*, 2012 ONCA 496, *Raphael Partners v. Lam* at para. 50, citing *Cohen v. Kealey & Blaney* (1985), 10 O.A.C. 344; *Desmoulin v. Blair* (1994), 1994 CanLII 333 (ON CA), 21 O.R. (3d) 217, 120 D.L.R. (4th) 700 (C.A.).

[12] Excluding amounts recovered which properly reimburse amounts paid by the licensee.

[13] This option is only feasible in courts which award costs on the basis of partial, substantial and full indemnity and would accordingly not apply to Small Claims Court matters and Tribunals that do not award costs on this basis.

BACKGROUND

14. The Working Group's recommendations are based on in-depth consideration of contingency fees and the complexity of the *Solicitors Act* that governs their operation.

15. The Working Group has been considering contingency fees, together with related advertising and referral fee issues since February 2016. To date, based on the Working Group's initiatives, Convocation has adopted amendments to the lawyer and paralegal professional conduct rules to protect against misleading advertising, and has introduced new referral fee regulations. These measures were adopted to increase transparency, consumer choice and public protection.

16. As part of its ongoing review of contingency fees, the Working Group's activities have included:

Spring 2016	Holding a series of meetings with plaintiff and defence side personal injury lawyers, which provided invaluable insights into advertising, referral fee and contingency fee practices.
June 2016	Reporting to Convocation with a summary of the spring 2016 meetings and initial findings [14]
July 2016 to September 2016	Issuing a Call for Feedback to seek further input regarding advertising, referral fee and contingency fee issues.
February 2017	Reporting to Convocation with a summary of feedback received.[15]
June 2017	Reporting to Convocation finding that with respect to the operation of contingency fees in Ontario "change is necessary in order to protect consumers."[16] The Working Group also presented initial recommendations and the announcement of a Call for Feedback with respect to the Working Group's initial recommendations.
July 2017 to September 2017	Consulting on potential recommended changes to the operation of contingency fees in Ontario ("2017 CFA Consultation").
Fall 2017	Refining recommendations regarding contingency fees.

[14] The June 2016 Report to Convocation can also be found online at https://www.lsuc.on.ca/advertising-fee-arrangements/.

[15] Summary of Feedback Received in Response to the Advertising and Fee Issues Working Group July 2016 Call for Feedback ("Summary"), February 2017 Convocation – Professional Regulation Committee Report, pages 119-136, online at: www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2017/2017-Feb-Convocation-Professional-Regulation-Committee-Report.pdf.

[16] Fifth Report of the Advertising & Fee Arrangements Issues Working Group, Tab 4.6 of the Professional Regulation Committee Report to Convocation, at Tab 4.6, online at http://lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2017/Convocation-June2017-Professional-Regulation-Committee-Report.pdf ["June 2017 Report"].

17. The Working Group has heard from lawyers and paralegals, insurers, motor vehicle accident victims, academics and government. It again thanks all those who have participated in its process and shared their expertise.

18. As noted in its June 2017 Report, in the course of its deliberations, the Working Group has carefully reviewed and considered recent developments relating to contingency fees in Ontario, including recent private members' bills addressing contingency fees,[17] the Insurance Bureau of Canada's report, *A Study of the Costs of Legal Services in Personal Injury Litigation in Ontario,* by Professor Allan C. Hutchinson ("Hutchinson Study"),[18] the report *Fair Benefits Fairly Delivered,* prepared by David Marshall, Ontario's advisor on auto insurance (the "Marshall Report"),[19] recent cases addressing contingency fee costs, and the Court of Appeal for Ontario's decision in *Hodge v. Neinstein,* a class action regarding fees charged by a personal injury law firm.[20]

19. As noted in the June 2017 Report, the Working Group has also reviewed the extensive academic literature on the subject, media reports, and different types of contingency fee models, notably the United States, English and Australian approaches.

20. The Working Group's consideration of contingency fees has excluded the current operation of contingency fees in class actions. As the Working Group has previously explained, this was a deliberate choice given the "material differences between class actions, including the representative nature of class actions and judicial approval of fees paid to plaintiff's counsel."[21]

DISCUSSION

(1) Ontario's Contingency Fee Regime

21. Contingency fees were introduced over a decade ago to provide injured Ontarians with

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[17] Bill 103, *Personal Injury and Accident Victims Protection Act, 2017,* introduced March 8, 2017 by Mike Colle, MPP, Legislative Assembly of Ontario online at: www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=4614; Bill 12, *Protection for Motor Vehicle Accident Victims and Other Consumers from Unfair Legal Practices Act, 2016,* introduced September 14, 2016 by Tim Hudak, MPP, Legislative Assembly of Ontario online at www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=4123.

[18] Allan C. Hutchinson, "A Study of the Costs of Legal Services in Personal Injury Litigation in Ontario" Final Report ("Hutchinson Study"), Insurance Bureau of Canada, online at: http://assets.ibc.ca/Documents/Studies/Study-of-the-Costs-of-Legal-Services-in-Personal-Injury-Litigation-Allan-C-Hutchinson.pdf.

