IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Courchesne v. McComb Witten Marcoux,* 2026 BCSC 129

Date: 20260129
Docket: S253562
Registry: Vancouver

Between:

Chantal Courchesne

Client

And

McComb Witten Marcoux

Lawyers

Before: Registrar Gaily

Reasons for Decision

Counsel for the Client:	N.W. Peterson
Counsel for the Lawyers:	A. Ponton
Place and Date of Pre-Hearing Conference:	Vancouver, B.C. November 17, 2025
Place and Date of Decision:	Vancouver, B.C. January 29, 2026

Introduction

[1] This is one of several appointments filed under s. 70 of the *Legal Profession Act*, S.B.C. 1998, c. 9 [*LPA*] to review bills issued by McComb Witten Marcoux ("MWM" or the "Law Firm") to clients who had retained a lawyer, Whitney Derber, under contingency fee agreements ("CFAs"), when she practised at MWM, but who went with her when she left MWM and set up Whitney Derber Law Corporation dba Derber Law ("Derber Law"). I seized myself of this *LPA* review and with the Chief Justice's approval I agreed to case manage it and the other appointments (together, the "Matters").

[2] This decision addresses whether the Matters are appropriately pursued as reviews under the *LPA*, or whether the two law firms (Derber Law and MWM) should be resolving their disagreement over the allocation of legal fees owing on these clients' files through a court action (that is, alleging a party has breached a contract). Although MWM maintains this is a contractual dispute between it and Ms. Derber, MWM has not commenced an action asserting the existence of a contract between them and that Ms. Derber has breached it, and MWM did not file a response to this effect in the petition Derber Law brought against MWM (the "Derber Law Petition").

[3] As detailed below, I find that the registrar has the jurisdiction to conduct the reviews of MWM's bills under s. 70 of the *LPA* in the circumstances, and that the Matters should proceed under the appointments that have been filed.

Background and Summary of the Proceedings

[4] It is common in personal injury cases for a client to have retained a lawyer under a CFA. The CFA will provide that if the action is concluded in the client's favour, the client will pay the lawyer a percentage of the judgment or settlement obtained. Before the action has been resolved, it is not uncommon for the client to retain a different lawyer, or to move with the original lawyer to a different law firm. Because of this regular occurrence, a client will agree to a term in the CFA providing that if the client terminates the solicitor-client relationship prior to the contingent event occurring, the legal fees incurred while the client was with the original law firm

will be paid to the original law firm at a future date (that is, when the contingent event occurs). Typically, lawyers moving to new firms who take client files with them will enter into agreements with the original firm regarding the transfer of client files.

[5] Once the contingent event has successfully occurred, the client's current lawyer will advise the former lawyer of the result and the amount available for legal fees. Normally, the lawyers will then render bills, which they provide to each other and the client, and the available legal fees will be apportioned between the lawyers according to the terms of the CFA or, if applicable, a transfer agreement. A client may dispute the portion of the available legal fees to which the former (or current) lawyer claims entitlement and may commence a review of the bill under s. 70 of the *LPA*. Occasionally, having received the proceeds of settlement or judgment, the client will take no position on the apportionment of the available legal fees between the lawyers, but the lawyers will disagree about the fees claimed by one (or more) of them with respect to the work performed for the client and will seek a review of the claimed fees under s. 70 of the *LPA* before the registrar in the client's name or, occasionally, in the lawyer's own name or that of their law firm.

[6] This decision arises in the context of the latter situation because I was advised that the client, Chantal Courchesne (the "Client"), takes no position on the fees claimed by MWM as its share of the legal fees available under the Client's judgment, and it is Derber Law who disputes the amount MWM claims.

[7] The Client retained Ms. Derber in January 2018 to represent her in a motor vehicle action while Ms. Derber was practicing at another law firm that is not directly involved in this proceeding ("Law Firm A"). The Client executed a CFA with Law Firm A, but that CFA is not in evidence before me.

[8] In March 2021, Ms. Derber left Law Firm A and joined MWM as an associate for a two-year term. At a pre-hearing conference ("PHC") in one of the related Matters (discussed below), counsel for Derber Law advised that when Ms. Derber joined MWM, she and MWM did not enter into an employment contract and did not agree to terms governing how legal fees were to be split between MWM and

Ms. Derber on files Ms. Derber brought with her to MWM, or files she took with her when she left MWM at the end of two years. MWM's counsel did not dispute this.

[9] The Client had elected to continue to retain Ms. Derber when she moved to MWM, signing a CFA agreement dated April 14, 2021 (the "MWM CFA").[1] As set out in the MWM CFA, the Client agreed to pay MWM a sum equal to 33.33% of the amount she recovered through settlement or judgment (MWM CFA, para. 2(d)). The MWM CFA provided that the Client could terminate the agreement on written notice to MWM and that, if that occurred, the Client agreed "to pay the Law Firm on a *quantum meruit* (services rendered) basis, once the lawsuit has been settled, or judgment rendered" and to pay the disbursements in full at the time of ending the solicitor-client relationship before the file would be transferred to the Client or another lawyer (MWM CFA, para. 10).

[10] When her term with MWM expired on March 7, 2023, Ms. Derber left and set up Derber Law. The Client elected to continue to retain Ms. Derber after Ms. Derber left MWM, executing another contingency fee agreement with Derber Law (the "Derber Law CFA"). The Derber Law CFA is not in evidence before me, but my notes reflect that counsel stated that the Client agreed to pay Derber Law the same percentage (33.33% of any judgment or settlement amount) in legal fees as under the MWM CFA.

