CONTINGENT FEES

*Bruce K. Arlidge**

I. INTRODUCTION

As a group long, and perhaps rightly, thought to be unduly concerned with matters of pay and reward, lawyers tend to be sensitive when their fees, charges and charging arrangements are called into question. It doesn't help that in several provinces their professional leaders continue to be "Treasurers" rather than "Presidents." [1]

Current fashions of openness, involving the public and critical re-examination of all sorts of ancient premises and practices, together with the growth of public Legal Aid, Quebec's Bill 250, and other developments, provoke this further look at the Contingent Fee and its position in law and legal ethics in this country. It is one more area where we seem to be midway between the English and the Americans with a lot of good Canadian grey surrounding it.

Three aspects will be reviewed: background, current law and ethics, and pros and cons with some conclusions being offered.

These generalities, definitions and comments are first stated for frame-of-reference:

1. Viewed functionally, Canadian lawyers (as in their own specialties are other "service experts") are essentially a smallish group offering to those who require (and can pay for) them a particular range of services based on special competence, skills and talents in legal matters. Generally they advise or "counsel" and represent others, as is reflected by their traditional titles of solicitor (or attorney) and barrister (or advocate). [2] Their capital and plant requirements are comparatively small and their only real saleable product is words; rather special words, no doubt, but still words.

2. The profession of Law has been described as "ancient, honourable and learned," [3] but from St. Luke down to the present the profession and its

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* B.A., LL.B (U.B.C.), LL.M. (York), of the Bars of British Columbia and Ontario. Associate Professor of Law, Faculty of Law, Common Law Section, University of Ottawa. The author wishes to acknowledge the research assistance of Milda Karen, Common Law III.

[1] British Columbia, Ontario and Newfoundland. The custom stems from the ancient English Inns of Court.

[2] For a thorough and realistic analysis and description of lawyers' work and roles in contemporary North American society *see* JOHNSTONE & HOPSON, LAWYERS AND THEIR WORK (1967).

[3] *Preamble* to C.B.A. CANONS OF LEGAL ETHICS (1970).

practitioners have received some pretty weighty criticisms.[4] Much of it has come down to matters of money. In contemporary Canada the public's legal servicing requirements are still largely met by private entrepreneurs practicing independently or in groups, in traditional fashion. In 1971, when there were some 21,568,315 Canadians, there were some 13,200 lawyers in private practice working in 5,800 law offices across the country. Additionally there were 1323 notaires practicing in Quebec. Firm-sizes varied: 86% were "small" (1 to 3 lawyers), 12% were "medium" (4 to 9 lawyers) and 2% were "large" (10 or more lawyers). These figures reflect a national "per capita" of one lawyer for each 1700 Canadians. The lawyers were unevenly-distributed. Quebec, Ontario and British Columbia contained 80% of the total, and their chief cities of Montreal, Toronto and Vancouver between them contained a disproportionate 40% of the firms and 45% of the lawyers.[5] In Metropolitan Toronto the vast bulk of the legal population was concentrated in one downtown square mile.[6]

3. The English legal separation between barristers and solicitors does not obtain in Canada, although in Quebec the profession and functions of avocat and notaire continue to be distinct. The generic word lawyer covers all, but in the context of contingent fees we are concerned only with Canadian lawyers, whether barristers, solicitors, attorneys, lawyers, avocats, or notaires, who provide professional legal services on the familiar remuneration-by-fees model. Many practicing lawyers are salaried by governments, by corporations, by legal aid plans and others, but the private practitioners still hold the field and are likely to continue to do so. There are, too, many "lawyers" who are not legally licenced to (or do not in fact) practice—academics, those retired or legally-disqualified, lawyers in judicial or administrative positions, etc. Fees, contingent or otherwise, don't concern them.

4. The Canadian certificating and licencing arrangements should be briefly touched upon. Law practice is constitutionally a provincial matter, and in each province and territory authority has been delegated by the legislators to the lawyers collectively, through their autonomous Law Societies or Bars, to regulate, police and generally run their own shows. The Societies set educational and competence standards, have power to admit and expel from the right to practice, and have many related powers.[7]

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[4] "Woe unto you, lawyers!" Luke 11:52.

[5] DEPT. OF JUSTICE & CANADIAN BAR ASS'N., OPERATION COMPLEX *Reprinted* in 6 LAW SOC. U. CAN. GAZETTE 156 (1972).

[6] H. Arthurs, L. Taman & Willms, *The Toronto Legal Profession: An Exploratory Survey*, 21 U. OF TORONTO L.J. 498 (1971).

[7] Each jurisdiction has its "Legal Profession," "Bar," "Law Society," "Barristers and Solicitors" or similarly-titled act or ordinance. Except in the Territories these statutes vest broad powers in the elected executives of the local societies (to which all practitioners must belong), and admissions to practice are either vested in or are on the presentation of those executives (collectively, "Governing Bodies"; locally, "Benchers," "the Council" or "Convocation").

There is no direct external regulation of governing bodies save the political power

5. Although the Canons declare that ". . . the profession is a branch of the administration of justice and not a mere money getting trade," they also declare that "[the lawyer] is entitled to reasonable compensation for his services . . . ." [8] Lawyers have many reasons for entering their profession; the desire to earn a better-than-average living is not the least of them. The lawyer's saleable product is rather special words, and his basic financial measure for them is his (or his staff's) time. From his words, and measured by his time, he aspires to get money.

6. The critics may be right. Throughout history (or at least for the past several hundred years) lawyers' charges have been a source of unhappiness to many, and the action and reaction has produced, in effect, the external regulation of fees. [9] The marketplace—pure lassaiz-faire—proved to be deficient. These thoughts recur:

(a) Perhaps there *is* something about the lawyer that makes him more venal and grasping than other men; if you charter monopolies, what do you expect? They'll charge all the traffic will bear;

(b) Lawyers are, in general, clever but unscrupulous; they'll grasp the main-chance (abuse the superordinate/subordinate relationship as the behaviourists put it) every time.

7. "Contingent fees" (or contingency arrangements) is really a compendious label for an old and familiar risk-sharing arrangement that can be made between two or more parties in a broad range of circumstances where:

(a) one undertakes to provide and devote his time, facilities, skills and talents towards attaining something of worth or value to the other(s);

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of legislatures and governments to amend (or threaten to amend) the pertinent statutes, and the requirement in some provinces that internal regulations and rules be approved by government Orders-in-Council.

In Quebec, Bill 250, now before the National Assembly, imports a cutting-down of this traditional autonomy by means of sundry boards and bureaucrats. In Ontario, a "Law Society Council" with minority lay representation has persuasive and reporting powers as to "the manner in which [lawyers] are discharging their obligations to the public and generally matters affecting the legal profession as a whole," and experimentation with lay membership on Convocation is under way.

Quasi-judicial decisions and the jurisdictional powers of governing bodies are subject to the appellate or supervisory jurisdictions of the superior courts, and individual lawyers, being by common law and statute "officers of the courts," may be subject to a traditional but little-exercised summary disciplinary power vested in the judiciary with respect to things done or omitted in connection with "court business."

[8] C.B.A. CANONS OF LEGAL ETHICS § 3(9)(10).

