COURT OF APPEAL FOR ONTARIO

CITATION: Bogue v. Miracle, 2025 ONCA 188
DATE: 20250312
DOCKET: COA-24-CV-0478

Nordheimer, Gomery and Dawe JJ.A.

BETWEEN

Glenn Bogue

Applicant/Moving Party (Respondent)

and

Andrew Clifford Miracle*, Andrew Clifford Miracle III, Smokin' Joe's and Smokin' Speedway, Virginia Maracle, Lisa Sexsmith Maracle operating as Smokin' Speedway and Yolanda Maracle

Respondents (Appellant*)

AND BETWEEN

R.A. (Rod) Gram
Glenn P. Bogue*

Plaintiffs (Respondent*)

and

His Majesty the King (The Crown)

and

Andrew Clifford Miracle*
(doing business as Smokin' Joe's)

and

Andrew Clifford Maracle III,
Virginia Maracle, Lisa Maracle Sexsmith
(all 3 doing business as partners in Smokin' Speedway)

Defendants (Appellant*)

AND BETWEEN

Andrew Clifford Miracle

Applicant (Appellant)

and

Andrew Clifford Maracle III, Jasmine Johnson,
Canadian Imperial Bank of Commerce (CIBC)

Respondents

AND BETWEEN

Andrew Clifford Miracle

and

Glenn Bogue

AND

In Bankruptcy and Insolvency
in the Matter of the Bankruptcy of
Andrew Clifford Maracle III
of the County of Hastings in the Province of Ontario

Andrew Rogerson and Nikhil Mukherjee, for the appellant

Greg Roberts, for the respondent

Jeffrey Larry, for the receiver, Schwartz Levitsky Feldman Inc.

Heard: February 26, 2025

On appeal from the judgment of Justice Graeme Mew of the Superior Court of Justice, dated April 4, 2024, with reasons reported at 2024 ONSC 1964.

Nordheimer J.A.:

[1] Andrew Miracle appeals from the judgment of the motion judge that granted summary judgment against him, and in favour of the respondent, his former lawyer, for $2,858,500. The appellant also seeks an order setting aside the solicitor's lien granted to the respondent.

(1) Contingency fee

[2] The appeal arises in the context of a business dispute between the appellant and his son, Andrew Maracle III, that involves the business "Smokin' Joe's". Both the appellant and his son are Mohawks of the Bay of Quinte. Smokin' Joe's operates as an on-reserve gas bar on Tyendinaga Mohawk Territory.

[3] The appellant and his son eventually agreed to settle their dispute by binding arbitration. The appellant retained the respondent as his lawyer for the arbitration. He did so pursuant to a contingency fee agreement ("CFA") that said, in part: "Counsel will receive a contingency fee of 25% of the amount awarded by the Arbitrator, who shall be selected with mutual consent of the parties to this agreement." An appendix to the CFA stated that "[t]he Amount of the fee is based on the amount recovered through the efforts of the lawyer", and provided a numerical example.

[4] The arbitrator found in favour of the appellant and awarded him $11,486,238 as his share of the undistributed profits of Smokin' Joe's. The arbitrator also ordered the dissolution of the partnership that owned Smokin' Joe's. The arbitrator provided for a buy/sell process. The process ultimately resulted in the appellant acquiring his son's interest in the business, along with the parcel of land it is located on, for $1, after his son failed to submit a bid for the business. An application to set aside the arbitrator's award brought by the son and his wife was dismissed by Kershman J. on October 10, 2017, and he was denied leave to appeal to this court.

[5] The appellant has not recovered any of the fixed sum awarded by the arbitrator. However, the appellant did gain control of the business. There does not appear to be any dispute that the business generates millions of dollars annually.

[6] The respondent says that the contingency fee owed to him under the CFA is $2,871,000. But for one small payment, the appellant has not paid it. The appellant contends that he does not owe the fee to the respondent because the appellant has not received the money that he was awarded under the arbitration.

