CITATION: Nootchtai v. Nahwegahbow Corbiere Genoodmagejig, 2024 ONSC 6088
COURT FILE NO.: CV-24-00721782-00ES and CV-24-00721884-00ES
DATE: 20241031

ONTARIO

SUPERIOR COURT OF JUSTICE [Estates List]
BETWEEN:

GIMMA (CHIEF) CRAIG NOOTCHTAI ON HIS OWN BEHALF, AND ON BEHALF OF ATIKAMEKSHENG ANISHNAWBEK FIRST NATION, AND OGIMAA KWE (CHIEF) KAREN BELL AND COUNCILLOR CHESTER LANGILLE ON THEIR OWN BEHALF, AND ON BEHALF OF GARDEN RIVER FIRST NATION

Applicants

– and –

NAHWEGAHBOW CORBIERE GENOODMAGEJIG BARRISTERS AND SOLICITORS, DAVID NAHWEGAHBOW, DIANNE CORBIERE, ROGER JONES, MARK STEVENSON, DONALD WORME, and CONNIE ADDARIO, MIKE RESTOULE, PETER RECOLLET, DUKE PELTIER, ANGUS TOULOUSE, PATSY CORBIERE, and WILMA-LEE JOHNSON

Respondents

AND BETWEEN:

MIKE RESTOULE, PETER RECOLLET, DUKE PELLETIER, ANGUS TOULOUSE, PATSY CORBIERE, AND WILMA-LEE JOHNSTON, in their capacities as trustees and members of the LITIGATION MANAGEMENT COMMITTEE OF THE ROBINSON HURON TREATY LITIGATION FUND

Applicants

– and –

CRAIG NOOTCHTAI, in his capacity as TRUSTEE OF THE ROBINSON HURON TREATY LITIGATION FUND and CHESTER LANGILLE in his capacity as TRUSTEE OF THE ROBINSON HURON TREATY LITIGATION FUND

Respondents

2024 ONSC 6088 (CanLII)

BEFORE: Justice Jana Steele

COUNSEL: *Michael Rosenberg & Alana Robert,* for the Applicants Gimaa (Chief) Craig Nootchtai on his own behalf, and on behalf of Atikameksheng Anishnawbek First Nation, and Ogimaa Kwe (Chief) Karen Bell and Councillor Chester Langille on their own behalf, and on behalf of Garden River First Nation

Peter Wardle & Evan Rankin, for the Applicants the trustees and members of the Litigation Management Committee of the Robinson Huron Treaty Litigation Fund

Brian Gover & Dan Gouge, for the Respondents Nahwegahbow Corbiere Genoodmagejig – Barristers and Solicitors, David Nahwegahbow, Diane Corbiere, Roger Jones, Mark Stevenson, Donald Worme, and Connie Addario

HEARD: July 30, 2024

2024 ONSC 6088 (CanLII)

ENDORSEMENT

THIS VERSION HAS BEEN REDACTED TO REMOVE DOCUMENTS SUBJECT TO A SEALING ORDERR.

Overview

[1] When lawyers provide legal services to their clients, their clients are entitled to seek an assessment of their legal fees. This matter involves a very sizable partial contingency fee, $510 million (the "Legal Fees"), and whether it will be assessed. At this stage the Court is not asked to consider whether the Legal Fees are reasonable. The primary issue before me was whether the applicant parties could seek an assessment of the Legal Fees.

[2] The application pertains to the Robinson Huron Treaty Litigation Fund (the "RHTLF" or the "Trust"). The Applicants are Gimaa (Chief) Craig Nootchtai on his own behalf and on behalf of Atikameksheng Anishnawbek First Nation, and Ogimaa Kwe (Chief) Karen Bell and Councillor Chester Langille on their own behalf and on behalf of Garden River First Nation (collectively, the "Applicants"). The Applicants seek, among other things, a Court direction requiring the assessment of the partial contingency legal fees paid to the respondents, Nahwegahbow Corbiere Genoodmagejig – Barristers and Solicitors, David Nahwegahbow, Diane Corbiere, Roger Jones, Mark Stevenson, Donald Worme and Connie Addario (collectively, the "Lawyer Respondents").

[3] Gimaa (Chief) Craig Nootchtai is the elected Chief of Atikameksheng Anishnawbek First Nation ("Atikameksheng"). Atikameksheng was one of the settlors of the RHTLF. Gimaa Nootchtai is Atikameksheng's trustee of the RHTLF.

[4] Ogimaa Kwe (Chief) Karen Bell is the elected Chief of Garden River First Nation ("Garden River"). Councillor Chester Langille is an elected Councillor of Garden River. Garden River was one of the settlors of the RHTLF. Councillor Langille is Garden River's trustee of the RHTLF.

[5] The trustees and members of the Litigation Management Committee (the "LMC") of the RHTLF also seek advice and direction from the court regarding, among other things, whether the Settlement Proceeds (defined below) are "Assets" of the Trust. The LMC is composed of Mike Restoule, Peter Recollet, Duke Peltier, Angus Toulouse, Patsy Corbiere, and Wilma-Lee Johnston, each of whom is a RHTLF trustee.

[6] For the reasons set out below, I am directing an assessment of the Partial Contingency Fee Agreement (defined below) and the Legal Fees. In addition, I am satisfied that the Settlement Proceeds are Assets of the Trust.