[11] MWM agreed in a letter dated June 7, 2023, signed by Robert C. Marcoux on behalf of MWM, to transfer the Client's file to Derber Law conditional on Ms. Derber providing various undertakings (the "Transfer Agreement").[2] Among other things, Ms. Derber undertook that prior to the transfer of the Client's file, Derber Law would pay MWM's account for incurred disbursements together with interest, and that Derber Law would advise MWM within 14 days of the matter settling or judgment being rendered and of the terms of settlement or judgment including the amount

[1] Affidavit of Victoria Bain, a designated paralegal at Taylor Nakai Litigation LLP, counsel for MWM, filed October 6, 2025 ("Bain Affidavit"), Ex. C.
[2] Affidavit #1 of Whitney Derber filed September 12, 2025 ("Derber Affidavit"), Ex. A.

(paras. 2 and 4). In paras. 5, 6 and 7, the Transfer Agreement provides the following:

> 5. [Derber Law] shall protect any legal fee [MWM], [Law Firm A] and other previous counsel(s) may have and shall pay [MWM] out of the monies they hold in trust on arrival of the contingency fee, with those fees to be as agreed or assessed.
>
> 6. [Derber Law] will ensure [MWM's] account for fees has been agreed to (or sufficient funds retained by [Derber Law] pending an assessment of [MWM's] account) before any funds are disbursed from [Derber Law's] fee portion of the proceeds of settlement or judgment;
>
> 7. If any dispute arises as to [MWM's] asserted legal fees on conclusion of the claim, [Derber Law] will allow [MWM] reasonable access to the file materials for the purpose of preparing for taxation or assessment of legal fees ...

[12] The Law Firm does not dispute that Ms. Derber gave the undertakings set out in the Transfer Agreement, that Derber Law paid the disbursements owing to MWM and that the Client's file was then transferred from MWM to Derber Law.

[13] MWM wound up as a law firm and closed in July 2023.

[14] Ms. Derber represented the Client through the trial of her action and in a judgment released in early November 2023[3], the Client was awarded over $3.7 million in damages. Ms. Derber deposed that the Client's injury claim is under appeal, but that the insurer provided partial payment of $2,878,472.96, of which $959,395.04 is allocated as legal fees (Derber Affidavit, para. 12). Derber Law holds these funds in its trust account and, given the undertaking she provided under para. 6 of the Transfer Agreement, Ms. Derber cannot pay herself from these funds until MWM's fees are agreed to or assessed without breaching that undertaking.

[15] As noted, I was advised that the Client does not dispute the percentage of her judgment that has been allocated to legal fees and that she takes no position on this *LPA* review. I was also advised that MWM and Law Firm A entered into an agreement under which Law Firm A's entitlement to fees (if any) is protected and

[3] *Courchesne v. Chau*, 2023 BCSC 1969.

accounted for by MWM, but a copy of this agreement is not in evidence before me (see Derber Affidavit, at para. 6).

[16] Ms. Derber deposed that Derber Law requested "a legal bill be issued by MWM" after advising the Law Firm of the judgment (Derber Affidavit, para. 13).

[17] The proceedings in one of the related Matters involving Derber Law's client, Amber Jutras (the "Jutras Matter"), provides further background context. On April 16, 2024, counsel representing Derber Law filed an appointment to review the CFA between Ms. Jutras and MWM (*Jutras v. McComb Witten Marcoux,* VA S242478). When the parties appeared before me at a PHC on June 25, 2024, Ms. Jutras' action had not yet resolved, and counsel advised that they consented to annulling that appointment. Ms. Jutras settled her claim shortly after and on August 12, 2024, in Ms. Jutras' personal injury file (*Jutras v. Dao*, VA M212887), counsel for Derber Law filed an appointment seeking to review the draft bill prepared by Derber Law on July 30, 2024. At the PHC on August 20, 2024, Associate Judge Harper (sitting as registrar) ordered the appointment struck on the basis that it should have been commenced as an *LPA* review proceeding, not filed in the personal injury action.

[18] MWM did not render bills to Ms. Derber's clients or to Derber Law as the Matters resolved, despite requests.

[19] Derber Law filed the Derber Law Petition in September 2024 seeking an order that MWM render bills for seven identified clients, including the Client (*Derber Law v. McComb Witten Marcoux*, VA S246557). As noted, MWM did not file a response to the Derber Law Petition and as a result, on October 29, 2024, counsel for Derber Law appeared before Justice Baker for the hearing on a without notice basis. Pursuant to s. 77(1) of the *LPA*, Baker J. ordered the Law Firm to issue bills for the identified Derber Law clients (including the Client and Ms. Jutras) and awarded costs to Derber Law (the "Baker Order").

[20] In compliance with the Baker Order, on November 7, 2024, the Law Firm rendered a bill to the Client, care of Derber Law, claiming a total of $752,165.71

($671,576.53 in legal fees, plus appliable taxes of $80,589.18) (the “MWM Bill”). Ms. Derber deposes that the legal fees claimed by MWM on the MWM Bill represents 70% of the total allocated to legal fees (Derber Affidavit, para. 14).

[21] In the Jutras Matter, Derber Law filed an appointment seeking to review the bill MWM rendered to Ms. Jutras in compliance with the Baker Order, under the style of cause, *Derber Law v. McComb Witten Marcoux,* (VA S251944). At the PHC before me on March 18, 2025, counsel advised that she represented Derber Law and that Ms. Jutras was not participating in the *LPA* review. Counsel said that Ms. Jutras’ action had settled and Derber Law was seeking to review the legal fees claimed by MWM on the bill issued to Ms. Jutras. Counsel for MWM disputed Derber Law’s right to review the MWM bill issued to Ms. Jutras under the *LPA*, asserting that the dispute was a contractual dispute between the two law firms outside the scope of the *LPA* (implying it was an employment matter by stating that the Law Firm had issues about Ms. Derber’s performance while she was at MWM). Derber Law’s counsel said there was no agreement or contract governing Ms. Derber’s employment at MWM and the parties had not agreed to a fee splitting arrangement when Ms. Derber commenced work at the Law Firm. Neither counsel referred to the terms of the CFA or to the transfer agreement between Ms. Derber and MWM when Ms. Jutras elected to follow Ms. Derber to Derber Law. At that PHC, I ordered the Jutras Matter adjourned suggesting the parties first determine the proper avenue to resolve their dispute.