[9] *In Re* Solicitor, [1972] 1 Ont. 694, at 697, (High Ct. 1971) Mr. Justice Wright said: "The question of compensation for solicitors has long been the anxious concern of the Court, both in the interest of clients and their solicitors. In the 19th century, both in England and in Canada, much legislative and judicial activity was directed to the reform and settlement of procedures for fair and reasonable fees under the Court's control. As a result, it can be said that a solicitor's charges in Ontario are, under law, subject in every respect to review and control by the Court . . . ." The Solicitors Act, ONT. REV STAT. c. 441, (1970), preserves an elaborate but not perfect system, weighted against solicitors, of measures which enable the Court to determine the quantity and quality of the bill. Thus it may be said of the solicitor's profession, that its members cannot set their own individual charges and that there is a procedure of determining in every case where it is invoked, that a solicitor's charges are "fair and reasonable."

(b) the outcome, and hence the utility to the other(s), is uncertain but is more likely to be favourable if the undertaker does his best;

(c) the parties agree that whether the undertaker shall be rewarded and the measure of his reward shall entirely depend or be contingent upon the results to be obtained.

Entire contracts and "no-cure-no-pay" arrangements are well-known in business, and in many speculative adventures, they are the only realistic ones. [10] We shall see that, although what the lawyer undertakes for his clients often squarely meets all the conditions of (a) and (b), for a variety of historical, legal and ethical reasons it is generally frowned-upon and often clearly unlawful for lawyers and clients in Canada to stipulate for, take or pay contingent fees.

8. Lawyers come increasingly expensive. In Canada, in 1970, their national average net income before taxes was $26,738 [second to medical doctors at $34,757]. [11] Again, on average, the overhead for rent, staff salaries and other overhead in their law offices ran around 50%. Allowing for holidays, sickness and unproductive and wasted hours, it has been reckoned that a reasonably diligent lawyer has some 1300 productive (or "billable") hours per year at his disposal. Although it is notorious that there is a lot of "Robin Hood" in legal charging, and that some areas of practice are more lucrative than are others, all this means (as lawyers will readily acknowledge) that currently they must, to "keep up," command about $40 per productive working-hour. [12]

The silk court gowns of Canadian Queen's Counsel still include a rectangularly-shaped pouch covering the wearer's shoulders. The more modest stuff gowns of utter barristers exhibit a bifurcated, truncated band, worn over the left shoulder, which, it is said, once extended into a more modestly-sized pouch. Into those pouches, in an earlier age, solicitors were accustomed as occasion required and, no doubt, with reassuring clinks, to deposit the honoraria of guineas and sovereigns. Hence, perhaps, the "cab in the rank" philosophy still nurtured by the English Bar. [13] Attornies and

[10] They were formerly common in building contracts, contracts for work and materials, and in contracts for the carriage of goods. By express agreement between the parties "entire performance" by one party would be made a condition precedent to his right to payment.

[11] DEPARTMENT OF NATIONAL REVENUE, TAXATION STATISTICS, TABLE 3 (1972). The table lists taxable returns by occupation for the taxation year 1970. The averages are taken from all income tax returns but may mislead in that they include all (not just "professional") taxable income of 9,304 lawyers and 19,347 doctors who derived the major part of their incomes from professional fees.

[12] This "costing approach" to legal fees has become fashionable over the past decade or so and is, obviously, only roughly valid since overheads and productivity vary from lawyer to lawyer. The present purpose is only to suggest (if it needs suggesting) that even in this inflationary age lawyers are expensive.

[13] *See* BOULTON, A GUIDE TO CONDUCT AND ETIQUETTE AT THE BAR OF ENGLAND AND WALES at 47 (5th ed. 1971), citing the ANNUAL STATEMENT OF THE GENERAL COUNCIL OF THE BAR (1951): "Counsel is bound to accept any brief in the Courts in which he professes to practice . . . but special circumstances may justify his refusal, at his discretion, to accept a particular brief."

solicitors were always lesser mortals. Anyway, in Canada in the seventies lawyers' fees are a realistic and not a quaint matter. Is the history of it all really significant? The answer, certainly as respects contingent fees, is yes.

II. BACKGROUND

(*A*) *Maintenance and Champerty*

In mediaeval England, during those pre-Reformation centuries when the common law, the common law courts and the separate classes of professional lawyers were gradually taking shape, there developed and grew up in reaction to abuses real and supposed a body of prohibitive laws and principles that we know under the exotic names of barratry, maintenance and champerty.[14] Today, both in their homeland and here, they are archaic if not completely dead,[15] but their ghosts linger on, and beyond question those ancient laws have shaped and moulded our present attitudes, laws and ethics respecting the contingent fee.

The detailed development, history and vicissitudes of that body of law has been thoroughly chronicled by historians, commentators and the judiciary and will only be summarized here.[16]

It is uncertain whether maintenance, which was both a crime and a tort, evolved as an independent part of the common law; certainly it was affirmed and declared by a series of ancient statutes commencing with the first Statute of Westminster of 1275,[17] and only ceased to be a crime (albeit a shadowy

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[14] A common barrator was a "common mover, exciter or maintainer of suits" and was guilty of the indictable offence of *barratry*. *Maintenance* is the giving of assistance or encouragement to one of the parties in civil proceedings by a person who has neither an interest in the proceedings nor any other motive recognized by law as justifying his interference.

Champerty is a particular kind of maintenance, namely maintenance of proceedings in consideration of a promise to give to the maintainer a share in the subject-matter or proceeds thereof if the proceedings succeed.

See 8 HALSBURY, STATUTES OF ENGLAND (3d) 562-63, and 1 HALSBURY, LAWS OF ENGLAND (3d) 39-41.

[15] In England, by §§ 13 and 14 of the Criminal Law Act, 1967 c. 58, they were abolished as criminal offences and as torts, implementing recommendations of the Law Commission, but § 14(2) provided that such abolitions "shall not affect any rule . . . as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal."

In Canada, by § 8 of the Criminal Code, which provides that "no person shall be convicted (a) of an offence at common law," they ceased to be crimes. There has been no provincial legislation altering the position in tort or in "public policy." Indeed, several provincial statutes declare "champertous agreements" to be unlawful.

[16] The most exhaustive and illuminating English cases in the area are: Neville v. London Express Newspaper Ltd., [1918-19] All E.R. 51 (H.L. 1919); Martell v. Consett Iron Co., [1955] Ch. 363 (C.A. 1954); *Re* Trepca Mines, Ltd. (no. 2), [1963] 1 Ch. 199 (C.A. 1962). In Hill v. Archbold, [1967] 3 All E.R. 100 (C.A.), the judgment of Danckwerts, L.J. in *Martell* was commended by his brethren as the "locus classicus on the topic of maintenance." Williston, *The Contingent Fee in Canada*, 6 ALTA. L. R. 184 (1967), succinctly outlines the background at 184-87. *See also* Winfield, *History of Maintenance and Champerty*, 35 L.Q.R. 50 (1919).

