Civil Procedure
Winter Term 2025

Lecture Notes No. 3

II. WHO PAYS FOR THE LITIGATION? (cont'd)

3. Champerty & Maintenance

At common law, **"maintenance"** refers to a wrong whereby one person aids another in bringing meritless litigation for an import purpose; **"champerty"** adds that the wrongdoer receives, or will receive, a share of the damages or award. At common law, these were crimes as well as torts. The concepts are simple and these torts rarely arise. However, the principles are challenged by two contexts: contingency fees, and, partial settlements to fund the litigation itself.

(i) Contingency Fees:

McIntyre Estate v. Ontario (Attorney General)
2002 CanLII 45046 (Ont. C.A.)

This case dealt with continency agreements. O'Connor ACJO surveyed the law at large and held:

> 78 The applications judge granted a declaration that the proposed fee agreement does not violate the Champerty Act. **The proposed agreement provides for payment to the respondent's lawyers of a fee in the amount of 30 percent of compensatory damages recovered, 40 percent of punitive damages, costs recovered in the action and any unrecovered disbursements. Depending on the amount recovered in the underlying action, the fees to be paid to the lawyer could be enormous.** The lawyers who drafted the agreement provided an example of the potential fees which totalled over $9,000,000. While the amount of the damages on which the example is based may or may not be realistic, the example does make the point that unacceptably large fees could become payable under the agreement.
>
> 79 The fee structure in the proposed agreement is related to the amount of money that is recovered on behalf of the respondent. The fee structure has no relationship to the amount of time spent by the lawyers, the quality of the services provided, the level of expertise of the lawyers providing the services, the normal rates charged by the lawyers who provide the services, or the stage of the litigation at which recovery is achieved. Under the terms of this agreement, the respondent would be

obliged to pay the lawyers the same amount of fees if the litigation is settled early in the process as she would if the same amount of money was recovered after a lengthy trial and appeal. In addition, the agreement raises the prospect of double recovery for the lawyers — fees from the respondent as well as costs recovered from the defendants in the action. **There is no way of telling at this point whether the fees that would be paid to the lawyers under this proposed agreement would be reasonable and fair. When an agreement like this one is structured so that the fees are based on a percentage of the recovery, the determination of whether the fees are reasonable and fair will normally have to await the outcome of the litigation.**

80 I have concluded in subsection (d) above that contingency fee agreements do not per se contravene the Champerty Act. However, in my view, **contingency fee agreements that provide for the payment of fees that are unreasonable or unfair are agreements that have an improper motive and come within the prohibition** in the Act. Because it is premature to address the issue of the reasonableness and fairness of the proposed agreement, it is my respectful view that the applications judge should not have granted the declaration sought by the respondent.

81 I want to address three other matters that were touched on during the arguments of counsel. The first relates to the criteria that should be used in assessing the reasonableness and fairness of fees in a contingency fee agreement. Contingency fee agreements have been expressly permitted by statute in many jurisdictions. Often, the authorizing legislation has also provided for a regulatory regime that addresses the manner in which the propriety of contingency fees may be determined. See for example, the Class Proceedings Act, s. 33(1).

82 Ontario, of course, does not have legislation specifically directed at regulating non-class action contingency fee agreements. Until such legislation is passed, **the regime in the Solicitors Act for assessing lawyers' accounts will apply. When assessing a contingency fee arrangement, the courts should start by looking at the usual factors that are considered in addressing the appropriateness of lawyer-client accounts.** See Cohen v. Kealey & Blaney (1985), 10 O.A.C. 344 (Ont. C.A.), at 346.

83 In addition, **I see no reason why courts should not also consider compensation to a lawyer for the risk assumed in acting without the guarantee of payment. This is, of course, where the discussion becomes controversial. Some argue that allowing a lawyer to be compensated for the risk assumed increases the**

concerns about the abuses that historically the law of champerty aimed to prevent. However, I do not think that that needs to be the case. The emphasis here should be on the reasonableness and fairness of the compensation to the lawyer for assuming the risk. Many jurisdictions that have expressly approved contingency fee agreements have set out the criteria for addressing the amount of compensation that will be permitted.

Indeed, Ontario has done so in the Class Proceedings Act. In these instances, one element giving rise to compensation is often the acceptance of risk and an assessment of the level of risk involved.