2024 ONSC 6088 (CanLII)

Background

[7] The RHTLF is a litigation trust that was created so that 21 First Nations could pursue their collective rights under the Robinson Huron Treaty of 1850 (the "Treaty") against Canada and Ontario.

[8] The RHTLF was established by a trust indenture agreement, dated August 23, 2010 (the "RHTLF Trust Indenture"). The settlors of the RHTLF consist of the 21 Lake Huron First Nations.

[9] The RHTLF has 22 trustees, one for each of the 21 First Nations and an additional trustee who represents individuals entitled to annuities under the Treaty but who are not members of the 21 First Nations.

[10] The LMC of the RHTLF is responsible for the day-to-day management of the annuities claim and for taking "all necessary steps to advance the Annuities Claim and the litigation."

[11] A representative action was commenced in this Court on September 9, 2014, styled *Restoule v. Canada (Attorney General)* (the "Treaty Action"). The Court appointed Mike Restoule, Patsy Corbiere, Duke Peltier, Peter Recollet, Dean Sayers, and Roger Daybutch as the representative plaintiffs for the Treaty Action, which was brought "on behalf of all members of the Ojibewa (Anishinaabe) Nation who are beneficiaries of the Treaty, except those that are members of the Temagami First Nation."

[12] A partial settlement of $10 billion (the "Settlement Proceeds") for past compensation for the breach of the Treaty rights was reached in January 2024 between the RHTLF and the Governments of Canada and Ontario (the "Settlement").

[13] The Lawyer Respondents were RHTLF's counsel in pursuing the Treaty Action and negotiating the Settlement.

[14] The Lawyer Respondents were retained by the RHTLF on June 17, 2011. At that time, the RHTLF entered into a partial contingency fee agreement with the Lawyer Respondents (the "Partial Contingency Fee Agreement").

[15] The RHTLF were not advised to, nor did they retain, independent legal advice when the Partial Contingency Fee Agreement was made.

[16] The Settlement is subject to a Compensation Disbursement Agreement that provides a formula for the distribution of the Settlement Proceeds to each of the Robinson Huron Treaty First Nations.

[17] During the Lawyer Respondents' retainer, the RHTLF paid them more than $22.7 million in legal fees and disbursements. Certain of the First Nations took out loans to pay these legal bills.

[18] Following the Settlement, the Lawyer Respondents sought payment of the contingency fee. On April 15, 2024, the Lawyer Respondents provided the LMC with their proposed contingency fee of $510 million under the Partial Contingency Fee Agreement.

[19] The Lawyer Respondents gave the RHTLF a legal opinion **[REDACTED].**

[20] The Lawyer Respondents did not recommend that the RHTLF obtain independent legal advice regarding the proposed contingency fee. Accordingly, the only advice the RHTLF obtained regarding the proposed contingency fee was from the Lawyer Respondents themselves.

[21] On April 15, 2024, the LMC unanimously passed a resolution recommending that the RHTLF approve the proposed $510 million contingency fee.

[22] Gimaa Nootchtai first became aware of the quantum of the proposed Legal Fees on or about April 16, 2024.

[23] On April 22, 2024, the Chiefs and trustees of the RHTLF met and approved the Legal Fees. The motion received support from 67% of the Chiefs. It also received support from 71% of the trustees in attendance, narrowly clearing the 70% threshold required under the Trust. Gimaa Nootchtai raised an objection at the meeting. Certain of the Lawyer Respondents were present at the meeting.

[24] Prior to the vote being held at the April 22, 2024 meeting, and absent consensus of the trustees, the trustees did not vote to consider the designation of an Elder or Elders, as contemplated at para. 5.2 of the RHTLF Trust Indenture, which provides:

> The Trustees shall make all reasonable efforts to reach a consensus with respect to all matters. Where there is a difference of opinion, in pursuing consensus, the Trustees may decide by a 50% vote of the Trustees present in the meeting where the matter is being considered, to ask the Chiefs in Assembly to designate an Elder or Elders from within the Lake Huron Region to assist the Trustees in achieving consensus. Once an Elder is designated, the Trustees shall assemble at the direction of the Elder, at a location named by the Elder and engage in deliberations and activities directed by the Elder with a view to achieving consensus.
>
> Should any difference of opinion remain after such efforts, in relation to the commission or omission of any act or the exercise of any discretion or otherwise howsoever in the

2024 ONSC 6088 (CanLII)

execution of the provisions of this Indenture, then, the Trustees may convene a meeting and decide the matter by a show of hands and 70% majority of the Trustees present will carry the vote.

[25] The Legal Fees were paid from the $10 billion Settlement Proceeds on or about May 3, 2024 by the RHTLF. Half of the Legal fees were paid to the Lawyer Respondents and the other half were retained in a segregated fund for initiatives to be determined by the Lawyer Respondents.

[26] On or about May 14, 2024, Gimaa Nootchtai brought a motion to the trustees that the RHTLF, as the client, should get independent legal advice and seek an assessment of the Legal Fees. However, that motion was rejected.

Issues

[27] Are the Settlement Proceeds assets of the Trust?

[28] Are Atikameksheng and Garden River parties to the application?

[29] Can the Applicants compel an assessment of the Partial Contingency Fee Agreement and Legal Fees under the *Solicitors Act*, R.S.O. 1990, c. S.15?

