Wong, Estate Trustee of the Estate of Jean, Deceased, et al. v. Wires Jolley LLP

[Indexed as: Jean Estate v. Wires Jolley LLP]

96 O.R. (3d) 171

2009 ONCA 339 (CanLII)

Court of Appeal for Ontario,
Weiler, Juriansz and MacFarland JJ.A.
April 29, 2009

Arbitration -- Jurisdiction -- Applicant applying to set aside notice of arbitration on basis that agreement to arbitrate was unenforceable for reasons of public policy -- Application judge not erring in assuming jurisdiction over threshold issue of enforceability of agreement as important question of law was raised and only cursory reference to evidence was required -- UNCITRAL Model Law on International Commercial Arbitration not preventing court from assuming jurisdiction to decide arbitrability of dispute.

Professions -- Barristers and solicitors -- Fees -- Assessment -- Solicitors and client entering into fee agreement which contained contingency fee -- Parties agreeing that any dispute about contingency fee would be resolved by arbitration -- Parties having right to have arbitrator rather than Superior Court judge hear contingency fee dispute -- Public policy preventing parties from contracting out of substantive statutory protections contained in Solicitors Act -- Arbitration must be conducted in accordance with those protections -- Arbitrator required to determine whether contingency fee is fair and reasonable -- Solicitors Act, R.S.O. 1990, c. S.15.

The client, who was the estate trustee and sole beneficiary

of his mother's estate, entered into a fee agreement with the solicitors that contained a "success fee" respecting litigation over the estate. The "success fee" was a contingency fee, which the parties agreed would be 10 per cent of the value of the assets of the estate. They also agreed that disputes in relation to the contingency fee would be resolved by arbitration. A dispute arose as to which of two dates should be used to value the assets for the purpose of applying the contingency fee. The solicitors served a notice of arbitration pursuant to the International Commercial Arbitration Act, R.S.O. 1990, c. I.9 (the "ICCA"). The client [page172] applied successfully to strike out the notice on the basis that the agreement to arbitrate was unenforceable for reasons of public policy. The application judge found that enforcing the arbitration agreement would result in the client losing the statutory protections of the Solicitors Act and that those protections cannot be waived. The solicitors appealed.

Held, the appeal should be allowed.

Per Weiler J.A. (MacFarland J.A. concurring): The application judge did not err in assuming jurisdiction to decide the enforceability of the arbitration clause in the contingency fee agreement. Section 8 of the ICAA provides that where, pursuant to art. 8 of the UNCITRAL Model Law on International Commercial Arbitration, U.N. Doc. A/40/17 (1985), Annex I (the "Model Law"), a court refers the parties to arbitration, the proceedings of the court are stayed with respect to the matters to which the arbitration relates. Article 8(1) of the Model Law states that a court before which an action is brought in a matter which is the subject of an arbitration agreement shall refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. The word "action" in art. 8(1) means the procedure used to invoke the court's jurisdiction. In Ontario, that includes an application. The Model Law did not prevent the court from assuming jurisdiction to decide the arbitrability of a dispute. As a general rule, the enforceability of an arbitration clause should be decided by the arbitrator. Exceptionally, however, a Superior Court judge can assume jurisdiction over the threshold issue of enforceability when an

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important question of law is raised and only cursory reference to the evidence is necessary. Those criteria were met in this case.

There are two rights in ss. 23 and 24 of the Solicitors Act. One is the right to have a Superior Court judge decide a contingency fee dispute. By their agreement, the parties in this case chose to have an arbitrator as opposed to a judge resolve any disputes. The right to arbitration is a substantive right and the parties' choice should be respected. The second right contained in ss. 23 and 24 is the right to an assessment of whether the contingency fee is fair and reasonable. The arbitration agreement was silent as to the powers of the arbitrator. If that right was lost, the arbitrator's decision would not be a decision on the merits and the fairness of the result would be compromised. Both the broad public policy favouring the resolution of disputes on the merits and the public policy underlying the remedies given to a client in the Solicitors Act militated against that result. A party cannot contract out of his or her right to have an independent assessment of whether the contingency fee is fair and reasonable by an independent assessor. The application judge erred in concluding that a solicitor and his client could not agree to have an arbitrator, as opposed to a Superior Court judge, hear a contingency fee dispute. However, any arbitration must be conducted in accordance with the substantive statutory protections contained in the Solicitors Act.

Per Juriansz J.A. (concurring in the result): The application judge should have declined to entertain the application to strike the notice of arbitration and, instead, should have referred the parties to the arbitrator. The Model Law makes it clear that the general rule is systematic referral to arbitration. In this case, there was no justification for a departure from that rule. If judicial control on the basis of public policy is necessary, the control should be exercised on review of the arbitration award.

Cases referred to

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Dell Computer Corp. v. Union des consommateurs, [2007] 2 S.C.R. 801, [2007] S.C.J. No. 34, 2007 SCC 34, 284 D.L.R. (4th) 577, 366 N.R. 1, J.E. 2007-1426, 34 B.L.R. (4th) 155, 44 C.P.C. (6th) 205, 158 A.C.W.S. (3d) 870, EYB 2007-121973; [page173] Desputeaux v. ditions Chouette (1987) Inc., [2003] 1 S.C.R. 178, [2003] S.C.J. No. 15, 2003 SCC 17, 223 D.L.R. (4th) 407, 301 N.R. 220, J.E. 2003-626, 23 C.P.R. (4th) 417, 120 A.C.W.S. (3d) 717, apld

Dancap Productions Inc. v. Key Brand Entertainment Inc., [2009] O.J. No. 572, 2009 ONCA 135, 246 O.A.C. 226, consd

Other cases referred to

Andrew Feldstein & Associates Professional Corp. v. Keramidopulos, [2007] O.J. No. 3683, 160 A.C.W.S. (3d) 724 (S.C.J.); Automatic Systems Inc. v. Bracknell Corp. (1994), 18 O.R. (3d) 257, [1994] O.J. No. 828, 113 D.L.R. (4th) 449, 74 O.A.C. 111, 12 B.L.R. (2d) 132, 13 C.L.R. (2d) 171, 27 C.P.C. (3d) 56, 47 A.C.W.S. (3d) 480 (C.A.); Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 2002 SCC 42, 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, J.E. 2002-775, 166 B.C.A.C. 1, 100 B.C.L.R. (3d) 1, 18 C.P.R. (4th) 289, 93 C.R.R. (2d) 189, REJB 2002-30904, 113 A.C.W.S. (3d) 52; Bisaillion v. Concordia University, [2006] 1 S.C.R. 666, [2006] S.C.J. No. 19, 2006 SCC 19, 266 D.L.R. (4th) 542, 348 N.R. 201, J.E. 2006-1081, 51 C.C.P.B. 163, [2006] CLLC 220-033, 147 A.C.W.S. (3d) 811, EYB 2006-105515, 149 L.A.C. (4th) 225; Borden & Elliott v. Barclays Bank of Canada (1993), 15 O.R. (3d) 352, [1993] O.J. No. 1946, 106 D.L.R. (4th) 478, 42 A.C.W.S. (3d) 399 (Gen. Div.); Canada (Director of Investigation and Research, Competition Act) v. Southam Inc., [1997] 1 S.C.R. 748, [1996] S.C.J. No. 116, 144 D.L.R. (4th) 1, 209 N.R. 20, J.E. 97-632, 50 Admin. L.R. (2d) 199, 71 C.P.R. (3d) 417, 69 A.C.W.S. (3d) 586, REJB 1997-00386; Dalimpex Ltd. v. Janicki (2003), 64 O.R. (3d) 737, [2003] O.J. No. 2094, 228 D.L.R. (4th) 179, 172 O.A.C. 312, 35 B.L.R. (3d) 41, 35 C.P.C. (5th) 55, 123 A.C.W.S. (3d) 217 (C.A.); GreCon Dimter inc. v. J.R. Normand inc., [2005] 2 S.C.R. 401, [2005] S.C.J. No. 46, 2005 SCC 46, 255 D.L.R. (4th) 257, 336 N.R. 347, J.E. 2005-1369, 141 A.C.W.S. (3d) 47; Gulf Canada Resources Ltd. v. Arochem International Ltd., [1992] B.C.J. No. 500, 11 B.C.A.C. 145, 66 B.C.L.R. (2d)