[19] David Marshall, *Fair Benefits Fairly Delivered, A Review of the Auto Insurance System in Ontario,* Final Report, April 11, 2017, online at http://www.fin.gov.on.ca/en/autoinsurance/fair-benefits.html.

[20] *Hodge v. Neinstein,* 2017 ONCA 494, online at www.ontariocourts.ca/decisions/2017/2017ONCA0494.htm ["*Neinstein*"].

[21] June 2017 Report to Convocation at footnote 12.

access to justice. Most people cannot pay for the legal assistance that they need unless and until they obtain recovery whether by settlement or after trial.

22. Ontario's CFA regime is set out in the *Solicitors Act* and O Reg 195 /04 (the "Regulation"), which came into force on October 1, 2004. Under the *Solicitors Act* and the Regulation:

    a. CFAs must be in writing.[22] The Regulation sets out several details which must be included in any CFA.[23]

    b. CFAs are available for any matter except for criminal or quasi-criminal proceedings or family law matters.[24]

    c. Fees may not be more than the client recovers as damages or receives by way of settlement, unless, within 90 days of the CFA being executed, the lawyer and client bring an application to have the agreement approved by the Superior Court of Justice.[25]

    d. A contingency fee may not be taken on the amount recovered for costs. Most contingency fees are determined based on the amount recovered on account of damages but not on the amount recovered on account of costs. However, the lawyer and client may jointly apply for court approval otherwise in "exceptional circumstances".[26]

23. Courts play an important role in regulating the operation of contingency fees. Court approval is required for any settlement involving a person under disability. Clients can also have their lawyer's contingency fee assessed on application to the Superior Court of Justice.[27]

24. The Court of Appeal has set clear, well established factors to consider whether fees are

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[22] *Solicitors Act* at s. 28.1(4).

[23] The Regulation provides, for example, that the CFA must include, among other information, statements:

a) of the type of matter in respect of which services are being provided (Regulation, at s.2.2);
b) indicating that the client and solicitor have discussed options for retaining the solicitor other than by contingency fee agreement, including by doing so by hourly rate (*Ibid*., at s.2.3);
c) setting out how the fee is to be determined, and a simple example of how the contingency fee is calculated (*Ibid.* at *s.*2.3-2.4);
d) outlining how the client or solicitor may terminate the contingency fee agreement, the consequences of termination and the manner in which the solicitor's fee is to be determined if the agreement is terminated (*Ibid.* at s.2.9);
e) informing the client of the right to ask the Superior Court of Justice to review and approve of the solicitor's bill (*Ibid.* at s.2.8);
f) if the client is a plaintiff, that the solicitor shall not recover more in fees than the client recovers (*Ibid.* at s.3).

[24] *Solicitors Act,* at s.28.1(3).

[25] *Ibid.* at s.28.1(6).

[26] *Ibid.* at s.28.1(8).

[27] *Ibid*. at s.28.1(11).

fair and reasonable in the circumstances. Fairness depends on how the CFA was entered into and is prospective in nature. Reasonableness depends on the ultimate result and is retrospective in nature. The Court of Appeal has determined that reasonableness depends on the time expended working on the matter, the legal complexity, the results achieved and the risk assumed, including the risk that the matter would not have been successful.[28] This flexible approach recognizes that there are differences in cases advanced on a contingency fee basis, and that a contingency fee rate that might be reasonable in the context of one case but may not be in the context of another case.

25. The Law Society lawyer and paralegal conduct rules also regulate licensees providing services pursuant to contingency fee agreements. The Law Society has instituted both general rules requiring that fees must be fair, reasonable, and disclosed in a timely fashion,[29] and rules specifically relating to contingency fees and contingency fee agreements.[30]

(2) Issues in the Operation of CFAs in Ontario

26. The Working Group has found the following issues in the operation of contingency fees in Ontario:

    a. **Transparency**

       The Working Group has repeatedly expressed concern that "contingency fee pricing is not currently sufficiently transparent at the outset to consumers" and that "it is difficult to determine whether a competitive fee structure is being proposed".[31]

    b. **Complexity**

       The *Solicitors Act* requirements are unduly complex and unclear. As the Court of Appeal stated in *Neinstein*, the *Solicitors Act* language "has created difficulties for lawyers and clients for many years", and that "much in the Act is not clear […] This case before this court represents another struggle to make sense of the Act."[32]

    c. **Non-compliance**

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[28] *Raphael Partners v. Lam, supra* note 10.
[29] Rule 3.6-1, Rules of Professional Conduct and Paralegal Rules of Conduct Rule 5.01.
[30] Rule 3.6-2, Rules of Professional Conduct, Paralegal Rules of Conduct Rules 5.01(7) to (9). Note that the *Solicitors Act* and the Regulation do not apply to paralegals; however, the Paralegal Rules of Conduct govern paralegal contingency fees.
[31] June 2017 Report to Convocation, at para 181, citing the Working Group's June 2016 Report to Convocation at para. 61.
[32] *Neinstein* at para 12.