[30] Should the Court exercise its inherent jurisdiction and direct an assessment?

Analysis

Are the Settlement Proceeds assets of the Trust?

[31] The LMC asks the Court for directions regarding the interpretation of the RHTLF Trust Indenture, including whether the settlement proceeds are an "Asset" of the RHTLF. The LMC requests that the Court pursuant to its powers under s. 60 of the *Trustee Act*, opine, advise or direct that the interpretation of "Assets" in the RHLTF Trust Indenture excludes the Settlement Proceeds.

[32] The Applicants did not take a position on this issue.

[33] The RHTLF Trust Indenture defines "Assets" as follows:

> "Assets" means:
>
> (a) The aggregate amount of the $100.00 payments, referred to in the recitals and transferred by the Settlors to the Trustees in trust;
>
> (b) The funds in Robinson Huron Treaty Defence Fund Account, at the Anishinabek Nation Credit Union, Account number [...], as at the date of the establishment of the Trust, less any outstanding cheques and payments for all invoices outstanding as at the date of the establishment of the Trust, which funds shall be transferred to the Trustees forthwith after the establishment of the Trust;

2024 ONSC 6088 (CanLII)

(c) All other property, including moneys, which is now or which at any time during the continuation of the Fund may be issued, assigned, transferred, awarded, contributed or appointed to the Trustees by the Settlors or by any other Person to be held in trust pursuant to this indenture (and which the Trustees may be willing to accept and hold);

(d) All property which may at any time be substituted therefor;

(e) All monies borrowed by the Fund;

(f) All capital accretions to or acquisitions by the Fund;

(g) All income of the Fund; and

(h) All proceeds of disposition of any Assets.

The definition of "Assets" excludes anything paid out or distributed (whether out of income or capital) in the normal course of administration or pursuant to the provisions of the Indenture, and excludes any Compensation/Settlement Proceeds distributed according to the terms of any Compensation Disbursement Agreement entered into pursuant to this Indenture. [Emphasis added.]

[34] The LMC states that the Settlement Proceeds are being held by the RHLTF for the 21 First Nations to be distributed in accordance with the Compensation Disbursement Agreement but are not Assets of the Trust.

[35] If the Settlement Proceeds are Assets of the Trust, the individual annuitants and the 21 First Nations may seek to require the trustees to pass their accounts. The RHLTF Trust Indenture specifies in para. 17.1 that the "Beneficiaries of the Fund[i] are the Settlors of the Trust [the 21 First Nations] and the Annuitants [those who receive or are entitled to receive annuities under the Robinson Huron Treaty of 1850]".

[36] The evidence of Duke Peltier, a member of the LMC, is that "[e]ach of Canada and Ontario agreed to pay to the RHTLF, on behalf of the Huron Treaty Anishinaabek, $5 billion, for a total of $10 billion." Further, his evidence is that "[c]urrently, approximately $9.5 billion is being held in various RHTLF accounts in anticipation of being distributed to the 21 First Nations in accordance with the terms of the Compensation Distribution Agreement."

[37] The LMC submits that the Settlement Proceeds are not "Assets" of the Trust, and therefore the individual annuitants have no beneficial interest in those funds. The LMC submits that instead, the funds are being held on behalf of the 21 First Nations to be distributed in accordance with the Compensation Disbursement Agreement. The LMC submits that specifying that "Assets" does not include the Settlement Proceeds is consistent with the collective rights that are held at the First Nation level. The distribution of the settlement funds to the individual annuitants is controlled at the First Nation level.

2024 ONSC 6088 (CanLII)

[38] Article 7.2 of the Trust Indenture contemplates the various Fund Accounts for the RHTLF. These include an "Administration & Legal Fees Account" and a "Compensation Account." The Trust Indenture provides that the "Trustees shall also open a "Compensation Account" in which they shall cause to be deposited any "Compensation/Settlement Proceeds" that may be received by the Trustees." The Settlement Proceeds were deposited in this Trust account.

[39] The definition of "Assets" excludes anything paid out or distributed or any Compensation/Settlement Proceeds that are distributed. It is not clear why this language is necessary given that once anything is paid out by the trustees, it is difficult to see how it could continue to be considered Trust funds. However, while any property is held by the trustees in their capacity as trustees, including the Settlement Proceeds, it is an Asset of the Trust. I note the following in the Trust Indenture:

a. The Trust contemplates in section 3.3 that the Trustees will develop "a Compensation Disbursement Agreement, to be entered into between the Lake Huron First Nations who are Settlors of the Trust, with regard to the disbursement of any Compensation/Settlement Proceeds awarded for and received by the Fund as a result of, or in respect of the Annuities Claim." [Emphasis added.]

b. "Fund" or "Robinson Huron Treaty Litigation Fund" is defined to mean "the entire trust and undertaking established by and carried on pursuant to this Indenture, and all the Assets."

c. Further, as noted above, the definition of Assets, in (c) includes "all other property, including moneys, which is now or which at any time during the continuation of the Fund may be issued, assigned, transferred, awarded, contributed or appointed to the Trustees by the Settlors or by any other Person to be held in trust pursuant to this Indenture (and which the Trustees may be willing to accept and hold)."

[40] The Settlement Proceeds were delivered to a Compensation/Settlement Proceeds account opened by the trustees pursuant to the Trust. There was no suggestion on transfer that the Settlement Proceeds were not to be subject to the Trust.