[22] On April 28, 2025, Derber Law filed a second appointment in the Jutras Matter, identifying Ms. Jutras as the client in the style of cause and removing reference to Derber Law. When counsel appeared before Associate Judge Robinson (sitting as registrar) at a second PHC on May 28, 2025, Robinson A.J. ordered the *LPA* review adjourned generally directing the parties to apply before a justice to determine whether the dispute could proceed as an *LPA* review or whether it was a contractual dispute. I was advised that Derber Law has filed a notice of appeal of Robinson A.J.’s order.

[23] On May 12, 2025, Derber Law filed the appointment to review the MWM Bill under s. 70 of the *LPA* in the Client's name (the "Appointment"). On June 2, 2025, the same counsel as had appeared on the Jutras Matter PHCs before me and Robinson A.J. appeared for the PHC in this Matter before me. My PHC notes, which the parties know are taken as the PHC is conducted, reflect that when I again asked whether Ms. Derber and MWM had entered into an agreement regarding the splitting of legal fees, counsel reiterated that there was no such agreement or contract and neither mentioned the CFA or the Transfer Agreement.

[24] At that PHC, I was advised that Derber Law had filed several appointments to review MWM bills issued in the other Matters (as ordered under the Baker Order) and that MWM resisted the pursuit of these appointments on the basis that the dispute was a contractual one properly resolved in another forum. In that context, I ordered the parties to appear before me for a half day hearing to determine whether the Courchesne Matter was properly brought as an *LPA* review. The Chief Justice granted me approval to case manage the appointments filed in the Matters shortly after the PHC and the *LPA* proceedings in the other Matters have been adjourned pending this decision.

Parties' Positions

[25] At the hearing, new counsel, Nicholas Peterson, appeared for Derber Law and Aidan Ponton (an associate of the counsel who had previously appeared for MWM) represented MWM. Neither had appeared as counsel in the earlier PHCs associated with this Matter or on the Jutras Matter.

[26] Derber Law submits that pursuant to both the *LPA* and case law considering it, the *LPA* applies as a matter of law to all legal accounts issued in the province. It submits that the review of the MWM Bill is appropriately within the registrar's jurisdiction under the *LPA* and the disagreement between the law firms over the amount of the MWM Bill is not properly the subject of a contract law action.

[27] Derber Law maintains that where legal fees are asserted by a former law firm, which are to be apportioned and paid to the former law firm from a global legal fee

recovered by the concluding law firm, a right of *LPA* review is engaged. Derber Law further submits that the definition of "person charged" in the *LPA* contemplates that a party who indemnifies a client may pursue a review of a lawyer's bill and that, in this context, given the terms of the Transfer Agreement, Derber Law is indemnifying the Client and is a "person charged". Mr. Peterson expressed surprise that previous counsel had not directed my attention to the Transfer Agreement and its terms, which he submits supplements and reflects the existing law. I also note that the termination provision of the MWM CFA was not before me at the PHCs.

[28] The Law Firm maintains that a dispute between two law firms with respect to a global contingency amount is outside the scope of the *LPA*. The Law Firm submits that Derber Law is asking the registrar to interpret the phrase "agreed or assessed" in para. 5 of the Transfer Agreement (reproduced above), which the Law Firm submits is outside the registrar's jurisdiction as it amounts to a question of contractual interpretation, citing *Cowichan Bay Contractors Ltd. v. Schroeder*, 2006 BCSC 1734 at para. 14 [*Cowichan Bay Contractors*]. The Law Firm disputes that Derber Law is a "person charged" under the *LPA*, relying on *Johns Southward Glazier Walton & Margetts v. Rotto*, 2015 BCSC 554 [*Rotto*] and asserts that *Rotto* is authority that the *LPA* does not apply to disputes between two law firms over the allocation of legal fees under successive CPAs.

[29] In reply, Derber Law submits that the Law Firm's submissions "creates red herring arguments, which fail to address the real question on this hearing, which is: when a client transfers law firms and the concluding law firm that is required to remit payment and share in the global legal fee with the prior law firm challenges the prior law firm's bill, is the proper forum to review the legal bill a registrar's review under the *LPA* or some other lawsuit proceeding?". Derber Law submits that MWM has not pointed to any compelling legal foundation for a more appropriate alternative process to be invoked besides a registrar's review. Finally, Derber Law submits that *Rotto* is not determinative and should be distinguished in the circumstances of this proceeding.

Discussion

[30] It is well established that the registrar of the Supreme Court, who is appointed under the *Supreme Court Act*, RSBC 1996, c 443 [*SCA*], is a creature of statute and may carry out only those duties assigned to a registrar by the *Supreme Court Civil Rules [SCCR]* (and the *Supreme Court Family Rules*) and any other enactment (*SCA*, s. 13(2)).

[31] Under Part 8, “Lawyers’ Fees”, the *LPA* expressly empowers the registrar to review fee agreements and to review lawyer’s bills.