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113, 43 C.P.R. (3d) 390, 32 A.C.W.S. (3d) 197 (C.A.); Javornich v. McCarthy, [2007] O.J. No. 2532, 2007 ONCA 484, 225 O.A.C. 201, 159 A.C.W.S. (3d) 289; Plazavest Financial Corp. v. National Bank of Canada (2000), 47 O.R. (3d) 641, [2000] O.J. No. 1102, 185 D.L.R. (4th) 78, 133 O.A.C. 100, 44 C.P.C. (4th) 288, 96 A.C.W.S. (3d) 320 (C.A.); Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982, [1998] S.C.J. No. 46, 160 D.L.R. (4th) 193, 226 N.R. 201, J.E. 98-1298, 11 Admin. L.R. (3d) 1, 43 Imm. L.R. (2d) 117, 79 A.C.W.S. (3d) 998, 38 W.C.B. (2d) 423; R. v. Ulybel Enterprises Ltd., [2001] 2 S.C.R. 867, [2001] S.C.J. No. 55, 2001 SCC 56, 203 D.L.R. (4th) 513, 275 N.R. 201, J.E. 2001-1823, 206 Nfld. & P.E.I.R. 304, 157 C.C.C. (3d) 353, 45 C.R. (5th) 1, 51 W.C.B. (2d) 180; Raphael Partners v. Lam (2002), 61 O.R. (3d) 417, [2002] O.J. No. 3605, 164 O.A.C. 129, 24 C.P.C. (5th) 33, 218 D.L.R. (4th) 701, 117 A.C.W.S. (3d) 335 (C.A.); Rogers Wireless Inc. v. Muroff, [2007] 2 S.C.R. 921, [2007] S.C.J. No. 35, 2007 SCC 35, 284 D.L.R. (4th) 675, 365 N.R. 177, J.E. 2007-1409, 36 B.L.R. (4th) 79, 44 C.P.C. (6th) 373, 158 A.C.W.S. (3d) 869, EYB 2007-121974

Statutes referred to

An Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters, R.S.Q., c. S-32.01, s. 37

Arbitration Act, 1991, S.O. 1991, c. 17, ss. 2(1), 7(2)

Civil Code of Qubec (C.C.Q.), S.Q. 1991, c. 64

Code of Civil Procedure, R.S.Q., c. C-25, arts. 940.1, 943

Copyright Act, R.S.C. 1985, c. C-42, s. 37 [as am.]

Construction Lien Act, R.S.O. 1990, c. C.30 [page174]

Consumer Protection Act, R.S.Q., c. P-40.1

International Commercial Arbitration Act, R.S.O. 1990, c. I.9, ss. 8, 13

Solicitors Act, R.S.O. 1990, c. S.15, ss. 15, 16, 17-33 [as am.], 23, 24, 28.1, (10), (11), (a)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 1.03

Treaties and conventions referred to

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 U.N.T.S. 3

UNCITRAL Model Law on International Commercial Arbitration,

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U.N. Doc. A/40/17 (1985), Annex I, arts. 5, 8, (1), 16, (1), (3), 34, (2)(a)(i), (b)(i), (ii), 36(1)(b)

Authorities referred to

UNCITRAL, Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, A/CN.9/264, 25 March 1985

Joint Committee on Contingency Fees (Ontario), Report on Contingency Fees (Report presented to the Attorney General for Ontario, September 2000)

Orkin, Mark, The Law of Costs, 2nd ed., looseleaf (Aurora, Ont.: Canada Law Book, 1987)

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APPEAL from the judgment of Low J. (2008), 90 O.R. (3d) 231, [2008] O.J. No. 1285 (S.C.J.) granting an application to strike out a notice of arbitration.

Graeme Mew, for appellant.

Glenn Hainey and Christopher Stanek, for respondents.

WEILER J.A. (MACFARLAND J.A. concurring): --

Overview

[1] The appellant, an Ontario law firm, and the respondent, a client who was the estate trustee and sole beneficiary of his mother's estate, entered into a fee agreement that contained a "success fee" respecting litigation over the estate. The "success fee" is a contingency fee, which the parties agreed would be 10 per cent of the value of the assets of the estate. They also agreed that disputes in relation to the contingency fee would be resolved by arbitration.

[2] A dispute arose as to which of two dates should be used to value the assets for the purpose of applying the contingency fee. The appellant served a notice of arbitration. The respondent brought an application in the Superior Court to strike it out on the basis that the agreement to arbitrate was unenforceable for reasons of public policy. The application

judge agreed and struck out the notice of arbitration. [page175]

[3] The appellant submits that the application judge erred in assuming jurisdiction to determine whether the dispute was arbitrable. It submits that the application judge should have deferred jurisdiction to the arbitrator. In the alternative, the appellant submits that an agreement to arbitrate a contingency fee dispute between a solicitor and a client is valid and that the agreement with the respondent should be enforced.

[4] The respondent's position is that an agreement to arbitrate a contingency fee dispute is an agreement to contract out of the client protection provisions of the Solicitors Act, R.S.O. 1990, c. S.15. Accordingly, he submits that the agreement to arbitrate is unenforceable for reasons of public policy and asks this court to uphold the application judge's order striking the notice to arbitrate.

[5] This appeal raises two issues. The first is whether the application judge erred by determining the enforceability of the arbitration clause contained in the contingency fee agreement, instead of leaving this determination for the arbitrator. The second is whether she erred in holding that an agreement to arbitrate a contingency fee dispute is prohibited and cannot be enforced on account of public policy.

[6] In relation to the first issue, I would hold that the application judge did not err in assuming jurisdiction to decide the enforceability of the arbitration clause in the contingency fee agreement. I acknowledge that, as a general rule, the enforceability of an arbitration clause should be decided by the arbitrator. However, in Dell Computer Corp. v. Union des consommateurs, [2007] 2 S.C.R. 801, [2007] S.C.J. No. 34 ("Dell"), at paras. 84-85, the Supreme Court of Canada recognized that exceptionally a Superior Court judge can assume jurisdiction over the threshold issue of enforceability when an important question of law is raised and only cursory reference to the evidence is necessary. The Supreme Court added a proviso that the issue must not be raised for purposes of delay: at

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para. 86.

[7] Two important questions of law arise in this case which do not require extensive reference to the evidence. The first is whether an arbitrator, as opposed to a judge, can decide a contingency fee dispute. The second is whether the parties can contract out of the statutory protection giving a client the right to an assessment of whether the contingency fee is fair and reasonable. No suggestion of delaying tactics arises on this record. While the application judge did not turn her mind to the requirements in Dell, I would hold that, having regard to them, the prerequisites for her to assume jurisdiction at first instance were met in this case. [page176]

[8] Having decided that the application judge correctly assumed jurisdiction, I must decide whether she correctly determined the questions of law. The application judge was of the opinion that enforcing the arbitration agreement would result in the respondent losing the statutory protections of the Solicitors Act. There are two rights in ss. 23 and 24 of the Solicitors Act. One is the right to have a Superior Court judge decide a contingency fee dispute. By their agreement, the parties chose to have an arbitrator as opposed to a judge resolve any disputes. In Dell, at para. 160, the Supreme Court held that the right to arbitration is a substantive right and that the parties' choice should be respected. I would apply Dell. The second right contained in ss. 23 and 24 is the right to an assessment of whether the contingency fee is fair and reasonable. The arbitration agreement is silent as to the powers of the arbitrator. If this right was lost, the arbitrator's decision would not be a decision on the merits and the fairness of the result would be compromised. Both the broad public policy favouring the resolution of disputes on the merits and the public policy underlying the remedies given to a client in the Solicitors Act militate against this result. I would hold that a party cannot contract out of his or her right to have an independent assessment of whether the contingency fee is fair and reasonable by an independent assessor.

[9] Thus, I would hold that the application judge erred in concluding that a solicitor and his or her client could not

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agree to have an arbitrator, as opposed to a Superior Court judge, hear a contingency fee dispute. However, apart from the decision maker, I would agree with her that public policy prevents the parties from contracting out of the statutory protections contained in the Solicitors Act and any arbitration must be conducted in accordance with them.

[10] For ease of reference, the relevant provisions of the Solicitors Act are attached as Appendix A to these reasons.

Facts

[11] As the application judge noted, the facts are not in dispute.

[12] The respondent Peter Wong's parents died in 1999. The respondent is the executor of his mother's estate and its sole beneficiary. His parents had significant assets in various jurisdictions, including China, Hong Kong, British Columbia, Quebec, Japan, Singapore and Ontario.

[13] Litigation over the assets arose in several jurisdictions. In Ontario, a dispute arose concerning entitlement to an account held jointly by the respondent's parents at the Royal Bank of Canada in Toronto. The respondent retained David Wires and [page177] Karen Jolley -- at that time members of another firm -- to make a claim to the funds. Before the litigation was resolved, Wires and Jolley left to form a new firm, the appellant Wires Jolley LLP. The respondent transferred the file to Wires Jolley.

[14] In March 2004, Mr. Wires informed the respondent that he was exploring the possibility of a global mediation of all issues involving the respondent's parents' estates. It was thought that the mediation would be preferable to litigation to resolve the various conflicts of laws issues arising in each jurisdiction. In May 2004, the parties agreed to a mediation to be conducted in Hong Kong.