[41] I am satisfied that the Settlement Proceeds are Assets of the Trust while held by the trustees.

Are Atikameksheng and Garden River parties to the application?

[42] The respondents submit that the Applicants do not have standing to bring the application on the basis that Atikameksheng and Garden River are not parties to the application.

[43] I am satisfied that Atikameksheng and Garden River are parties to the application and have standing.

[44] First Nations are "legal entities separate from their members with the status to sue or be sued:" *Kelly v. Canada (Attorney General)*, 2013 ONSC 1220, 226 A.C.W.S. (3d) 654, at para. 112.

2024 ONSC 6088 (CanLII)

[45] Both Atikameksheng and Garden River are named as applicants.

[46] Gimaa Nootchtai confirmed on cross-examination that Atikameksheng's Band Council passed a Band Council Resolution ("BCR") authorizing him to commence this application in the name of the First Nation. Similarly, Ogimaa Kwe Bell confirmed that Garden River's Band Council had duly authorized her to commence the application in the name of the First Nation.

[47] The respondents rely on *Kelly*. The plaintiffs in *Kelly* were chiefs of various First Nations who were attempting to enforce a particular clause within Treaty 3. Treaty 3 was an agreement between the Crown and those who were once known as the Saulteaux Tribe of the Ojibway Indians. Among other things, the plaintiffs made a motion pursuant to Rule 12.08 of the *Rules of Civil Procedure* to have Chief White made the representative plaintiff for the beneficiaries of Treaty 3. The trial judge held that "the Plaintiffs' proposed representation action is procedurally unsound" "because the necessary parties are not before the court" and dismissed the plaintiffs' Rule 12.08 motion. The trial judge concluded as follows, at para. 16:

> Thus, in the case at bar, to resolve the dispute about who is the rights holder and to have the proper parties before the court, requires that Grand Chief White either: (1) bring a representation action for the beneficiaries of Treaty 3 with the authorization of all of the 28 reserve bands (by band council resolutions); or (2) bring a representation action but join as a party defendant any band that does not authorize his representation action. Grand Chief White has done neither and, therefore, his proposed action is not procedurally sound.

[48] The Court stated the following regarding standing, at para. 107:

> Aboriginal rights and treaty rights are collective rights, and the proper party with the standing to assert an Aboriginal rights claim or a treaty rights claim is the collective that is the rights holder.

[49] The Court also discussed standing, at para. 16, where it wrote:

> [...]
>
> Because the rights under Treaty 3 are communal rights and because the court's decision about the treaty rights will bind all the rights holders, it is necessary that all the persons affected by the decision be before the court. The rights holders are necessary parties to the action, and there can be no opting-out.
>
> If a rights holder under a treaty is an Indian band, because it has the legal capacity to sue or to be sued, it can, by band council resolution, authorize an action against the Crown.
>
> If, however, the rights holders under a treaty are an unincorporated association, then the rights holders can sue only if the court authorizes a representation action.

2024 ONSC 6088 (CanLII)

> Thus, depending on who are the rights holders, the claim for a breach of a treaty may be an action by an Indian band as plaintiff and/or it may be a representation action by a representative plaintiff for the rights holders under the treaty.
>
> [...]

[50] However, while the standing issues addressed in *Kelly* were upheld on appeal (*Kelly v. Canada (Attorney General)*, 2014 ONCA 92, 237 A.C.W.S. (3d) 363), the Court of Appeal noted the following before adopting the trial judge's conclusion, at para. 20:

> From the submissions made by Crown counsel, we are satisfied that whether the 28 bands or the larger collective that the appellants seek to represent are the correct parties in this extremely complex litigation remains a live issue. The motion judge's solution is a practical one. We see no basis to interfere with the conditions that he imposed. [Emphasis added.]

[51] The Court of Appeal does not explicitly set out how standing in Indigenous claims ought to be resolved or decided. Instead, the Court of Appeal noted that standing "remains a live issue" and stated that they adopted the trial judge's conclusion because it was "practical".

[52] There is law from other jurisdictions that speaks to the issue of standing in Indigenous claims. This is addressed in the recent Alberta Court of Appeal decision in *Kehewin Cree Nation v. Kehew Construction Ltd*, 2022 ABCA 78, 39 Alta. L.R. (7th) 232. The Applicants rely on *Kehewin* in support of their position that formal requirements are not necessarily needed to bind a First Nations band.

[53] In *Kehewin*, the court considered whether two agreements signed by the then Chief of Kehewin were binding on the First Nations band. The decision in *Kehewin* addresses section 2 of the *Indian Act*, R.S.C. 1985, c. I-5, which includes the exercise of powers conferred on a band:

> 2(3) Unless the context otherwise requires or this Act otherwise provides,
>
> (a) a power conferred on a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the electors of the band; and
>
> (b) a power conferred on the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened.

[54] The Alberta Court of Appeal considered whether a written band council resolution was required for a contract made with a First Nation to be valid. Crighton J.A., writing for the majority of the Alberta Court of Appeal, noted that there were no "formalistic requirements" regarding how a power is conferred on a band or a council, and that s. 2(3) does not specify how consent is to be given, at para. 21:

> To decide whether the band or council authorized the contracts in question, it is necessary to look at what s. 2(3) requires. On the plain meaning of the section,

2024 ONSC 6088 (CanLII)

> absent any contrary provision, a power of a band can only be exercised "pursuant to the consent of the majority of the councillors of the band present at a meeting duly convened". However, there are no formalistic requirements specifying how a power is conferred on a band as opposed to a council or vice versa and the section does not specify how consent is given. [...] [Emphasis added.]