[17] 3 Edw. 1 c. 25, 28 (1275). For synopses and listings, see *Neville*, *supra* note 1, at 81-82 (per Lord Shaw) and at 89 (per Lord Phillimore).

one, since prosecutions were rare) in Canada in 1954. It lingered on in England until 1967.[18]

In 1919[19] Lord Phillimore said:

> A perusal of these [pre-Reformation] statutes shows that in the days when they were enacted the ordinary subject of the King found great difficulty in procuring a fair trial when his adversary was in some privileged position. Sometimes the King's officers were induced by a bribe or by the offer of a share of the spoil to favour his adversary, sometimes confederacies were formed to support unjust claims or defences. And the statutes are directed against maintenance, champerty and confederacy or conspiracy, while embracery or subornation of perjury were some of the means used to secure these unlawful ends . . . .
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> Maintenance is on a par with champerty, conspiracy and embracery. The doctrine was established to prevent injustice.[20]

In the same case Lord Finlay, referring to such authors as Blackstone, Lork Coke and Hawkins, said:

> Maintenance in a court of justice is defined . . . as being 'where one officiously intermeddles in a suit . . . which in no way belongs to him, by assisting either party with money, or otherwise, in the prosecution or defence of any such suit.' He [*Hawkins' Pleas of the Crown* (8th ed. published in 1824)] goes on to point out, however, that acts of this kind may be justified in various cases — eg., if there is an interest in the thing at variance, in respect of kindred or affinity, in respect of other relations as lord and tenant or master and servant, or in respect of charity . . . The essence of the offence is intermeddling with litigation in which the intermeddler has no concern, unless the case falls under some of the heads of exception to which I have above adverted. It was considered that it is against public policy that litigation should be promoted and supported by those who have no concern in it . . . .[21]

In 1962, Lord Denning said:

> Maintenance may, I think, nowadays be defined as improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse. At one time, the limits of 'just cause or excuse' were very narrowly defined. But the law has broadened them very much of late . . . but there is one species of maintenance for which the common law rarely admits of any just cause or excuse, and that is champerty. Champerty is derived from *campi partitio* (division of the field). It occurs when the person maintaining another stipulates for a share of the proceeds: see the definitions collected by Scrutton L.J., in *Haseldine v. Hosken*, [1933] All E.R. Rep. 1. The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. These fears may be exaggerated; but, be that so or not, the law for centuries has declared champerty to be unlawful . . . .[22]

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[18] *Supra* note 15.
[19] In *Neville*, *supra* note 16.
[20] *Id.* at 89.
[21] *Id.* at 65.
[22] *Re* Trepca Mines, Ltd. *supra* note 16.

It has also been said that champerty:

> is a form of maintenance, and occurs when the person maintaining another takes as his reward a portion of the property in dispute . . . Every champerty is maintenance but, every maintenance is not champerty, for champerty is but a species of maintenance which is the genus. [23]

Or, as expressed by the British Columbia Court of Appeal in 1964: [24]

> . . . champerty is maintenance plus an agreement to share in the proceeds, and . . . while there can be maintenance without champerty, . . . there can be no champerty without maintenance. There must be present in champerty as in maintenance an officious intermeddling, a stirring up of strife, or other improper motive.

The *genus* Maintenance and its *species* Champerty came to British North America and were received here as part of the common law both as actionable torts on the civil side and as uncodified crimes under the former "catch-all" provision of the Criminal Code. [25] Only in Manitoba was it held that they were obsolete as crimes by 1870 and not applicable in that province as any part of the criminal law. [26] A Quebec conviction and fine of $500 for such offences was appealed to the Supreme Court of Canada as recently as 1939. [27] Their formal and certain abolition as crimes here came in 1954. [28]

In 1967, England went further and abolished them as crimes and as torts. [29] In Canada, by reason of the provincial property and civil rights jurisdiction and the thrust of the case law, it seems clear that:

(a) the provinces have the undoubted power, should they choose, to abolish maintenance and champerty as civil wrongs and;

(b) that no province has yet done so.

(*B*) *Lawyer's Fees Against that Background*

The old laws respecting maintenance and champerty were of general application and were neither invented nor particularly directed against lawyers. The original villians, apparently, were sundry feudal barons and venal royal officers. However, from Tudor and Stuart times on they took on a special twist vis-a-vis the attorneys, partly in reaction to the excessive zeal displayed by some of them in promoting and financing doubtful suits and in seeking substantial reward if they succeeded; and partly in reflection of a general judicial attitude which was set against litigation as being disruptive and divi-

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[23] Per Lord Finlay, L.C., in *Neville, supra* note 16, at 67.

[24] Monteith v. Calladine, 47 D.L.R.2d 332, at 342. (B.C. 1964) (per Whittaker, J.A.).

[25] By §§ 9-12 of the pre-1955 Criminal Code, CAN. REV. STAT., 1927 and on other bases the (common law) "criminal law of England" continued in force as it stood on various dates, in the different parts of Canada. *See* TREMEEAR, ANNOTATED CRIMINAL CODE [OF] CANADA at 42-49 (5th ed. 1944), for authorities and commentaries on the applicability of, maintenance, champerty and barratry.

[26] By the Manitoba Court of Appeal in Thomson v. Wishart, 19 Man. 340 (1910).

[27] Goodman v. The King, [1939] Sup. Ct. 446.

[28] *Supra* note 15.

[29] *Ibid.*

sive.[30] In the former English social system attorneys were not, it seems, necessarily gentlemen, and their fees and charging arrangements have long been regulated by statute and by the courts.[31]

Since earliest times, lawyers' charges, both in England and in this country have been, and are still largely made on a time/work basis.[32] In recurring and typical situations they are often pre-estimated or stereotyped, and reflect factors other than simple hours necessarily spent and folios of words put on paper. Factors of complexity, urgency, expertise, magnitude, means, responsibility and geography are all considered but, in the last analysis, time spent and work done are still basic. Statutory and regulatory tariffs and a vast body of judicial dicta in the area of costs reflect these facts.[33]

The troublesome question is: can/should the money measure of a lawyer's time/work reward be directly tied to the outcome/amount involved/value of the subject-matter? In England the answer is no, in the United States it is yes, and in Canada it is maybe.[34] Worse, in all three countries these answers must be qualified by reference to the character of the legal services under consideration: contentious?, non-contentious?, civil?, criminal?, or matrimonial?

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[30] *See* Bulbulia, Comment, 49 CAN. B. REV. 603, at 605-06 (1971). *See also* Radin, *Contingent Fees in California*, 28 CALIF. L.R. 587 at 587-88 (1940).

[31] Since at least 1278, by the Statute of Gloucester 6 Edw. 1 c. 1, Radin *supra* note 30, at 595.

For the contemporary position in England see CORDERY, SOLICITORS c. 10, at 212-329; esp. at 216-18 (as to "contentious business"), 218-39 (as to "non-contentious business"), 239-44 (as to "special business"), and 245-58 (as to "special agreements") (6th ed. 1968).

[32] In *Re* Solicitors, [1972] 3 Ont. 433 at 436 (High Ct. 1971), Master McBride said:

"The factors that have been held through the years to constitute the framework within which a solicitor's fee should be assessed are:

1. The time expended by the solicitor.
2. The legal complexity of the matters dealt with.
3. The degree of responsibility assumed by the solicitor.
4. The monetary value of the matters in issue.
5. The importance of the matters to the client.
6. The degree of skill and competence demonstrated by the solicitor.
7. The results achieved.
8. The ability of the client to pay.

. . . time expended is not in most cases, the overriding factor, nor even the most important. On the other hand, there are comparatively few cases where the time factor can be completely ignored . . . ."