[15] During the preparation for the mediation, the parties discussed a contingency fee arrangement. The parties agreed on a fee arrangement in late August 2004 under which the appellant

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would receive a fee of 10 per cent of the value of the respondent's inheritance after deducting certain liabilities and expenses in the event that the mediation was successful.

[16] The mediation was successful. On September 12, 2005, almost a year after the minutes of settlement were signed, the appellant sent a letter to the respondent setting out two options. Under Option 1, the appellant would assess its accounts before the court using the original retainer agreement. The assessment was to be based on the value of the services. The letter restated the appellant's policy "to charge fees which are fair and reasonable" set out in earlier correspondence and then went on to list the factors that the appellant considered relevant to such an assessment in accordance with the case law.

[17] Option 2 proposed a fee of $212,547.27 and a success fee "as discussed and recorded in earlier correspondence" of 10 per cent of the net value of the assets the respondent received or was entitled to receive from the estate. There is no issue that the success fee is a contingency fee agreement within the meaning of the Solicitors Act.

[18] Option 2 also contained a number of other stipulations, including the following arbitration clause:

> Disputes arising from or in relation to the success fee will be resolved by arbitration in Toronto with a single arbitrator from ADR Chambers.

[19] After receiving the benefit of independent legal advice, the respondent chose Option 2. He concedes that at the time of entering into the fee agreement, he embraced the idea of keeping the matter private.

[20] In July 2007, Mr. Wires met with the respondent in Vancouver to discuss the administration of the estate. Mr. Wires suggested that 10 per cent of the current value of the assets [page178] equalled a success fee of $2 million. The respondent did not accede to this suggestion as he was of the opinion that the contingency fee should be calculated based on

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the value of the estate as of January 1999. Based on the January 1999 valuation date, he estimated the contingency fee was approximately $461,115.92. The relationship then became strained.

[21] The appellant rendered an account to the Estate of Tung Jean and Peter Wong based on the July 2007 valuation date and claimed a success fee of over $2 million. It also served the respondent with a notice of arbitration pursuant to the International Commercial Arbitration Act, R.S.O. 1990, c. I.9 (the "ICAA").

[22] The respondent replied with an application to the Superior Court to strike the notice on the ground that it was an attempt to oust the Superior Court's jurisdiction under ss. 23 and 24 of the Solicitors Act, which provide that a fee agreement will be enforced by the Superior Court if the court is of the opinion that the agreement is fair and reasonable. If not, the agreement will be declared to be void. The respondent also contended that the account submitted by the appellant was not due and owing because he had not received distribution of all the estate assets.

The Application Judge's Reasons

[23] The application judge recognized that, as a general rule, an arbitral tribunal can and should determine the existence and extent of its own jurisdiction. She assumed jurisdiction, however, because [at para. 26]:

> . . . the court also has jurisdiction to determine whether an agreement between a solicitor and client, or a term thereof, is enforceable. The parties are now before the court and there is no practical or theoretical purpose served in deferring the argument to the arbitrator (para. 26).

[24] The application judge accepted that private commercial disputes can be left to private arbitration, but she was of the view that "[t]he relationship between members of the legal profession and the members of the public that they serve however, is one which transcends a mere commercial transaction".

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[25] The application judge held that the arbitration clause was inconsistent with clients' rights under the Solicitors Act to have contingency fee agreements assessed by a court to determine whether they are fair and reasonable. In her view, "an agreement to arbitrate is in effect an agreement by the client to relinquish his recourse to the court and ought not to be enforced" (at para. 31). The application judge held that a client's right to have judicial supervision over a fee agreement with his or her [page179] lawyer is supported by reasons of public policy. At paras. 28-30, she held:

> The relationship between members of the legal profession and the members of the public that they serve... is one which transcends a mere commercial transaction. The profession has a monopoly over the provision of legal services and the occasions upon which lawyers interact with members of the public occur often when the latter are in the most vulnerable of circumstances. There is therefore an overarching public interest to be served in the court's supervision of the profession's monopoly.
>
> One may be entirely confident that the chosen arbitrator in this case . . . would act judicially and skillfully in deciding the issues between the parties. There is, however, a residual institutional duty imposed on the court to have regard to the public interest and the broader ramifications of the decision it is to make that is not owed by a private arbitrator resolving a dispute privately . . .
>
> Because of the profession's monopoly and the imbalance in bargaining power that so often works in the solicitor's favour, it is in the public interest that the court retain a supervisory role to ensure that fee agreements are fair and reasonable and it is for that purpose that the Solicitors Act confers access to the court and establishes a mechanism or protocol for the determination of the reasonableness of a solicitor's fees . . .

[26] Accordingly, she ordered that the notice of arbitration served under the ICAA by the appellant be struck out.

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Issues

[27] The issues in this case are:

(1) In what forum should the question of the enforceability of the arbitration agreement have been decided at first instance?

(2) To what extent is the arbitration agreement in this case enforceable?

[28] The respondent has raised, as an additional issue, the question whether the July 2007 account claiming an increase in the success fee was a final account pursuant to the Solicitors Act. It is not necessary to resolve this question at this stage of the proceedings.

[29] In addition, in oral argument before us, the respondent submitted that the ICAA does not apply to this dispute and that, if anything, the Arbitration Act, 1991, S.O. 1991, c. 17 (the "Arbitration Act") applies. The ICAA has more stringent provisions governing enforceability than the Arbitration Act. Given the manner in which I propose to resolve the legal question, it is not necessary for me to decide this issue. Thus, for the purposes of this appeal, I am prepared to assume that the ICAA applies. [page180]

Analysis

1. In what forum should the question of the enforceability of the arbitration agreement have been decided at first instance?

[30] The appellant submits that, based on the provisions governing international arbitrations, the Superior Court judge was obliged to stay the respondent's application and refer the question of whether the arbitration agreement should be enforced to the arbitrator. In order to appreciate the appellant's argument, I must make brief reference to some of the relevant statutory provisions.

[31] Section 2(1) of the Arbitration Act states:

> 2(1) This Act applies to an arbitration conducted under an arbitration agreement unless,

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(a) the application of this Act is excluded by law; or
(b) the [ICAA] applies to the arbitration.

[32] As I have indicated, the appellant has chosen to proceed under the ICAA.

[33] Section 8 of the ICAA provides:

> 8. Where, pursuant to article 8 of the Model Law, a court refers the parties to arbitration, the proceedings of the court are stayed with respect to the matters to which the arbitration relates.

[34] Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration, U.N. Doc. A/40/17 (1985), Annex I (the "Model Law", attached as a schedule to the ICAA) allows a court to refuse to enforce an agreement to arbitrate where the court finds that the agreement is "null and void, inoperative or incapable of being performed". Article 8(1) states:

> 8(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

[35] The appellant submits that art. 8(1) of the Model Law does not confer jurisdiction on the Superior Court to determine the enforceability of the arbitration clause in this case. According to the appellant, this provision is limited to situations where an "action" has been brought to determine whether the arbitration agreement is null and void, inoperative or incapable of being enforced before the arbitrator has made such a determination. An application, the appellant submits, is not an action. [page181]

[36] The appellant also submits that art. 8(1) must be read with art. 16 in mind. Article 16 gives the arbitral tribunal competence to rule on its jurisdiction, "including any objections with respect to the existence or validity of the

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arbitration agreement", either as a preliminary question or in an award on the merits. If the tribunal rules on a preliminary question that it has jurisdiction, any party may request the court to decide the matter within 30 days of the ruling and there is no appeal from the court's decision: art. 16(3). Article 5 of the Model Law also states that court intervention in arbitral proceedings is limited to circumstances expressly provided for by the ICAA. When this article is applied, the appellant submits that the Superior Court judge ought to have declined jurisdiction.

(i) Does art. 8(1) of the Model Law apply only to an action?

[37] Section 23 of the Solicitors Act specifies that an application is to be brought to determine the validity of a contingency fee agreement.

[38] In urging me to hold that the Model Law prevents a court from assessing whether this dispute is arbitrable because the application brought by the respondent is not an "action" within the meaning of art. 8(1) of the Model Law, the appellant is urging me to adopt a literal interpretation of the word "action".

