CITATION: Siskinds LLP v. Canadian Imperial Bank of Commerce, 2014 ONSC 3211
COURT FILE NO.: CV-11-9390-00CL
DATE: 20140528

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: Siskinds LLP, Plaintiff

AND:

Canadian Imperial Bank of Commerce, Defendant

BEFORE: D. M. Brown J.

COUNSEL: E. Cherniak, Q.C. and J. Squire, for the Plaintiff

P. LeVay and J. Safayeni, for the Defendant

HEARD: January 22, 2014

REASONS FOR DECISION

I. Competing motions for summary judgment on the interpretation of a contract

[1] From 1999 until 2011 Siskinds LLP performed certain debt collection services for the Canadian Imperial Bank of Commerce, with the last period of the relationship governed by an October 15, 2008 Business Agreement (the "2008 Business Agreement"). In November, 2010 the CIBC gave Siskinds notice that it intended to terminate the 2008 Business Agreement in accordance with its early termination provisions. A dispute then arose about the amount of compensation to which Siskinds was entitled upon that termination.

[2] Siskinds moved for partial summary judgment declaring that upon CIBC's termination of the 2008 Business Agreement, Siskinds was entitled to invoice the CIBC "for services performed up to July 1, 2011, the date of termination". Siskinds argued that it was entitled to receive compensation on receipts arising after the date of termination on files upon which the firm had worked prior to the date of termination. On the motion Siskinds did not seek a determination of the quantum of CIBC's liability, leaving that to further adjudication following oral examinations for discovery.

[3] The CIBC brought its own cross-motion for "full" summary judgment for a declaration that it had paid Siskinds in full "in respect of all monies owed to it" under the 2008 Business Agreement, together with an order dismissing this action.

[4] For the reasons set out below, I dismiss the motion for partial summary judgment brought by Siskinds and I grant the motion of the CIBC, with the result that I dismiss this action.

II. Fact evidence

A. Overview of the business relationship and the last contract

[5] Siskinds LLP is a 70-lawyer law firm based in London, Ontario. The CIBC is a Canadian bank.

[6] Starting in 1999 Siskinds performed collection work for the CIBC administering (i) proposals filed under the *Bankruptcy and Insolvency Act* and (ii) informal repayment arrangements negotiated through credit counselling services ("CCS") and other orderly payment of debt ("OPD") arrangements. In brief, Siskinds would act as the bank's agent for purposes of managing *BIA* proposals and CCS/OPD arrangements. Siskinds would prepare relevant documents, receive, deposit and transmit dividends and payments to CIBC from trustees or estate administrators on behalf of debtors. As compensation for its services, Siskinds would receive a commission of 10%, plus GST/HST (but inclusive of disbursements) applied to all dividends and payments received.

[7] Trustees or estate administrators initially would contact CIBC on a file regarding any debts due to the bank, and CIBC would then out-source the files to several service providers, one of which was Siskinds, who prepared proofs of claim and other documents and who monitored and collected dividends or payments. In the latter years of the arrangement Siskinds used CIBC's proprietary software to prepare most documents, track and manage files, and to post payments as received. I will deal later with the mechanics of payment receipts under this arrangement.

[8] The first contract for collections work was entered into by Siskinds and the CIBC in June, 1999. In 2003 the CIBC issued new Bankruptcy Directives and CCS/ Consumer Proposal Directives for retail products, the provisions of which formed the back-drop against which the parties negotiated a May 25, 2004 Business Agreement, the terms of which substantially resembled those in the 2008 agreement. A further agreement was entered into on April 25, 2006, with the final agreement being the 2008 Business Agreement.

[9] In addition to performing work for the CIBC on *BIA* proposals and CCS/OPD arrangements, Siskinds also worked on "opposition files", essentially files on which an opposition to a *BIA* discharge had been filed and which might require court attendances. CIBC paid Siskinds a contingency fee on "opposition files", ranging from 30% all inclusive to 35% plus costs plus taxes, depending upon the file.

[10] Most of the work performed by Siskinds under the 2008 Business Agreement was standardized, highly routine in nature and undertaken by firm staff who were not lawyers. In November, 2010, when the CIBC gave notice of its intention to terminate the 2008 Business Agreement, 21 people at Siskinds were working on the Bank's collection matters, only one of whom was a lawyer.

