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ORKIN ON THE LAW OF COSTS

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Publisher's Special Release Note 2021

The pages in this work were reissued in June 2021 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the June 2021 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

Changes to chapter and heading numbering may have occurred. Please refer to the Correlation Table in the front matter if you wish to confirm references.

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This is a unique looseleaf service that covers all costs issues in legal proceedings, with relevant decisions analyzed and rules of court and tariffs referenced for every jurisdiction. This practical all-in-one resource provides coverage of the awarding and fixing or assessment of costs between party-and-party and between solicitor-and-client; costs in both civil and criminal proceedings; and costs awards in bankruptcy and insolvency proceedings and construction liens.

What's New in this Update

This release includes updates to case law and commentary in Chapters 3, 5, 6, 8 and 13 to 15, as well as a new Ontario Contingency Fee Agreements section in Appendix A.

Highlights

- In an Ontario action, the plaintiff law firm moved for an order *nunc pro tunc* for permission to commence the action before the court for its fees after the defendant clients had already commenced an assessment of its accounts under the *Solicitors Act*. Motion was dismissed. It is the legislative policy of the Province of Ontario that clients of lawyers be entitled to assess their lawyers' accounts. Part of the obligation that goes with the privilege of being a licensed lawyer in Ontario is that clients are entitled to question and have an independent assessment officer review their lawyers' accounts under the statutory process. The answer to issues surrounding the operation of the assessment office is not to bring assessments to court in the guise of an action on the lawyer's fees. That just masks the issues and misallocates the burden of undertaking these proceedings to the court where the Legislature wishes these important matters to be dealt with by assessment. Notwithstanding that the assessment court proceedings are suspended due to a pandemic with no indication of the likely duration of the suspension that is not a basis to allow lawyers to just move the proceedings to the court without regard to the legislative policy supporting the assessment process. If lawyers and/or clients have concerns with the operations of the assessment office and whether it is meeting the goal of providing "speedy and inexpensive proceedings", a civil proceeding before the court is not the forum for those questions: *Matthew R. Harris Professional Corporation v. Carey*, 2020 ONSC 7808 (Ont. S.C.J.).
- In an Alberta Queens Bench action, the client and the law firm entered into a contingency fee agreement (CFA) in relation to a patent dispute. The client terminated the law firm claiming it was not happy with the settlement that had been reached. The defendant brought a motion to enforce the settle-

ment agreement. The Federal Court found that the parties reached a binding settlement agreement. The law firm issued an invoice to the client for \$92,460.64 which was subsequently lowered on review to \$80,915.80. The client filed an appointment for review. The Review Officer conducted a hearing and confirmed the invoice. The client appealed the Review Officer's decision. The appeal was dismissed. Consideration of the CFA under rule 10.7(2) of the Alberta Rules of Court did not require an interpretation of the CFA but required a factual determination as to whether it contained the requisite particulars in precise and understandable terms. The Review Officer made factual determinations that the CFA did not contain the requisite elements and he did not exceed his jurisdiction in making that determination. The Review Officer had authority to make findings of fact as to whether the CFA was valid having regard to rule 10.7 and he did not err in finding that the CFA was defective under rule 10.7. Rule 10.2(1) sets out a number of factors to be considered in determining the reasonable amount for services performed by the lawyer. The Review Officer had a wide discretion and the client's reasonable expectation that the fees would be limited in some way based on a written agreement drafted by the lawyer was an appropriate factor to consider. The Review Officer did not err in law or in principle or in fact in addressing the client's reasonable expectations based on the CFA in his analysis under rule 10.2. The Review Officer was alive to the client's argument that the law firm terminated the retainer and was not entitled to any fees whatsoever but he rejected that position. The Review Officer took the client's reasonable expectations into account as well as the results achieved: *Betser-Zilevitch v. Prowse Chowne LLP*, 2020 ABQB 732 (Alta. Q.B.), additional reasons 2021 ABQB 135 (Alta. Q.B.), affirmed 2021 ABCA 129 (Alta. C.A.).

- New changes to the *Solicitors Act* regarding contingency fees came into effect in Ontario on July 1, 2021. These new changes are governed by O. Reg. 563/20. The Law Society has issued a Notice to the Profession that mandates the use of a new standard form of Contingency Fee Agreement once the Regulation is in force on July 1, 2021. Use of the standard form is required for most cases where a contingency fee is agreed to. For example see Personal injury cases. Use of the standard form agreement is not required where the client is a sophisticated client or where the court has approved the CFA or the ultimate CFA. A sophisticated client is generally a corporation.

ProView Developments

Your ProView edition of this product now has a new, modified layout:

- The opening page is now the title page of the book as you would see in the print work
- As with the print product, the front matter is in a different order than previously displayed
- The Table of Cases and Index are now in PDF with no searching and linking
- The Table of Contents now has internal links to every chapter and section of the book within ProView
- Images are generally greyscale and size is now adjustable