In June 2017 the Working Group identified non-compliance with the current requirements as a concern, noting that "Lawyers and paralegals are expected to adhere to the current requirements. Lawyers and paralegals must follow the *Solicitors Act,* the Regulation and the professional conduct requirements; failure to do so erodes the public's respect for the administration of justice."[33]

d. **The Calculation of Contingency Fees**

The Working Group has described the calculation of contingency fees as "the single greatest issue in the operation of contingency fee arrangements."[34]

In its June 2017 Report, the Working Group summarized its concerns with the current contingency fee rules as follows:

> "a. Clients often do not have a full understanding of contingent fees;
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> b. The current requirement that costs belong to the client creates inherent conflicts of interest for licensees;
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> c. The current requirements misalign the interests of licensees and clients;
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> d. There is unnecessary risk that fees will not be fair and reasonable, unfairly compensating a licensee at the expense of the net amount recoverable by a client; and
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> e. There is also an unnecessary risk that a client may receive a windfall amount for legal costs reflecting work performed by a licensee."[35]

The Working Group also expressed concern that while clients may apply to have their lawyer's contingency fee assessed, there are insufficient checks on legal fees that do not settle before trial, and which are not subject to mandatory Court approval.[36]

The Working Group also recognizes that there are certain cases, such as those "where there is a high likelihood of requiring a trial, but relatively low to mid value compensatory damages" which present particular challenges.[37] As the Working Group has previously reported, "Under the current regime, where the client receives all of the costs, the limit on compensation may prevent licensees from

[33] June 2017 Report at para. 197.
[34] *Ibid.* at para. 191.
[35] *Ibid*. at para. 216.
[36] *Ibid*. at para. 217.
[37] *Ibid*. at para. 220.

taking the case to trial."[38] This raises significant access to justice concerns.

(3) Recommendations: Facilitating Access to Justice at Fair and Reasonable Cost

i) Regulated Contingency Fees to Facilitate Access to Justice

27. The Law Society has a statutory responsibility to regulate lawyers and paralegals which requires it, in carrying out its functions, to act to "facilitate access to justice for the people of Ontario",[39] "maintain and advance the cause of justice and the rule of law"[40] and act in a manner that protects the public interest.[41] The Working Group's recommendations are rooted in these duties.

28. The Working Group supports properly regulated contingency fee agreements as a means of facilitating access to justice. As it stated in June 2017:

> Given the Law Society's statutory responsibility, the continued access to justice crisis, the vital access to justice role played by contingency fees to advance both class action and individual claims, and the related benefits that access to justice brings to the administration of justice, the Working Group continues to support the availability of contingency fees in Ontario.
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> The Working Group also reaffirms that contingency fees must be properly regulated. Contingency fees must be regulated in a way that protects consumers, so that consumers understand contingency fee arrangements, and consumer protections are in place to ensure that contingency fees are transparent, fair and reasonable.[42]

29. The access to justice benefits of contingency fees are well recognized. Contingency fees provide a way for clients to access our justice system without facing upfront costs and risks. For personal plight cases, such as motor vehicle accident cases, the contingency fee provides an option that assists particularly vulnerable clients who otherwise may be deprived of their ability to advance their claims.

ii) Scope of Contingency Fee Reforms

30. Contingency fees are used by a broad range of clients for a broad range of legal services. Vulnerable individuals and sophisticated businesses retain lawyers and paralegals based on contingency fees.

31. Contingency fees are often used by individuals as a means of facilitating access to

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[38] *Ibid*. at para. 220.
[39] *Law Society Act,* R.S.O. 1990, c.L.8, s.4.2(2).
[40] *Ibid.* s.4.2(1).
[41] *Ibid.* at s.4.2(3).
[42] June 2017 Report at para. 178.

justice. They are perhaps best known for personal injury claims, where they are the standard fee arrangement. However, contingency fees are also available in other "personal plight" circumstances, such as for employment law matters. In these circumstances, clients are frequently vulnerable and unable to afford legal services but for the availability of contingency fee arrangements.

32. Contingency fees can also be attractive even where the claimant has an ability to pay, but access to justice is not necessarily a factor in the same way in those cases. For example, in its 2017 CFA Consultation, the Working Group learned about the operation of contingency fee arrangements between insurers and lawyers with respect to subrogation claims, and contingency fee arrangements for corporate commercial litigation.

33. Contingency fees also operate in the class action arena. As previously noted, the Working Group has not engaged in a review of contingency fees in the class action setting given the very different context for contingency fees. Class actions are subject to judicial review of proposed legal fees and related third party funding. Any changes in this area require further separate consideration.

