Court of Queen's Bench of Alberta

Citation: Hamilton v. Nerbas, 2008 ABQB 674

Date: 20081031
Docket: 0601 04780
Registry: Calgary

Between:

Linda Hamilton and Gregory Hamilton

Plaintiffs

- and -

Michael John Nerbas

Defendant

Reasons for Judgment
of the
Honourable Mr. Justice D.B. Mason

I. Introduction

[1] One intended purpose of the comma is to illuminate the grammar of a sentence. Yet despite this clarifying goal the comma has earned its notoriety as a troublemaker. The "Million Dollar Comma" debacle, in which a single comma of a single sentence of a fourteen page contract almost cost a Canadian communications giant over 2 million dollars, serves as an expensive reminder of the importance of correct grammar and punctuation. As Lynne Truss pointedly notes in *Eats, Shoots & Leaves*, "... legal English, with its hifalutin efforts to cover everything, nearly always ends up leaving itself semantically wide open...." It is the result of such legal efforts that the following application is before me, for advice and directions, on the interpretation of Rule 616(2)(e)(ii) of the *Alberta Rules of Court* ("Rule 616").

II. Facts

[2] Ms. Hamilton ("the Applicant") was injured in a motor vehicle accident on May 21, 2004. She retained Brian Conway–for whom she has been employed as a legal assistant for seven years–on May 21, 2004 pursuant to a contingency fee retainer agreement (the "Agreement"). At the time she signed the Agreement, the Applicant was familiar with the Rules of Court requirements for contingency agreements given that a significant amount of Mr. Conway's files were personal injury matters. Specifically, the Applicant was aware of Rule 616, as she had reviewed the changes to the Rules of Court with Mr. Conway when they were first implemented.

[3] Rule 616 states that, to be enforceable, a contingency fee agreement must contain, among other things, a statement about

> (ii) the maximum fee payable, or the maximum rate calculated, after deducting disbursements.

The Applicant understood the word "or" in Rule 616 to read disjunctively, in that the Agreement had to contain a clear statement of either: (I) the maximum fee payable ("Option 1"); or (ii) the maximum rate calculated after deducting disbursements ("Option 2").

[4] Given that the Applicant did not have the ability to pay the disbursements as they were incurred, she chose Option 1. Her choice was motivated by the likelihood that her case will go to trial seeing as the parties are "too far apart to settle." The Agreement clearly states that the maximum fee is 35% of the gross amount recovered, and that the gross amount includes disbursements.

[5] According to the Agreement, if Option 2 is chosen, outstanding disbursements are subject to an interest rate of 2% per month. The Applicant wished to pay the "capped" amount of 35% per Option 1, as disbursements under this Option would be included under the "gross" settlement amount. She claims that, in circumstances where the client cannot pay the disbursements as they arise and the case takes longer than 18 months to resolve, Option 1 ultimately costs less than Option 2. Mr. Conway affirms that in his 20 years of experience practising personal injury law, personal injury cases can take several years to resolve. He has always considered Option 1 to be much more fair for clients as it is invariably less than paying interest on disbursements at an interest rate of 2% per month.

[6] The Law Society of Alberta interprets Rule 616 to require the deduction of disbursements before the contingency fee is applied to the remainder of the funds. As such, Rule 616 should be understood to mean that disbursements are to be deducted from both the maximum fee payable and the maximum rate calculable.

[7] The Applicant argues that Rule 616 is unclear and ambiguous; any ambiguity should be resolved in favour of the client per the *contra proferentum* rule. If the drafters of the Alberta

Rules of Court intended that disbursements be deducted from the gross recovery before application of the contingency fee percentage, clear language should have been used instead of the confusing language of Rule 616. As such, Rule 616 should be interpreted to permit Mr. Conway to charge his contingency fee on the gross amount recovered, including the disbursements.

III. Issues

[8] What is the correct interpretation of Rule 616(2)(e)(ii)? Does it require that disbursements are to be included in the maximum fee payable, but are to be deducted from the maximum rate calculated ("Interpretation 1")? Or does it require that disbursements are to be deducted from both the maximum fee payable and the maximum rate calculable ("Interpretation 2")?

[9] If Interpretation 2 is the correct interpretation, does it govern the Agreement or should freedom of contract prevail?

IV. Analysis

A. The Correct Interpretation of Rule 616(2)(e)(ii)

[10] A canvass of Strunk & White's *The Elements of Style* (Boston: Allyn & Bacon, 2000) and various other "bibles" on grammar and usage suggests that Rule 616 is properly interpreted to mean the following: a contingency agreement is to have a statement about the maximum fee payable after deducting disbursements, or a statement about the maximum rate calculable after deducting disbursements (Interpretation 2).