[39] I do not consider a literal interpretation to be appropriate for two related reasons. The first is the statutory principle of interpretation known as harmonization. Both the Arbitration Act and the ICAA deal with the same subject matter: arbitrations. Statutory interpretation presumes a harmony, coherence and consistency between legislation dealing with essentially the same subject matter: R. v. Ulybel Enterprises Ltd., [2001] 2 S.C.R. 867, [2001] S.C.J. No. 55, at para. 52 and Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, at para. 27. The language in art. 8(1) of the Model Law can be compared with s. 7(2) of the Arbitration Act, which provides that a court shall stay a "proceeding" in limited circumstances. In Ontario, a proceeding "means an action or an application": see s. 1.03 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. [See Note 1 below] Applying this principle, the word "action" in art. 8(1) should be read as including an application. [page182]

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[40] The second reason is that statutes are to be interpreted having regard to their purpose and the context in which the words are used. As I will explain below, the purpose of art. 8(1) of the Model Law is to grant parties limited access to the courts to resolve jurisdictional disputes of a legal nature due to the court's expertise compared with that of the arbitrator, the desire to avoid multiple legal disputes over the jurisdiction of an arbitral tribunal and the interests of finality. That purpose ought not to be undermined by an unduly literal interpretation of the proceeding used to initiate the court's process.

[41] I find support for both aspects of my position in the Supreme Court of Canada's recent decision in Dell, a decision that considered art. 940.1 of the Quebec Code of Civil Procedure, R.S.Q., c. C-25 (the "Qubec CCP") in light of art. 8 of the Model Act. Article 940.1 of the Qubec CCP provides:

> 940.1 Where an action is brought regarding a dispute in a matter on which the parties have an arbitration agreement, the court shall refer them to arbitration on the application of either of them unless the case has been inscribed on the roll or it finds the agreement null.

(Emphasis added)

Deschamps J. recognized that the plain language of art. 940.1, allowing courts to depart from the rule of systematic referral to arbitration when an agreement is "null", was more restrictive than that of art. 8(1) of the Model Law, which permits a court to refuse to refer an agreement to arbitration where the agreement is "null and void, inoperative or incapable of being performed".

[42] She departed from a literal approach to art. 940.1, recognizing that the Civil Code had to be interpreted in light of the context in which it was enacted. That context was the implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3 and of its counterpart in the Model Law, art. 8. Having regard to the context and purpose of art. 940.1, she adopted a broader meaning of "null" so as to conform with the

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approach laid out in the Model Law.

[43] Here, the context requires me to depart from the literal meaning of the word "action" in art. 8(1). Applying the principle of harmonization and having regard to the purpose and context of the Model Law, I would interpret the word "action" as meaning the procedure used to invoke the court's jurisdiction and, in Ontario, this would include an application. [page183]

(ii) Irrespective of whether the issue is brought by way of an action or application, does the Model Law prevent a court from assuming jurisdiction to decide the arbitrability of a dispute?

[44] Dell is instructive on the issue of whether and when a court should assume jurisdiction to decide whether an arbitration clause is enforceable in the face of the Model Law. To appreciate the context of the ruling, I will briefly summarize the facts of that case.

[45] Dell, a well-known retail computer vendor, erroneously posted a sale price on its Web site for certain computer models. The error was soon discovered, Dell corrected its mistake and announced it would not honour sales of computers at the erroneous, lower price. Mr. Dumoulin, a Quebec consumer, circumvented the measures taken by Dell to correct its mistake and was able to order a computer at the erroneous price. Other consumers also ordered computers at the erroneous price. When Dell refused to honour the sales, the Union des consommateurs (the "Union") and Mr. Dumoulin filed a motion for authorization to institute a class action. Dell applied for a referral of Mr. Dumoulin's claim to arbitration pursuant to an arbitration clause contained in the terms and conditions of sale and dismissal of Mr. Dumoulin's motion. Dell argued that the arbitrator, rather than the court, had jurisdiction to determine whether the clause was enforceable. The Union contended instead that it was proper for the court to determine the validity of the clause.

[46] Writing for the majority, Deschamps J. reaffirmed the basic principles in favour of fostering the arbitration process

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set out in such cases as Desputeaux v. ditions Chouette (1987) Inc., [2003] 1 S.C.R. 178, [2003] S.C.J. No. 15 ("Desputeaux"); GreCon Dimter inc. v. J.R. Normand inc., [2005] 2 S.C.R. 401, [2005] S.C.J. No. 46; and Bisaillion v. Concordia University, [2006] 1 S.C.R. 666, [2006] S.C.J. No. 19. She recognized, at para. 3, that "[t]he independence and territorial neutrality of arbitration are characteristics that must be promoted and preserved in order to foster the development of this institution". Later, at paras. 51-52, she remarked that arbitration is "a creature that owes its existence to the will of the parties alone" and that, generally speaking, parties are free to choose "any place, form and procedures they consider appropriate". She also noted that the provision of the Qubec CCP that was in issue, art. 940.1, incorporates the essence of art. 8 of the Model Law and that its [page184] counterpart, art. 943, incorporates art. 16 of the Model Law, adopting the "competence-competence" principle: at para. 80.

[47] The "competence-competence" principle is one of deference to the arbitrator and means that the arbitrator is competent to determine his or her own jurisdiction and competent to rule on objections to it. In this regard, Deschamps J. observed, at para. 75 of her reasons, that:

> Some authors argue that the competence-competence principle requires the court to limit itself to a prima facie analysis of the application and to refer the parties to arbitration unless the arbitration agreement is manifestly tainted by a defect rendering it invalid or inapplicable[.]

[48] Deschamps J. appears to have rejected this argument and adopted a somewhat broader interpretation of the prima facie principle in that she recognized two exceptions to it.

[49] After reviewing the international and domestic arbitration law of Quebec, Deschamps J. laid down a "general rule" that she said was faithful "to the prima facie analysis test that is increasingly gaining acceptance around the world" and consistent with the "competence-competence" principle: Dell, at paras. 83 and 87. The "general rule" is that "in any

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case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator": Dell, at para. 84.

[50] Deschamps J. then recognized two limited exceptions to the "general rule" of "systematic referral" to the arbitrator within art. 940.1 of the Qubec CCP, which she held was analogous to art. 8 of the Model Law. Where the challenge to the arbitrator's jurisdiction is based "solely on a question of law" or a question of "mixed law and fact" where the "questions of fact require only superficial consideration of the documentary evidence in the record" as opposed to "the production and review of factual evidence", a court could depart from the general rule of systematic referral: Dell, at paras. 84-85. These exceptions, under which a court may rule first on questions of law relating to the arbitrator's jurisdiction, recognize that a court can itself find that an agreement is null rather than referring this issue to arbitration: Dell, at para. 87.

[51] Deschamps J. explained the justification for the exception to the rule of systematic referral to the arbitrator respecting questions of law, at para. 84:

> A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law. This exception is justified by the courts' expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral and by the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. It allows a legal [page185] argument relating to the arbitrator's jurisdiction to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate. In addition, the danger that a party will obstruct the process by manipulating procedural rules will be reduced, since the court must not, in ruling on the arbitrator's jurisdiction, consider the facts leading to the application of the arbitration clause.
> (Emphasis added)

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[52] There are three reasons why Dell is of assistance in this case. First, the policy considerations mentioned in the above passage are not unique to Quebec, but apply equally in Ontario. Courts should have concurrent jurisdiction to resolve questions of law (and, also, questions of mixed law and fact requiring only a superficial examination of the record) based on their comparative expertise in resolving such questions, the rule that an arbitrator's decision can be reviewed by a court, the desirability of attaining finality and the avoidance of duplication of a legal debate.

[53] Second, the provision of the Qubec CCP that was in issue in Dell, art. 940.1, incorporates the essence of art. 8 of the Model Law: see Dell, at para. 80. As I have indicated, art. 8 of the Model Law also forms part of the law of Ontario pursuant to the ICAA.

[54] Third, this court's prior jurisprudence on art. 8 of the Model Law is consistent with the general rule set out in Dell. At para. 82, Deschamps J. referred to Dalimpex Ltd. v. Janicki (2003), 64 O.R. (3d) 737, [2003] O.J. No. 2094 (C.A.) and Gulf Canada Resources Ltd. v. Arochem International Ltd., [1992] B.C.J. No. 500, 66 B.C.L.R. (2d) 113 (C.A.) with apparent approval in the context of a discussion concerning the appropriate degree of scrutiny by the courts in determining the enforceability of an arbitration clause.

[55] I pause here to observe that the general rule in Dell was recently applied by this court in Dancap Productions Inc. v. Key Brand Entertainment Inc., [2009] O.J. No. 572, 2009 ONCA 135. That case concerned an ordinary commercial agreement in which the motions judge ignored the deferential approach to arbitration mandated by prior Ontario jurisprudence, as well as Dell. Sharpe J.A. was of the opinion that Dell did not change this court's prior jurisprudence to the effect that a court should grant a stay of any court proceedings where it is "arguable" that the dispute falls within the terms of the arbitration agreement: see paras. 32-35. Dancap did not involve a pure question of law or mixed fact and law requiring only limited reference to the evidence. Rather, as noted by Sharpe

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J.A., at para. 40, "[t]he determination of the scope of the ARA [Additional Rights Agreement] and the arbitration clause will require a thorough review [page186] of the parties' complex contractual discussions, understandings, expectations and arrangements, an inquiry that clearly calls for much more than a 'superficial consideration of the documentary evidence in the record'".