[32] The following sections of the *LPA* are relevant to this proceeding:

> **Definitions and interpretation**
>
> 64 (1) In this Part:
>
> **"agreement"** means a written contract respecting the fees, charges and disbursements to be paid to a lawyer or law firm for services provided or to be provided and includes a contingent fee agreement;
>
> **"bill"** means a lawyer's written statement of fees, charges and disbursements;
>
> **"charges"** includes taxes on fees and disbursements and interest on fees and disbursements;
>
> **"contingent fee agreement"** means an agreement that provides that payment to the lawyer or law firm for services provided depends, at least in part, on the happening of an event;
>
> **"court"** means the Supreme Court;
>
> **"person charged"** includes a person who has agreed to pay for legal services, whether or not the services were provided on the person's behalf;
>
> **"registrar"** means the registrar of the court.
>
> **Agreement for legal services**
>
> 65 (1) A lawyer or law firm may enter into an agreement with any other person, requiring payment for services provided or to be provided by the lawyer or law firm.
>
> (2) Subsection (1) applies despite any law or usage to the contrary.
>
> ….
>
> **Contingent fee agreement**

> 66 (1) Section 65 applies to contingent fee agreements.
>
> …
>
> **Examination of an agreement**
>
> **68** (1) This section does not apply to agreements entered into before June 1, 1988.
>
> (2) A person who has entered into an agreement with a lawyer or law firm may apply to the registrar to have the agreement examined.
>
> **…**
>
> **Lawyer's bill**
>
> **69** (1) A lawyer must deliver a bill to the person charged.
>
> (2) A bill may be delivered under subsection (1) by mailing the bill to the last known business or residential address of the person charged.
>
> (3) The bill must be signed by or on behalf of the lawyer or accompanied by a letter, signed by or on behalf of the lawyer, that refers to the bill.
>
> (4) A bill under subsection (1) is sufficient in form if it contains a reasonably descriptive statement of the services with a lump sum charge and a detailed statement of disbursements.
>
> …
>
> **Review of a lawyer's bill**
>
> 70 (1) Subject to subsection (11), the person charged or a person who has agreed to indemnify that person may obtain an appointment to have a bill reviewed before
>
> > (a) 12 months after the bill was delivered under section 69, or
> >
> > (b) 3 months after the bill was paid,
>
> whichever occurs first.
>
> (2) The person who obtained an appointment under subsection (1) for a review of the bill must deliver a copy of the appointment to the lawyer at the address shown on the bill, at least 5 days before the date set for the review.
>
> ….
>
> (13) The procedure under the Supreme Court Civil Rules for the assessment of costs, review of bills and examination of agreements applies to the review of bills under this section.

[33] In the Baker Order, Baker J. relied on s. 77(1) of the *LPA*, which provides that the court may order "delivery of a bill to the person charged if (a) a bill has not been

delivered, and (b) the bill, if it had been delivered, could have been the subject of an application for a review under section 70." The case law establishes that the registrar is not the "court" for the purposes of the *LPA* (see for example *Skidders v. Hartshorne & Mehl*, 2024 BCSC 1924 (Registrar), appeal dismissed, (24 January 2025), Vancouver S240512 (B.C.S.C.)).

Is Derber Law "a person charged"?

[34] In the text by Gordon Turriff, Q.C. and Michael Lucas, K.C., *Annotated Legal Profession Act*, (British Columbia: Carswell) (loose-leaf updated 2022) (the "Annotated *LPA*") at 10:3, the authors cite *Rotto* as authority that the definition of "person charged" in s. 64(1) "does not include a lawyer who has agreed with her predecessor on the way in which she and the predecessor would share fees properly chargeable to a client who discharged the predecessor and employed the lawyer in the predecessor's place". MWM relies on *Rotto* as authority that Ms. Derber, as Derber Law, has no standing as a "person charged" to pursue the review of the MWM Bill.

[35] I will discuss *Rotto* after I review the three authorities cited by Derber Law to support its submission that Derber Law has standing to review the MWM Bill as a "person charged", which are also summarized by the authors of the *Annotated LPA* text under s. 64(1). Two of the cases, *Nathanson, Schachter & Thompson LLP v. Boss Power Corp*., 2016 BCCA 1 [*NST v. Boss Power*] and *Robert James King Law Corporation v. Kevin A. McLean Law Corporation*, 2016 BCSC 1598 [*King Law v. Kevin McLean Law*], were released after *Rotto*. The other, *Garth A. Wright Law Corp. v. ICBC*, 2012 BCSC 149 [*Wright Law v. ICBC*], was not cited in *Rotto*. None of the three cases involved a dispute between two lawyers or law firms over the allocation of legal fees awarded under a CFA.

[36] As Justice Chiasson stated at the outset of his reasons for the Court in *NST v. Boss Power Corp.*, the case involved provisions of the *LPA*, the court's inherent jurisdiction to review the accounts of lawyers, and the assignability of the right to have an account reviewed (para. 1). Among other things, NST (the respondent)

argued that the appellants, who were assignees of NST's client, did not have standing to seek an assessment of NST's bills "because they were not charged with paying the account", relying on the wording of s. 70(1) of the *LPA*, which gives the right of review to "the person charged" (para. 48). Chiasson J.A. agreed with the appellants that the definition in s. 64 of the *LPA* of person charged is inclusive, that is, it "is greater than stated in the definition" and, as a result, the Court held that the appellants, as assignees, could pursue a review of the NST bills (paras. 50–51).