34. In addition, on October 2, 2017 the Law Commission of Ontario, which is funded by the Law Society and the Ministry of the Attorney General, among others, announced its *Class Actions: Objectives, Experience and Reforms* project, which will research Ontario's experiences with class actions to date, and report in late 2018.[43]

35. The Working Group's proposals for changes to the contingency fee regime should not apply in all contexts. They should only apply when the client is an individual or a small business. However, as the Working Group has not focused on class actions, courts already directly supervise class actions, and the operation of class actions will be the subject of a full review by the Law Commission of Ontario, the changes should not apply in the class action context. Nor should any changes apply to sophisticated entities, such as large corporations, which are generally able to negotiate the terms of service delivery with licensees, and who may decide to proceed by way of contingency fee but otherwise still would have been able to access legal services.

[43] "LCO Launches Project: Class Actions: Objectives, Experience, and Reforms", Law Commission of Ontario, October 2, 2017, online at: www.lco-cdo.org/project-launch-class-actions-objectives-experience-and-reforms/.

iii) Transparency to Enhance the Operation of Contingency Fees

36. The Working Group has focused on transparency in its recommendations to date regarding advertising and referral fees, and is also committed to the principle of transparency for the operation of contingency fees. As the Working Group stated in June 2016, contingency fee structures "should be transparent and that the total costs associated with contingent fees should be clear to the consumer at the outset. Consumers should be able to evaluate proposed fees against the fees being offered by others."[44] Furthermore, "fees should be on an agreed upon and transparent basis."[45] Based on these principles, and the feedback it has received, the Working Group recommends a series of transparency measures.

37. As described in detail below, the Working Group makes recommendations to enhance transparency when consumers are searching for legal services delivered through a contingency fee arrangement, when they are considering entering into a contingency fee agreement, and with respect to fees and disbursements at the conclusion of a contingency fee matter (if a payment is made).

(a) Enhancing the Client Search for Legal Services: Disclosure of the maximum percentage charged

38. The Working Group recognizes that "contingency fee pricing is not currently sufficiently transparent at the outset to consumers" and that although "the contingency fee model facilitates access to legal services, it reduces the perceived importance at the outset of the basis on which the fees will eventually be charged."[46]

39. The Working Group has considered a range of ways to facilitate transparency and means for consumers to determine whether services being offered are competitive.

40. It expressed the preliminary view that licensees should disclose their "usual contingent rates" and disbursements on their websites.[47] However, upon further reflecting on this based on the input received, the Working Group recognized that this would not be an appropriate recommendation because licensees and law firms do not generally have a "standard" contingency fee rate, but rather the "rate will depend on a range of factors specific to the particular case."[48]

41. The Working Group considered other potential price indicators. It considered, for

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[44] June 2016 Report to Convocation at para. 60.
[45] *Ibid*. at para. 102.
[46] *Ibid*. at para. 61.
[47] *Ibid*. at para. 62.
[48] June 2017 Report, at para. 185. The Working Group also recognized at para. 185 that publishing a "standard rate" could have several drawbacks, including that it could lead to licensees limiting the types of cases they accept, charging a higher standard rate in order to cover higher-risk cases, or being unduly constrained in their ability to tailor their fees to the particular case.

example, requiring posting of the general "range" of contingency fee rates or the average percentage that a licensee or firm charges, but was concerned that this would likely be of limited value and potentially problematic.

42. Ultimately the Working Group recommends that licensees be required to disclose their "personal cap", that is, the maximum amount they charge for services on a contingency fee basis. Under this proposal, maximum rates should be posted on the licensee's website or the law firm's website. If the licensee (or the licensee's firm) does not have a website, the maximum rate should be disclosed to potential clients when they first contact the licensee.

43. In order to account for different practice areas, the Working Group recommends that licensees disclose their maximum rates for all prescribed practice areas to be developed by the Law Society.[49] There should be the ability to compare fees as one factor for prospective clients to consider while shopping for legal services. This measure enhances transparency.

44. Licensees would be able to charge above their "personal cap" in a particular case. This would require them to disclose this as their new cap rate unless judicially approved as being exceptional.

45. If adopted by Convocation, the Working Group would return to Convocation with specific proposed professional conduct rules.

(b) A mandatory standard contingency fee agreement

46. In June 2017, the Working Group recommended a mandatory standard form CFA, subject to receiving further input. It noted the numerous benefits of such a form, including that:

    a. This would provide the opportunity to develop a simplified agreement, one that could highlight key consumer rights and responsibilities;

    b. A standard form CFA would facilitate consumer comparison of the cost of legal services between providers;

    c. A standard form would ensure that all CFAs are compliant with all requirements under the *Solicitors Act* and its Regulation.[50]

47. The input that the Working Group has received has generally recognized throughout that there is a need for enhanced transparency and simplicity. In its 2017 CFA Consultation, there were mixed views regarding the development of a standard form CFA. A few submissions were opposed to standard form agreements on the basis of concerns that

[49] Practice areas could include, for example, Statutory Accident Benefits Scheme, motor vehicle – tort, long term disability claim, medical malpractice, other personal injury, employment matters, municipal assessment appeal and tax disputes.
[50] June 2017 Report, at para. 189.

this would unnecessarily interfere with private contract. Some expressed the concern that an unduly restrictive CFA would restrict the types of cases that could be accepted on a contingency fee basis. Some suggested that rather than a standard CFA there should be standard clauses to be used. Some suggested that there should be different mandatory standard form agreements across different practice areas, while others suggested that perhaps a standard form agreement should only be required in personal injury law.