[7] Based on this debt, the respondent sought the appointment of a receiver over the assets, undertakings and properties of the appellant, his son, and Smokin' Joe's. On October 11, 2019, Kershman J. granted the order, pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The son had, by this time, declared

bankruptcy but it does not appear that Kershman J. was aware of that fact at the time that he made the receivership order.

[8] The appellant appealed the receivership order. He asserted that the application judge had erred because: (i) he had no authority to make a final order for a receiver; (ii) there was no money owed to the respondent for fees on the CFA; and (iii) the final order for a receiver contravened ss. 29 and 89 of the *Indian Act*, R.S.C. 1985, c. I-5, which prohibits “levy, seizure, distress or execution” against the assets of an “Indian” situated on a reserve.

[9] On April 30, 2021, this court released its decision on the appeal.[1] The decision only addressed the third ground. This court found that, since the *Indian Act* issue had not been fully canvassed before the application judge, the matter had to be remitted to him for determination of that issue.

[10] On November 15, 2021, Kershman J. held that, in the particular circumstances of the case, the appointment of a receiver and manager of the appellant’s property was permitted by the "commercial mainstream" exception under s. 89 of the *Indian Act*. The appellant appealed again.

[11] On September 29, 2022, this court allowed the appeal, holding that the receiver, acting on behalf of a creditor who is not an “Indian” for the purposes of

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[1] *Bogue v. Miracle*, 2021 ONCA 278

the *Indian Act*, could not recoup profits from the appellant's on-reserve businesses.[2] However, this court also held that s. 89 did not protect the appellant's off-reserve assets from seizure.

[12] Another fact that must be noted is that on January 29, 2018, the appellant had executed an assignment of the judgment to his then lawyer in trust. The assignment states that it is made under r. 60.7(12.2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.[3] Of consequence for this appeal, the assignment records a list of persons to whom the appellant owes monies, which includes the respondent, who is listed as being owed $2,871,000. The document states that the assignment "expressly does not affect Andrew Clifford Miracle's obligation to pay the above Creditors from his own assets, including from Smokin' Joe's".

[13] The appellant's central contention is that the motion judge erred in granting summary judgment in favour of the respondent for the contingency fee amount. He contends that, since the money ordered by the arbitral award has not been collected, he does not owe any contingency fee to the respondent.

[14] In my view, it is unnecessary, in the particular circumstances of this case, to engage in, and resolve, the debate over whether a contingency fee can only be

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[2] *Bogue v. Miracle*, 2022 ONCA 672, 163 O.R. (3d) 641, at paras. 46–47.
[3] That rule refers to the assignment of a writ of seizure and sale from one creditor to another.

due and payable if the client actually receives monies, nor is it necessary to resolve the corresponding debate over the proper meaning of the words “recover, recovers, recovered, recovery” as they are often used in this context.

[15] The *Solicitors Act*, R.S.O. 1990, c. S.15 clearly contemplates that a contingency fee can arise from the recovery of monies or the recovery of property. For example, s. 28.1(5) reads, in part:

> If a contingency fee agreement involves a percentage of the amount or of the value of the property recovered in an action or proceeding, ….

[16] As earlier noted, the arbitral award gave the appellant not only a monetary amount but also a process for the sale of Smokin’ Joe’s. That process led to the appellant gaining control of that business. There was a real monetary benefit conferred on the appellant as a result of the arbitration process. The appellant received, or has had access to, the significant funds that the business generates as a direct result of the arbitration. It follows from that reality that the appellant has received a benefit that gives rise to, and warrants, the payment of the contingency fee. In that regard, there is no reason, in my view, to interpret the CFA as requiring the appellant to pay the respondent only if he successfully collected a cash award. Reading the contract as a whole, giving the words used their ordinary and grammatical meaning, and consistent with the surrounding circumstances known

to the parties at the time of formation of the contract,[4] the CFA should be interpreted as requiring the appellant to compensate the respondent for his work if he received any benefit from the arbitration. The percentage of the amount awarded by the arbitrator that he was required to pay under the CFA simply provides the mathematical calculation of the amount due. No issue is taken with the calculation.