[37] In *King Law v. Kevin McLean Law*, King Law had issued accounts to Kevin McLean Law for the services it provided to the latter as a practice supervisor, appointed under an order of the Law Society. Kevin McLean Law refused to pay the bills and, among other things, asserted that King Law could not seek a review of its bills because it had been retained to supervise the practice of Kevin McLean Law, which was not the same as providing legal services, and it was not a "person charged". Registrar Nielsen (as he then was) rejected this argument, finding that King Law had provided legal services to Kevin McLean Law and could pursue the review of its bills. At para. 32, he held the following:

> [32] Further, the *LPA* defines "person charged" as including "a person who has agreed to pay for legal services, whether or not the services were provided on the person's behalf". The *LPA* therefore expressly contemplates that any person who agreed to pay for legal services, whether a client or not, is subject to the review process, and may invoke that review process.

[38] In *Wright Law v. ICBC*, a lawyer, Mr. Wright, had been retained by a personal injury client and was involved in settlement negotiations with the insurer, ICBC. The ICBC adjuster asked Mr. Wright to provide her with copies of the client's clinical records, stating that once ICBC had received the records "our office will forward a cheque reimbursing your firm for costs incurred in obtaining same" (para. 4). When Mr. Wright provided ICBC with the bill for the associated costs, ICBC refused to pay and Mr. Wright commenced a review under s. 70 of the *LPA*, which ICBC resisted. ICBC maintained that it had not retained Mr. Wright to provide "legal services" and it was not a "person charged".

[39] Relying on the earlier decision of Master Horn (siting as registrar) in *Walker & Wilson v. I.C.B.C.*, 1998 CanLII 5457 (BC SC), Master Baker (sitting as registrar) found that Mr. Wright had standing to pursue the review of the bill he had issued to ICBC, rejecting ICBC's argument that the person charged "can only be a person who is, through some means, responsible for the charges a solicitor renders to his or her own client" (*Wright Law v. ICBC*, para. 18). At para. 22, Master Baker found that ICBC had agreed with Mr. Wright to pay for legal services rendered to his client "and consequently is the person charged with the payment of this bill".

[40] MWM submits that *Rotto* "has a nearly identical fact pattern to the case at bar" and is binding in this case. The context in which Ms. Rotto raised the argument that she was a "person charged" under the *LPA* (which Fitzpatrick J. dismissed) is important and, as discussed below, different from the situation before me.

[41] Like Ms. Derber, Ms. Rotto worked as an associate at a law firm, Jones Southward Glazier Walton & Margetts ("Jones Southward"), for a relatively short period and left to start her own firm. Like Ms. Derber, Ms. Rotto practised mainly personal injury law for clients who retained her on CFAs, and, like Ms. Derber's clients in the Matters before me, some of Ms. Rotto's clients went with her from Jones Southward to her new law firm. The CFAs that Ms. Rotto's clients executed with Jones Southward when they retained Ms. Rotto, like the MWM CFA executed by the Client, included a provision about the payment of legal fees if they changed lawyers before settlement or trial. The termination provision of the Jones Southward CFA provided that if the client terminated the solicitor-client relationship before the contingent event, the client agreed to pay Jones Southward "the higher of [Jones Southward's] account at an hourly rate of $195 … or its *pro rata* share of the total legal fees owed by [the client], based on each lawyer's recorded time…" (see *Rotto*, para. 5).[4]

[4] As noted, the MWM CFA provides in para. 10 that if the Client changes lawyers, the Client agreed to pay the Law Firm on a *quantum meruit* (services rendered) basis once her lawsuit had settled or she had obtained judgment.

[42] Before the transferring clients' files were released to Ms. Rotto, Ms. Rotto had executed a letter agreement with Jones Southward, which included the following (reproduced at para. 7 of *Rotto*):

> 2. We enclose a copy of a draft statement confirming the "work-in-progress" outstanding on this file as at June 15, 2012. You will see it simply sets out the time recorded to the credit of the file. We would understand that upon resolution of the file, or at the time an advance on account of the client's claim is made, that we would discuss and reach with you an agreement as to appropriate fee allocation.
>
> 3. Upon settlement or judgment, and accord as provided for in paragraph two of this letter, being obtained in a particular matter you undertake to forthwith provide our firm with a cheque representing the payment of the outstanding fees owing to Johns, Southward, Glazier, Walton & Margetts in accordance with the terms of the Contingency Fee Agreement and our agreement. In addition, these fees will be taken into consideration on any advance payments which may be received by the client prior to settlement or judgment.

[43] Ms. Rotto left Jones Southward in June 2012 and in mid-February 2013, she advised Jones Southward that 11 files that had transferred with her had settled, but she did not provide any details of the settlements to her former law firm. Ms. Rotto provided some cheques to Jones Southward representing her calculation of the outstanding fees owing to the law firm in compliance with para. 3 of their letter agreement, but Jones Southward refused to cash them and requested details of the settlements from Ms. Rotto. One month later, Ms. Rotto provided Jones Southward with timesheets for the 11 files, together with a trust sheet or calculation for each file, based on an allocation of the time spent respectively by Jones Southward and Ms. Rotto on each file, as agreed under the CFAs. She also included a 10% "risk" allocation to her credit (*Rotto*, para. 10). Jones Southward refused to cash the cheques Ms. Rotto provided and "expressed some difficulty with the "risk fee", which the law firm considered was unilaterally imposed on them" (*Rotto*, para. 11). They could not resolve the allocation of fees between them because Ms. Rotto maintained that there was no binding agreement between them governing the fee allocation.