[11] If there were no comma after "calculated", so that the Rule read "the maximum fee payable, or the maximum rate calculated after deducting disbursements", then Interpretation 1 would apply. Because there is a comma after "calculated", however, it serves a conjunctive as opposed to disjunctive purpose between the clause "the maximum fee payable" and the clause "after deducting disbursements".

[12] This interpretation was also drawn in *Chee v. Goldford Law Office,* 2004 CarswellAlta 1854 (Q.B.). The Alberta Court of Queen's Bench held at para. 15 that

> [t]he proper calculation of the contingency fee, as contemplated by Rule 616(2)(e)(ii), is put into effect by deducting *all* disbursements and associated GST from the total recovery *before* applying the contingency fee multiplier....

[13] Of note is that the phrase at issue in the Million Dollar Comma case had a similar construction to Rule 616. The contract read that the agreement

> ... shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one year prior notice in writing by either party.

The Canadian Radio-television Telecommunications Commission ("CRTC") held at para. 27 of its decision that the above phrase was clear and unambiguous and that

> based on the rules of punctuation, the comma placed before the phrase "unless and until terminated by one year prior notice in writing by either party" means that that phrase qualifies both the phrases "[the agreement] shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made" and the phrase "and thereafter for successive five (5) year terms": *Telecom Decision CRTC* 2006-45.

[14] In an interesting twist of events, the CRTC reversed its decision after it was presented with the French version of the contract. The French version, unlike the English version, had no commas to cloud the termination rights.

[15] Although the Alberta Rules of Court are not published in French, there is accompanying literature from the committees that inform the Alberta Justice Department in its creation and reformulation of the Rules of Court. One such committee is the Alberta Law Reform Institute.

[16] The Alberta Law Reform Institute's Consultation Memorandum No. 12.17 includes a discussion of the appropriateness of the requirements for contingency fee agreements since the rules were reviewed and updated on April 1, 2000. Rule 616 remains the same today. The Memorandum notes at pp. 61-62 that

> [m]ost of these changes required *more disclosure from the lawyer to the client about the nature of the agreement* and the way in which the contingency fee was to be calculated, using "plain language."
>
> ...
>
> The taxing officers support the rules relating to contingency fee agreements, feeling that lawyers generally in the past have not taken sufficient time to explain contingency arrangements to their clients.... The taxing officers believe that the wide discretionary power to vary a contingency agreement allows them *to provide a reasonable result for clients* [emphasis added].

[17] The Alberta Law Reform Commission describes Rules 616 and 619 (Rule 619 gives judges the power on review to approve, vary, modify or disallow contingency agreements) to be a "detailed 'road map' of the required terms of a contingency agreement": p. 64. Further, the Commission stresses that the purpose of these Rules is to "protect the client."

[18] It was decided by The Alberta Law Society Benchers that the best way to protect the client would be to implement policy that encourages lawyers to "draft contingency agreements in plain understandable language": Alan Macleod, Q.C. (now Macleod J.), "New Rules for Contingency Fees" *Benchers' Advisory* (February 2000). Rule 616 is intended to be a reflection of this policy – a policy that grew from extensive consultation with the Alberta Law Reform Institute, the Alberta Law Society Benchers, the Law Foundation, the Queen's Printer, and the legal profession generally.

[19] It is clear that the new rules regarding contingency fee agreements implemented on April 1, 2000, including Rule 616, are intended to assist the client. The rules were formulated to ensure that clients fully understand the terms and financial consequences of any contingency fee agreement.

[20] As discussed above, the Alberta Law Reform Commission has stated these Rules are a roadmap of the required terms. A roadmap is a plan to guide progress toward a goal. In this case, the goal is a fully-informed client. Given that these Rules are client-friendly, it would be absurd in the present case to permit bureaucratic intrusion and endorse a result that would be less beneficial to the client.

[21] That Rules of Court regarding contingency agreements should not be allowed to displace the agreements themselves was upheld by the Alberta Court of Appeal in *Morrison v. Rod Pantony Professional Corporation*, 2008 ABCA 145, 429 A.R. 259 [*Morrison*]. Albeit the Court was considering Rule 613, which states that counsel are to be reasonably compensated for services rendered, the principle is equally applicable to Rule 616.

[22] The Applicant affirms that she understood Rule 616 to mean the Agreement had to contain a clear statement of either (I) the maximum fee payable or (ii) the maximum rate calculated after deducting disbursements. The underlying purpose of Rule 616 is to ensure the client understands the agreement. It inevitably follows that the Agreement holds the answer to this application.