[17] My conclusion is reinforced by the contents of the assignment agreement. In that document, the appellant expressly acknowledges that he owes the respondent $2,871,000. It is an unconditional acknowledgment. That acknowledgment is entirely inconsistent with the position that the appellant now advances that no fee is payable because no portion of the monetary award has been paid. I note that the assignment agreement was signed in the context of enforcing the arbitration award. It simply does not lie in the mouth of the appellant to now contend that he does not, and never has, owed the contingency fee to the respondent.

[18] The appellant also asserts that the CFA cannot be enforced because it does not comply with the requirements of the *Solicitors Act* and the regulation under it (then O. Reg. 195/04). While the regulation, at that time, stipulated various items that had to be included in a contingency fee agreement, neither the statute nor the

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[4] *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 47.

regulation provided that non-compliance with these requirements rendered a contingency fee agreement void or unenforceable. Rather, s. 24 of the *Solicitors Act* reads, in part:

> [I]f 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….

[19] This court has previously ruled that a contingency fee agreement can be enforced if the court concludes that it is fair and reasonable: *Raphael Partners v. Lam* (2002), 61 O.R. (3d) 417 (C.A.), at para. 37. Similarly, in *Laushway Law Office v. Simpson*, 2011 ONSC 4155, 336 D.L.R. (4th) 632, Beaudoin J. said, at para. 126: “I conclude that a CFA that does not meet the requirements of O. Reg 195/04 is not inherently void or voidable.”

[20] The failings in the contents of the CFA relied upon by the appellant are not material to the nature of the proceedings in this case. I note, on this point, that while the appellant filed an affidavit in response to the motion, he did not say, or even suggest, in that affidavit that he did not understand, or was confused by, the CFA and what it required of him. In fact, the provisions from the regulation, that the appellant complains are missing from the CFA, do not appear to bear any relevance to the circumstances of this case nor should their absence render the CFA unenforceable.

(2) Solicitor's lien

[21] The appellant also challenges the solicitor's lien that the respondent obtained. He raises a number of issues with respect to the motion judge's decision to grant a solicitor's lien to the respondent. All of those issues were addressed in the motion judge's reasons. The appellant has failed to show any error of law or palpable and overriding error of fact, in the motion judge's reasons.

[22] The motion judge determined that the respondent could not obtain a solicitor's lien under s. 34 of the *Solicitors Act* because the fees arose out of an arbitration and not a proceeding in the Superior Court of Justice. I do not see any error in that conclusion. The wording of s. 34 is clear on this point.

[23] However, the motion judge also determined that the respondent was entitled to a common law solicitor's lien. A solicitor's lien under s. 34 and at common law have been said to be "two sides of the same coin": *Weenen v. Biadi*, 2018 ONCA 288, 141 O.R. (3d) 276, at para. 16. The granting of a solicitor's lien is also discretionary. The test for granting either form of solicitor's lien is the same. Three factors are to be considered:

a) the fund or property is in existence at the time the order is granted;
b) the property was "recovered or preserved" through the instrumentality of the solicitor; and

c) there must be some evidence that the client cannot or will not pay the lawyer's fees.

[24] The motion judge found that each of these factors were met. I agree. In addition, there is nothing on the facts of this case that would provide a basis for this court to interfere with the motion judge's exercise of his discretion to grant the solicitor's lien.

[25] The appellant raises an issue whether the solicitor's lien can apply to certain funds in his son's bankruptcy proceeding. That issue is not properly before this court. It is an issue that must first be dealt with in the bankruptcy proceeding.

(3) Conclusion

[26] I would dismiss the appeal. I would award the respondent his costs of the appeal fixed in the amount of $20,000, inclusive of disbursements and HST. I would not make any award of costs to the Receiver.

Released: March 12, 2025 "I.N."

"I.V.B. Nordheimer J.A."
"I agree. S. Gomery J.A."
"I agree. J. Dawe J.A."