[44] Jones Southward commenced an action against Ms. Rotto, seeking (among other things) a declaration that there was a binding agreement "that the fees would

be allocated based on a *pro rata* or proportionate basis with respect to time spent on legal services by the law firm and Ms. Rotto respectively", challenging the 10% "risk fee" (*Rotto*, para. 14). The parties agreed the action could proceed as a summary trial and Fitzpatrick J. released her oral reasons at the conclusion of the hearing. Finding for Jones Southward, she concluded that "the terms of the agreement between [Jones Southward] and Ms. Rotto were sufficiently clear in terms of how they would each share in any recovery by the clients with respect to the transferred files" based on the two "controlling documents", that is, the Jones Southward CFA executed by Ms. Rotto's clients, and the letter agreement signed by Ms. Rotto (para. 22). Fitzpatrick J. rejected Ms. Rotto's argument that the parties had an unenforceable "agreement to agree". She reiterated that, when considered in the context of both the Jones Southward CFA and the letter agreement as a whole, "the meaning is clear that the [Jones Southward CFA] is the basis upon which the calculation is to be made" that it was the "mechanism" by which the fee allocation between them was to be made (para. 26).

[45] After reaching this conclusion, Fitzpatrick J. also addressed Ms. Rotto's final argument, which was that Jones Southward could not compel payment from her for its portion of the legal fees awarded to her client because the *LPA* applied. Ms. Rotto argued that she was a "person charged" (as defined in s. 64(1)) and that Jones Southward had not complied with its obligation under s. 69(1) and had not properly issued a bill to her as a person charged. As Fitzpatrick J. noted, Ms. Rotto took the position "that the law firm's time sheets [provided at the time Ms. Rotto departed Jones Southward as agreed in para. 2 of the parties' transfer agreement] do not constitute a 'bill'" (para. 35). Fitzpatrick J. rejected Ms. Rotto's argument, stating the following:

> [36] I see no merit in this argument. Ms. Rotto did not agree to pay for legal services provided from the law firm. Indeed, she was the one providing the legal services at the relevant time, albeit as an associate of the law firm. The proper characterization is that Ms. Rotto has agreed on the mechanism by which she and the law firm would share in the recovery of legal fees properly chargeable to the clients under the various contingency fee agreements. This situation is not addressed at all by the *Legal Profession*

> *Act* in that the provisions above only refer to requirements between the lawyer or law firm and the clients.

[46] MWM submits that Ms. Derber is in the same position as Ms. Rotto and that Ms. Derber did not agree to pay for the Client's legal services provided by MWM, but was the one providing the legal services to the Client at the relevant time. MWM does not deny that the wording of para. 5 of the Transfer Agreement requires Ms. Derber to "pay [MWM] out of the monies they hold in trust out of the contingency fee", but it submits that "pursuant to the individual retainer agreements [such as the MWM CFA] and the Transfer Agreement, Derber Law is not providing a service to MWM. Rather, MWM says that Derber Law and MWM have an agreement that they would share in the recovery of legal fees properly chargeable to the clients under the various [CFAs]". MWM submits that Derber Law is "not paying the legal fees of [the Client]" and is therefore not a "person charged" and that it is the Client who, as the proper "person charged", has standing to pursue the Appointment not Derber Law.

[47] Derber Law submits that by asserting that only the Client can pursue a review of the MWM Bill under s. 70, MWM is ignoring its own agreement that Derber Law was to pay MWM's fees under the Transfer Agreement. Derber Law reiterates that as a corporation, it is a "person"[5], and that because of the parties' agreement that Derber Law would pay MWM's fees from the percentage of the Client's judgment allocated to legal fees under para. 5 of the parties' Transfer Agreement, Derber Law meets the definition of "person charged" in s. 64(1) of the *LPA*.

[48] *Rotto* was not a review under s. 70 of the *LPA,* but Ms. Rotto had relied on the *LPA* to support her argument that Jones Southward could not compel payment of its fees from her (because it had not properly rendered a bill to her under s. 69 of the *LPA*). It is unclear from Fitzpatrick J.'s oral reasons if in making this argument, Ms. Rotto had directed the court's attention back to para. 3 of the parties' transfer agreement, under which she had expressly agreed to pay Jones Southward its

[5] S. 29 of the *Interpretation Act* RSBC 1996, c. 238, states: In an enactment … "person" "includes a corporation, partnership or party, and the personal or other legal representatives of a person to whom the context can apply according to law".

outstanding fees. Fitzpatrick J. does not refer to any of the cases in which the definition of "person charged" was considered, such as *Wright Law v. ICBC*, and, as Derber Law notes, although *Rotto* is summarized in the *Annotated LPA* text, it has not been mentioned or considered in subsequent judgments or decisions in the ten years since its release.

[49] Unlike Ms. Rotto, Ms. Derber does not deny the terms of the MWM CFA or the Transfer Agreement or assert that the parties do not have a binding agreement regarding the allocation of fees on the Client's file. MWM knows the terms of the Transfer Agreement and that Ms. Derber gave an undertaking that she would not pay herself from the Client's judgment until the MWM fees were resolved. Unlike Ms. Rotto, Ms. Derber does not deny that MWM can compel payment of its fees from her as the Client's matter has concluded. The relationship between Ms. Derber and her former law firm, MWM, is clearly acrimonious, and for reasons that were not explained at the hearing, she was forced to pursue the Derber Law Petition and obtain the Baker Order.

[50] In my view, the situation before me is distinct from that before Fitzpatrick J. in *Rotto* and I agree with Derber Law that *Rotto* is not determinative. Following *NST v. Boss Power*, as well as *King Law v. Kevin MacLean Law*, I find that given the inclusive definition of "person charged" in s. 64(1) of the *LPA*, together with the express agreement of Ms. Derber under the Transfer Agreement to pay the fees claimed by MWM on the Client's file (to indemnify the Client), Derber Law has standing as a "person charged" to pursue the review of the MWM Bill under s. 70 as contemplated by the Appointment (and those filed in the other Matters).

Can the registrar 'interpret' the provisions of the Transfer Agreement?