> 84 That said, **I want to sound a note of caution about the potential for unreasonably large contingency fees. It is critical that contingency fee agreements be regulated and that the amount of fees be properly controlled. Courts should be concerned that excessive fee arrangements may encourage the types of abuses that historically underlay the common law prohibition against contingency fee agreements and that they can create the unfortunate public perception that litigation is being conducted more for the benefit of lawyers than for their clients. Fairness to clients must always be a paramount consideration.**

85 **Notwithstanding my conclusion that contingency fee agreements should no longer be absolutely prohibited at common law, I urge the government of Ontario to accept the advise that it has been given for many years to enact legislation permitting and regulating contingency fee agreements in a comprehensive and co-ordinated manner. There are obvious advantages to having a regulatory scheme that is clearly and specifically addressed in a single legislative enactment. There is no reason why Ontario, like all the other jurisdictions in Canada, should not enact such a scheme. Again, I wish to make clear that this comment is not intended to apply to family law matters, where different factors apply.**

86 The second matter I wish to briefly address is the effect of the Solicitors Act of Ontario on the disposition of this appeal. I start by noting that the underlying application does not raise the question whether the proposed agreement breaches the Solicitors Act and, strictly speaking, it is not necessary to comment on the effect of that Act on the issues raised in this case. However, for completeness, I think a few comments are warranted.

87 Section 28 of the Solicitors Act reads as follows:

> 28. Nothing in sections 16 to 33 gives validity to a purchase by a solicitor of the interest or any part of the interest of his or her client in any action or other contentious proceeding to be brought or maintained, or gives validity to an agreement by which a solicitor retained or employed to prosecute an action or proceeding stipulates for payment only in the event of success in the action or proceeding, or where the amount to be paid to him or her is a percentage of the amount or value of the property recovered or preserved or otherwise determinable by such amount or value or dependent upon the result of the action or proceeding.

88 I agree with the applications judge and others who have observed that this section and other similarly worded sections do not prohibit contingency fee agreements. See Bergel & Edson at 791-92; and Thai Trading, supra, at 785. The section says nothing more than contingency fee agreements are not permitted by the Solicitors Act if they are not otherwise permitted.

89 Finally, I want to address the Rules of Professional Conduct of the Law Society of Upper Canada. Again, the application that underlies this appeal does not call for a determination whether the proposed agreement contravenes these Rules. Because this argument was not fully developed on the appeal, I think the issue of the application of those Rules is better left for another occasion. That said, the Rules of Professional Conduct and the complaints and disciplinary regimes of the Law Society clearly have a role to play in ensuring that lawyers who enter into contingency fee agreements follow the ethical and professional standards set out in the Rules, so that the abuses feared in the past do not become a reality in the future.

(ii) Mary Carter Agreements

This is a relatively new litigation tool in Canada.

Suppose that the plaintiff sues a number of defendants, one of whom wishes to settle but also wishes to assert that another defendant should be held liable to pay more damages. In such a case, the ‘settling defendant’ may enter into a partial settlement with the plaintiff featuring a transfer of money by the settling defendant to the plaintiff pending final judgment, remain in the litigation as a defendant, and make common cause with the plaintiff against another defendant. In essence this allows the defendant to cap its exposure and the plaintiff to fund its litigation against other defendants.

For example, in a tort action brought by the driver of a car against a number of

defendants, the defendant driver (or his or her insurer) may wish to settle the action but join the plaintiff in asserting that faulty maintenance of a roadway was the dominant cause of the accident and the plaintiff's injuries (rather than the defendant's driving).

The doctrine originates in an American case - *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (1967, Fla. Dist. Ct. - and features a number of elements in its original form:

- the contracting parties agree that the plaintiff will receive a minimum amount of damages, regardless of the outcome of the trial;

- the liability of the settling defendant is capped at the amount agreed;

- the settling defendant remains in the litigation;

- the plaintiff agrees to limit its claims against the other defendants to a set amount (which protects the settling defendant from claims for contribution from other defendants);

- the settling defendant's liability is decreased as agreed based on the plaintiff being awarded damages in excess to that received to be paid by the non-settling defendants' liability (i.e. damages ordered above the amount agreed upon).

Pettey v. Avis Car Inc.
(1993), 13 O.R. (3d) 725 (Ont. S.C.J.)

This case discusses the fundamental principles respecting Mary Carter agreements and the rules barring 'champerty and maintenance' (that is, litigation subsidized by an uninterested party). The context of the litigation was a serious car accident and claims and counter-claims for negligence on various bases in respect of the 5 parties to the action.