[55] In the concurring reasons in *Kehewin*, Slatter J.A. noted, at para. 39, that s. 2(3) of the *Indian Act* "does not cover internal band policies". In *obiter*, Slatter J.A. implies that in certain cases, third parties can rely on the "ostensible authority" of the First Nation's representative. Slatter J.A. stated, at paras. 39, 41:

> [39] Section 2(3), when properly interpreted, does not extend out beyond the *Indian Act* to cover internal band policies such as the appellants' *Financial Administrative Customs Law*. Any "powers conferred" under such an internal policy are not "conferred" within the meaning of s. 2(3). The appellant is entitled to adopt such policies and limitations on its agents, but under the indoor management rule they cannot be used to prejudice *bona fide* third parties.
>
> [...]
>
> [41] Some courts have attempted to ameliorate the harshness that would result from a literal application of s. 2(3) by reasoning that it does not preclude ostensible authority or delegation: *Maloney v. Eskasoni First Nation; Sands v. Walpole Island First Nations Band,* 2018 ONCA 188 (Ont. C.A.). As the reasons of the majority point out, the section does not specify any degree of formalism in council approvals; a formal typed "band council resolution" is not required. It also does not exclude ostensible authority or delegation. However, that analytical technique is not necessary in this case since the section does not apply to powers granted or limited outside the *Indian Act*.

[56] I agree with the Applicants' submission that the means of ascertaining the consent of the band council is an internal matter for each First Nation. In the instant case the duly elected Chiefs of Atikameksheng and Garden River have given sworn evidence that they have their respective band's authority to commence this application on behalf of their First Nation. This is compelling evidence that authorization was sought in conformity with the internal practices of the respective First Nations bands. I am satisfied that Atikameksheng and Garden River are parties to the application.

[57] As Atikameksheng and Garden River are parties, I next consider whether they can compel an assessment of the Legal Fees and the Partial Contingency Fee Agreement.

[58] The Applicants raised numerous avenues for the Court to consider. Because I have found that the Applicants can compel an assessment, I have not addressed each of the other avenues raised.

Can the Applicants compel an assessment of the Partial Contingency Fee Agreement and Legal Fees under the Solicitors Act?

2024 ONSC 6088 (CanLII)

[59] The Applicants submit that the following provisions of the *Solicitors Act* apply: ss. 3, 9, 23, 24, 25, and 26:

> **Order for assessment on requisition**
> 3 Where the retainer of the solicitor is not disputed and there are no special circumstances, an order may be obtained on requisition from a local registrar of the Superior Court of Justice,
>
> a) by the client, for the delivery and assessment of the solicitor's bill;
> b) by the client, for the assessment of a bill already delivered, within one month from its delivery;
> c) by the solicitor, for the assessment of a bill already delivered, at any time after the expiration of one month from its delivery, if no order for its assessment has been previously made.
>
> **Assessment where a party not being the principal, pays a bill of costs**
> 9 (1) Where a person, not being chargeable as the principal party, is liable to pay or has paid a bill either to the solicitor, his or her assignee, or personal representative, or to the principal party entitled thereto, the person so liable to pay or paying, the person's assignee or personal representative, may apply to the court for an order referring to assessment as the party chargeable therewith might have done, and the same proceedings shall be had thereupon as if the application had been made by the party so chargeable. R.S.O. 1990, c. S.15, s. 9 (1).
> . . .
> **Assessment at instance of third person**
> 9(4) When a person, other than the client, applies for assessment of a bill delivered or for the delivery of a copy thereof for the purpose of assessment and it appears that by reason of the conduct of the client the applicant is precluded from assessing the bill, but is nevertheless entitled to an account from the client, it is not necessary for the applicant to bring an action for an account, but the court may, in a summary manner, refer a bill already delivered or order delivery of a copy of the bill, and refer it for assessment, as between the applicant and the client, and may add such parties not already notified as may be necessary. R.S.O. 1990, c. S.15, s. 9 (4).
>
> **Determination of disputes under the agreement**
> 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

2024 ONSC 6088 (CanLII)

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.

Reopening of agreement
25 Where the amount agreed under any such agreement has been paid by or on behalf of the client or by any person chargeable with or entitled to pay it, the Superior Court of Justice may, upon the application of the person who has paid it if it appears to the court that the special circumstances require the agreement to be reopened, reopen it and order the costs, fees, charges and disbursements to be assessed, and may also order the whole or any part of the amount received by the solicitor to be repaid by him or her on such terms and conditions as to the court seems just.

Agreements made by client in fiduciary capacity
26 Where any such agreement [contingency fee agreement] is made by the client in the capacity of guardian or of trustee under a deed or will, or in the capacity of guardian of property that will be chargeable with the amount or any part of the amount payable under the agreement, the agreement shall, before payment, be laid before an assessment officer who shall examine it and may disallow any part of it or may require the direction of the court to be made thereon.

[60] Because I find below that sections 9(1) and 9(4) of the *Solicitors Act* apply, it is not necessary for me to consider the other provisions of the *Solicitors Act*.