[11] It was not controverted that on the majority of the referred files, Siskinds performed most of its work in the files' early stages, and often recoveries would not be made for more than a year after file opening - in some cases, up to three years later. The timing of the payments depended upon the proposal, arrangement or court orders made in the particular case.

B. The 2008 Business Agreement

[12] The last contract in force between the parties was the 2008 Business Agreement dated October 15, 2008. It was to run for a three-year term ending on October 15, 2011. Section 2(a) of the 2008 Business Agreement described the services to be provided by Siskinds in the following terms:

> **2. GENERAL**
>
> (a) [Siskinds] shall provide the services as set out in the DirectivesProgram and any subsequent updates that the Bank may make from time to time ("Services"). The Directives will be supplied by the Bank upon execution of this Agreement.

The DirectivesProgram was an April, 2009 document entitled, "Recovery Operations, Secured/Unsecured Portfolio, CCS and Consumer Proposal Directives (Retail Products), Version 3.1".

[13] Section 14 of the 2008 Business Agreement dealt with the compensation the CIBC was to pay Siskinds:

> **14. COMPENSATION**
>
> [Siskind's] compensation and incentives shall be governed by specific business programs in which the Organization participates and as detailed in the attached "Program".

Siskinds acknowledged that throughout the business relationship, CIBC had compensated it for *BIA* proposals, CCS proposals and orderly payment of debt arrangements on the basis of 10% of the amounts collected and received from debtors.[1]

[14] The version of the Program in force at the time of termination was a January, 2007 "Consumer Proposal/CCS/OPD Directive Update", the "Fees" section of which read as follows:

> **Fees**
>
> The fees chargeable by the Business Partners are based on the current commission rate of 10.0 % applied to all dividends and payments received inclusive of all disbursements. The commission charged will be subject to the Goods and Services Tax.[2]

[15] Section 15 of the 2008 Business Agreement addressed the issue of termination and provided, in full, as follows:

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[1] Transcript of the cross-examination of Barbara VanBunderen conducted December 3, 2013, QQ. 14 to 16.

[2] Section B of the April, 2009 CIBC, Recovery Operations, CCS and CCP Program, contained similar language about compensation.

15. TERMINATION

(a) The Bank may at any time upon five (5) business days' notice (or such longer period as may be required by statute), in its absolute discretion terminate the Agreement.

(b) Notwithstanding subsection 15(a), the Bank may terminate this Agreement immediately upon delivery of written notice for the reasons set out in subsection 5(b) or in the event the Organization's license to operate is revoked, lapses or the Organization is under investigation by applicable provincial authorities, or the Organization is responsible for a breach of the Bank's customer's privacy or the provisions contained in this Agreement (including the Directives and Program).

(c) The Organization shall use reasonable efforts within a reasonable period of time after the due date of any invoice submitted to the Bank to provide the Bank notice of all overdue payments. The Organization may, at its option, terminate this Agreement in the event the Bank fails to pay invoices in thirty (30) to sixty (60) days, except with respect to that portion of invoices which has been disputed by the Bank. The Organization will provide sixty (60) days prior written notice of its intent to terminate this Agreement if such default has not been cured.

(d) All information, records, and documents relating to the Bank and the Bank customers remains the property of the Bank. If the Agreement is terminated, the Organization will deliver to the Bank all such Bank related materials then in its possession or control. If such documents are in machine-readable form, they must be returned in machine-readable form. ***Upon Termination, the Organization may invoice the Bank for Services performed up to the date of termination of the Agreement.*** (emphasis added)[3]

That form of termination clause dated back to the 2004 agreement between the parties. Siskinds had attempted to negotiate changes to the termination clause in the 2008 Business Agreement, but CIBC had not agreed to them.

[16] One other provision of the 2008 Business Agreement came into play on these motions – Section 18 which dealt with the "Recall" of files:

18. (a) The Bank shall have the right to recall, at any time, any accounts referred to the Organization, with or without cause. In the event of any such recall, the Organization will cease all activity. The Bank will not be liable to the Organization for compensation on fees, accrued or lost interest, costs (including legal costs) or charges incurred after the recall date. The Organization shall immediately return to the Bank all applicable documentation and information (written or electronic) that is in the possession of the Organization with respect to the accounts.