[33] The usual Canadian pattern involves detailed "tariffs" setting out in items reflecting time/work factors and related to the "amount involved" what may be allowed to lawyers for their professional services. Usually these tariffs are appended to the local Rules of Court and are legitimized by Orders-in-Council. Lawyers' fees are subject to review on "taxation" (that is, judicial invigilation) as to quanta, fairness and reasonableness, with wide discretions inhering in the various "Taxing Officers" (who act at first instance) and, on review, in the Judges. There are wide variations as to scales of generosity, criteria and mechanics between the twelve jurisdictions.

[34] This statement is over-generalized but it broadly states the national attitudes and current positions, as appears from the specifics that follow *post*.

(C) The English Position

Before 1870 any agreement to remunerate a solicitor by a share of, commission on, percentage of, or sum proportional to the amount of property to be recovered was held to be illegal as champertous. The essence of the vice was a prospective agreement—a forward-looking bargain to "share in the fruits"—of any "joint speculative venture" as between lawyer and client. To measure and claim reward for *past* services by reference to a percentage of or commission on a recovery, or by reference to the value of a subject-matter was not in itself bad (and has long been common, particularly in estate, conveyancing and collection matters). [35]

By the Attorneys' and Solicitors' Act of 1870 [36] solicitors were permitted to enter into binding written agreements with their clients providing for more generous ("favourable") remuneration than they would otherwise have been entitled to under the standing scales and tariffs, subject to scrutiny by the Court. ("Unfavourable" oral agreements had long been known, and were enforced). The measure might be by commission or percentage, on the rationale that the statute sanctioned what would otherwise offend against the champerty laws, but any such measures were regarded strictly.

By the 1957 amendments to the Solicitors Act [37] the distinction between "favourable" and "unfavourable" agreements was dropped, so that now in England any agreements, provided they are in writing and signed by the parties or their agents, and whether made "before," "during" or "after," may be enforced by lawyer or client subject to the powers of the Court to interfere on grounds of unfairness, unreasonableness or illegality.

The current provisions pertain only to noncontentious matters. Although provisions are also made for agreements in contentious matters, and quite apart from the practical difficulty that there may often be no valuable "recovery" or "subject-matter," any bargain for a "share" by the lawyer continues to be regarded as illegal and unenforceable. [38]

The taking-up by lawyers of "speculative actions" should also be men-

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[35] For details of the English statutory history, *see* 35 HALSBURY, STATUTES OF ENGLAND 124, n.p and at 129-169. *See also* Williston, note 16, at 197, where it is said: "Compensation based upon the value of services is obviously affected in size and amount by the benefit to the client, but this compensation is measured after the service is performed and is determined by the actual facts in retrospect . . . ."

[36] 33 & 34 Vict. c. 28 (U.K.).

[37] 5 & 6 Eliz. 2 c. 27 (U.K.).

[38] For a detailed exposition, see CORDERY, *supra* note 31 and *see, e.g., per* Lord Denning M.R., in *Trepca, supra* note 16, at 220 "the law for centuries has declared champerty to be unlawful, and we cannot do otherwise than enforce the law; and I may observe that it has received statutory support, in the case of solicitors, in section 65 of the Solicitors Act, 1957." The § states:

(1) Nothing . . . shall give validity to:

(a) any purchase by a solicitor of the interest, or any part of the interest, of his client in any action, suit or other contentious proceeding; or

(b) any agreement by which a solicitor retained or employed to prosecute any action, suit or other contentious proceeding stipulates for payment only in the event of success . . . ."

tioned. Legal Aid, though pioneered in England after World War II, is by no means universal or perfect even now, but it practically answers in large part what was touched on by Lord Russell when he said, in 1900:

> . . . it was perfectly consistent with the highest honour to take up a speculative action in this sense, viz., that if a solicitor heard of an injury to a client and honestly took pains to inform himself whether there was a bona fide cause of action, it was consistent with the honour of the profession that the solicitor should take up the action. It would be an evil thing if there were no solicitors to take up such cases because there was in this country no machinery by which the wrongs of the humbler class could be vindicated. Law was an expensive luxury and justice would very often not be done if there were no professional men to take up their cases and take the chance of ultimate payment, but this was on the supposition that the solicitor had satisfied himself by careful enquiry that an honest case existed. [39]

Lord Justice Diplock said, in 1967:

> But most litigants are laymen. They cannot effectively avail themselves of the remedies provided by the courts except with the professional assistance of lawyers: hence the creation 20 years ago of the comprehensive scheme for legal aid designed to enable every citizen, whatever his means, to obtain the skilled assistance of solicitors and counsel in the enforcement or defence of his legal rights through the machinery of the courts. [40]

In English eyes it is not the "percentage fee" in itself, nor even the prospect that a lawyer may be paid generously if he wins and less or not at all if he loses, that disturbs. Rather, it is feared that he may be tempted, "for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses." [41] One might add, as further "hazards" all essentially stemming from a basic "conflict of interest with duty" position, that the fears are that:

(i) — an opportunity for settlement might be advised against (or grasped, depending on whether the lawyer was adventurous or conservative) contrary to a client's dispassionate "best-interests";

(ii) — a lawyer might be tempted to ambulance-chase, Chicago fashion, (implying pay-offs to runners, high-pressure salesmanship, and similar practices);

(iii) — hard and unconscionable bargains might be driven. [42]

(D) The United States

In the United States the contingent fee is and has long been lawful and almost the norm in all jurisdictions, save possibly one, being sanctioned by statutes and judicial decisions. The English common law of maintenance

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[39] In Ladd v. London Road Car Co., 110 L.T.J. 80 (1900).

[40] Allen v. Sir Alfred McAlpine & Sons Ltd., [1968] 2 W.L.R. 366 at 378 (C.A. 1967).

[41] Quoted from *Trepca, supra* note 16, at 7.

[42] Youngwood, *Contingent Fee—A Reasonable Alternative?* 28 MOD. L.R. 330, at 333 (1965) and Williston, *supra* note 16, at 198 set out the negative arguments exhaustively.

and champerty, at least to the extent that it was held to render contingency agreements unlawful, was clearly rejected as being locally inapplicable. The Supreme Court of the United States and many state high courts have considered the matter, and have uniformly taken the view that such public policy considerations as underlaid the prohibitory English doctrines were outweighed, in American society, by the practicality that: "[a contingent fee contract] is often the only way by which the poor and helpless can have their rights vindicated and upheld and the injuries they suffered redressed." [43]

The courts have, however, imposed limitations and restrictions, again on policy grounds, holding that contingent fee contracts must be reasonable as to terms and amount and that there must be no undue influence or overbearing on the part of the lawyer. Further, it has been held that in criminal and matrimonial causes and in "lobbying" contexts, where the interests of society impinge, contingent fee arrangements are improper.

> Many lawyers there [in the United States] conduct litigation on the footing that, if successful, they are to retain a percentage of the proceeds, such percentage being sometimes as high as one-third or even one-half of the proceeds; but, if unsuccessful, they are to receive nothing. The percentage thus payable to the lawyer is called a "contingency fee," because it is only payable in the contingency of his winning. This practice is so prevalent there . . . . [44]

The ethical propriety, as distinguished from the legality, of contingent fee arrangements was long debated in the United States, as it has been elsewhere, with the proponents carrying the day. [45]

(*E*) *Canada*

In Canada we have, generally, moved from an unequivocal "no" towards a qualified "yes/maybe" and, in what is sometimes said to be typical Canadian fashion, have done so without really planning or perhaps even intending it. The English have no monopoly on "muddling through." The story can be sketched in this way:

1. In the pre-Confederation colonial era the three "charter" common law colonies and Quebec each received (or had ordained) the body of English criminal common law, including its doctrines and misdemeanours of maintenance and champerty.