[56] Finally, in Dell, Deschamps J. also held that, before deciding to assume jurisdiction, the court must be satisfied that resort to its process is not a "delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding". Thus, "even when considering one of the exceptions, the court might decide that to allow the arbitrator to rule first on his or her competence would be best for the arbitration process": Dell, at para. 86.

[57] The approach set out in Dell therefore requires me to answer three questions. First, what is the nature of the challenge to the arbitrator's jurisdiction: is it a question of law, fact or mixed law and fact? Second, if the challenge raises a question of mixed law and fact, does it require a detailed factual inquiry or only a superficial review of the evidentiary record? Third, is the party initiating the jurisdictional challenge doing so for the purpose of delaying the arbitration process?

[58] In my view, the central question in this case -- the enforceability of the arbitration clause -- falls squarely within the exception to systematic referral set out by Deschamps J. in Dell. The question whether an agreement to arbitrate disputes over a contingency fee is unenforceable and void for reasons of public policy is very much a question of law. The nature of the question requires an examination and application of the text and judicial interpretation of the provisions of the Solicitors Act together with consideration of the jurisprudence favouring enforcement of arbitration clauses.

[59] While the line between questions of law and questions of mixed law and fact is not always clear, an appropriate litmus test was set out by the Supreme Court of Canada in Pushpanathan

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v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982, [1998] S.C.J. No. 46, at para. 37, citing Canada (Director of Investigation and Research, Competition Act) v. Southam Inc., [1997] 1 S.C.R. 748, [1996] S.C.J. No. 116, at para. 37:

> Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

[60] Whether an agreement to arbitrate disputes over a contingency fee is enforceable is very much a question that is of [page187] interest to lawyers and judges. Even assuming that the nature of the question is one of mixed law and fact, however, the resolution of the legal issue is not inextricably linked to a detailed consideration of the evidentiary record. Brief consideration of undisputed facts is all that is necessary to resolve the questions at issue in this case.

[61] As for the third question in the Dell test, the appellant has in no way suggested that the respondent's application was brought as a delaying tactic or so as to unduly impair an arbitration proceeding. As the application judge observed, although the respondent initially embraced the idea of keeping the dispute over the fees private, he then changed his mind and sought to exercise his rights under the Solicitors Act. The parties have proceeded throughout on the footing that, since then, he has sought to raise a bona fide issue concerning the enforceability of an agreement to arbitrate a dispute over a contingency fee. In my view, the record simply does not support a conclusion that the respondent brought the application as a delaying tactic.

[62] Accordingly, I would hold that the application judge properly declined to leave the issue of the enforceability of the arbitration clause to the arbitrator and I would not give effect to the first ground of appeal.

2. Is the arbitration clause unenforceable or can a

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solicitor and his or her client enter into an agreement to arbitrate a dispute respecting a contingency fee?

[63] In order to answer this question, I must first consider the relevant provisions of the Solicitors Act. Section 16 of the Solicitors Act provides that a solicitor may make an agreement in writing with his or her client for the payment of services "either by a gross sum or by commission or percentage, or by salary or otherwise, and either at the same rate or at a greater or less rate than that at which he or she would otherwise be entitled to be remunerated".

[64] The right to make an agreement is subject to the provisions of ss. 17-33. The relevant portion of s. 23 of the Solicitors Act provides:

> . . . . every question respecting the validity or effect of [a contingency fee agreement] may be examined and determined, and it may be enforced or set aside without action on the application of any person who is a party to the agreement . . . by the Superior Court of Justice. [page188]

[65] Pursuant to s. 28.1(11)(a), [See Note 2 below] a client may apply to the Superior Court of Justice for an assessment of an account 30 days after a final account has been rendered or within one year of its payment.

[66] While the application judge acknowledged that the Solicitors Act does not contain an express prohibition against contracting out of its provisions, she held that a client has the right to have fee disputes resolved by a Superior Court judge.

[67] The appellant contends that existing jurisprudence stands for the proposition that whenever a statute is silent on the issue of arbitrability, the right to arbitration exists. The application judge failed to give sufficient weight to the strong public policy fostering the effectiveness and integrity of the arbitration process by holding parties to their agreement. The appellant says it should not be denied recourse to arbitration, especially in light of the application judge's

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comment and the parties' apparent agreement that the arbitrator would act "skillfully and judicially" in deciding the issues.

[68] The respondent counters that s. 23 of the Solicitors Act provides that every question regarding the validity or effect of a written retainer agreement may be determined on application to the Superior Court. Moreover, contingency fee agreements are regulated under s. 28.1 of the Solicitors Act, which provides a comprehensive code for the assessment of contingency fees. The Superior Court has the exclusive jurisdiction to resolve fee disputes between Ontario solicitors and their clients. The application judge correctly held that public policy does not permit contracting out of the protections of the Solicitors Act, including who conducts the assessment. While the first option that [page189] the appellant gave to the respondents for paying the appellant's costs refers to an assessment of whether the fee is fair and reasonable, Option 2, containing the contingency fee and the agreement to arbitrate disputes, does not. Nor does the clause specify that the law of Ontario is to apply. Thus, the respondent fears that the arbitrator will not apply the statutory requirements of the Solicitors Act and decide whether the contingency fee is fair and reasonable.

[69] For the reasons outlined below, I am of the opinion that a balance must be struck between these competing policy interests and that the application judge erred because she did not do so.

[70] The majority decision of Deschamps J. in Dell did not comment directly on the argument that if a statute is silent on the issue of the arbitrability of a dispute, then arbitration is permissible, even where the statute specifically provides for a judicial dispute resolution mechanism. In dissent, Bastarache and Lebel JJ., at para. 221, held that because the Consumer Protection Act, R.S.Q., c. P-40.1 (the "Consumer Protection Act") and the Civil Code of Qubec (C.C.Q.), S.Q. 1991, c. 64 ("Civil Code") "are silent as to the arbitrability of a consumer dispute", that silence "suggests its permissibility".

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[71] The comment by the minority in Dell was based on the court's unanimous decision in Desputeaux. In that case, at para. 46, LeBel J. articulated the proposition that "[i]f Parliament had intended to exclude arbitration in copyright matters, it would have clearly done so".

[72] Desputeaux involved a dispute concerning the interpretation of licensing agreements relating to the copyright in a fictional character. One of the artists sought to refer the matter to arbitration. Section 37 of the Copyright Act, R.S.C. 1985, c. C-42 provided that the Federal Court and provincial courts had concurrent jurisdiction to decide disputes. Section 37 of Quebec's An Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters, R.S.Q., c. S-32.01 recognized the validity of using arbitration to resolve disputes arising out of copyright matters. The Supreme Court held that s. 37 of the federal Copyright Act was sufficiently general that it could be read to include arbitration procedures contemplated by the Quebec statute. Accordingly, the court overturned the decision of the Quebec Court of Appeal declaring the arbitrator's award a nullity. Lebel J. held, at para. 42, that the mere fact that the legislation in question identified the courts as having jurisdiction over a dispute did not mean that the statute should be interpreted as excluding [page190] arbitration. The legislature was merely identifying the courts within the judicial system that would have jurisdiction to hear the dispute; it was not excluding arbitration over a particular subject matter. Arbitration, although not part of a state's judicial system, is still, in a broad sense, part of a legitimate dispute resolution system that has been fully recognized by legislative authorities: see Desputeaux, at para. 40.

[73] Given the strong policy of deference afforded to arbitration agreements, and following the line of reasoning in Desputeaux, I would hold that, simply because the Solicitors Act refers to a Superior Court judge as having the jurisdiction to protect clients' rights, this does not mean that disputes arising between a solicitor and a client may not be submitted

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to arbitration. The Act simply identifies the person within the judicial system empowered to make a decision. The right to have an independent decision maker who can interpret the agreement and make a decision respecting a contingency fee dispute is preserved through arbitration and hence the public policy of the Act, the provision of a forum for legitimate dispute resolution, is not undermined.

[74] The analysis cannot, however, end here. My review of the jurisprudence leads me to two important interrelated qualifications. First, substantive statutory rights going to the merits of the dispute cannot be affected by the decision to enforce the arbitration clause. Second, the jurisprudence concerning the Solicitors Act reflects a strong public policy limiting the parties' freedom of contract that ought not to be ignored. For the sake of completeness, this jurisprudence is discussed below.