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[3] The earlier 1999 Collection Account Agreement did not specify how the Bank would pay Siskinds in the event of a termination.

> (b) The Organization may likewise return to the Bank at any time and without cause any account referred to it, provided five (5) Business Days prior written notice of such recall has been provided to the Bank. At the time of recall, the Organization shall immediately return to the Bank all applicable documentation and other related material that are in the possession of the Organization.
>
> (c) In the event the Bank recalls an account with cause, as a result of the Organization failing to comply with the terms of this Agreement, including the Directives, the Organization shall be liable to pay to the Bank, all reasonable costs incurred to transition files to another service provider, or other reasonable costs the Bank determines are necessary to close or remedy an account.[4]

According to the Bank, from December, 2008 onward it had recalled approximately 1,800 files from Siskinds, with 1,600 of them being recalled more than two days after their assignment to the firm. Siskinds disputed those numbers based upon documents produced by CIBC. In my view, that dispute was not relevant to the material issues requiring determination on these motions.

[17] CIBC stated that its position on the issue of the recall clause had been consistent. The Bank was not relying on the recall clause to justify its refusal to pay the invoice rendered by Siskinds following termination because the CIBC had terminated the 2008 Business Agreement, not recalled all the files in the possession of Siskinds; rather, the CIBC contended that the recall provision formed a useful part of the contractual matrix in which to interpret Section 15(d).

[18] The dispute between the parties can be simply stated. Siskinds contended that upon the Bank's termination of the 2008 Business Agreement, it was entitled to invoice the CIBC for all services performed on the files on which it had been working up until the date of termination, even in respect of payments made by debtors *after* the agreement's termination date, and it intended to rely on expert evidence to quantify that amount. CIBC took the position that Siskinds was only entitled to fees on recovery payments received up until the date of termination on the various files upon which it had been working.

C. How Siskinds rendered invoices to CIBC during the currency of the business relationship

[19] Since the last sentence of Section 15(d) of the 2008 Business Agreement provided that upon termination Siskinds "may invoice the Bank for Services performed up to the date of termination of Agreement", it merits taking a closer look at the actual work performed by Siskinds and how, in the ordinary course, it billed CIBC.

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[4] The evidence disclosed that in 2003 the parties had discussed the issue of compensation upon the recall of a file. The Bank made it clear, and in the result Siskinds accepted, that no contingency or other fee would be paid in the event the Bank recalled a file.

[20] The 2008 Business Agreement did not deal expressly with the issue of invoicing. However, two sections touched indirectly on the issue:

> **16. REMITTANCE TO THE BANK**
>
> Treatment of all amounts received by the Organization shall be governed by specific provisions in the attached "Directives".
>
> **17. COSTS AND EXPENSES**
>
> Treatment of all costs and expenses that may be charged to the Bank by the Organization shall be governed by specific provisions in the attached "Directives".

[21] Turning to the Directives, Section 6.0 dealt at some length with when and how Siskinds was to render invoices to CIBC. That section provided, in part, as follows:

> 6.1 Remittances, Invoices and Reporting
>
> 6.1.0 The Organization will forward funds received from the customer's representative to CIBC or deposit all funds received from the customers to a trust account. Uncertified funds will be held for a period of no less than ten (10) and no more than twenty (20) days for foreign funds to allow clearing.
>
> CIBC will not accept charge backs on any returned items, i.e.: NSF, Stop Payments, once settlement has been invoiced to CIBC.
>
> 6.1.1 Upon the clearing of amounts, the Organization will forward to CIBC by the submission date determined by CIBC all monies collected by Docket net of commissions and government sales tax (GST), unless otherwise instructed by CIBC Recovery Operations to comply with product requirements, i.e. Amicus/Bizsmart Products. These monies will be submitted along with the respective back up documents such as settlement approvals and the original statements with the following details:
>
> [account details omitted]
>
> The invoices must be sorted by product, payment category (i.e. payment in full, settlement, payments, etc.), and account surname. In addition, the Organization will submit a summary total report along with the product breakdown report and a copy of the statements as per above.
>
> 6.1.2 The Organization must ensure that all cheques, statements and reports are received by CIBC weekly i.e. every Monday by 12:00 p.m. EST for Consumer Proposals and bi-weekly for CCS, or as otherwise requested by CIBC Recovery Operations. The Organization must submit the necessary documents in accordance with the schedule of dates as prescribed by CIBC on a monthly basis (This schedule would mirror the afore-mentioned time lines but in addition also define the dates).