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[43] Quoted by Radin, *supra* note 30, at 188, being dicta of the Connecticut Supreme Court of Errors in Gruskay v. Simenuskas, 140 A. 724, at 727 (1928).

[44] Per Lord Denning M.R., in *Trepca*, *supra* note 16, at 220.

[45] *See generally*, Radin, *supra* note 30 and Williston, *supra* note 15, at 187-89, for a statement of the American position. In JUDICATURE at 347 (1972) 55 the following appears:

> "New limits on contingent fees for attorneys have been set by the Supreme Court of New Jersey. They are: 50 per cent on the first $1,000 recovered; 40 per cent on the next $2,000; one-third of the next $47,000; 20 per cent of the next $50,000; and 10 per cent of anything above $100,000. The maximum fee that a lawyer could collect on a $100,000 settlement would be about $27,000 . . . The order was issued following hearings in which strong opposition was expressed by lawyers . . . ."

2. Those common law colonies also each received or adopted the body of English civil common and statute law as it stood on their respective foundation-dates, subject to qualifications as to local interpretations and changes. [46]

3. Quebec, on the civil side, retained and adhered to its French, *droit civil* foundations.

4. British Columbia, Prince Edward Island and Newfoundland, while late-joiners of Confederation, and Manitoba, Alberta and Saskatchewan, also late joiners or creations from the Ruperts' Land territories of the Hudson's Bay Company, each broadly followed the model of the "charter" common law provinces, taking on English criminal and civil common law as of various dates.

5. Under the Confederation Scheme of 1867 "criminal law and procedure" was made federal, while "property and civil rights" became provincial. [47] Parliament adopted a national Criminal Code in 1892 based on Stephens' famous draft, but that Code was not exhaustive, leaving alive (if obscure) sundry "common law crimes" including our friends maintenance and champerty. [48] Interestingly, certain of the more troublesome species of maintenance such as conspiracies to obstruct justice, witness-tampering and subornation of perjury were codified right from the start, but champerty was not. It was suggested that ". . . the genus has been lost in the species." [49]

6. Regulation of the legal profession and of lawyers' fees fell clearly within provincial jurisdiction. Except in Quebec, where M. le Notaire holds sway, the English professional models and traditions were broadly followed, save that the complete separation and specialization between barristers and solicitors or attorneys was found unworkable in a new, pioneering and sparsely populated society, with the consequence of "fusion."

7. Attorneys (the old common law term) and solicitors (who practiced in Chancery) were long held to be "officers of the court" and subject to its special regulation and discipline as such. Such regulation encompassed, and by modern statutes and rules still encompasses, powers nowadays usually exercised by special "taxing officers" and, on review, by the Judges, to "tax" (that is, audit or review) legal fees and fee arrangements. [50]

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[46] *See, e.g.*, per Perdue J.A., in *Thomson, supra* note 26, where the Manitoba position is canvassed.

[47] The B.N.A. Act provides:

§ 91 the exclusive Legislative Authority of the Parliament of Canada extends to . . .

27. The Criminal Law . . . including the Procedure in Criminal Matters.

§ 92 In each Province the Legislature may exclusively make law in relation to . . .

13. Property and Civil Rights in the Province.

[48] For a succinct exposition see, TREMEEAR, *supra* note 25.

[49] *Per* Perdue J.A., in *Thomson, supra* note 26, at 347.

[50] *Supra* note 33. No attempt is made to detail the particular Canadian arrangements, since they can be found in any standard work on "Costs."

8. Commencing in 1890[51] provincial legislatures enacted various Acts directed towards legitimizing and regulating contingent fee arrangements. Some were struck down as being *ultra vires*, some were rather oddly-construed, and some have stood.

Thus, in this country between 1867 and 1955 it was held to be a crime nationally, except in Manitoba, to be guilty of maintenance by champerty, and in most if not all the provinces maintenance and champerty were held to be independent civil wrongs or torts. In Quebec, by reason of their acknowledged criminality, agreements so tainted were held to be unenforceable for illegality. In 1955 the crimes were abolished. It seems that they continue as torts save to the extent that they may have been modified by statute.[52]

Was and is a contingent fee arrangement between a lawyer and his client necessarily, by definition, champertous? Although Canadian courts have, over the years, frequently ruled respecting lawyer/client fees agreements, and have considered the validity of various provincial "enabling" statutes, they have seldom grasped the nettle, preferring to assume the conclusion. An exhaustive chronicling of the decisions would be redundant. What follows is selected to illustrate the varying approaches and judicial attitudes:

1. In 1907 Chancellor Boyd said:

> Especially does the law forbid any agreement for the lawyer to share in the proceeds of a litigated claim as compensation for his services . . . The effect of the agreement first made is that the solicitor and the client embark in a joint speculation to be prosecuted in the Court for their joint advantage — the client bringing in his claim for injuries and the lawyer contributing his skill and service. When the professional man becomes a covert co-litigant instead of an independent advisor, many are the temptations to secure success by unworthy means . . . [In the United States] Things have gone from bad to worse on this downward grade, for now the 'American Ambulance-Chaser' has become a visible factor in so called professional life . . . .[53]

His Lordship held that such arrangements contravened the statute relating to champerty and violated the solicitor's oath of office, and concluded: "It is well then, in Ontario to repress the beginnings of anything savouring of this kind of illicit procedure."

2. In 1927, with a local background of earlier similar condemnations, in considering a provincial "enabling" statute, the British Columbia Court of Appeal[54] affirmed that position, striking down the legislation on the reasoning that:

(a) Criminal Law is federal;

(b) Champerty is a part of the criminal law;

(c) Agreements for contingent fees are necessarily champertous;

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[51] With the enactment by the Manitoba Legislature of Man. Stat. 1890 c. 2 § 37.

[52] *Supra* note 15.

[53] In *Re* Solicitor, 14 Ont. L.R. 464, at 465 (High Ct. 1907).

[54] In *Re* Section 100 of the Legal Professions Act, [1927] 2 W.W.R. 808 (B.C.).

(d) a province cannot, constitutionally, legalize a crime.

3. Seventeen years earlier an opposite result had been reached in Manitoba, its Court of Appeal having held, in considering a similar "enabling" statute, that:

> . . . not all the criminal laws of England were introduced, but only those that were applicable to the Province, that is, to the conditions of life then existing in the Province. In the sections of the [Criminal] Code (10 & 11) which deal with the introduction of the criminal law into Ontario and British Columbia, no such qualification as the above is found . . . The occupation of Rupert's Land by the Hudson's Bay Co. under its charter did not introduce all the laws of England as existing in the year 1670. In the case of an uninhabited country, as Rupert's Land was, the few tribes of Indians . . . For more than a hundred years after the date of the Company's charter there were no civil or criminal courts in Rupert's Land and no litigation to stir up or maintain. [p. 345].
>
> I am aware that expressions have been used by a high authority to the effect that the law of maintenance and champerty is in force throughout Canada as part of the criminal law of England . . . [but] . . . . the clause in the Dominion statute purporting to introduce that law differs widely from the other sections introducing the criminal law of England into other provinces. . . . . Section 65 of the Law Society Act has been in force for twenty years . . . I confess that I can see nothing morally wrong in such a bargain between solicitor and client. The statute was designed to legalize such a bargain and to take away any objection that might be urged against its validity under the doctrine of champerty. This is purely a matter relating to property and civil rights until the Dominion Parliament steps in and makes champerty an actual criminal offence . . . [pp. 348-49].[55]

4. The Dominion Parliament did no such thing. Rather, effective on April 1, 1955, it quietly abolished maintenance and champerty as crimes in any part of Canada.