[51] Derber Law submits that it is clear from the wording of the Transfer Agreement that if there was a dispute over the fees claimed by MWM on the Client's file, the parties agreed to a review under the *LPA*. Derber Law submits that under the Transfer Agreement, the parties expressly envisioned resolution through the review process under the *LPA* by agreeing to having the fees claimed "assessed"

through a “taxation or assessment of legal fees” (the phrases used in paras. 5–7 of the Transfer Agreement). Derber Law submits that the Transfer Agreement is an agreement under s. 65 of the *LPA*, which the registrar is authorized to review under s. 68, and it is proper for the registrar to consider its terms in the context of a review of the MWM Bill under s. 70.

[52] MWM maintains that by pursuing the review of the MWM Bill, Derber Law is improperly asking the registrar to engage in contractual interpretation, in particular, to determine the meaning of the phrase “agreed or assessed” as the parties used it in para. 5 of the Transfer Agreement. Relying on *Cowichan Bay Contractors*, MWM submits that it is established law that the registrar has no jurisdiction to interpret a contract.

[53] I disagree with MWM that the registrar does not have the jurisdiction to interpret the terms of the Transfer Agreement in these circumstances. *Cowichan Bay Contractors* was not an *LPA* proceeding. The case involved a contractual dispute in which the parties had consented to a reference to the registrar for an accounting to be done by way of a report and recommendations (now provided under R. 18-1 of the *SCCR*). District Registrar Bouck (as she then was) conducted the reference and stated in her report that she found it was the plaintiff’s responsibility under the contract to insure excavation was done properly, and that the excavation was done (albeit improperly) by the time the defendant assumed control of construction (*Cowichan Bay Contractors*, para. 13, citing para. 184 of the registrar’s report). On the application to confirm District Registrar Bouck’s report, Justice Halfyard noted at para. 14, that, “by necessary implication, the registrar interpreted the contract to mean that the dewatering work done by the defendant was part of the plaintiff’s contractual obligations in relation to excavation and drainage. The interpretation of the contract is a question of law, and beyond the terms of reference to the registrar. …” It is established law that on a reference to the registrar for an accounting under the *SCCR*, the registrar is bound by the terms of the order directing the reference, and this is the context in which Halfyard J. noted that the interpretation of the terms of the parties’ contract was beyond the terms of the reference.

[54] In my view, *Cowichan Bay Contractors* is not authority for the overarching principle that in *LPA* proceedings, a registrar cannot interpret provisions in an agreement for fees when assessing those fees. In a case cited by MWM, *Grewal v. Jenkins Marzban Logan LLP*, 2019 BCSC 1963 [*Grewal v. JML LLP*], which involved an appeal from the decision of Master McDiarmid, sitting as registrar, on an *LPA* review, Justice Horsman (as she then was) rejected one of the arguments of the respondent law firm that Master McDiarmid erred in finding that the retainer agreement imposed an obligation on the law firm to provide the client with fee updates. At para. 87, Horsman J. stated the following:

> The respondent argues that Master McDiarmid erred in finding that the retainer agreement imposed an obligation on the Firm to provide such updates. The Respondent points out that the agreement contains no express provision requiring updates. This is true, but such a contractual commitment may be implied. Furthermore, in interpreting the agreement the Master was engaged in an "inherently fact-specific exercise": *Creston Moly Corp. v. Sattva Capital Corp*., 2014 SCC 53 at para. 55; *Teal Cedar Products Ltd. v. BC*, 2017 SCC 32 at para. 57. In the absence of an extricable error of law, which the Respondent has failed to identify, I will defer to Master McDiarmid's contractual interpretation.

[55] Notably, Horsman J. did not find in *Grewal v. JML LLP* that Master McDiarmid exceeded his jurisdiction as registrar when he interpreted the provisions of the parties' retainer agreement.

[56] There is no dispute that the *LPA* affords the registrar the jurisdiction to examine fee agreements under s. 65 and s. 68, which review by necessary implication involves interpreting the provisions of these fee agreements. MWM did not assert that in the Transfer Agreement, the parties intended something other than a review under s. 70 of the *LPA* (which is frequently referred to as a "taxation" or an "assessment" of a lawyer's bill) as the mechanism by which they would resolve a dispute over their respective fees. As Derber Law points out, the Law Firm has not provided a viable alternative.

[57] In my view, the registrar has the jurisdiction under the *LPA* to consider the terms of the Transfer Agreement in the circumstances of this case. MWM and Ms. Derber entered into the Transfer Agreement after the Client had advised MWM

she was terminating the solicitor-client relationship and taking her file to Derber Law. Under the MWM CFA, the Client had agreed to pay MWM's fees on a quantum meruit basis after the contingent event occurred and under the Transfer Agreement, Ms. Derber agreed to pay MWM's fees on the Client's file. Like the situation in *Rotto*, the MWM CFA and the Transfer Agreement together establish the mechanism through which MWM and Derber Law agreed to allocate their fees on the Client's file. However, unlike Jones Southward in *Rotto*, MWM did not advise Ms. Derber of the fees it was claiming and she was forced to obtain the Baker Order, requiring MWM to produce bills. Now that the MWM Bill has been produced, Ms. Derber disagrees with the amount claimed for the Client's file, which she had agreed to pay, and seeks to have it assessed or taxed, as contemplated in the Transfer Agreement. Without compelling evidence to the contrary, I find that when the parties referred to resolution of their fee dispute through "assessment" or "taxation", they contemplated the process would be a review under s. 70 of the *LPA*. As Derber Law pointed out, in *Rotto*, Fitzpatrick J. directed a reference to the registrar to assess the fees claimed by Ms. Rotto, a process analogous to a review under s. 70 of the *LPA*.

