

## Arbitrating Legal Fee Disputes

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Updated May 2017. This article is legal information, not legal advice.

This article comments on arbitrating legal fee disputes as opposed to going to Court or through an assessment. The article is relevant to lawyers, paralegals and clients. Arbitration is an under-utilized and advantageous dispute resolution mechanism.

### Legal Fee Dispute Options

When negotiation and/or mediation fail, there are 3 options for legal disputes:

1. Court;
2. Assessment; or
3. Arbitrate.

### Why Clients Prefer to Arbitrate

Clients prefer arbitration because it's faster, simpler and most significantly, it's confidential.

Going to Court or an assessment means that sensitive, privileged information will be disclosed in public. Retainer agreements, invoices and correspondence all become evidence accessible to anyone. Especially in ongoing litigation, this can have unintended consequences.

Consider how a simple billing line such as "telephone conference to discuss pros and cons of settlement offer and recommendation to accept offer" can undermine a negotiation if it falls into the wrong hands.

### Legal Fee Disputes and Small Claims Court

In late 2014, the Divisional Court ordered that you cannot take a legal fee dispute to Small Claims Court where there is a contingency fee retainer agreement.

Please see *Jane Conte Professional Corporation v. Josephine Smith*

(<http://canlii.ca/t/gf2r5>) for the decision, clarified in *Gilbert's LLP v. David Dixon Inc.* (<http://canlii.ca/t/h03zb>).

In early 2016, the Divisional Court ordered that you can take a legal fee dispute to Small Claims Court where there is a simple written retainer based on an hourly rate. Please see *Cozzi v. Heerdegen* (<http://canlii.ca/t/grpd4>) for the decision, which comments on the Divisional Court's previous decision in *Jane Conte*.

According to the Divisional Court, upholding a decision of the Small Claims Court, arbitration awards can be enforced in Small Claims court. See *Evergreen v. Gemma Depositario* (<http://canlii.ca/t/gn03w>). Mick Hassell made submissions to the Divisional Court as amicus curiae in support of the Small Claims Court's jurisdiction to enforce arbitral awards.

### **Arbitrating Legal Fee Disputes and the *Solicitors Act***

Arbitrators have jurisdiction to hear legal fee disputes.

The Ontario Court of Appeal ruled in 2009 in *Jean Estate v. Wires Jolley* (<http://canlii.ca/t/23bpn>) that an arbitrator had jurisdiction over a legal fee dispute and in this particular case a contingency fee dispute, which is the type of retainer agreement with maximum protections under the *Solicitors Act*.

The Ontario Court of Appeal ruled that an agreement to arbitrate was enforceable despite the client requesting to have the contingency fee dispute heard by a Judge.

The Court of Appeal held that an arbitration must be conducted in accordance with the substantive statutory protections contained in the *Solicitors Act* and that parties cannot contract out of these protections.

### **Arbitrating Legal Fee Disputes and LawPRO Insurance**

LawPRO is not responsible for and does not get involved in legal fee disputes. But legal fee disputes can often trigger allegations of errors, omissions and negligence.

LawPRO is required to defend any "civil suit" and the definition of civil suit means "an action, application or arbitration in which a claim for damages is asserted".

Therefore, while there is no insurance coverage for the legal fee aspect of a dispute, LawPRO is obliged to get involved in the arbitration if insurable allegations of errors, omissions or negligence are made.

## **Assessments of Legal Fees**

Assessment hearings require lawyers to justify their accounts. This can be a positive for clients, but that positive exists in arbitration where the principles of the *Solicitors Act* must be applied.

Assessments can result in a line-by-line analysis of invoices and there is no time limit. Arbitrations do not have time for that sort of analysis and can be a much speedier remedy, especially if there are time limitations.

A sensible approach is to review the contractual obligations in the retainer agreement and only if necessary look beyond the contract to consider the importance of the matter, complexity, time, effort and results, or in other words the value of services.

## **Retainer Agreements and Arbitration**

Many, but not all, retainer agreements can and should include an arbitration clause. A sample arbitration clause appears toward the end of the article. Arbitration clauses should be inserted into retainer agreements because arbitration is going to be best for lawyers, paralegals and clients.

Arbitration clauses can only go into business retainer agreements, not consumer retainer agreements. This is due to the *Consumer Protection Act* and is discussed next.

## **Arbitrating Legal Fees Disputes and the *Consumer Protection Act, 2002***

What is a consumer retainer agreement? Section 1 of the *Consumer Protection Act* contains relevant definitions necessary to answer this question.

A consumer retainer agreement is an agreement between a supplier of legal services to an individual for personal, family or household purposes excluding an individual who is retaining the lawyer/paralegal for business purposes.

Subsection 7(2) of the *Consumer Protection Act* invalidates any consumer retainer agreement clause that “prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under the “*Consumer Protection Act*.” What exactly this means is somewhat unclear. It does not seem to be an outright ban on arbitration clauses in consumer agreements, rather a limited ban for specific rights to sue in Court in the legislation.

Subsection 7(3) permits consumer arbitration agreements under any circumstances once a legal fee dispute arises.

## **Sample Retainer Agreement Arbitration Clause**

Below is a sample retainer agreement clause for lawyers, paralegals and clients to insist on being inserted into their retainer agreement:

While we anticipate a constructive relationship, should any issue arise out of or in relation to this retainer agreement and/or our representation that cannot be resolved, you agree to confidential, binding arbitration in accordance with Hassell Arbitration's rules, available online at: [www.hassellarbitration.ca](http://www.hassellarbitration.ca)

## **How Do I Start Arbitrating My Legal Fee Dispute**

If you are a lawyer, paralegal or client with a legal fee dispute that you cannot resolve, you can agree to arbitrate and then serve and file a notice to arbitrate, available online here: [www.hassellarbitration.ca/arbitrate-now](http://www.hassellarbitration.ca/arbitrate-now)

You do not have to have a clause in your retainer agreement to do so. You can arbitrate business and consumer legal fee disputes.