(i) Sections 9(1) and 9(4) of the Solicitors Act

[61] The Applicants submit that they may compel the assessment under either s. 9(1) or s. 9(4) of the *Solicitors Act*. I agree.

[62] The Applicants submit that the First Nations can compel an assessment under s. 9 of the *Solicitors Act* because the money to pay the legal fees was taken from the Settlement Proceeds at the expense of all the RHTLF First Nations, including Atikameksheng and Garden River. Further, the Partial Contingency Agreement contemplates that the Legal Fees shall be paid from the Settlement Proceeds.

[63] The LMC submits that section 9(1) of the *Solicitors Act* is not of assistance to the Applicants because they were not liable to pay the whole bill.

[64] The LMC points to *McGugan v. McGugan,* 19 O.A.R. 56 (aff'd (1982), 21 S.C.R. 267). In *McGugan,* the Court of Appeal, in 1892, held that a ratepayer of the school section could not compel an assessment because being required to bear an aliquot portion of the fees as a taxpayer did not make him "liable to pay the bill," at pp. 58-59.

2024 ONSC 6088 (CanLII)

[65] *McGugan* has received recent unfavourable commentary in *Glanc v. O'Donohue & O'Donohue*, 2008 ONCA 395, 236 O.A.C. 124. In *Glanc*, the Court of Appeal made the following comments on liability to pay:

> [31] Here, however, Estelle is not "a person who is responsible to pay a portion of the account." The evidence is that she and Krysia jointly retained the law firms. In the absence of some indication to the contrary – there is none here – Estelle and Krysia would each be liable for the whole amount of the bill. Moreover, I am not persuaded that either *McGugan v. McGugan*, 19 O.A.R. 56 (C.A.) aff'd (1982), 21 S.C.R. 267 or *Kayor Energy Systems Inc. v. Davies, Ward & Beck*, [2001] O.T.C. 468 (S.C.J.) support the proposition for which they are cited.
>
> [32] *McGugan* involved an attempt by an individual ratepayer to have a solicitor's bill of costs that was delivered to and paid by the school trustees referred for taxation. The Court of Appeal affirmed that he was not the person chargeable with the bill or liable to pay it, even though he may, ultimately, have had to bear an aliquot portion of it in his capacity as a taxpayer. Mr. McGugan was not the client. His circumstances were quite different than those of Estelle Glanc vis-à-vis Hughes Amys LLP.
>
> [34] The motion judge also relied on the old case of *Re Beecher, Barker, and Street*, (1860-1869), 19 U.C.R. 607, a determination by the Secretary of the Upper Canada Court of Chancery in Chambers, and on the decision of Master Donkin in *Goodman and Carr v. Goldstein Estate*, [1988] O.J. No. 273 (S.C.), for the proposition that all parties retaining the solicitors must be part of the request to assess an account. <u>While I have some reservations about the continuing soundness of that principle as a general proposition in the present day – longstanding as it may be – it is not necessary to decide the question here because all parties to the retainer are part of the request.</u> [...] [Emphasis added.]

[66] The Applicants note that in *McGugan v. McGugan*, 21 S.C.R. 267, Strong J. was concerned with the fact that there was not a direct payment. At p. 271, he wrote: "Shall be liable to pay whom? It must mean liable to pay somebody, but a ratepayer is not liable to pay a solicitor though he may be liable to contribute to a fund for the purpose; but he is not liable in the sense of the statute. The statute meant liable to pay directly which is not the liability of a ratepayer."

[67] Under the current wording of s. 9(1) of the *Solicitors Act*, direct payment is no longer necessary. In *Temedio v. Niagara North Condominium Corporation No. 6*, 2019 ONCA 762, 440 D.L.R. (4th) 154, the Court of Appeal agreed with the application judge's holding that because the *Condominium Act* made the applicant liable to pay the condominium corporation's legal bills, the applicant was entitled to apply for an assessment under s. 9(1) of the *Solicitors Act*.

[68] The evidence of Gimaa Nootchtai was that the Robinson Huron Treaty First Nations took interest-bearing loans to fund the ongoing legal fees and disbursements in respect of the Treaty Action and provided their loan proceeds to the RHTLF to pay the Lawyer Respondents. Further,

2024 ONSC 6088 (CanLII)

the RHTLF Trust Indenture provides that the 21 First Nations are required to backstop the fund on termination. Article 20.4 of the RHTLF Trust Indenture provides:

> **20.4 Liabilities exceeding Assets**
> In the event that the liabilities of the Fund exceed the Assets of the Fund, the Settlors of the Trust shall remit funds to the Trust to enable the liabilities to be fully discharged. For greater certainty, the Fund shall remain in existence till all the liabilities are discharged.

[69] The Lawyer Respondents rely on *DS&D Personnel Inc. v. Maple Equipment & Leasing Inc.*, 2022 ONSC 4103, 2022 A.C.W.S. 4990, which in my view is distinguishable from the instant case. In *DS&D*, another company, Maple, sought to have DS&D's counsel's fees assessed. Vermette J. found, at para. 62, that Maple was not liable to pay DS&D's counsel's invoices and had not paid such invoices. She noted that the source of the funds used to pay DS&D's invoices was irrelevant: "For instance, if a litigant borrows funds from a friend to pay his lawyer, it does not mean that the friend, as the source of the funds, has standing to apply for an assessment of the lawyer's accounts." The funds were provided by Maple to DS&D for general use, which included payment of legal fees. That is not the case with the RHTLF, which requires the First Nations settlors to put money into to the Trust to discharge its liabilities, which includes the Legal Fees.