5. That abolition was judicially-noticed by Lord J. in British Columbia in 1963. His Lordship said:

> The offences may not have been abolished, but parliament has seen fit to make them ineffective and, in the result, the common-law offences should not now be regarded as crime under the criminal law of Canada. In any event one inescapable conclusion which may be drawn from sec. 8 of the *Code* is that parliament does not consider maintenance and champerty to be against public policy or the public interest. . . . The reason which has motivated our courts in holding against champertous agreements, namely as being contrary to public policy by reason of champerty being a common-law offence, no longer exists.[56]

6. Earlier, in 1962, Mr. Justice Michaud in New Brunswick, after considering dicta of Earl Slebourne L.C., had said:

> So, if an action for maintenance would not lie if the act of maintenance had not been declared criminal, and as champerty is a kind of maintenance, it seems to follow that an agreement to share in the proceeds or results of an

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[55] In *Thomson, supra* note 26.

[56] In Amacher v. Erickson, 42 W.W.R. 348, at 352 (B.C. Sup. Ct. 1963).

> action or suit would not be champertous if champerty were not a criminal offence . . . Champerty and maintenance are no longer criminal offences in Canada. It would thus seem that the court's decision with reference to maintenance and champerty rendered before 1955 have no longer any application to present day conditions. In this Province there is no statute respecting champerty. [57]

7. In Ontario, interestingly, there is such a statute. It is worth reproducing:

> 1. Champertors be they that move pleas and suits, or cause to be moved, either by their own procurement, or by others, and sue them at their proper costs, for to have part of the land in variance, or part of the gains. 33 Edw. I.
> 2. All champertous agreements are forbidden, and invalid. [58]

8. Finally, in British Columbia in 1964, [59] in a situation where:

(a) the provincial enabling statute authorized the making of lawyer/client remuneration agreements for services to be rendered, subject to judicial review as to fairness and reasonableness (the statute being silent as to whether the "measure" might be by percentage, commission or share);

(b) the statute also said: "Nothing . . . shall authorize the making of a champertous contract";

(c) a lawyer and client had agreed upon a 25% fee to be based on a certain award, Mr. Justice Whittaker, after affirming the Trial Judge's finding that the agreement was not definitely or finally made until after the award, and holding that the lawyer did not instigate the proceedings or the fees agreement, said:

"Even if it could be said that there was an agreement before trial for payment to the solicitor of a percentage of the proceeds, in my opinion, that would not, under the circumstances here present, be a champertous agreement." [60]

His Lordship then reviewed and adopted the authorities and line of reasoning that runs:

(a) Maintenance is the officious intermeddling or stirring-up of litigation by those not legitimately concerned,

(b) Champerty is a species of maintenance, involving some division of the fruits,

(c) " . . . while there can be maintenance without champerty, there

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[57] In Hogan v. Hello, 1 N.B.R.2d 306, at 307 (Q.B. 1962). The reasoning, though not the result, is critically commented upon by Bulbulia, *supra* note 30.

[58] An Act Respecting Champerty, ONT. REV. STAT. c. 327 (1897), to be found in vol. 6, Appendix "A" of ONT. REV. STAT. (1970), under the heading "Certain Imperial Acts and Parts of Acts relating to Property and Civil Rights that were Consolidated in The Revised Statutes of Ontario, 1897, Volume III pursuant to Chapter 13 of the Statutes of Ontario, 1902, that are not repealed by the Revised Statutes of Ontario, 1970 and are in force in Ontario subject thereto."

[59] In *Monteith, supra* note 24.

[60] *Id.* at 341.

> can be no champerty without maintenance. There must be present in champerty as in maintenance an officious intermeddling . . . ." [61]

Having found that the initiatives came from the client, not the lawyer, and so negatived any maintenance, his Lordship said:

> The respondent [lawyer] could not guarantee success and the client was either unable or unwilling to risk incurring a large bill for legal services. He was, however, willing that his solicitor should risk his valuable time and that the solicitor should in return be compensated by more than the usual charges in the event of success. It was agreed that in the event of failure the respondent's charges would be very nominal. Such agreements would not be necessary were all clients wealthy; but unfortunately there are many poor people whose claims would never be tested in Court unless solicitors are prepared to do battle on their behalf, running the risk of receiving an inadequate fee if unsuccessful, and being compensated by receipt of more than the usual charges should success attend their efforts . . .
> . . . There is nothing in this [enabling] subsection which says that the additional remuneration must be a fixed sum regardless of the amount recovered. Such an agreement might well be less fair to the client than one for payment of a percentage . . . . [62]

Referring to the 1927 Court of Appeal decision striking-down the earlier British Columbia "percentage" enabling statute, his Lordship continued:

> The point that an agreement, to be champertous, must involve one or more of the aspects of maintenance does not appear to have been considered. The decision is not, in my view, authority for the proposition that all percentage agreements between solicitor and client are necessarily champertous . . . [the enabling statute now in force] would appear to be wide enough to include agreements on a percentage basis. If it is intended to exclude them, it should be done in express terms . . .
> For the reasons given I am of the opinion that even if, as appellant alleges, there was an agreement between respondent and Calladine in the year 1955 whereby the former would receive a percentage of the amount to be recovered, such an agreement would not, under the circumstances, be champertous. [63]

Elsewhere Mr. Justice Whittaker did caveat the position by saying:

> It should not be assumed, from anything I have said, that there can never be a champertous agreement between solicitor and client. If a solicitor, hearing that Smith has been in a motor car accident, seeks Smith out, the latter not having up to that time contemplated any action, and bargains for a retainer including a percentage of any sum recovered, that would be champerty . . . [64]

Strictly, of course, much of what fell from the learned Judge was *obiter*, and indeed his brethren (Mr. Justice Bird and Mr. Justice Davey) who concurred in the result, deliberately avoided the "champerty" issue. Nonetheless the decision is the most recent to come from a Canadian appellate court, and it will be respectfully contended that it is right both in law and in principle. It remains only for more conservative legislatures to act.

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[61] *Id.* at 342.
[62] *Id.* at 342-43.
[63] *Id.* at 344.
[64] *Id.* at 343.

III. An Epitome of Current Canadian "Statutory" and "Rules" Positions

Five of the ten provinces and one territory now have, either in their statutes, Rules of Court, or in By-Laws or Rules having the force of law, provisions which, broadly:

(a) sanction the making between lawyer and client of "tailor-made," forward-looking, "remuneration" agreements;

(b) vary considerably as to details of scope, required mechanics, and provisions for outside review or scrutiny.

None, with any clarity, expressly abolish champerty or the "public policy" considerations which inhere in it. In the other six presumably, the Old Regime holds sway.

