

Collecting legal fees: The Small Claims Court is back in business

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18 January 2017

For the past few years, the courts have grappled with the issue of whether the Small Claims Court has jurisdiction to hear cases about the collection of unpaid legal fees. First, a court determined that s. 23 of the *Solicitors Act* essentially precluded a lawyer from bringing a Small Claims Court action to collect an outstanding account.

Then another court determined that lawyers who did not have written retainer agreements with their respective clients or who had “standard” written agreements with their respective clients could bring a Small Claims Court action to collect an outstanding account. But little guidance was provided as to what constituted a “standard” written agreement and so the profession continued to endure frustration in connection with the process that had to be followed to collect an unpaid legal bill.

Clients were equally frustrated because of the delays that were being systemically encountered at assessment offices, particularly in Toronto, because hearings were being scheduled two or three years from the date of an application for an assessment.

A decision late last year, however, signals that the Small Claims Court can once again be used by lawyers to collect their unpaid accounts in cases where a written agreement merely provides that fees will be calculated based on time and hourly rates.

In *Zeppieri & Associates v. Gupta*, the plaintiff law firm was owed approximately \$5,500 by a client. While the law firm sought to assess the account in October 2015, it learned six months later that the first available date for an assessment was 28 June 2018. Accordingly, the law firm applied for leave to bring a Small Claims Court action to collect the outstanding fees.

The application was granted.

Justice Dunphy carefully reviewed the relevant provisions of the Act and immediately noted that under ss. 2 and 3 two avenues existed by which a lawyer could seek to collect outstanding fees. The lawyer could either bring an action or requisition an assessment.

The judge then considered ss. 16, 17 and 23 of the Act and the absurd outcomes that might result if lawyers who reduced their retainer agreements to writing were precluded from bringing Small Claims Court actions to collect outstanding fees within its monetary limits before concluding that there were two paths by which to find that the Small Claims Court had jurisdiction to hear lawyer fee collection actions where a written retainer agreement existed.

His Honour first explained that if the effect of s. 23 was to require any bill arising from a written retainer agreement to go to assessment, s. 17 of the Act would mean that a happy client with no disputes about his or her lawyer's bill would, in cases involving a court proceeding, not need to pay the bill until the agreement was referred to assessment. This was absurd. The judge also then explained that since s. 17 did not apply to contingent agreements, lawyers who opted for an “ordinary” engagement would have to apply for assessment before receiving any payments while lawyers with contingent fee engagements would not. This also was absurd and was contrary to the accepted notion that lawyers should strive to reduce all retainer agreements to writing.

So as determined in *Cozzi v. Heerdegen*, Justice Dunphy agreed that the phrase “any such agreement” used in s. 23 of the Act referred to agreements in writing described in 16(1), but that this section was intended to cover alternative billing arrangements, such as contingent fees, block fees or other arrangements and not a “standard” written agreement.

A “standard” written agreement is one in which fees are calculated based on time and hourly rates and Zeppieri & Associates was allowed to bring a Small Claims Court action to collect their fees.

The second path to the Small Claims Court existed under the following analysis. Justice Dunphy described that the “trigger” for bringing an action or referring an account for assessment is the lawyer’s bill. But under a single ‘retainer agreement’, dozens of ‘bills’ could be rendered. An action on a ‘bill’, however, was not an action on an ‘agreement’. Thus, viewing an assessment of an action on an individual bill as being on the bill itself and not on the underlying engagement agreement resulted in the harmonious reading of s. 17 in a manner that did not produce absurdities.

Based on the foregoing interpretations, His Honour concluded that a “standard” engagement agreement was not the sort of “agreement” contemplated by ss. 16, 17 or 23 and that an action on one or more bills under a written agreement that was not an “alternative fee arrangement” was not covered by s. 23.

The bottom line of this decision is regardless of the path taken to justify the result, the Small Claims Court is open for business in connection with the collection of outstanding legal fees where a lawyer simply charges his or her client for work done based on time and hourly rate.

The fact that the lawyer and client reduce this simple fee arrangement to writing, which would be standard in the solicitor-client relationship, will not preclude a lawyer from bringing an action for the collection of unpaid legal fees in the Small Claims Court.

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Author



Stephen A. Thiele

Partner

416.865.6651

sthiele@grllp.com



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com