

Civil Litigation

Court of Appeal dismisses Fasken's motion for charging order against client

By **Amanda Jerome**

(March 28, 2018, 9:43 AM EDT) -- The Ontario Court of Appeal has dismissed a motion brought by Fasken Martin DuMoulin LLP for a charging order on costs against a client. The decision, counsel says, shows that provisions under the *Solicitors Act* should not be used as "primary tools" for the collection of unpaid accounts.

In *Weenen v. Biadi* 2018 ONCA 288, the court heard that Fasken had successfully represented its client, Matthew Weenen, in an action against his neighbour, Graziano Biadi, for causing flooding on his property. Biadi was ordered to pay Weenen \$390,000 in damages and \$550,000 in costs.

According to court documents, Biadi's appeal of the damages award was unsuccessful and he was ordered to pay Weenen \$50,000 in costs on the appeal. After the appeal was dismissed, Fasken brought a motion for a charging order of over \$360,000 on the funds to be paid to Weenen.

The amount requested is the remaining balance Fasken claimed it was owed out of the approximately \$820,000 in fees it charged Weenen for representation. According to court documents, Weenen contested the amount owed and initiated an assessment process before Fasken brought the motion for the charging order.

Fasken's motion was initially sought as a charge under s. 34(1) of the *Solicitors Act*.

The motion was heard by Court of Appeal Justice David Brown and he questioned the court's jurisdiction to grant a s. 34 charging order over costs awarded by the Superior Court of Justice. Due to this concern, the issue was referred to a three-judge Appeal Court panel.

According to court documents, Fasken then amended its notice of motion to add an alternative claim for a lien based on the court's jurisdiction.



Yan David Payne, Payne Law Professional Corporation

The panel determined that a Court of Appeal judge is, by virtue of his or her office, a judge of the Superior Court with all of the jurisdiction that position holds and therefore is able to issue a charging order or lien. However, it dismissed Fasken's motion as the law firm was unable to discharge its burden to establish that it would not be paid without a charging order.

"The test for a charging order under s. 34 is clear. To obtain a s. 34 charging order a solicitor must demonstrate that: the fund or property is in existence at the time the order is granted; the property was 'recovered or preserved' through the instrumentality of the solicitor; there must be some evidence that the client cannot or will not pay the lawyer's fees," wrote Justices Gloria Epstein, C.W. Hourigan and David Paciocco in the decision.

The court noted that while the first and second element of the test was satisfied, the third element was not and therefore the motion must be dismissed.

"The correspondence between the parties demonstrates that the Law Firm has asked the Client for instalment payments toward the outstanding accounts on at least four occasions over the past several years. Tellingly, the Client has made payments on three of those four occasions," the court wrote.

"The Law Firm does not appear to have requested the full amount due on the outstanding accounts or a corresponding refusal or inability to pay. There is, of course, the pending assessment but, in our view, the fact that the Client contests the amount he owes the Law Firm is not evidence of his inability or unwillingness to pay," the court added.

The panel of three judges determined, in a decision released March 21, to dismiss the motion as they noted they "are of the view that the Law Firm has not satisfied us that we should exercise our discretion to grant the requested charging order or lien."

Yan David Payne, of Payne Law Professional Corporation and counsel for the respondent, said this case shows that lawyers should be cautious in seeking charging orders and solicitors' liens.

"These special rights should not be a lawyer's first recourse when it comes to collecting on an outstanding account. A lawyer must come to court with supporting evidence demonstrating that, without a charging order or lien, they are unlikely to be paid what is owing," he said.

"At the very least, a lawyer should be prepared to demonstrate good faith attempts to collect," he added.

Payne noted that the Court of Appeal was unwilling to treat a pending assessment as evidence of inability or unwillingness to pay.

"It was insufficient for Fasken to baldly state that it verily believed it would not be paid. The client, on the other hand, confirmed that he was ready, willing and able to pay. Further, Fasken had represented three separate clients in the proceedings and there was no evidence of any attempt to collect from those clients," Payne explained.

Counsel for Fasken declined to comment.