The six, and the essence of their provisions, are as follows:

1. Alberta

Under statutory warrant the Rules of Court permit the making of "prospective" agreements, including measures by percentage and contingencies on outcome, *provided* that any "contingency" agreements be written, be signed by the client or his agent, and contain particulars of the parties, the claim, the contingency, a maximum, and a notice that the agreement may be reviewed by the [Supreme Court] Clerk and a Judge, *and* that the agreement be filed in the Clerk's office within fifteen days of its making. The provisions as to "non-contingency" agreements differ with respect to filings and review. [65]

2. British Columbia

Provincial statute authorizes written "prospective" lawyer/client remuneration agreements, and declares that the taking of a fee "based on a proportion of the amount recovered" is not in itself champertous. Such agreements may be reviewed as to fairness and reasonableness by a Supreme Court Judge, and "Champertous contracts are prohibited." The rules of Court provide that in the *absence* of a special agreement lawyers may charge percentage commissions as specified on "the collection of accounts or claims." [66]

3. Manitoba

In this maverick jurisdiction provincial statute has, since 1890, authorized the making of "contingency contracts" between lawyer and client. The current definition envisages and encompasses lawyers' remuneration "for services rendered or to be rendered" that is:

> a portion of the proceeds of the subject matter of the action or proceedings . . . .

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[65] *See* Alta. Stat. 1967 c. 42 § 38(a)(i) and Alta. Rules of Court 615-18 and 646, Alta. Reg. 390/68.

[66] *See* Legal Professions Act, B.C. Rev. Stat. c. 215, § 108 (1960), as amended by B.C. Stat. 1969 c. 15, § 20, and Sup. Ct. Rules Order 65 Rule, 27 Reg. 29 (B.C. 1961).

> a portion of the money or property in respect of which [the lawyer] is . . . employed, whether or not an action or proceeding therefor has been commenced or is contemplated; or
> a commission or a percentage of the amount recovered or defended or of the value of the property about which any transaction, action, or proceeding is concerned.

Any such contracts must be written, and a copy, together with a copy of specified statutory provisions relating to the right to have it reviewed on grounds of unfairness and unreasonableness by a Queen's Bench Judge, must be delivered to the client. The Rules of Court provide that copies of such "contingency contracts" must be filed in Court in actions where they pertain. They also authorize percentage/commission charges in the absence of other arrangements in specified administration and partition matters. [67]

4. New Brunswick

Under provincial statute the Barristers Society has made Rules which require that any "contingent fee" agreement be written, signed by the client, and a copy must be given to the client endorsed with a notice of the statutory right to have the agreement reviewed. The Rules of Court (as they do in many provinces) provide for "percentage fees" in the *absence* of agreements in partition and administration matters. [68]

5. North West Territories

Under the Judicature Ordinance the Rules of Alberta [item 1, *supra*] are applicable. [69]

6. Quebec

Under By-Law of the Bar enacted in 1968 and having statutory force, Quebec advocates are required, in "collection matters," to charge fixed, percentage fees. In "non-collection matters" they are permitted, "in advance in writing" to agree with clients "to charge [them] an extra judicial fee not exceeding 30% of the amount obtained and collected from any source whatsoever, whether as a result of a settlement or pursuant to a judgment, in addition to the judicial costs paid by the opposing party and the extra judicial disbursements." [70]

In contrast to the six foregoing, in Ontario, the most wealthy and populous of the provinces, statute makes it clear that although "percentage fees" agreements related to value of subject matter are permissible with respect to non-contentious and conveyancing matters, in any action or other contentious

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[67] *See* The Law Society Act, MAN. REV. STAT. c. L100, § 49 (1970), and Rule 638-A of the Queen's Bench Rules enacted in 1956.

[68] *See* The Barristers' Society Act, 1931, 21 Geo. 5 c. 50 and amendments, §§ 3(a), 31(8) and 37, and Rule E-2 enacted by the Council of the Society in 1971, quoted *post* at p. 25.

[69] *See* Judicature Ordinance 1970 (Third Session) § 25(1). *Cf.* note 25, for Alberta Rules references.

[70] *See* Bar Act, QUE REV. STAT. c. 247, § 9 (1964), and By-Law No. I of the Bar of the Province of Quebec, Arts. 86 and 87.

proceeding "nothing . . . gives validity to an agreement . . . for payment only in the event of success . . . or where the amount to be paid . . . is a percentage of the amount or value . . . or [is] dependent upon the result . . . ." [71] The Champerty Act" [72] is a part of Ontario law, and thus far no court of the province has gone behind the attitude that "contingent fees equal champerty."

Thus, in cross-country survey terms, we have Alberta, British Columbia, Manitoba, the North West Territories and Quebec saying "yes" (or at least "maybe"), and Saskatchewan, the Yukon, Ontario, Nova Scotia, Prince Edward Island and Newfoundland saying "no" (or at least "probably not") as to the legality of contingent fees. [73] At least the split is not along the usual regional or linguistic lines!

Before 1955 the established doctrine in Canada ran:

(a) Champerty is a crime and a tort, and is contrary to public policy;

(b) Contingent Fees equal Champerty;

(c) Therefore, Contingent Fees are unlawful.

In 1955 champerty ceased to be a crime, but it continues unchanged in its provincial "Property and Civil Rights" aspects save to the extent that it has been modified by particular "enabling" Acts. Do contingent fees necessarily equal champerty?

It has been said:

> A fee which is based on contingency is quite distinct from a fee measured by results. Compensation based upon the value of services rendered is obviously affected in size and amount by the benefit to the client, but this compensation is measured *after* the service is performed . . . The fundamental aspect of the contingency fee agreement is that it is usually made before the action is commenced. [74]

That is, the crucial test is, "prospective or retrospective?"

It is submitted that Mr. Justice Whittaker in *Monteith*, [75] albeit by *obiter*, quite clearly stated the correct answer in the now state of the law. His Lordship said in effect:

1. Maintenance involves officious intermeddling or stirring-up;

2. There can be no champerty without maintenance;

3. If a lawyer did not "officiously intermeddle or stir-up," his fees arrangements with his client, whether or not they involved his receiving a share of prospective fruits, cannot be held to be tortious or unenforceable as being contrary to public policy under the rubric of champerty.

Of this line of reasoning a distinguished commentator wrote:

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[71] Solicitors Act, ONT. REV. STAT. c. 441, § 30 (1970).

[72] Quoted *supra*, note 58, at 18.

[73] Representing some softening of the position (*i.e.*, as respects Quebec, Alberta and the North-West Territories) since the subject was examined by Williston in 1968, *supra* note 16.

[74] By Williston, *supra* note 16 at 197.

> Nor is it appealing to say that an agreement to pay a contingent fee may not be maintenance if there is no stirring up of strife. This conclusion appears to be directly contrary to the decision of the Court of Appeal in *Re Trepca Mines Ltd.* [76]

To the present writer the logic and legal respectability of Whittaker J.A.'s dicta in *Monteith* appears impeccable, and if anyone is wrong in principle it is the English Court of Appeal.