B. The Agreement

[23] The Alberta Court of Appeal noted in *Morrison* at paras. 13-14 that,

> [a]s a general rule, issues regarding the interpretation of a contingency fee agreement should be resolved first by the ordinary rules respecting contractual interpretation.
>
> ...
>
> Contracts are interpreted on an objective basis, having regard to what a reasonable person would infer from the words used. The contract must be interpreted considering the factual and legal background against which it was concluded and the practical objectives which it was intended to achieve: *ATCO Electric Ltd. v. Alberta (Energy and Utilities Board)*, 2004 ABCA 215, 31 Alta. L.R. (4th) 16 at para. 77.

[24] The Agreement clearly states that the maximum fee is 35% of the gross amount recovered, and that the gross amount includes disbursements:

> 2. "Recovery" means any sums of money received by the Lawyers, the Client, or anyone on the Client's behalf, whether by way of judgment or settlement, as damages or compensation to the Client.
>
> 3. The Client agrees to pay the Lawyers:
>
> a) Thirty Five Percent (35%) of the gross amount of any Recovery collected on behalf of the Client.

Moreover, the Applicant states in her affidavit that it was her understanding, upon signing the agreement, that her payment to Mr. Conway would be capped at 35%. This understanding is confirmed by Mr. Conway. It will be recalled that the Applicant is familiar with Rule 616 as she reviewed the changes to the Rules of Court with Mr. Conway when they were first implemented.

[25] Our Court of Appeal stressed in *Morrison* at para. 26 that "[c]ontingency fee agreements are an important device for providing access to justice to impecunious clients: *Cogan, Re* (2007), 88 O.R. (3d) 38 (S.C.J.) at paras. 37, 59-62." The respondents in *Morrison* argued that a clause in the contingency fee agreement was not fully explained to them and, thus, the appellant could not enforce it against them. The Court held at para. 26 that "[i]n order to promote certainty, the terms of the written retainer agreement should be given effect, unless those terms are manifestly unfair or confusing."

[26] In the instant case there is no allegation of unfairness in the Agreement. Quite the opposite. Both counsel and his client agree that Interpretation 1 is the most just avenue for the Applicant.

V. Disposition

[27] The Applicant suggests that an example of clear language is found in the regulations supplementing Ontario's *Solicitor's Act*, R.S.O. 1990 . O. Reg. 195/04, s. 2.5 reads:

> 2. A solicitor who is a party to a contingency fee agreement shall ensure that the agreement includes the following:
>
> 5. A statement that sets out the method by which the fee is to be determined and, if the method of determination is as a percentage of the amount recovered, a statement that explains that for the purpose of calculating the fee the amount of recovery excludes any amount awarded or agreed to that is separately specified as being in respect of costs and disbursements.

[28] Ontario's contingency fee rules also require disbursements to be deducted before the contingency fee multiplier is applied. What distinguishes Ontario's rule from Alberta's is an explicit, fleshed out statement noting that disbursements are to be excluded when the method of

determination is a percentage of the amount recovered. Although Interpretation 2 of Alberta's Rule 616 is technically correct, it is easy to understand why the instant case is before me.

[29] Had Rule 616 been phrased: "to be enforceable, a contingency fee agreement must contain a statement about (ii) the fee payable after deducting disbursements or the maximum rate calculated after deducting disbursements", this case would likely not be before me. Having said this, it should not be forgotten that contingency fee rules are client-friendly rules. They are in place to assist the client in understanding his or her obligations under the agreement and to ensure the whole process is a fair and just one.

[30] In light of the purpose of Rule 616 discussed above, the wording of the Agreement, and the understanding of the Applicant upon signing the Agreement, this Court finds that Interpretation 1 should apply. The Applicant is therefore responsible for paying Mr. Conway a maximum fee payable of 35% of gross proceeds, including disbursements.

[31] Ultimately, this case stands for the principle that Rules of Court regarding contingency agreements should not be allowed to displace the agreements themselves. As Test Draft Three of the New Rules of Court currently stands, the wording of Rule 616 has not changed. It will be interesting to see, however, whether decisions such as this and that of the Court of Appeal in *Morrison* will result in changes to the Rules.

Heard on the 3rd day of July, 2008.
Dated at the City of Calgary, Alberta this 31st day of October, 2008.

D.B. Mason
J.C.Q.B.A.

Appearances:

Walter W. Kubitz of Everard, Kubitz & Mueller
for the Linda Hamilton and Brian Conway

Michael John Nerbas (Non-appearance)
self-represented