Ferrier J.:

> 17 ... **Cases in the United States have indicated that a typical Mary Carter agreement contains the following features:**
>
> **1. The contracting defendant guarantees the plaintiff a certain monetary recovery and the exposure of that defendant is "capped" at that amount.**
>
> **2. The contracting defendant remains in the lawsuit.**
>
> **3. The contracting defendant's liability is decreased in direct proportion to the increase in the non-contracting defendant's liability.**

4. The agreement is kept secret.

See *Hoops v. Watermelon City Trucking*, 846 F.2d 637, 640 (10th Cir. 1988); *General Motors v. Lahocki*, 410 A.2d 1039, 1042 (My. 1980); and *Elbaor v. Smith*, 845 S.W.2d 240 (Tex. 1992).

18 In reported decisions, the majority of the courts in the United States which have considered the validity of Mary Carter agreements have allowed them to stand provided the agreement is disclosed to the parties and to the court. See *General Motors v. Lahocki*, supra; *Ratterree v. Bartlett*, 707 P.2d 1063 (Kan. 1985); *City of Tucson v. Gallagher*, 493 P.2d 1197 (Ariz. 1972); *Dosdourian v. Carsten*, 580 So.2d 869 (Fla. App. 4 Dist. 1991) and *Ward v. Ochoa*, 284 So.2d 385 (Fla. 1973).

19 In Nevada and Texas, Mary Carter type of agreements have been declared void as against public policy. See *Lum v. Stinnett*, 488 P.2d 347 (Nev. 1971) and *Elbaor v. Smith*, supra; *City of Tucson v. Gallagher*, supra; *Dosdourian v. Carsten*, supra; and *Ward v. Ochoa*, supra.

...

25 **The Rules of Professional Conduct** enacted by the Law Society of Upper Canada address the question of the encouragement of settlements and the disclosure of agreements. Commentary 4 to R. 10 under the heading "Abuse of Process" provides as follows:

> 4. **In civil proceedings, the lawyer has a duty not to mislead the court as to the position of the client in the adversary process. Thus, a lawyer representing a party to litigation who has made or is party to an agreement made before or during the trial whereby a plaintiff is guaranteed recovery by one or more parties notwithstanding the judgment of the court, shall forthwith reveal the existence and particulars of the agreement to the court and to all parties to the proceedings.**

…

1. When must such agreements be disclosed?

26 The answer is obvious. The agreement must be disclosed to the parties and to the court as soon as the agreement is made. The non- contracting defendants must be advised immediately because the agreement may well have an impact on the strategy and line of cross- examination to be pursued and evidence to be led by them. The non- contracting parties must also be aware of the agreement so that they can properly assess the steps being taken from that point forward by the plaintiff and the contracting defendants. In short, procedural fairness requires immediate disclosure. Most importantly, the court must be informed immediately so that it can properly fulfil its role

in controlling its process in the interests of fairness and justice to all parties.

...

2. Must the complete terms of the agreement including the dollar amounts of the settlement be disclosed to the court and to the parties?

34 Excepting the dollar amounts, it is rather obvious that all of the terms of the agreement must be disclosed, especially for the purpose of enabling the court to control its own process. I agree with the statements in the Florida case of *Insurance Co. of North America v. Sloan*, 432 So.2d 132 (Fla. App. 4 Dist. 1983) to the effect that gratuitous and self-serving language ought not to be part of the disclosure.

35 The disclosure of the dollar amounts is patently in the discretion of the court. In the case at bar, as above noted, a copy of the full text of the agreement, including the dollar amounts, was sealed and made an exhibit in the trial, so that full disclosure was entirely within the court's control. I declined to be apprised of the dollar amounts, being of the view that they would be of no assistance to me in controlling the process or in deciding the issues. It is not for me to consider whether, in given circumstances, the court ought to learn the dollar amounts. I note that in some jurisdictions in the United States, disclosure of the amounts to the jury is prohibited. See *Ratterree v. Bartlett*, supra. See also *Hatfield v. Continental Homes*, 610 A.2d 446 at 452 (Pa. 1992).

3. Does such an agreement amount to an abuse of process?

36 The agreement here has not been kept secret. Accordingly, the court is able to control its process with full knowledge of all relevant circumstances.

37 The contracting defendants remain in the lawsuit. They remain for the specific purpose of establishing their claims for contribution and indemnity against their co-defendants. Such claims would have been vigorously pursued even in the absence of the agreement. The agreement did not bring those cross-claims into existence, nor did it prejudice the non-contracting defendants' position in defending the cross-claims. I see no reason why the agreement should prohibit the pursuit of those cross-claims.

38 The additional feature similar to a Mary Carter agreement is that the contracting defendants' exposure is decreased in direct proportion to the increase in the non-contracting defendant's exposure. This is so to a degree in the case at bar. With such an agreement, it is in the interests of the contracting defendants to pursue the non-contracting defendants on

> the issues of liability; but this would be so as well in the absence of an agreement. However, it is also in the interests of the contracting defendants, once having made the agreement, to have the plaintiffs' damages assessed as high as possible in the circumstances. The higher the assessment, the greater the return to the contracting defendants...