(a) Substantive statutory rights not affected

[75] In Automatic Systems Inc. v. Bracknell Corp. (1994), 18 O.R. (3d) 257, [1994] O.J. No. 828 (C.A.), Austin J.A. of this court granted a stay of a construction lien action pursuant to the ICAA in view of an agreement between the parties to arbitrate the quantum of a claim under the Construction Lien Act, R.S.O. 1990, c. C.30. In so doing, Austin J.A. considered whether resort to arbitration would result in the loss of any right for the lien claimant: at p. 263 O.R. He concluded that apart from the adoption of a different procedure, no such right would be lost. The decision of Austin J.A. was cited with approval by the Supreme Court of Canada in Desputeaux, at para. 46, albeit not on this point.

[76] In Dell, both the majority and the dissenting opinions of the Supreme Court affirmed that the class action legislation in Quebec was merely procedural and did not create new rights: [page191] see paras. 105 and 224. As such, it could not oust Dell's right to enforce the arbitration clause, a substantive right that was part of the terms and conditions of the sale of its computers. A similar conclusion was reached in the companion case of Rogers Wireless Inc. v. Muroff, [2007] 2 S.C.R. 921, [2007] S.C.J. No. 35. [See Note 3 below]

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[77] Thus, in the jurisprudence cited above, the courts ensured that no substantive statutory rights affecting the merits of the dispute were lost when the arbitration agreement was enforced.

(b) Public policy

[78] To properly address the public policy concerns at play in this case, some further reference to the underlying legislative framework is essential.

[79] Section 24 [of the Solicitors Act] provides:

> 24. Upon any such application, if it appears to the court that the agreement is in all respects fair and reasonable between the parties, it may be enforced by the court by order in such manner and subject to such conditions as to the costs of the application as the court thinks fit, but, if the terms of the agreement are deemed by the court not to be fair and reasonable, the agreement may be declared void, and the court may order it to be cancelled and may direct the costs, fees, charges and disbursements incurred or chargeable in respect of the matters included therein to be assessed in the ordinary manner.

[80] The application judge held, and I would agree, that public policy considerations animate the right to an assessment of the fairness and reasonableness of the terms of a contingency fee agreement. In Raphael Partners v. Lam (2002), 61 O.R. (3d) 417, [2002] O.J. No. 3605 (C.A.), Cronk J.A. discussed the criteria of fairness and reasonableness in the context of the review of a contingency fee agreement, stating, at para. 37:

> When a fee agreement is challenged under the Act, the solicitor bears the onus of satisfying the court that the way in which the agreement was obtained was fair and that the terms of the agreement are reasonable. The fairness requirement of s. 24 of the Act is concerned with the circumstances surrounding the making of the agreement and whether the client fully understands and appreciates the

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nature of the agreement that he or she executed. (Citations omitted) [page192]

[81] She continued, at para. 50:

> The 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 latter factor includes the risk of non-payment where there is a real risk of an adverse finding on liability in the client's case. (Citations omitted)

[82] The case law supports the respondent's position that a client cannot contract out of the protections in the Solicitors Act for reasons of public policy. For example, this court has held that an agreement to raise any disputes concerning accounts within 15 days as opposed to the 30 days provided for under the Act was held to be unenforceable: Javornich v. McCarthy, [2007] O.J. NO. 2532, 225 O.A.C. 201 (C.A.). Similarly, in Andrew Feldstein & Associates Professional Corp. v. Keramidopulos, [2007] O.J. No. 3683, 160 A.C.W.S. (3d) 724 (S.C.J.), Murray J. held, at para. 60, that "[t]o permit contracting out of the provisions of the Solicitors Act would defeat the whole purpose of those legislative provisions enacted in the public interest and designed to allow a client protection against unwarranted or unreasonable legal fees". Also, in Plazavest Financial Corp. v. National Bank of Canada (2000), 47 O.R. (3d) 641, [2000] O.J. No. 1102 (C.A.), at para. 14, Doherty J.A. quoted a passage from the judgment of Adams J. in Borden & Elliott v. Barclays Bank of Canada (1993), 15 O.R. (3d) 352, [1993] O.J. No. 1946 (Gen. Div.), at pp. 357-58 O.R., to the effect that the legal profession's monopoly status, coupled with the obligations on the profession in the Solicitors Act, make it clear that the rendering of legal services is not simply a matter of contract. He rejected the submission that an agreement between a client and a lawyer could preclude the client from resorting to the Solicitors Act or the inherent power of the court to conduct an assessment of the lawyer's fees.

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[83] However, unlike in the present case, none of these decisions concern an agreement to choose a different forum in which to resolve the dispute, namely, arbitration. Thus, there was no competing public policy to consider other than that contained in the Solicitors Act.

(c) Conclusion with regard to the enforceability of the arbitration clause

[84] I would hold that the application judge erred in concluding that a solicitor and his or her client could not agree to have an arbitrator, as opposed to a Superior Court judge, hear [page193] a contingency fee dispute. However, the two qualifications to the arbitrability of contingency fee disputes examined above lead me to the conclusion that public policy prevents the parties from contracting out of the statutory protections contained in the Solicitors Act and that any arbitration must be conducted in accordance with them. While the parties are free to select a different decision maker than the one contemplated in the Solicitors Act, any decision maker appointed to hear the dispute make his decision in accordance with the substantive statutory rights contained in the Solicitors Act. There are two reasons for my conclusion. First, the jurisprudence that I have reviewed regarding the enforcement of arbitration clauses has not considered or sanctioned the removal of any substantive statutory right affecting the merits of the underlying dispute. Second, the jurisprudence in relation to the Solicitors Act holds that it would be contrary to the public interest to allow solicitors and their clients to contract out of any statutory remedy in relation to the assessment of solicitors' accounts.

[85] The jurisprudence is illustrative of broader principles at work. One of the overarching principles that the law recognizes, albeit subject to the value of finality, is the right to have a dispute decided on the merits. No doubt it is for that reason that the jurisprudence respecting enforcement of arbitration clauses considers whether enforcing the arbitration agreement will affect the merits of the dispute. In addition, freedom of contract, the value recognized in the strong policy enforcing arbitration agreements, is tempered

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here by the jurisprudence removing the client's freedom to contract out of the remedies contained in the Solicitors Act on account of public policy.

Conclusion

[86] I would, accordingly, allow the appeal and set aside the order of the application judge striking the notice to arbitrate. However, any arbitrator appointed to make a decision regarding this dispute must make that decision in accordance with the substantive statutory rights contained in the Solicitors Act.

[87] The panel is indebted to both counsel for their very thorough argument of this issue.

[88] As the issue raised on this appeal is a novel issue, and subject to any submissions the party's may wish to make, I would be inclined to order no costs.

[89] JURIANSZ J.A. (concurring in the result): -- I have considered the reasons of Weiler J.A. but would conclude that the application judge should have declined to entertain the application [page194] to strike the notice of arbitration and, instead, should have referred the parties to the arbitrator. If a question of law and public policy arises before the arbitrator, and if the arbitrator deals with the issue incorrectly, the respondent can seek to set aside the award.

[90] I reach this different result because I would attach greater force than does Weiler J.A. to certain passages in Dell and, in particular, the guidelines laid down to determine when a court may intervene in the arbitration process before its completion.

Did the Application Judge Err in Determining the Issue of Arbitrability?

[91] The basis upon which the application judge decided to deal with the application was clearly inadequate. She recognized that the arbitrator could decide the question, but observed [at para. 26] "the court also has jurisdiction to determine whether an agreement between a solicitor and client,

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or a term thereof, is enforceable". The reason she gave for the court exercising that jurisdiction was that "[t]he parties are now before the court and there is no practical or theoretical purpose served in deferring the agreement to the arbitrator".

[92] Had the application judge asked the right questions, namely, whether the respondent was engaging in delaying tactics and whether deciding the question raised on the application would promote the arbitration process, she would not have come to this conclusion. The text, case law and the Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration all endorse a deferential approach to the question of the arbitrability of disputes under the Model Law [UNCITRAL Model Law on International Commercial Arbitration, U.N. Doc. A/40/17 (1985), Annex I ("Model Law")]. Thus, if and when they arise, jurisdictional challenges to the ability of the arbitrator should generally be raised after the arbitrator has rendered a decision through an application to set aside the arbitral award. This approach both fosters the arbitration process and prevents delaying tactics.

[93] I first turn to the text of the Model Law. Both the arbitration tribunal and the court have jurisdiction to determine an arbitrator's jurisdiction. Article 16(1) of the Model Law gives the arbitral tribunal the power "to rule on its own jurisdiction, including any objections with respect to the existence of validity of the arbitration agreement". Article 8 is not worded as a grant of jurisdiction to the court, but as a limitation of when the court will exercise the jurisdiction it otherwise possesses. It provides [page195] that when a matter which is the subject of an arbitration agreement is brought before the court, the court "shall . . . refer the parties to arbitration" except in the limited circumstances that "it finds that the agreement is null and void, inoperative or incapable of being performed".