> 6.1.3 The Organization will forward to CIBC by the submission date but not limited to the following reports:
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> • Exception Report (Consumer Proposal Unissued Proof of Claim Report/voting letter)
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> • Monthly Outsourcing Statistics
>
> • Close Out Reports
>
> • Default Report
>
> • Statements (Recoveries)
>
> …
>
> 6.1.4 CIBC's commitment is to pay the Organization's invoices, upon receipt, within 30 to 60 days. If the invoices have been submitted and the payments are not received within 60 days of issuance of the Invoices, the respective Organization must send a memo to the following address, requesting for an urgent processing of the payment…

[22] In the case of *BIA* consumer proposal files, Siskinds monitored the payment of expected dividends. When dividends were received, they were posted and tracked in the program's software. So, too, with payments received under Consumer Credit Counselling agreements with debtors and Orderly Payment of Debt proposals under Part X of the *BIA*.

[23] All payments made by trustees, estate administrators and CCS offices were made payable to the CIBC, and Siskinds possessed the authority to deposit cheques payable to the Bank.

[24] In some cases the trustees and others sent payments directly to the CIBC. Siskinds would send CIBC a monthly Direct Billing Report identifying such payments, which CIBC would review and, when approved, would pay Siskinds its 10% commission on those payments.

[25] According to Anuj Vohra, Vice-President of Retail Account Services in Client Account Management at CIBC:

> The invoicing arrangement between Siskinds and CIBC in respect of CP and CCS/OPD files (e.g. work done under the Business Agreements) never operated in the same manner as a fee-for-service invoicing arrangement. Rather, in the normal course, Siskinds received dividends and other payments meant for CIBC directly, and then sent CIBC an invoice detailing the 10% contingency fee amounts retained by Siskinds, along with the "net recovery" amount owed by Siskinds to CIBC after tax…
>
> In the minority of cases when CIBC would receive direct payments on files assigned to Siskinds, CIBC ensured that Siskinds received its 10% contingency fee, since the payments were collected during the term of the Business Agreements. Siskinds would present a list of the direct payments, and then CIBC would internally validate whether

> these payments were made and send a confirmation to Siskinds. Siskinds would invoice separately for these direct payments once a month…
>
> Simply, Siskinds only invoiced CIBC once: (i) either Siskinds or CIBC had received payment; (ii) on a file properly assigned to Siskinds that had not been recalled; and (iii) during the life of the Business Agreements. The invoicing arrangement, and the required information to be included on invoices, is described in section 6 of the 2009 Directives and the 2003 Directives.
>
> …
>
> When Mr. Barry advised me about Siskinds' intention to invoice us for the work it had performed on Siskinds Files, I was completely shocked and blindsided. Pursuant to the terms of the 2008 Business Agreement, the only invoice that I could imagine Siskinds sending after the termination date was in respect of monies collected, prior to the termination date, on files serviced by Siskinds.

On cross, Vohra testified that the deal with Siskinds "was all about collecting the funds".[5]

[26] In response, Barbara VanBunderen, the lawyer at Siskinds in charge of the relationship with the CIBC, deposed:

> It has never been Siskinds' position that termination of the 2008 Business Agreement by CIBC somehow changed the commission structure of the relationship to one in which Siskinds was entitled to invoice on a fee-for-service basis. Siskinds is only seeking to be paid for its services provided up to the date of the termination of the 2008 Business Agreement, as specifically provided for in that agreement. The calculation of Siskinds' invoice for services performed up to the date of termination is not a subject matter of Siskinds' motion for partial summary judgment.

D. The termination of the 2008 Business Agreement

[27] In late 2009 the CIBC asked Siskinds to participate in a Request for Information process to continue the collections work. Siskinds made a bid; it was not successful.

[28] CIBC sent Siskinds a November 24, 2010 letter advising that it had selected another company to provide Consumer Proposal and Credit Counselling Services. The letter stated:

> We have also added your company's information to our database for future sourcing initiatives and will invite you to participate in any future initiatives. The transition plan will follow shortly and *we request that you continue on a business as usual basis*. (emphasis added)

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[5] Transcript of the cross-examination of Anuj Vohra conducted December 2, 2013, Q. 158.