What is or should be the standard approach in these types of cases?

[58] MWM submits that in *Rotto*, Fitzpatrick J. "made an explicit finding that the *LPA* does not address a situation where two law firms are sharing in the recovery of legal fees under a contingency fee agreement." MWM asserts that the purpose of the *LPA* is to protect the public and that disputes between two law firms over the allocation of fees under a CFA is outside the scope of the *LPA*.

[59] Derber Law maintains that it is "standard practice" for lawyers disputing fee allocations under CFAs to bring their disagreements before the registrar under s. 70 of the *LPA*, citing *Sagert v. Cascade Law Corporation*, 2020 BCSC 484, and *Renneberg v. Normandeau*, [1985] B.C.J. No. 189 (S.C.). MWM points out that neither *Sagert* nor *Renneberg* are directly on point as neither case involved a dispute between two law firms over the allocation of fees under a CFA and the comments were made in *obiter*.

[60] In *Sagert*, Justice Wilson was asked to order that Cascade Law Corporation ("Cascade") provide Ms. Sagert, who had previously worked as an associate at Cascade, copies of files for 58 clients who had retained Cascade but chose to continue with Ms. Sagert when she left Cascade. In response, Cascade argued that it had a possessory lien over the files and was entitled to keep them until the disbursements had been paid. Ms. Sagert asserted she did not have to pay the disbursements prior to the transfer of the files because the relevant CFAs were silent on the timing of the payment of disbursements. Wilson J. dismissed Ms. Sagert's petition, stating the following:

> [45] The standard practice in British Columbia is that a law firm who wishes to assume conduct of an ongoing personal injury file pays the disbursements and agrees to protect the fees portion. The fees may be the subject of a review by the registrar in the event the two lawyers cannot agree. …

[61] In *Renneberg*, the plaintiff in an ongoing personal injury action sought a declaration that his account with his previous lawyer was not yet settled, but still subject to review (taxation) under the *LPA* and an order that monies his previous lawyer had deducted from his trust account against fees should be returned to the client until the action was concluded. Justice Spencer declared that the account in question had not been settled and was still "open to be taxed", holding that the account "should be taxed after the contingency is satisfied either by settlement or by an award at trial" (*Renneberg*, para. 7).

[62] I agree with MWM that neither *Sagert* nor *Renneberg* are binding and the justices' comments are *obiter*, but I find that their comments reflect the accepted practice for resolving disputes between two law firms about the allocation of legal fees awarded under CFAs.

[63] MWM submits that many of the cases referred to by Derber Law as examples of *LPA* reviews involving two law firms fighting over a fee split under a CFA can be distinguished and that "it cannot be said that because a review has happened before under the *LPA*, it provides an entitlement to any future party to undertake a similar review. If a dispute, such as the case at bar, does not fall within the statutory

requirements as set out in the *LPA*, a party cannot have an entitlement just because it has happened before." As noted above, MWM relies on *Rotto* as authority that these disputes are outside the *LPA*.

[64] In my view, *Rotto* does not stand as authority that disputes between law firms over the allocation of legal fees under a CFA are outside the *LPA*, and I cannot ignore that such disputes are regularly brought before the registrar as reviews under s. 70 of the *LPA*. The cases referred to by the parties are *Holness Law Group Professional Law Corporation v. Cui*, 2020 BCSC 1448 (Master Muir sitting as registrar); *Holness Law Group Professional Law Corporation v. Mann*, 2015 BCSC 2380 (District Registrar Nielsen); and *MacAlpine v. Funk*, 2020 BCSC 1225 (Registrar Nielsen). As Derber Law pointed out, Mr. Marcoux was counsel for one of the parties on *McAlpine v. Funk*, a dispute involving the allocation of fees between two law firms under a CFA where the client had moved with a departing lawyer to their new law firm. I do not intend to summarize these cases in this decision, other than to note that there are no reported appeals from any of them, all of which were released after *Rotto*.

Conclusion

[65] As discussed above, I find that it is appropriate to proceed with the review of the MWM Bill under s. 70 of the *LPA*. I am satisfied that Derber Law is a "person charged" who can seek a review of the MWM Bill given the terms of the Transfer Agreement under which Ms. Derber expressly agreed to pay the MWM fees on the Client's file (thereby indemnifying the Client). In my view, Fitzpatrick J.'s comments in *Rotto* are not authority that the *LPA* precludes the review of the MWM Bill for the purposes of determining the allocation of fees between the competing law firms.

[66] At the hearing, counsel for Derber Law, Mr. Peterson, asked if I could provide some direction regarding the style of cause in similar *LPA* reviews, that is, whether it should be filed in the name of the client, or if the appointment can be filed in the names of the competing law firms. In my view, given that the dispute is about the fees associated with a particular client, it is preferable to name the client in the

appointment, even if, as here, the client takes no position. As in this case, there may be more than one client who has moved to the successive firm, and it would be confusing to have several appointments filed under the names of the two law firms.

[67] Under the *LPA* costs of a review of a lawyer's bills under s. 70 are awarded according to whether the bill under review was reduced by 1/6th or more (see s. 72(1)). Section 72(2) provides that despite s. 72(1), "the registrar has the discretion, in special circumstances, to order the payment of costs other than as provided" in s. 72(1).

[68] Derber Law has succeeded on this application. Because of my conclusion that the Matters should proceed to review under s. 70 of the *LPA*, I find that this application is a preliminary step in the s. 70 review of the MWM Bill. Exercising the discretion afforded to the registrar under s. 72(2), I find that the application presents special circumstances and that, as the successful party, Derber Law is entitled to its costs of this application on a party-and-party basis in any event of the cause.

"Registrar Gaily"