[94] The pivotal question is what kind of review should the court engage in before deciding whether the agreement is "null and void, inoperative or incapable of being performed"? In Dell, Deschamps J. indicated there are two opposing schools of thought in the debate over the degree of judicial scrutiny of

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an arbitrator's jurisdiction under an arbitration agreement. She referred to these as the interventionist and the prima facie approaches.

[95] Both the interventionist and the prima facie approaches seek to promote efficiency and economy in dispute resolution but do so from different perspectives. The interventionist model is based on the concern that costly proceedings can be avoided by the court deciding the matter at the outset, rather than waiting to review the decision made by the arbitrator regarding his or her jurisdiction. The interventionist model will tend to be more efficient and economical in those cases in which the court finds that the arbitrator was without jurisdiction. However, where the court finds the arbitrator has jurisdiction, the arbitration proceedings will have been delayed.

[96] The prima facie approach also seeks to save the parties the time, cost and effort of litigating the existence and validity of the arbitration agreement in duplicative proceedings. However, this approach is primarily concerned with preventing delaying tactics and protecting the arbitration process from obstruction. Proponents of the prima facie approach argue that routine or "systematic" referral to arbitration leads to the ultimate resolution of disputes and best prevents attempts to delay the arbitral process through early challenges to the arbitrator's jurisdiction.

[97] The deferential prima facie approach, based on the "competence-competence" principle, is more apparent in the Model Law that expressly recognizes the competence-competence principle in art. 16. Article 16 provides:

> 16. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

[98] As noted Deschamps J. in Dell Computer Corp. v. Union des Consommateurs, [2007] 2 S.C.R. 801, [2007] S.C.J. No. 34, under the prima facie test, a court should "limit itself to a prima facie analysis of the application and . . . refer the

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parties to arbitration unless the arbitration agreement is manifestly tainted by [page196] a defect rendering it invalid or an applicable". Deschamps J. sets out one articulation of the prima facie test, at para. 76:

> [TRANSLATION] The nullity of an arbitration agreement will be manifest if it is incontestable . . . . As soon as a serious debate arises about the validity of the arbitration agreement, only the arbitrator can validly conduct the review . . . . An apparently valid arbitration clause will never be considered to be manifestly null.

(. Loquin, "Comptence arbitrale", Juris-classeur Procdure civile, fasc. 1034 "Arbitage" (1994), No. 105)

[99] The case law of this court supports a deferential or prima facie approach to the question of arbitrability. In Dell, Deschamps J. cited this court's decision in Dalimpex Ltd. v. Janicki (2003), 64 O.R. (3d) 737, [2003] O.J. No. 2094, 228 D.L.R. (4th) 179 (C.A.) and observed that the prima facie analysis is applied in Ontario not only to the validity but also the applicability of an arbitration clause. In Dalimpex, Charron J.A. adopted [at para. 21] the following test articulated by the British Columbia Court of Appeal in Gulf Canada Resources Ltd. v. Arochem International Ltd., [1992] B.C.J. No. 500, 43 C.P.R. (3d) 390, 66 B.C.L.R. (2d) 113 (C.A.):

> Considering s. 8(1) in relation to the provisions of s. 16 and the jurisdiction conferred on the arbitral tribunal, in my opinion, it is not for the court on an application for a stay of proceedings to reach any final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the arbitration agreement, because those are matters within the jurisdiction of the arbitral tribunal. Only where it is clear that the dispute is outside the terms of the arbitration agreement, or that a party is not a party to the arbitration agreement, or that the application is out of time should the court reach any final determination in respect of such matters on an application for a stay of proceedings.

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> Where it is arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then, in my view, the stay should be granted and those matters left to be determined by the arbitral tribunal. (Emphasis added)

[100] As Weiler J.A. points out, in a recent decision, Sharpe J.A. suggested that Dell did not change this court's prior jurisprudence regarding the deferential approach to arbitrability. In Dancap Productions Inc. v. Key Brand Entertainment Inc., [2009] O.J. No. 572, 2009 ONCA 135, Sharpe J.A. indicated [at para. 34] that the Supreme Court endorsed the "competence-competence" principle in Dell. He applied [at para. 33] that principle as articulated by Charron J.A. in Dalimpex, calling for "a deferential approach" allowing the arbitrator to decide whether the dispute is arbitrable, absent a clear case to the contrary. [page197]

[101] Reference to the Analytical Commentary provides further support for the deferential prima facie approach and useful background for interpreting Deschamps J.'s statements regarding dilatory tactics and the integrity of the arbitral process in Dell. Section 13 of the International Commercial Arbitration Act, R.S.O. 1990, c. I.9, of which the Model Law is a Schedule, provides that when interpreting the Model Law, recourse may be had to:

> 13. . . . (a) the Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (June 3-21, 1985); and
>
> (b) the Analytical Commentary contained in the Report of the Secretary General to the eighteenth session of the United Nations Commission on International Trade Law,
>
> as published in The Canada Gazette, Part I, Vol. 120, No. 40, October 4, 1986, Supplement.

[102] The Analytical Commentary discusses art. 16(3) of the Model Law and contrasts it with an earlier draft version which would have provided for concurrent court control. Article 16(3)

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provides that, where the arbitral tribunal has ruled that it has jurisdiction, that ruling may be contested only in an action for setting aside the arbitral award after it has been rendered. As the Analytical Commentary explains, "judicial control may be sought only after the award on the merits is rendered, namely in setting aside proceedings . . . ([or perhaps] in any recognition or enforcement proceedings)". By contrast, draft art. 17(1) [as reproduced in the Analytical Commentary] provided:

> (Notwithstanding the provisions of art. 16,) a party may (at any time) request the Court specified in art. 6 to decide whether a valid arbitration agreement exists and (, if arbitral proceedings have commenced,) whether the arbitral tribunal has jurisdiction (with regard to the dispute referred to it).

[103] Thus, draft art. 17(1) would have allowed a party to request the court to determine the arbitral tribunal's jurisdiction at any time, even while the arbitral proceedings have commenced. The Analytical Commentary explains that the draft art. 17 was deleted from the text of the Model Law and art. 16(3) was added. The change was made "for the purpose of preventing dilatory tactics and abuse of any immediate right to appeal". The Analytical Commentary explains that this solution was chosen even though its disadvantage, as was pointed out by the proponents of immediate court control, is that it may lead to considerable waste of time and money where, after lengthy proceedings with extensive hearings and taking of evidence, but the court sets aside the award for lack of jurisdiction. [page198]

[104] It can be inferred from the Analytical Commentary, then, that the Model Law is tilted strongly against tactics that may obstruct and delay arbitration proceedings. The policy of the Model Law is less concerned with individual instances in which applications to find the arbitration clause invalid may be well-founded. The scheme of the Model Law is designed to enhance the efficiency of the arbitration process by deferring judicial control to the setting aside of arbitration awards after they have been rendered.

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[105] It is against this context that Deschamps J.'s judgment in Dell must be understood. Deschamps J. made clear that the court's ability to decide the matter with only a superficial consideration of the record was a necessary but not a sufficient condition for assuming jurisdiction. She then stated, at para. 86:

> Before departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding. This means that even when considering one of the exceptions, the court might decide that to allow the arbitrator to rule first on his or her competence would be best for the arbitration process.

(Emphasis added)

[106] While she did not refer to Dell, I am prepared to assume that the application judge entertained the application to strike the arbitration notice because she thought she could determine it on a superficial consideration of the record. As well, I accept that in this case only a superficial consideration of the record is necessary to pose the public policy question asserted. The application judge, however, showed no appreciation for the additional requirements that the court must be satisfied that the application is not a delaying tactic and that an immediate court decision as to the arbitrator's jurisdiction would be best for the arbitration process. Had the application judge asked herself these questions, I am satisfied that she would not have departed from the rule of systematic referral to arbitration set out in Dell.

[107] The respondent made no effort to satisfy the application judge that his application was not a delaying tactic. I recognize that the appellant did not argue before the application judge that the respondent was engaging in delaying tactics. However, given Deschamps J.'s unequivocal statement in Dell that the court "must be satisfied" the challenge is not a delaying tactic, the application judge was required to turn her mind to that issue. Given the design of the Model Law to avoid

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delays in the arbitration process and to generally reserve court intervention to the review of the arbitral award, the application judge was required to consider what would be best for the arbitration process. [page199]

[108] Here, the respondent, after receiving independent legal advice, entered into a contract to arbitrate any fee disputes about his agreement with the appellant. He is liable to the appellants for their legal services, whether the assets of the estate are valued on the date he would choose or on the day the appellants would choose. His application has resulted in the delay of the arbitration process to determine the amount owing to the appellants. Until the arbitration and court proceedings are concluded, the respondent will not be compelled to make any payment in respect of the services performed by the appellant. He did not, as he might have, support his application for court intervention with proof that he had paid the lower undisputed amount. I make no finding that the respondent was seeking to delay. My point is that the respondent in applying for the court's intervention did not file any evidence on which the court could be satisfied his application was not a tactic to delay.