48. The Working Group considered the wide ranging feedback it received on this point. While a standard form agreement would need to be carefully drafted, the Working Group believes that one can be developed that would:

    a. Simplify the contract for consumers;

    b. Comply with all of the requirements under the *Solicitors Act* and the Regulation; and

    c. Provide sufficient flexibility around how licensees design their contingency fees to facilitate innovative solutions to meet clients' needs and foster competition.

49. The Working Group notes that the current issues with respect to the complex, technical requirements of the *Solicitors Act,* and the unavailability of a standard form agreement are issues that apply to all areas where individuals obtain legal services pursuant to a CFA. The Working Group therefore recommends that the mandatory standard form CFA be applicable to all contingency fee matters regardless of practice area.

50. The Working Group proposes that the Law Society promptly develop and recommend a standard form CFA to the Attorney General to be prescribed by regulation under the *Solicitors Act*.

(c) Mandatory client "Know Your Rights" document

51. The Working Group believes that, in addition to a mandatory standard form CFA, a mandatory, plain language client "Know Your Rights" document will enhance consumer awareness and transparency. In April 2017, the Working Group recommended, and the Law Society approved a document titled "Law Society Requirements for Referral Fees – What Clients Need to Know,"[51] and the Working Group recommends the development of a similar document for clients with respect to contingency fee agreements.

52. The intent of the "Know Your Rights" document is to inform consumers of their rights and responsibilities with respect to contingency fee agreements. The Working Group recommends that this document must be provided to the consumer by licensees prior to the client entering into a contingency fee agreement. The document will inform consumers of their rights and responsibilities.

53. If adopted by Convocation, the Working Group would return to Convocation with specific

[51] April 2017 Report at para. 46 and at Tab 4.2.10.

proposed professional conduct rules, and staff will develop this document for approval by the Professional Regulation and Paralegal Standing Committees. Amendments to the "Know Your Rights" document would require the approval of the Professional Regulation and Paralegal Standing Committees. The document, and any amendments, would be reported to Convocation for its information.

(d) Mandatory disclosure requirements in the final client reporting letter

54. In the June 2017 Report, the Working Group noted that it was considering a range of enhanced client reporting requirements which would "ensure that clients have a sense of the cost of the services provided, and may act as a further check on the reasonableness of fees."[52] The Working Group invited input regarding a range of regulatory options to apply at the final client reporting stage to "enhance transparency and client understanding of fees and their rights."[53]

55. In order to provide clients with a more transparent and complete account for the fee, and to protect consumers from the risk of unreasonable fees, the Working Group recommends that the Law Society introduce the following mandatory disclosure requirements in the final reporting letter to clients:

    i. A clear breakdown of the total amount of a settlement or award, the net amount actually going to the client, itemized and clearly identified disbursement costs, legal fees and taxes;
    ii. A statement explaining the reasonableness of the fee in light of the factors established by the Court of Appeal, including the time expended working on the matter, the legal complexity, the results achieved and the risk assumed including the risk that the matter would not have been successful.[54]; and
    iii. A statement that the client has the right to assess the account.

56. The Working Group has noted that there can be confusion regarding the breakdown of the total amount of a settlement or award. The Law Society already requires that fees and disbursements be disclosed in a timely fashion.[55] The mandatory breakdown of the settlement or award extends this general requirement and is intended to provide clients with a full and clear account of all amounts.

57. The Working Group recommends that licensees be required to provide a statement explaining the reasonableness of the fee in light of the factors established by the Court of Appeal as a further means of providing clients with full information regarding the reasonableness of the legal fee being charged for the services provided.

58. The Working Group has reached this recommendation after hearing significant

[52] June 2017 Report at para. 228.
[53] *Ibid*. at para. 228.
[54] *Raphael Partners v. Lam, supra*.
[55] Rules of Professional Conduct Rules 3.6-1 and 3.6-2; Paralegal Rules of Conduct Rule 5.01.

opposition through its 2017 CFA Consultation to the idea that licensees be required to disclose and report on the time spent on a matter without necessarily providing any further information. The feedback noted that time is not the sole factor to consider whether a fee is reasonable. The Working Group agrees, and recommends that all of the relevant factors be addressed in the reporting letter, which will provide clients with a more complete understanding of the basis for the final account.