III. PARTICIPATION

1. Status and Standing

'Status':

One must have **legal personality** to sue or be sued in Ontario, with some exceptions (e.g. the Crown, foreign states, 'Indian Bands', unions, statutory bodies, etc. – sometimes status for such actors is provided in another statute than the Rules).

For example, see Rules 8 (partnerships) and 9 (estates and trusts).

'Standing':

One must have **a sufficient interest** in the dispute to have the right to participate in the litigation; i.e. a person's sufficient and protectable legal rights or interests are affected by the resolution of the dispute. However, this does not mean that just because a person may be affected by litigation, that he or she has the right to participate – there are considerations used by the Court to contain the litigation. In most private law disputes standing is clear – a person suffered a loss and has a claim recognized in substantive law. At other times, particularly with respect to public law, standing is less clear – but a person or organization may be permitted to participate as an **intervenor**.

A person might have standing *in a procedural aspect* of the litigation but not in the outcome; e.g. whether a business record (like a bank record or a medical record) must be produced by a third party (like a bank or hospital) so that one of the parties may adduce it in evidence. The third party has standing in respect of the motion for production but not 'in the cause'.

Carroll v. Toronto-Dominion Bank
2021 ONCA 38 (Ont. C.A.)

A former employee of the bank sued, but in a rather curious fashion. She asserted that the bank had acted improperly in obtaining fees from customers and argued that a trust obligation arose which she could enforce. The Court denied her standing to do so.

Paciocco J.A.:

> 30 **Ms. Carroll argues that if standing is required, the motion judge was obliged to apply a flexible, discretionary, purposive approach to standing that asks whether there is a "real and legitimate basis for asking the court to adjudicate legal issues". Ms. Carroll contends that the motion judge erred by not applying this test**, and that, had she done so, Ms. Carroll would have been found to have standing given that she is a whistleblower who has sacrificed a great deal, thereby acquiring a "genuine interest and real stake in the outcome of the proceedings".
>
> 31 I do not agree with Ms. Carroll's conception of the test to be used in determining her standing. As I will explain, **where legislation does not provide standing, there are two paths to securing standing to initiate proceedings, "private interest standing" and "public interest standing". These paths are distinct.** Ms. Carroll does not seek public interest standing since it is clearly unavailable in her case. Instead, she argues that public interest standing principles should inform whether she has private interest standing. I do not agree with this proposition. Public interest standing principles do not apply where the private interest standing test governs. The motion judge would have erred had she applied the standing test Ms. Carroll proposes.
>
> 32 I will begin by describing the tests for private interest and public interest standing.
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> **33 To have private interest standing, a person must have a personal and direct interest in the issue being litigated:** Campisi v. Ontario (Attorney General), 2018 ONCA 869, 144 O.R. (3d) 638 (Ont. C.A.), at para. 4, leave to appeal refused, [2019] S.C.C.A. No. 52 (S.C.C.). **They must themselves be "specifically affected by the issue":** Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney

General), 2012 SCC 45, [2012] 2 S.C.R. 524 (S.C.C.), at para. 1. **It is not enough that the person has a "sense of grievance" or will gain "the satisfaction of righting a wrong" or is "upholding a principle or winning a contest":** Finlay v. Canada (Minister of Finance), [1986] 2 S.C.R. 607 (S.C.C.), at para. 21, citing Australian Conservation Foundation Inc. v. Australia (1980), 28 A.L.R. 257 (Australia H.C.), at p. 270. As it is sometimes put, **to have private interest standing, a person must have a "personal legal interest" in the outcome**: Landau v. Ontario (Attorney General), 2013 ONSC 6152, 293 C.R.R. (2d) 257 (Ont. S.C.J.), at para. 16. **Where the party initiating the litigation has a personal legal interest in the outcome, standing exists as of right**: Landau, at para. 21. An appeal of a private interest standing decision is therefore evaluated using a correctness standard: Miner v. Kings (County), 2017 NSCA 5, 60 M.P.L.R. (5th) 1 (N.S. C.A.), at para. 23.

34 **"In public law cases, however, Canadian courts have relaxed these limitations on standing and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations" (emphasis added): Downtown Eastside, at paras. 1, 22. This more flexible approach is warranted "to ensure that legislation is not immunized from challenge":** Downtown Eastside, at para. 33, citing Canadian Council of Churches v. R., [1992] 1
S.C.R. 236 (S.C.C.), at p. 256. As Cromwell J. explained in Downtown Eastside, at para. 37:

> **In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts.** The plaintiff seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing. [Emphasis added, citations omitted.]