[109] The more significant point though, is that the application judge erred in failing to find that referral to arbitration would be best for the arbitration process. At this stage, the issue of public policy raised by the respondent is hypothetical and may or may not become an issue. Whether the issue arises at all depends on the decision of the arbitrator as to the applicable valuation date for the estate assets and liabilities of the estate. If the arbitrator accepts the valuation date asserted by the respondent, or if the arbitrator chooses the valuation date asserted by the appellants but reduces the fee to an amount the respondent accepts as fair and reasonable, the question raised before the application judge will not arise. In my view, allowing an application judge to entertain an application attacking arbitration every time there is an issue of public policy might possibly arise would "unduly impair the arbitration process" and would certainly not be "best for the arbitration process": Dell, at para. 86.

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[110] In this case, when the matter first came before the application judge, it was at least arguable that the matter was arbitrable. Weiler J.A.'s analysis confirms that is the case. If the judge had applied the Dalimpex standard, she would have referred the parties to the arbitrator.

[111] A question as to the fairness and reasonableness of the fee may not arise before the arbitrator. If it does arise, if the arbitrator addresses it and if the arbitrator decides it incorrectly, the court can pronounce on matters of public policy in reviewing the arbitrator's award. On a review, the court would have the findings of the arbitrator regarding the nature and complexity of services provided, any risks taken in the retainer, [page200] the qualifications of the lawyers, their usual rates, the hours worked and any other information that would be relevant to deciding if the final fee was fair and reasonable.

[112] It is worth identifying provisions of the Model Law that allow the court to set aside an arbitration award as incompatible with the state's public policy. Article 34 of the Model Law deals with setting aside an arbitral award after it has been made. An arbitral award may be set aside under art. 34(2)(a)(i) if the agreement is not valid under the applicable law, under art. 34(2)(b)(i) if the subject matter of the dispute is not capable of settlement by arbitration under the law "of this State", and under art. 34(2)(b)(ii) if "the award or any decision contained therein is in conflict with the public policy of this State". Moreover, art. 36(1)(b) of the Model Law allows a court to refuse to recognize or enforce an arbitral award if it finds that (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of this state, or (ii) the recognition or enforcement of the award would be contrary to the public policy of this state.

[113] In conclusion, if judicial control on the basis of public policy is necessary, that control should be exercised on review of the arbitration award. The Model Law, as explained by the Analytical Commentary and as interpreted by the Supreme Court in Dell and the jurisprudence of this court, makes clear that the general rule is systematic referral to the parties to

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arbitration. In this case, there was no justification for a departure from that rule.

[114] Therefore, I would hold that the application judge should have refused to entertain the application and should have referred the parties to the arbitrator.

[115] I add that I agree with the Weiler J.A. that the respondent was properly before the court. It is no moment that art. 8 (1) of the Model Law refers to an "action" brought before the court, whereas in this case the respondent brought an "application". The Model Law is an international instrument that was not drafted with an eye on the Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194. In explaining art. 8, the Analytical Commentary refers to when "a party starts litigation". The word "action" in art. 8 is to be interpreted in that sense.

Is the Arbitration Agreement Enforceable?

[116] Given my conclusion on the first question, I would not address [the] second question at this stage. [page201]

Conclusion

[117] I would allow the appeal, set aside the application judge's decision and refer the parties to the arbitrator.

Appeal allowed.

APPENDIX A

RELEVANT PROVISIONS OF THE SOLICITORS ACT

For ease of reference, the relevant provisions of the Solicitors Act are as follows:

Definitions

15. In this section and in sections 16 to 33,

. . . . .

"contingency fee agreement" means an agreement referred to in section 28.1; ("entente sur des honoraires conditionnels")

Agreements between solicitors and clients as to compensation

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16. (1) Subject to sections 17 to 33, a solicitor may make an agreement in writing with his or her client respecting the amount and manner of payment for the whole or a part of any past or future services in respect of business done or to be done by the solicitor, either by a gross sum or by commission or percentage, or by salary or otherwise, and either at the same rate or at a greater or less rate than that at which he or she would otherwise be entitled to be remunerated.

Definition

(2) For purposes of this section and sections 20 to 32,

"agreement" includes a contingency fee agreement.

Approval of agreement by assessment officer

17. Where the agreement is made in respect of business done or to be done in any court, except the Small Claims Court, the amount payable under the agreement shall not be received by the solicitor until the agreement has been examined and allowed by an assessment officer.

Opinion of court on agreement

18. Where it appears to the assessment officer that the agreement is not fair and reasonable, he or she may require the opinion of a court to be taken thereon.

Rejection of agreement by court

19. The court may either reduce the amount payable under the agreement or order it to be cancelled and the costs, fees, charges and disbursements in respect of the business done to be assessed in the same manner as if the agreement had not been made. [page202]

. . . . .

Determination of disputes under the agreement

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23. No action shall be brought upon any such agreement, but every question respecting the validity or effect of it may be examined and determined, and it may be enforced or set aside without action on the application of any person who is a party to the agreement or who is or is alleged to be liable to pay or who is or claims to be entitled to be paid the costs, fees, charges or disbursements, in respect of which the agreement is made, by the court, not being the Small Claims Court, in which the business or any part of it was done or a judge thereof, or, if the business was not done in any court, by the Superior Court of Justice.

Enforcement of agreement

24. Upon any such application, if it appears to the court that the agreement is in all respects fair and reasonable between the parties, it may be enforced by the court by order in such manner and subject to such conditions as to the costs of the application as the court thinks fit, but, if the terms of the agreement are deemed by the court not to be fair and reasonable, the agreement may be declared void, and the court may order it to be cancelled and may direct the costs, fees, charges and disbursements incurred or chargeable in respect of the matters included therein to be assessed in the ordinary manner.

. . . . .

28.1 (1) A solicitor may enter into a contingency fee agreement with a client in accordance with this section.

Remuneration dependent on success

(2) A solicitor may enter into a contingency fee agreement that provides that the remuneration paid to the solicitor for the legal services provided to or on behalf of the client is contingent, in whole or in part, on the successful disposition or completion of the matter in respect of which services are provided.

No contingency fees in certain matters

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(3) A solicitor shall not enter into a contingency fee agreement if the solicitor is retained in respect of,

(a) a proceeding under the Criminal Code (Canada) or any other criminal or quasi-criminal proceeding; or

(b) a family law matter.

Written agreement

(4) A contingency fee agreement shall be in writing.

Maximum amount of contingency fee

(5) If a contingency fee agreement involves a percentage of the amount or of the value of the property recovered in an action or proceeding, the amount to be paid to the solicitor shall not be more than the maximum percentage, if any, prescribed by regulation of the amount or of the value of the property recovered in the action or proceeding, how ever the amount or property is recovered. [page203]

. . . . .

Non-application

(10) Sections 17, 18 and 19 do not apply to contingency fee agreements.

Assessment of contingency fee

(11) For purposes of assessment, if a contingency fee agreement,

(a) is not one to which subsection (6) or (8) applies, the client may apply to the Superior Court of Justice for an assessment of the solicitor's bill within 30 days after its delivery or within one year after its payment; or

(b) is one to which subsection (6) or (8) applies, the client or the solicitor may apply to the Superior Court of Justice for an assessment within the time prescribed by regulation made under this section.

Notes

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Note 1: Section 13 of the ICAA provides that, for the purpose of interpreting the Model Law, recourse may be had to aids to interpretation ordinarily available under the law of Ontario.

Note 2: Sections 28.1(10)-(11) set out the procedure for assessment in the case of contingency fee agreements. Section 28.1(10) provides that ss. 17-19 -- which require an assessment officer to determine whether a fee agreement for business done in court is fair and reasonable, and permit the officer to solicit the opinion of a court and have that court remedy the situation if the agreement is not fair and reasonable -- do not apply to contingency fee agreements. That section, however, must be read in conjunction with s. 28.1(11). Thus, s. 28.1(10) and (11) were designed to ensure that judges of the Superior Court, rather than assessment officers, are given the authority to review contingency fee agreements according to the standards of fairness and reasonableness: see Mark Orkin, The Law of Costs, 2nd ed., looseleaf (Aurora, Ont.: Canada Law Book, 1987), at para. 308.1(3), and The Joint Committee on Contingency Fees (Ontario), Report on Contingency Fees (Report presented to the Attorney General for Ontario, September 2000), at pp. 41-42. Assessment officers cannot interpret agreements.

Note 3: The majority and dissenting opinions of the court further held that legislation amending the Consumer Protection Act and prohibiting agreements obliging a consumer to arbitrate a dispute or preventing them from bringing a class action, unless entered into after the dispute arose, was prospective only and of no application.

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