59. The Working Group also received feedback expressing concerns about adding administrative burden to licensees practicing pursuant to contingency fees. The Working Group is satisfied that requiring accurate records of time spent for the purpose of disclosure to clients is a reasonable requirement inherent in the requirement of reasonableness. Moreover, reporting to clients why a fee is reasonable based on a consideration of the time spent on the matter, the legal complexity, the results achieves and the risks assumed by the licensee should be a relatively straight forward exercise. The Working Group has concluded that clients, and their independent advisors where applicable, should be entitled to know and to consider the very information that the Court of Appeal has determined is necessary in the determination of the reasonableness of a contingency fee.

60. Finally, the Working Group recommends requiring that the final reporting letter include a statement that the client has the right to assess the account.

61. If the recommended mandatory elements to the client final reporting letter are adopted by Convocation, the Working Group would return to Convocation with specific proposed professional conduct rules.[56]

iv) Amending the *Solicitors Act* to Promote Fair and Reasonable Contingency Fees

62. The Working Group recommends amendments to the *Solicitors Act* to address the significant issues that arise due to the current prescribed method of calculating contingency fees.

63. Simply put, the *Solicitors Act* fee calculation needs to be changed in the public interest. The changes to the *Solicitors Act* proposed by the Working Group are intended to facilitate access to justice, and ensure, together with its related recommendations, that fees are fair and reasonable.

64. The numerous and significant issues with the current method of calculating contingency

[56] The Working Group also considered requiring independent legal advice ("ILA") before a client agrees to the payment of legal fees in certain circumstances. The Working Group asked for input regarding this option through its 2017 CFA Consultation. Most responses were opposed, noting that it was not clear when ILA would be required, the parameters of the ILA, that ILA requirements could add cost and delay, and that the ILA requirement could significantly interfere with opportunities for settlement such as mediations. It was also noted that this measure is unnecessary given the existing right for a client to have a lawyer account assessed. The Working Group determined based on this input that the ILA option should not be further explored.

fees are described above. The Working Group proposes that the current requirement, that contingency fees may not reflect recovery on account of legal costs, be replaced such that recovered legal costs may be included together with all amounts recovered in the total amount based on which the contingency fee is calculated. In addition, the Working Group proposes that a new provision be added to address the unique cost issues that arise when a matter requires adjudication, in order to protect access to justice in such instances.

(a) Recovered legal costs may be included together with all other amounts recovered in the total amount based on which the contingency fee is calculated

65. In its June 2017 Report, the Working Group proposed that generally fees be calculated based on "a percentage of the total amount offered on settlement or awarded at trial, less disbursement."[57] It also invited the public to provide input as to what types of safeguards should be recommended to ensure that fees are fair and reasonable.

66. The vast majority of those who have provided input to the Working Group on the issue of the current fee requirements have indicated that change is necessary. In response to its 2017 CFA Consultation, the Working Group received a wide range of proposed options. Many submissions supported amending the calculation of fees as proposed by the Working Group in June 2017.

67. Ultimately the Working Group recommends calculating contingency fees by including recovered legal costs together with all other amounts recovered when calculating the contingency fee. This approach presents significant key advantages to the current rule. It is a straight-forward calculation. The calculation aligns the interest of client and licensee in most cases, rather than creating conflicts as has been the unintended consequence of the current rule.

Consideration of Fee Caps

68. In its 2017 CFA Consultation, the Working Group expressly sought input to consider the option of capping contingency fees as a way to ensure that fees are reasonable under its proposed new calculation. The Working Group has carefully considered the strengths and risks created by caps. The Working Group ultimately is opposed to caps on the basis that they can, and in some instances clearly have, created significant barriers to the justice system, particularly for some of society's most vulnerable people.

69. The Working Group considered the arguments in favour of a cap, and the input from those who recommend a cap for Ontario's contingency fee system.

70. Proponents of a cap presented a range of caps. At the lower end, insurers recommended a cap on contingency fees of 25% or lower, and even lower amounts for legal fees related to Statutory Accident Benefits Schedule matters. Others suggested

[57] June 2017 Report, at para. 219.

higher caps. Insurers also supported capping on the basis of a sliding scale.

71. The Working Group considered the strengths of introducing a cap or sliding caps, including the following:

- Caps provide a ceiling against which consumers can consider legal fees when shopping for legal services provided pursuant to a contingency fee arrangement.
- Consumers may be able to negotiate for rates below the cap.
- They provide a check to reduce the risk that clients pay unreasonable legal fees where the unreasonableness arises from an overly "high" percentage.
- They are simple to administer.

72. Certain proponents of caps also submit that this is a way of ensuring, particularly in areas such as Ontario's motor vehicle insurance system, that the total costs to administer the system are reduced, and that more money is going to the hands of injured parties instead of their legal representatives.