35 I have added emphasis to the above passages from Downtown Eastside to reinforce that the flexible, discretionary, purposive approach that has been adopted applies only in public interest litigation. Similar developments have not occurred in private law proceedings. There are good reasons why this is so.

36 First, the reasons for liberating standing requirements in public interest litigation do not apply in the same degree to private litigation. For example, there will invariably be greater justification for using public legal resources to address matters of public interest than there will be for using public legal

resources to vindicate private interests that the parties affected are not seeking to vindicate.

37 As well, public interest litigation tends to affect the interests of many, particularly where laws are being challenged. In contrast, the outcome of private litigation has a unique impact on those whose legal interests are directly affected by the litigation. They are therefore the ones who should carry out the litigation so that they can make decisions relating to the protection of their interests.

> **38 Ms. Carroll's proposed action illustrates the point. She is suing for an investigation and for the passing of accounts without notice to the unitholders and has requested that unitholders be compensated. If she were to be granted standing, the private information of unitholders would be accessed for the lawsuit without their input. Further, if she were to be given standing to litigate, she would not only control the tactical choices made during litigation but would also have standing to settle the litigation. Despite her lack of personal legal interest in the outcome, she would be empowered to manage the litigation in ways that could potentially compromise the financial interests of the unitholders, who hold the personal legal interests in question.**

…

43 In my view, the motion judge considered the correct standing tests in determining whether Ms. Carroll had standing. She determined that the statutory standing provisions that govern standing to pass accounts do not apply, and she considered whether Ms. Carroll had a personal legal interest in the litigation that could support private interest standing. She also considered and correctly rejected Ms. Carroll's contention that her status as a knowledgeable whistleblower gave her standing to bring the application, or that more generous standing rules apply in breach of trust cases. I would therefore reject this ground of appeal.

2. Parties under a Disability

(i) Relationship Between Lawyer and Client

Rules of Professional Conduct

Rule 3.2-9
When a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.

Commentary
[1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about their legal affairs and to give the lawyer instructions. A client's ability to make decisions, however, depends on such factors as their age, intelligence, experience, and mental and physical health, and on the advice, guidance, and support of others. Further, a client's ability to make decisions may change, for better or worse, over time.

[1.1] When a client is or comes to be under a disability that impairs their ability to make decisions, the impairment may be minor or it might prevent the client from having the legal capacity to give instructions or to enter into binding legal relationships. Recognizing these factors, the purpose of this rule is to direct a lawyer with a client under a disability to maintain, as far as reasonably possible, a normal lawyer and client relationship.

…

[3] A lawyer with a client under a disability should appreciate that if the disability of the client is such that the client no longer has the legal capacity to manage their legal affairs, the lawyer may need to take steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Guardian and Trustee or the Office of the Children's Lawyer to protect the interests of the client. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned.

…

[5] When a lawyer takes protective action on behalf of a person or client lacking in capacity, the authority to disclose necessary confidential information may be implied in some circumstances. (See Commentary under rule 3.3-1 (Confidentiality) for a discussion of the relevant factors). If the court or other counsel becomes involved, the lawyer should inform them of the nature of the lawyer's relationship with the person lacking capacity.

The passage highlighted above means that there is an ethical obligation to accommodate intellectually disabled clients who have capacity to retain a lawyer and to take steps where the client loses capacity at some point thereafter.

(ii) What sort of disability?

Rule 1.03

"disability", where used in respect of a person, means that the person is,

(a) **a minor**,

(b) **mentally incapable** within the meaning of section 6 or 45 of the Substitute Decisions Act, 1992 in respect of an issue in the proceeding, whether the person has a guardian or not, or

(c) **an absentee** within the meaning of the Absentees Act;

***(iii) Need for a Litigation Guardian:* Rule 7**

7.01 (1) Unless the court orders or a statute provides otherwise, a proceeding **shall** be commenced, continued or defended **on behalf of a party under disability by a litigation guardian**.

...

7.02 (1) **Any person who is not under disability may act, without being appointed by the court, as litigation guardian for a plaintiff or applicant who is under disability, subject to subrule (1.1).**

[(1.1) provides that disabled people with guardians, attorneys, etc already in place are presumptive litigation guardians absent the court ordering otherwise.]