[70] The LMC cites *Hardy v. Rubin*, 23 E.T.R. (2d) 113 (Ont. Gen. Div.), which is also distinguishable from the instant case. In *Hardy* there was an estate and the beneficiaries' shares were to be reduced by the amount going to pay the legal fees. The beneficiaries were not able to compel an assessment under s. 9(1) of the *Solicitors Act* because they were not liable to pay the legal fees; the estate was liable. The Court stated, at para. 8:

> It is not clear to me that the Applicants are entitled to access the "referral to assessment" process through the provisions of subsection 9(1). They are not "chargeable as the principal party" to the bills; the Estate is – or, more accurately, the Trustee is. Nor are they liable to pay the solicitor or the Estate Trustee on the bills; if the Estate has insufficient funds to pay, the beneficiaries do not become personally liable for the estate solicitors' accounts. [...]

[71] The Lawyer Respondents point to the retainer agreement, which, in para. 23, sets out the obligation to pay legal fees as between the RHTLF and the Respondent Lawyers:

> The Client [the RHTLF] agrees and directs that all funds claimed by the RHT Legal Team for legal fees, cost, taxes and disbursements shall be paid to the RHT Legal Team in trust from any judgment or settlement money.

[72] The Partial Contingency Fee Agreement specifically contemplates that the Lawyer Respondents will be paid from the Settlement Proceeds. Further, although the Partial Contingency Fee Agreement states that the RHTLF is responsible for payment, the RHTLF is funded and backstopped by the 21 First Nations.

[73] In addition to the Partial Contingency Fee Agreement, there was other evidence before the Court. The chart attached to the Compensation Distribution Agreement indicates that Legal Fees

2024 ONSC 6088 (CanLII)

and other costs were a first charge on any settlement proceeds (which settlement proceeds belong to the 21 First Nations). Although the Lawyer Respondents argued that the chart was simply for illustration purposes, the Compensation Disbursement Agreement referred to the chart and stated:

> Also, attached to this Compensation Disbursement Agreement is a priority of payment document intended to assist the Settlors of the Trust [the 21 First Nations] to understand how the disbursement of any Compensation/Settlement Proceeds awarded for and received by the Fund as a result of, or in respect of the Annuities Claim. [sic]

[74] The RHTLF Trust Indenture also requires that any borrowing to finance the litigation must be approved by the 21 First Nations and guaranteed by them. Section 7.4 of the RHTLF Trust Indenture states:

> The Trustees may not borrow money for any purpose except as follows:
>
> (a) The Trustees may establish an operating line of credit facility up to a maximum of $100,000.00, with a Financial Institution; and
>
> (b) The Trustees may borrow money to finance the litigation for the Annuities Claim, subject to the approval of the Settlors of the Trust.
>
> Any moneys borrowed by the Trustees on behalf of the Trust shall be guaranteed by the Settlors of the Trust. Money borrowed shall be treated as Trust Property.

[75] I am satisfied that Atikameksheng and Garden River, while "not being chargeable as the principal party," are nevertheless "liable to pay" the Lawyer Respondents' bills. First, the Settlement Proceeds, which belong to the 21 First Nations, are used to pay the Legal Fees. The chart attached to the Compensation Disbursement Agreement shows the Legal Fees as a first charge on any settlement proceeds. Second, the 21 First Nations must backstop the RHTLF's debt: There are 21 First Nations that settled the RHTLF and all of them, including Atikameksheng and Garden River, are required to remit funds to the Trust to discharge the Trust's liabilities, which include the Legal Fees.

[76] In any event, I am of the view that the Applicants can compel an assessment of the Legal Fees under section 9(4) of the *Solicitors Act*.

[77] Section 9(4) of the *Solicitors Act* applies "[w]hen a person, other than the client, applies for assessment of a bill" and "it appears that by reason of the conduct of the client the applicant is precluded from assessing the bill, but is nevertheless entitled to an account from the client."

[78] The client in the instant case was the RHTLF. The RHTLF will not seek an assessment of the Legal Fees.

[79] The RHTLF, however, owes certain duties to the applicants, as beneficiaries. Among other things, the trustees of the RHTLF must have their accounts (which would include payment of legal

2024 ONSC 6088 (CanLII)

fees from the Trust assets) always ready and available to be provided when compelled to pass accounts by the Court or where otherwise required (see *Sandford v. Porter*, [1889] 16 O.A.R. 565). The Court in *Sandford v. Porter*, stated at pp. 571-572:

> The duty of a trustee or other accounting party is to have his accounts always ready, to afford all reasonable facilities for inspection and examination, and to give full information whenever required; but as a general rule he is not obliged to prepare copies of his accounts for the parties interested. Cases may be imagined where it would be reasonable to require, and when it might be the duty of the trustee to furnish, statements of accounts [...]. But every case must depend on its own circumstances, and must be governed by reason and common sense.

