

Allan Mitchell Glen Botan operating as Botan Law Office (plaintiff) v.  
Brian Gerrard St. Amand (defendant)  
(1003 19856; 2011 ABQB 774)

**Indexed As: Botan v. St. Amand**

Alberta Court of Queen's Bench  
Judicial District of Edmonton  
Michalyszyn, J.  
December 8, 2011.

**Summary:**

Botan, a lawyer practising in the area of HCV tainted blood claims, sought an order paying him a fee of \$58,633.33 on account of a contingency fee agreement with St. Amand. The agreement included a 25% contingent fee of any claim proceeds. Of particular relevance was the federal government's 2007 compensation plan for individuals infected before January 1, 1986 and after July 31, 1990.

The Alberta Court of Queen's Bench found Botan was entitled to compensation not on the basis of a percentage set out in the agreement, but rather on an hourly basis. The court set Botan's fee at \$5,250. The court made the following findings: (a) the agreement was valid, as was Botan's account; the agreement was terminated, however, by St. Amand on May 19, 2010, when he terminated Botan's services; (b) in the alternative, the 25% fee was not fair and reasonable, and the court varied the agreement to provide a 15% fee; (c) termination of the agreement triggered a compensation scheme that resulted in a fee of \$5,250, being "fair and reasonable compensation ... based on an hourly rate of \$250 per hour"; and (d) Botan was not entitled to any further damages.

**Barristers and Solicitors - Topic 3131**

Compensation - Agreements - Contingent fees - Reasonable percentage fee - [See first **Barristers and Solicitors - Topic 3132**].

**Barristers and Solicitors - Topic 3132**

Compensation - Agreements - Contingent fees - Modifications or cancellation or departure from agreement (incl. premiums) - Botan, a lawyer practising in the area of HCV tainted blood claims, sought an order paying him a fee of \$58,633.33 on account of a contingency fee agreement with St. Amand - The agreement included a 25% contingent fee of any claim proceeds - Botan had agreed to waive his disbursements - He kept no time records - St. Amand terminated Botan's services on May 19, 2010 - The Alberta Court of Queen's Bench found that, if it was wrong regarding the agreement's termination on May 19, 2010, the 25% fee was not fair and reasonable, and varied the agreement to provide a 15% fee - The court addressed its role in the review of contingency fee agreements and the appropriate test - "Morrison [v. Pantony (Rod) Professional Corp. (2008) (Alta. C.A.)] permits an inquiry into the proportionality between the fee sought on the one hand and the work performed/risk taken on the file on the other, the focus of that inquiry based largely on what the parties knew or reasonably ought to have known when the Agreement was

entered into" - The 25% fee was unfair, mindful of the risks, facts and prospects known at the time the agreement was reached - At seven hours' time or even at double that, and with few if any disbursements, there was an obvious lack of proportionality between the time and money likely to be expended and the likely risk of failure - Botan ran no unusually high risk of not being paid anything for his services - See paragraphs 59 to 70.

### **Barristers and Solicitors - Topic 3132**

Compensation - Agreements - Contingent fees - Modifications or cancellation or departure from agreement (incl. premiums) - Botan, a lawyer practising in the area of HCV tainted blood claims, sought an order paying him a fee of \$58,633.33 on account of a contingency fee agreement with St. Amand - The agreement included a 25% contingent fee of any claim proceeds - St. Amand terminated Botan's services on May 19, 2010 - The Alberta Court of Queen's Bench found that the agreement was valid notwithstanding imperfections in its execution, and also found that the agreement was terminated effective May 19, 2010 - If terminated "for any reason whatsoever" the agreement continued to have force in that it both ousted the 25% contingency fee and triggered the alternate payment scheme, namely " ... fair and reasonable compensation ... based on an hourly rate of \$250 per hour" - Botan kept no time records and failed to respond to estimates by St. Amand's counsel that Botan spent roughly seven hours on the claim, resulting in a fee of \$1,750 - The court "generously" tripled the seven-hour estimate, setting Botan's fee at \$5,250 - See paragraphs 71 to 74.

### **Barristers and Solicitors - Topic 3133**

Compensation - Agreements - Contingent fees - Invalid agreements - The defendant (St. Amand) argued the contingency fee agreement with the plaintiff lawyer (Botan) was invalid owing to technical defects including that it was not dated or arguably signed, was not formally served on him, and was not appropriately witnessed - The Alberta Court of Queen's Bench held the agreement was valid - "The formalities around execution of a contingency fee agreement aim to avoid uncertainty and disputes as to what was agreed. Formal service of such an agreement creates a 'cooling off' period enabling the client to walk away from the agreement without liability even for disbursements. Here the Agreement would have been no clearer to St. Amand with or without an affidavit of execution of the witness to St. Amand's signature or indeed with or without Botan's signature. And St. Amand was no worse off for the loss of the 'cooling off' period that follows service. He could terminate the Agreement at any time before Botan submitted an application for compensation, without liability for fees and - given Botan's waiver of out-of-pocket expenses - without liability for disbursements" - See paragraph 44.

### **Barristers and Solicitors - Topic 3139**

Compensation - Agreements - Contingent fees - Where lawyer or advocate discharged or withdraws - [See second **Barristers and Solicitors - Topic 3132**].

### **Cases Noticed:**

Morrison v. Pantony (Rod) Professional Corp. (2008), 429 A.R. 259; 421 W.A.C. 259; 2008 ABCA 145, reld to. [para. 43].

Rusk v. Medicine Hat (City) et al. (2001), 305 A.R. 332; 2001 ABQB 1020, reld to. [para.

43].

**Counsel:**

Allan G. M. Botan (Botan Law Office), for the plaintiff;

Dennis G. Groh, Q.C. (Randall C. Heil Professional Corporation), for the defendant.

This action was heard on September 16, 2011, before Michalyshyn, J., of the Alberta Court of Queen's Bench, who delivered the following judgment, with reasons, dated at Edmonton, Alberta, on December 8, 2011.

Judgment accordingly.

Editor: E. Joanne Oley