73. The Working Group weighted these considerations against the risks of introducing a cap or sliding caps, such as the following:

- The cap or sliding caps being set at a level such that some or many cases become economically unviable and injured people lose access to justice in those cases.
- The cap or sliding caps being set high enough that they do not really protect consumers from unreasonable fees.
- A cap or caps failing to actually address the problem of unreasonable fees as the amount recovered, the risk of non-recovery and the cost of attaining recovery are irrelevant to percentage caps.
- The cap or sliding caps practically becoming the new "floor" or tariff, such that some consumers would pay more for legal services than when there was no cap[58].

74. To assist the Working Group in its deliberations, benchers met on October 24th to consider the Law Society's approach to contingency fee caps. After discussion and debate, benchers expressed near unanimous opposition to capping contingency fees. Benchers expressed strong opposition to capping contingency fees because of the risks that such caps could have on access to justice.

75. Studies have shown that caps that limit contingency fees negatively impact access to justice. The empirical data is limited in Canada. However, in the United States, the evidence from jurisdictions where various types of caps have been introduced indicates that the caps cause lawyers who rely on contingency fees to stop representing certain clients and to handle fewer cases generally. This is because, as the title to one leading study on the topic puts it, "It is No Longer Viable from a Practical and Business

[58] Even if a judicial process is made available to lift or vary the cap where the client agrees, this adds transaction costs, and the Court may not correctly assess risk/reward at the outset of a case when the CFA is being negotiated.

Standpoint" to advance certain types of claims, such as those from lower income groups when there is an effective cap on the contingency fee.[59]

76. The Working Group heard repeatedly that a contingency fee cap would have an adverse effect on access to justice. Certain types of claims, such as lower to medium value claims, would no longer be economically viable to be advanced under a contingency fee arrangement. This would deny victims the ability to pursue the necessary compensation to which they may be entitled at law, and which they may require to move on with their lives. While it would reduce the costs of insuring various losses it would do so by denying victims access to justice.

77. The Working Group concluded that while caps may be simple, they are actually simplistic, and will not address the issue of unreasonable fees. Depending on the context, a low percentage may result in an entirely unreasonable fee while in other circumstances a high percentage may be entirely reasonable. There is simply no principled basis by which a cap can be set that distinguishes reasonable fees from unreasonable fees. Inevitably, a generic cap will impair access to justice for injured people with higher risk/complexity or lower value claims while failing to guard against unreasonable fees where claims are lower risk/complexity or higher value. Caps advantage defendants over plaintiffs in avoiding claims and by incenting unfair settlements.

78. The Working Group is of the strong view that replacing the Court of Appeal's reasonableness approach with a cap would remove fairness from the system, and ultimately would not provide Ontario's contingency fee system with an evidence-based basis for what would constitute a reasonable legal fee.

79. Ultimately contingency fee caps risk eroding access to justice by making certain higher risk and/or lower value cases economically unviable. This must be avoided, and the Working Group recommends maintaining a more flexible approach to legal fees in order to ensure that contingency fees are able to promote access to justice.

80. As noted above, Cory J. stated with respect to contingency fees:

> The concept of contingency fees is well established in the United States although it is a recent arrival in Canada. Its aim is to make court proceedings available to people who could not otherwise afford to have their legal rights determined. This is indeed a commendable goal that should be encouraged. . . . **Truly litigation can only be undertaken by the very rich or the legally aided. Legal rights are illusory and no more than a source of frustration if they cannot be recognized and enforced. This suggests that a flexible approach should be taken to**

[59] Stephen Daniels & Joanne Martin, "It is No Longer Viable from a Practical and Business Standpoint": Damage Caps, "Hidden Victims," and the Declining Interest in Medical Malpractice Cases, 17 INT'L J. LEGAL PROF. 59 (2010).

> **problems arising from contingency fee arrangements, if only to facilitate access to the courts for more Canadians.** Anything less would be to preserve the courts facilities in civil matters for the wealthy and powerful.[60]

81. In short, the Working Group recommends transparency and disclosure as proposed and opposes a cap, so that the contingency fee system can retain a flexible approach that facilitates access to justice.

(b) Costs for adjudicated matters

82. The Working Group recommends amendments to the *Solicitors Act* to address legal fees when a matter goes to trial. As noted above, there are certain cases, such as lower value cases and cases where there is a higher likelihood of requiring a trial, where the current rule that costs may not be reflected in the contingency fee can prevent licensees from taking such cases to trial. While the Working Group's proposed calculation realigns the client and licensee in most cases, there is a significant risk that this approach would not sufficiently address the risk of such claims being economically unviable to advance.

83. In adjudicated matters such as this, both under the current *Solicitors Act* calculation and the proposed amendment, there is significant risk of the interests of the client becoming misaligned with the interest of counsel. Of greater concern, however, is the real risk that injured individuals in this situation will not be able to seek restitution because it makes no economic sense for counsel to take on their cases.