(2) No person except the Children's Lawyer or the Public Guardian and Trustee shall act as litigation guardian for a plaintiff or applicant who is under disability until the person has filed an affidavit in which the person,

(a) consents to act as litigation guardian in the proceeding;

(b) confirms that he or she has given written authority to a named lawyer to act in the proceeding;

(c) provides evidence concerning the nature and extent of the disability;

(d) in the case of a minor, states the minor's birth date;

(e) states whether he or she and the person under disability are ordinarily resident in Ontario;

(f) sets out his or her relationship, if any, to the person under disability;

(g) states that he or she has no interest in the proceeding adverse to that of the person under disability; and

(h) acknowledges that he or she has been informed of his or her liability to pay personally any costs awarded against him or her or against the person under disability.

... and the Litigation Guardian's need to retain a lawyer:

15.01 (1) A party to a proceeding who is under disability or acts in a representative capacity **shall** be represented by a lawyer.

(iv) Approval of Settlement

7.08 (1) No settlement of a claim made by or against a person under disability, whether or not a proceeding has been commenced in respect of the claim, is binding on the person without the approval of a judge.

Gronnerud (Litigation Guardians of) v. Gronnerud Estate
2002 SCC 38 (S.C.C.)

This leading case deals with one of the main criteria for appointment, the litigation guardian's disinterest in the results of the litigation. It also considers whether the Court can, and should, fetter the discretion of the Public Guardian and Trustee when appointed as Litigation Guardian.

The context of this dispute is how the assets of the deceased husband of an incapable woman should be treated. Here the deceased was survived by his wife (an older woman who suffered from Alzheimer's Disease and was mentally incapable) and his children.

The husband owned land upon which he and his wife farmed. She had made a Will 35 years before her husband's death (which was never revoked) and in which she expressed her wish that the farm land stayed together. In her husband's Will, the wife was beneficiary of only a $100,000 trust as she was already in long term care when that document was executed.

A question arose as to whether the wife's interests in her Husband's Estate were sufficient

- should she apply for equalization of property in preference to the gifts given to her in the Will? Should she sue for dependant's support?

The trial court appointed two of her children, J and B, her Guardians. J and another child, G, were appointed to be her Litigation Guardians. **On first appeal, the appointments were vacated in favour of the Public Trustee (as two of the children would inherit more after their mother died than if the farm was disposed of as set out in the husband's will) but that appointment was limited by the condition that a division of matrimonial property (which would cause the farm to be sold) should not be made. Was that restriction valid?**

Per Major J:

> 18 A litigation guardian is responsible for commencing, maintaining or defending an action on behalf of a person... **The test to remove and replace a litigation guardian turns on the "best interests" of the dependent adult**.
>
> ...
>
> **18 A litigation guardian is responsible for commencing, maintaining or defending an action on behalf of a person**. Under The Queen's Bench Rules of Saskatchewan, the litigation guardian can be the property guardian appointed under The Dependent Adults Act or any other individual appointed by the court: Rules 46(2)(a) and 46(2)(f). Under Rule 49, the court can remove a litigation guardian and appoint a substitute, if it appears to the court that the guardian is not acting in the best interests of the disabled adult. The test to remove and replace a litigation guardian turns on the "best interests" of the dependent adult.
>
> 19 **The leading Saskatchewan case on the criteria to appoint a litigation guardian is *Szwydky v. Magiera* (1988), 71 Sask. R. 273 (Sask. Q.B.), at pp. 276-777... The six criteria are:**
>
> **- the evidence must establish that the incompetent is unable to act for himself or herself;**
>
> **- evidence should be verified under oath as to the incompetent's mental condition and his or her inability to act as plaintiff;**
>
> **- evidence must demonstrate that the litigation guardian is both qualified and prepared to act, and in addition is indifferent as to the outcome of the proceedings;**
>
> **- the applicant should provide some evidence to support the claim being made;**

- the applicant should obtain the consents of the next-of-kin or explain their absence;

- if the applicant has a personal representative or power of attorney whose status is not being challenged in the proceedings, some explanation should be offered as to why the attorney or representative has not been invited to bring the claim.