[80] While the Court in *Hardy v. Rubin* determined that section 9(1) of the *Solicitors Act* did not apply, the Court noted that section 9(4) of the *Solicitors Act* was the statutory provision under which the applicants (the estate beneficiaries) would have needed to rely upon. However, in that case, the assessment application was not made within 12 months of the account having been paid. The Court sets out the requirements for an application under section 9(4). Specifically, in circumstances where the client's conduct has precluded the assessment of a solicitor's bill and there is an obligation of the client to account to the applicant, section 9(4) "enable[s] the Court to avoid the costly necessity of the beneficiaries taking a separate action for an account, and instead, "in a summary manner" refer to bill "for assessment, as between the applicant and the client":" *Hardy*, p. 7.

[81] The Applicants submit that s. 9(4) of the *Solicitors Act* provides a "gateway" for a beneficiary to have a solicitor's fees reviewed: *Knight Estate (Re)*, 30 E.T.R. (2d) 225, at para. 16. I agree.

[82] In the instant case, as discussed above in my analysis under s. 9(1) of the *Solicitors Act*, the 21 First Nations are required to pay the Legal Fees out of the Settlement Funds. The trustees of the RHLTF have refused to seek an assessment. However, trustees have an obligation to have their accounts (which would include payment of legal fees from the trust assets) ready at any time and available to be provided to a beneficiary upon request or when compelled to pass accounts by the Court (see *Sandford v. Porter*). Article 17.1 of the RHTLF Trust Indenture specifies that the beneficiaries of the fund are the Settlors (the 21 First Nations) and the annuitants. In my view, section 9(4) of the *Solicitors Act* provides the gateway for Atikameksheng and Garden River to have the Legal Fees reviewed.

[83] I am satisfied that under the clear wording of s. 9(4) of the *Solicitors Act*, the court can refer the bill for an assessment.

[84] Because the bill has already been paid, section 11 of the *Solicitors Act* requires the Court to be of the opinion that the "special circumstances of the case [...]" "appear to require an assessment." For the same reasons as I would exercise my inherent jurisdiction and direct an assessment (set out below), I am satisfied that there are special circumstances of this case that appear to require an assessment.

2024 ONSC 6088 (CanLII)

Should the Court exercise its inherent jurisdiction and direct an assessment?

[85] Had I not found that section 9 of the *Solicitors Act* applied, I would have exercised my inherent jurisdiction to order an assessment of the legal fees.

[86] *Glanc*, referred to *Price v. Sonsini*, 60 O.R. (3d) 257 (C.A.), when it noted, at para. 42, "the importance of the court's inherent jurisdiction as the guardian of public confidence in the administration of justice." The Court of Appeal went on to quote from *Price* directly: "[t]he court has an inherent jurisdiction to control the conduct of solicitors and its own procedures." Further, at para. 44, the Court of Appeal in *Glanc* stated that "procedural issues notwithstanding, it is well-established that the court has a discretion to direct the assessment of a solicitor's account apart from the provisions of Solicitor's Act."

[87] In *Knight Estate*, where the solicitor's fees were an issue, the Court ordered a review of the accounts under section 49(2) of the *Estates Act*. At para. 17, the Court stated: "Absent the authority of s. 49(2), I would find that the court had inherent jurisdiction to review the accounts even absent fraud or misconduct."

[88] At para. 45 in *Glanc*, the Court of Appeal sets out the factors it considered in determining that the lawyers' accounts should be assessed. The Court of Appeal concluded, at para. 46, that those considerations "point to the fairness, in the circumstances of this case," of directing an assessment of the lawyers' accounts.

[89] I am of the view that the below considerations "point to the fairness, in the circumstances of this case" of directing an assessment of the Legal Fees. The Court should exercise its inherent jurisdiction in the instant case and direct an assessment of the Lawyer Respondents' accounts for the following reasons:

a) The only opinion regarding the fairness and reasonableness of the Legal Fees that the LMC obtained was from the Lawyer Respondents – the parties who would benefit from the payment of the sizable partial contingency fee.

b) The Lawyer Respondents did not recommend that the LMC or the trustees of the RHTLF obtain independent legal advice when they were retained and the Partial Contingency Fee Agreement was made or when the Legal Fees were charged. No independent legal advice was obtained.

c) The Legal Fees will impact the amount of the Settlement allocated to each First Nation in accordance with the Compensation Disbursement Agreement, which will, in turn, impact the amount that will be distributed to the individual annuitants. Numerous individual annuitants are interested in the outcome of this matter – after I ordered that notice of the hearing be provided to the individual annuitants the Court had to ensure that a large courtroom was available to accommodate the many in person attendees. In addition, about 1000 people attended all or part of the proceedings via Zoom. I am concerned that given the significant number of beneficiaries under the Trust who are impacted by the LMC and majority of the RHTLF trustee decision to pay the sizable partial contingency fee without any

2024 ONSC 6088 (CanLII)

independent legal advice on the reasonableness of the fee, failure to have the Legal Fees reviewed by the Court may erode the public confidence in the administration of justice.

Disposition

[90] I direct that the Partial Contingency Fee Agreement and Legal Fees shall be assessed.

[91] Given the magnitude of the Legal Fees and the fact that it is likely that there will be legal issues to be considered at the assessment, the assessment shall be done by the Court. The parties shall schedule a case conference with me forthwith to schedule next steps.

Justice Steele

Date: October 30, 2024

[i] Fund means the entire trust and undertaking established by and carried on pursuant to [the] Indenture, and all the Assets.

2024 ONSC 6088 (CanLII)