84. The Working Group therefore recommends that for matters that are adjudicated, in order to balance client and licensee interests, the *Solicitors Act* should be amended to permit the licensee to elect between receiving the agreed CFA amount, and legal costs determined as follows. Where costs are awarded on a full or substantial indemnity basis, legal costs would be in that amount. Where only partial indemnity costs are awarded, legal costs would be deemed to equal the costs awarded together with a gross-up equal to two-thirds of the partial indemnity costs awarded.[61] This gross-up could not exceed one-half of the contingency fee that the licensee would otherwise have been able to charge under their CFA.

85. This approach is reasonable because the fee is based on a contested judicial determination that results in payment by the defendant on account of costs. Where full indemnity costs are recovered and paid to counsel, the client receives full recovery of his or her legal entitlements. Where partial indemnity costs are recovered and paid to

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[60] *Coronation Insurance Co. v. Florence*, [1994] S.C.J. No. 116, at para. 14, cited in *McIntyre Estate, v. Ontario (Attorney General),* 2002 CanLII 4506 (ON CA), http://canlii.ca/t/1fzl2 at para. 55 (emphasis added).

[61] Partial indemnity costs are generally understood to equal 60% of full indemnity costs. Accordingly, full indemnity equals 167% of partial indemnity costs.

counsel, the contribution of the client to costs from the recovery is limited to half of the agreed percentage.

86. This approach seeks to ensure that legal rights do not become illusory for those with higher risk/complexity and lower value claims that may require adjudication, and that successful plaintiffs in those circumstances receive a reasonable payment based on the value of the assessed damages.

Safeguards to Ensure that Fees are Fair and Reasonable

87. The Working Group maintains its view, expressed in its June 2017 Report, that its proposed amendment to simplify the calculation of contingency fees must be accompanied by new safeguards to ensure that fees are fair and reasonable.

88. As noted above, the Working Group recommends a suite of market transparency measures to protect consumers and better safeguard against unreasonable fees, including the posting of licensees' maximum rates, a new standard form contingency fee agreement and related "Know Your Rights" document, and new final client reporting requirements which would provide a clear breakdown of the total amount of the settlement or award and the net amount going to the client, a brief statement explaining the reasonableness of the fee in light of the Court of Appeal factors, and a statement that the client has the right to assess the account.

89. In addition, the Working Group strongly supports the existing safeguards that the client has a right to assess a lawyer's fee, and that settlements involving a party under disability require Court approval.

v) Data Collection Through the Member Annual Report

90. The Working Group has previously noted the lack of available data with respect to the operation of contingency fees.[62] There is a consensus that there are gaps in available data. The Marshall Report, legal organizations, the Ministry of Finance, the Insurance Bureau of Canada and legal academics all note gaps in the available data with respect to the operation of contingency fees.

91. The Working Group recommends that the Law Society collect more data through the Lawyer Annual Report and Paralegal Annual Report to assist in closing these data gaps.

92. The Law Society, as the regulator of lawyers and paralegals, is uniquely positioned to collect data from licensees. It is also uniquely positioned to protect information which is subject to solicitor-client privilege.

93. The Working Group therefore recommends that the Law Society ask licensees on their Annual Reports for information as to average contingency fees by area of practice, or other questions as may be determined to be appropriate, with the data then shared on

[62]See for example June 2016 Report at para. 107.

an aggregate basis with the public.

94. Data collection has several potential benefits. It may:

- Assist the Law Society in identifying outlier cases and outlier licensees, which may assist the Law Society to proactively identify regulatory risks;
- Assist the Law Society and others in understanding the operation of contingency fees and give better insight as to how to regulate contingency fee markets to protect the public; and
- Disclosure to consumers may serve as a check to ensure that fees are fair and reasonable.

95. As indicated in its response to the Marshall Report, the Law Society opposes any requirement that CFAs be filed with the government or another regulator in light of the inherent breach of solicitor-client and litigation privilege and potential for misuse by defendants. The proposal for standard form CFAs and other recommendations in this report obviate the basis for this proposal.

NEXT STEPS

96. The Working Group continues to consider other contingency fee issues and potential amendments to the *Solicitors Act* raised in the course of its 2017 CFA Consultation. This includes, for example:

a. Concerns that additional guidance is necessary regarding how costs submissions should be made when a licensee is retained pursuant to a CFA given the requirement that counsel submit a Bill of Costs when they seek costs;
b. How to address interlocutory costs / costs of an appeal awarded to a party operating under a CFA;
c. Issues related to disbursements;
d. Issues related to after-the-event insurance and third party litigation funding.

97. The Working Group also recognizes that the government is interested in potential changes to Ontario's motor vehicle Statutory Accident Benefits Schedule. The Working Group continues to explore potential changes from an access to justice perspective, and recommends that the Law Society continue to offer its expertise to government.

98. The Working Group also continues to explore issues regarding lawyers receiving compensation or other benefits and related practices with respect to title insurance and other services, and will report to Convocation regarding this issue.