Both parties treated this letter as notice by the CIBC of its intention to terminate the 2008 Business Agreement.

[29] On December 13, 2010, CIBC advised that it would stop sending new files to Siskinds as of April 1, 2011 - a date later moved back to May 2, 2011 at the Bank's request – and that thereafter the existing inventory of open files at Siskinds would be transferred to CIBC's new business partner. From the time CIBC gave notice of termination until May 2, 2011, CIBC referred an average of 180 new files a week to Siskinds[6] and the firm continued to work on files assigned to it both before and after November 24, 2010. Vohra observed that Siskinds did not refuse to accept any new files and that during the transition period the Bank had paid the firm about $1 million in compensation. CIBC ultimately directed Siskinds to transfer all of its open files to the new service provider as of July 1, 2011. Approximately 35,000 open files were transferred.

[30] On December 22, 2010, Kevin Neil, on behalf of Siskinds, wrote to Kevin Barry at CIBC outlining how Siskinds proposed to issue its final invoices under the 2008 Business Agreement:

> [W]e will need to invoice CIBC for the work already performed for all files we turn over to your new vendor before the work is completed. This is considered in Section 15(d) of our services contract with CIBC which I have attached to this email for you. Of course, we will not be able to finalize the billing amount until the date(s) we turn over files to your new vendor as work will be ongoing until that time (and many files will be opened and/or completed in the interim).
>
> We should likely have a discussion regarding this early in the new year so it doesn't catch anyone off guard when we present our invoice(s) to CIBC as we end our involvement with the files. Given the current inventory of files and the work done to date on them, the invoice(s) will be significant and I didn't want you to be surprised.

Vohra deposed that this was the first time in the bank's relationship with Siskinds that the firm had suggested it was to be compensated on a fee-for-service basis.

[31] On February 16, 2011, Barry responded to Neil stating, in part: "I also spoke with the business [people] about your questions re: final billing, to which they responded that the final billing will done (sic) as per the current process." That elicited the following response from Neil on March 3, 2011:

> With respect to the issue of final billing, you should understand that, with certain exceptions, the majority of work that we are required to perform in respect of a file is completed within days of us receiving the file. However, we are typically paid for that work much later as we are paid a 10% contingency fee upon collection of funds and collection of funds can come much later.

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[6] Or files for about 4,132 debtors from November 24, 2010 until May 2, 2011.

> That process works well as long as we are a continuing supplier and overseeing the collection of funds. However, it does not work on termination as a third party will then be collecting funds in respect of which we will be owed a contingency fee for work performed before termination. Our contract contemplated this scenario and it provides that, on termination, Siskinds is entitled to invoice for all work performed up to the date of termination. In other words, on the termination date, Siskinds is entitled to be paid in respect of all files that we are then carrying for CIBC.
>
> Calculating the amount owed will no doubt be an involved exercise, where we will have to look at all files we then carry, historical recoveries and contingencies fees paid then extrapolate the amount owed. Based on rough estimates using historical recoveries and information currently in VMM, we anticipate that fees owing on termination will be in the $4M to $5M range.
>
> Given the relatively short time frame, the quantum involved and the complexity of the calculation, we think it makes sense if we began immediately to share information and develop a framework for calculation of the fees due upon termination so that the process can be completed as seamlessly as possible.

[32] In the result, payments to Siskinds stopped on June 1, 2011 and its files were transferred to the new vendor by June 30, 2011. Siskinds ultimately sent CIBC a July 7, 2011 invoice for $4,632,138.94 for all outstanding services rendered up until June 30, 2011 on *BIA* proposals, CCS and OPD files. According to VanBunderen, the Siskinds invoice was not for 10% of what actually had been collected, but "it was projected collections".[7] The professional fee of $4,099,238.00 which appeared on the invoice was not broken down into its component parts, nor did the invoice disclose how Siskinds had arrived at those numbers. CIBC refused to pay the invoice. According to Vohra:

> With respect to contracts between CIBC and vendors operating on a contingency basis (such as Siskinds), I understood that section 15(d) could only have given the right to invoice in respect of monies collected, prior to the termination date, on the files that were being serviced by those vendors.