IV. Contingent Fees and Legal Ethics

The voluntary Canons adopted by the Canadian Bar Association in 1920 (which have been locally-implemented with some variations as Rulings in British Columbia, Saskatchewan and Ontario), declare that: "[The lawyer] should not, except as by law expressly sanctioned, acquire . . . any interest in the subject-matter of the litigation . . . ." [77]

The 1956 Code of the International Bar Association, which adopted with slight changes the provision of the 1908 American Canons, says:

> A contract for a contingent fee, where sanctioned by the law or by professional rules and practice, should be reasonable in all the circumstances of the case, including the risk and uncertainty of the compensation and subject to supervision of a court as to its reasonableness. [78]

The 1970 American Code provides:

> A lawyer shall not enter into an agreement for . . . an illegal or clearly excessive fee. A fee is clearly excessive when . . . a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guidelines in determining the reasonableness of a fee include . . . whether the fee is fixed or contingent.
> A lawyer shall not enter an agreement for . . . a contingent fee for representing a defendant in a criminal case. [79]

And the 1971 New Brunswick Rules provide:

> A retainer agreement providing for a contingent fee must be in writing and signed by the client; the terms must be reasonable; and the client must be given the opportunity at the outset of paying for the legal services on a regular solicitor and client basis. A copy of any such agreement must be given to the client at the time of its execution and the lawyer shall include in any such agreement notice of [a statutory right of review] . . . . An agreement providing for a contingent fee for representing a defendant in a criminal or quasi criminal case is improper. [80]

No other formal enunciations are to be found, although the subject gets talked about from time to time.

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[75] Monteith v. Calladine, *supra* note 24, at 342.
[76] *Id.*
[77] C.B.A., Canons of Legal Ethics No. 2(7) (1920).
[78] Art. 18. Canon 13 of the (now superseded) 1908 American Canons was almost identical.
[79] Disciplinary Rules 2-106(A) and (B)(8).
[80] N.B. Rules of Practice Rule E-2 (1971).

V. The Arguments Pro and Con the Contingent Fee

Eminent Judges and distinguished commentators have from early times, in their reasons and writings, exhaustively marshalled the arguments with varying degrees of persuasiveness, elegance and rhetoric. Despite the arguments and blandishments, this writer suspects that Canadian lawyers tend on this subject to be non-politically (but equally obstinately) either liberal or conservative. Seven "pros" and then "cons" were reiterated in an exhaustive Canadian article in 1968.[81] The two positions can be summarized as follows:

The Proponents say that the contingent fee equalizes, or at least lessens the disparities between the rich and the poor, in that:

(a) Lawyers are essential/necessary evils useful towards the attainment of justice, particularly *inter partes* civil justice;

(b) Lawyers (as do plumbers and others) require money in payment for their time and efforts;

(c) Since the poor, by definition, have no money, the carrot of the prospect of reward, albeit in the form of a "piece of the action," will induce at least some lawyers to run the risks of "no pay," and as a spin-off those lawyers will (if only by reason of self-interest):

(i) shrewdly assess and screen the merits and prospects of their clients' cases, and

(ii) strive to the highest towards their best preparation and presentation. Under our adversary system of justice clients are thus competently served, justice is most likely to be done, and everyone benefits.

The contestants say that all that sounds beautiful, but human nature is such that "co-adventuring" lawyers are almost bound to be directly or indirectly influenced by their financial self-interest in such a way that their execution of those professional duties, which they owe both to their clients and to the administration of justice, will suffer or be compromised. The dangers inhering in an inescapable "conflict of interest" position outweigh any possible public benefits, and the only realistic solution is prohibition. The dangers usually cited include fears of increased frivolous and vexatious litigation, of devious and corrupt practices relating to witnesses and evidence, of cut-throat competition between lawyers, of overreaching and overbearing, of diminished candour, and of the discouragement of compromises. Traditional and "anti-commerce" objections are also, at times, put forward.

Both positions reflect a pragmatic (some would say a downright cynical) attitude towards what motivates lawyers. Even lawyers do good works—far more, generally, than they are credited for. However, no one suggests that good works or capricious charity can begin to answer what is, essentially, an economic question.

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[81] Williston, *supra* note 15. *See also supra* note 42. Radin, *supra* note 30 also reviews the arguments. No fresh ones, either more or less persuasive, occur to this writer.

In their 1970 Code the Americans state the position this way:

> Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that
>
> (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance and obtain the services of a competent lawyer to prosecute his claim, and
>
> (2) a successful prosecution of the claim produces a res out of which the fee can be paid.
>
> Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil case with any client who, after being fully informed of all relevant factors, desires that arrangement. Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relation cases are rarely justified. In administrative agency proceedings contingent fee contracts should be governed by the same considerations as in other civil cases. Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a *res* with which to pay the fee. [82]

The whole subject of the propriety or morality of the contingent fee strikes this writer as approaching the theological, in that neither camp can hope, save by arguing to extremes, to prove or disprove anything, and there are few if any hard facts to clutter up the debates.

VI. Conclusion

This writer, in the conviction that Manitoba has been right all along, submits that:

(a) there are no longer any legal obstacles to the legitimizing, definition and sensible regulation of the contingent fee in any part of Canada, [83]

(b) there is ". . . nothing morally wrong in . . . a [contingent fee] bargain between solicitor and client," [84]

(c) there *are* certain dangers or hazards inhering in the arrangement, but regulation, not prohibition, is the proper solution,

(d) as legal aid and other new and emerging "delivery systems" improve and become more readily and universally available to needful Canadians, the heat and rhetoric that have for so long bedevilled the contingent fee will abate, since the underlying economic necessities that chiefly justify it will be reduced. Depending on whether and how far "partial" or "con-

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[82] Ethical Consideration 2-20.

[83] The "constitutional difficulties" attributed to the occupancy of the field by the (federal) Criminal Law jurisdiction disappeared with the abolition of all uncodified common law crimes.

[84] A subjective value-judgment, no doubt; it was articulated by Perdue, J.A., in *Thomson, supra* note 16, at 349, sixty-three years ago.

tributory" legal aid becomes available for those not poor, but modestly-circumstanced, [85] the contingent fee may continue to afford a useful option for some. It may not be too long before the whole subject becomes as quaint as are discussions of maintenance, champerty and barratry.

The essence of desirable regulation can best be accomplished in two ways:

1. There should be incorporated in any "legitimizing" statutes or Rules ample and effective provisions empowering the courts to scrutinize contingent fee arrangements as to fairness and reasonableness, coupled with effective communication to all clients of their right thereto, and provision of a simple and speedy mechanism therefor;

2. The integrity (or, for those less trusting, the urge for professional self-preservation) of lawyers, over whom there always hangs the very effective disciplinary powers of their Governing Bodies, can be relied on for the avoidance of such real dangers and hazards as may arise. These, it is hoped, are soon to be reinforced by an improved statement and guide in the area of legal ethics and problems of professional responsibility, [86] and by increased emphasis on such matters in the law schools and in lawyers' associations and assemblies. [87]

[85] The Ontario Legal Aid Plan, instituted in 1967, and generally regarded as being the most comprehensive and effective in this country thus far, contemplates the provision of partial aid on a contributory basis for those not destitute but unable to bear the full cost of "private" legal services. Until now it has inclined to an "all or nothing at all" approach, leaving persons "in between" on their own. In these austere times one doubts whether its expansion towards assisting those needful but not destitute is likely to be encouraged.

[86] PRELIMINARY REPORT, CODE OF PROFESSIONAL CONDUCT (1973). A similar committee of the American Bar Association, after five years' study, produced a Code of Professional Responsibility which superseded the 1908 Canons and was promulgated in 1970.

[87] Several of the sixteen Canadian law schools now offer formal instruction in these areas, and their systematic emphasis has been urged by, *e.g.*, the Special ("MacKinnon") Committee on Legal Education, whose recommendation on this point was approved by the Ontario Governing Body. Panels and symposia within the profession are becoming increasingly common.