20 The *Szwydky* criteria provide guidance in defining the "best interests" test set out in Rule 49. The third criterion, that of **"indifference" to the result of the legal proceedings, essentially means that the litigation guardian cannot possess a conflict of interest vis-à-vis the interests of the disabled person. Indifference by a litigation guardian requires that the guardian be capable of providing a neutral, unbiased assessment of the legal situation of the dependent adult and offering an unclouded opinion as to the appropriate course of action. In essence the requirement of indifference on the part of a litigation guardian is a prerequisite for ensuring the protection of the best interests of the dependent adult. A litigation guardian who does not have a personal interest in the outcome of the litigation will be able to keep the best interests of the dependent adult front and centre, while making decisions on his or her behalf. Given the primacy of protecting the best interests of disabled persons, it is appropriate to require such disinterest on the part of a litigation guardian.**

21 **It is acceptable in most cases, and perhaps desirable in some cases, to have a trusted family member or a person with close ties to the dependent adult act as litigation guardian... However, there are exceptions. One such exception is the situation currently presented by this appeal, in which there is a particularly acrimonious and long-standing dispute among the children concerning their dead parent's estate. In such cases, the indifference required to be a litigation guardian is clearly absent.**

22 In my opinion, the Court of Appeal was correct in removing Judy and Glenn as Cherie Gronnerud's litigation guardians and replacing them with the Public Trustee. Judy and Glenn could not act in their mother's best interests because... **they were not indifferent as to the outcome of the proceedings surrounding the estate of Harold Gronnerud... As residuary beneficiaries under Harold's will, Judy and Glenn have an interest in proceedings that could result in the movement of assets from Harold's estate to Cherie's estate. As Cherie's 1967 holograph will is not broad enough to cover all potential assets passing from Harold's estate, those new assets would be distributed to all four of Cherie's children equally in accordance with the laws of intestacy. If proceedings brought by Cherie's litigation guardian against Harold's**

estate are successful, Judy and Glenn could stand to gain more as beneficiaries with one-quarter interest each in Cherie's newly increased estate, as opposed to residuary beneficiaries under Harold's will. It is obvious that Judy and Glenn cannot be said to be disinterested in the results of the legal proceedings. The Court of Appeal was correct to remove them as litigation guardians.

...

29 It is my opinion that, in appointing the Public Trustee as litigation guardian for a disabled adult, the Court of Appeal for Saskatchewan has the jurisdiction to restrict the Public Trustee to litigating some types of claims and not others. This authority of the appellate court is apparent from the plain wording of the relevant statute...

...

35 **On my review, it appears that underlying the Court of Appeal's decision must be the implicit recognition that the best interests of Cherie Gronnerud are protected by the trust account in Harold's will.** This is supported by evidence of: Cherie's intentions regarding the family farm; Cherie's relationships with her children and her husband; Cherie's present physical and mental condition; and the fact that a public facility best suits Cherie's present needs. While none of these factors is determinative on its own, taken together they serve to illuminate the best interests of Cherie Gronnerud.

36 First, in terms of Cherie's intentions regarding the estate, the evidence shows that both Cherie and Harold wished to keep their assets together and also wanted to give the majority of their assets to their son Bud. If a claim under The Matrimonial Property Act was brought that resulted in an equal division of the matrimonial property, then the family farm and house would have to be sold to permit the payment to Cherie's estate. This would be antagonistic to the testamentary intention of Harold, who wanted to bequeath almost everything to Bud in part to ensure the farm land so labouriously acquired was retained. Harold's intentions are only relevant in that they may assist one in discerning Cherie's intentions, which in turn are useful in establishing her best interests.

37 That Cherie shared her husband's view is evident in her holograph will. Although this will was drafted a number of years ago, it nevertheless indicates Cherie's desire that Bud have the bulk of the family assets primarily to ensure protecting the family farm...

38 It is also significant that Harold Gronnerud drafted his will in 1999, after Cherie had been diagnosed with Alzheimer's disease in 1997. Given their lengthy and satisfactory marriage, it is likely that had Cherie been competent in 1999, Harold would not have drafted his will in the manner that he did. It

> is apparent that he knew Cherie was terminally ill and permanently disabled mentally by Alzheimer's disease. In the result, it was pointless to provide for her in any other way. His will not only expressed his intentions but reflected those of his wife expressed in her holograph will some 35 years ago. We do not know if or how Cherie would have changed her original will had she not become medically incompetent. While not significant on its own, the evidence of the testamentary intentions of Cherie and Harold Gronnerud is relevant in that it provides additional clues as to what would be in Cherie's best interests, the latter being the central inquiry.
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> 39 At present, Cherie's condition, both mental and physical, is dire. As noted above, the Court of Queen's Bench has twice found that Cherie's needs are best met in the publicly funded facility in Regina, rather than in a private home or in an expensive private facility. She has no chance of recovery, she suffers from dementia, and she requires assistance with most basic activities. It is reasonable to assume that, in deciding to leave a $100,000 trust fund to his wife of 57 years, Harold had in mind the fact that Cherie is suffering from a debilitating and incurable disease, and believed that the trust fund would provide for her particular needs. This appears to be supported by the findings of the Court of Queen's Bench that Cherie's needs as an Alzheimer's patient are best met in a publicly funded facility. We believe that, given this factual record, the Court of Appeal must have recognized this as well.

Per Arbour J. (dissenting):

> 49 One of the main difficulties with this case is that there is not much of a record constructed around that critical issue. The most there is to ascertain what would be the wishes of Mrs. Gronnerud were she capable of formulating any such wishes is essentially a holographic will dating back some 35 odd years, and the fact that nothing since shows a change of heart on her part. In the absence of reasons by the Court of Appeal, I cannot say how the court felt that this was sufficient to dispose of the issue of her best interests. **For myself, I cannot be persuaded, again on this record, that I am in a better position than the Public Trustee to make that determination. It is obviously rarely in a person's best interests to forgo a statutory entitlement to as much as possibly half a million dollars. I cannot say that this is not such an unusual case. However, considerably more investigation should be done, as the Public Trustee is fully ready, able and willing to do, to ascertain whether this is in fact the case...** In the circumstances I think it would be far preferable to leave the decision as to whether an action for division of assets under The Matrimonial Property Act should proceed to those who are better placed to make that decision.

[One would think that the Public Trustee would not make an equalization election in the

circumstances of this case. I think Arbour J.'s criticism more strongly sounds in ensuring that spousal entitlements are not easily abandoned by third parties on behalf of a surviving spouse. See also the dicta of Cullity J. in *Dolmage v. Ontario*, 2010 ONSC 1726 (Ont. S.C.J.) on 'indifference'.]

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For an example of a motion to oust the PGT in favour a family member, see ***Lochner v Callanan*, 2016 ONSC 1705 (Ont. S.C.J.)** Here a claim was brought against police in respect of the arrest of a man with mental health issues which rendered him mentally incapable. The family members retained a number of lawyers who were granted leave to withdraw as counsel of record. Eventually the PGT was appointed. The former Litigation Guardians sought to oust the PGT who had reached a tentative settlement on the theory that the case was strong; the evidence was that the case was weak and the Court denied the motion to replace the PGT. Justice Faieta held:

> [29] The moving parties submit that Mr Kim's affidavit sworn January 18, 2016 contains a "litany of unfounded opinions". This affidavit appears comprehensive (28 pages plus over 30 exhibits) in respect of both liability and damages. The moving parties dispute whether 2 or 3 tasers were used. The evidence explicitly addresses Silvano's theory that three tasers were used. It appends various records, including taser reports, related to the use of tasers that evening.
>
> [30] The moving parties also assert that George was tasered on both his front torso and his back. This point was also expressly addressed by the Mr. Kim's affidavit sworn January 18, 2016. In doing so, it references various police records and a report obtained from a forensic pathologist who provided an opinion regarding the number of taser impacts as well as the location, seriousness and permanency of the injuries suffered by George as a result of this incident, including the injuries caused by being tasered. This report also provides the pathologist's opinion regarding the number of times that George was tasered as well as the location of impact caused by the tasers as well as whether the impacts caused by taser being used in probe mode or drive-stun mode.
>
> [31] The PGT's management of the litigation seems to stem from the fact that they feel that the PGT has not adopted their position on the circumstances of this incident. The PGT has no such obligation to the moving parties. A Litigation Guardian is obliged to disclose all material facts so that the Court considering the settlement can determine whether it is in the best interests of the party under disability. I agree with the following statement:
>
> Before approving a settlement for a party under disability, the court will require that the motion record include full disclosure of the entire settlement including the total amount to be received from all of the defendants and how

it is proposed that the global amount be allocated if there is more4 than one plaintiff. The court expects and requires full disclosure of all facts which might bear on any material aspect of the case, including liability, damages and fees, so that the court will be able to make a reasoned decision on the appropriateness of the settlement in every aspect. The applicants should provide sufficient evidence to demonstrate that: (1) an appropriate investigation with respect to both liability and damages has been completed; (2) an appropriate assessment of liability issues has been made; (3) an appropriate assessment of damages issues has been made, and (4) the fees and disbursements which the plaintiffs' lawyers propose to charge are reasonable in all the circumstances.[5]

[32] These circumstances do not establish that the PGT is not acting in George's best interests.

[33] Further, the moving parties have not demonstrated that the PGT has a conflict of interest vis-à-vis George. There is no evidence that the PGT has a relationship, pecuniary or otherwise, with the defendants.

[34] Further, the moving parties have not demonstrated that the PGT has a personal interest in the outcome of George's action. The fact that the PGT did not seek this appointment underscores that it does not have a personal interest in the outcome.