[33] Vohra also deposed that the amount claimed by Siskinds nearly equaled the approximately $5.1 million which the Bank had paid the firm during the course of the 2008 Business Agreement. Siskinds later sent an expert's report to CIBC which quantified the amount due, on a preliminary basis, as between $2.39 and $2.5 million, later revised upwards to just over $4 million.

[34] CIBC stated that it had paid Siskinds a 10% contingency fee on all payments received, prior to the termination date of June 30, 2011, on the Siskinds Files. At the hearing counsel for Siskinds agreed with that statement.

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[7] VanBunderen CX, Q. 128.

[35] On its part, Siskinds continued to remit to the CIBC, after the termination date, any amounts it received from debtors on former files which amounted to over $12 million; Siskinds did not engage in any form of set-off.

III. Expert evidence

[36] Although Siskinds did not propose that the quantum of its damages be determined on the motion for partial summary judgment, on the motion the firm filed evidence from Mr. Peter Weinstein, a chartered business valuator retained by it, who had authored an expert report dated January 15, 2013 opining on the quantum of damages suffered by Siskinds in the event the Court determined that CIBC was liable to it in damages. In a November 22, 2013 updated expert report Weinstein opined that his preferred approach to calculating damages resulted in a damage figure of $4.020 million.

[37] Some of the calculations performed by Weinstein dealt with the breakdown over time of the total amounts collected on the different kinds of files CIBC had referred to Siskinds. On average, the majority of collections in Proposal and Credit Counselling Services files took place in the second and third years of those files. In terms of the time incurred by Siskinds on such files, in the case of Proposal files the majority of the work was completed in the file's first year, whereas on CCS files the majority was done by the end of the second year. That led Weinstein to state, in his September 19, 2013 affidavit:

> The foregoing analysis demonstrates that, on average, a significant amount of work was performed by Siskinds early after it was assigned files, and, in particular, in the first year, but substantial recoveries would not be made until later in those matters, with the majority being recovered in years two through five.

IV. Summary judgment principles

[38] Both parties submitted that this was an appropriate case to decide by way of their competing motions for summary judgment. I agree. Material facts were not in dispute. At its heart the dispute was one over the interpretation of the contract between the parties. The evidence filed essentially was that which would be before the trial judge on the issue of liability. Having engaged in the first step of the inquiry now mandated by *Hryniak v. Mauldin*, I conclude that the summary judgment process has provided me with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). As a result, there is no genuine issue requiring a trial.[8]

[39] I also accept that Siskinds' approach of requesting the Court to consider granting partial summary judgment was appropriate in the circumstances of this case because the issue of liability turned on a quite discrete issue of contractual interpretation. I would also observe that Siskinds did file sufficient expert evidence to provide the Court with some understanding of its

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[8] *Hryniak v. Mauldin*, 2014 SCC 7, paras. 57 and 66.

proposed methodology for calculating damages and the likely range of the damages it would claim.

V. Analysis

A. The governing principles of contractual interpretation

[40] As the starting point of the analysis, let me repeat the summary of contractual interpretation principles set out in *Western Larch Limited v. Di Poce Management Limited*:

> In a series of cases decided over the past few years the Court of Appeal has summarized the main principles which apply to the interpretation of commercial contracts. Specifically:
>
> > (i) a commercial contract is to be interpreted as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
> >
> > (ii) a court must determine the intention of the parties in accordance with the language they have used in the written document and based upon the "cardinal presumption" that they intended what they said;
> >
> > (iii) a contract should be interpreted in a fashion which accords with sound commercial principles and good business sense, and that avoids a commercial absurdity;
> >
> > (iv) where the language of a written contract is unambiguous, extrinsic evidence is not admissible to alter, vary, interpret, or contradict the words used in the contract;
> >
> > (v) where a group of agreements essentially form components of one larger transaction, in the sense that each agreement is entered into on the faith of the others being executed and where it is intended that each agreement form part of a larger composite whole, assistance in the interpretation of any particular agreement may be drawn from the related agreements; and,
> >
> > (vi) a court should interpret a commercial contract with regard to objective evidence of the circumstances underlying the negotiation of the contract, but without reference to the subjective intention of the parties.
>
> On this last point, a consideration of the context in which the written agreement was made is an integral part of the interpretative process, irrespective of whether any ambiguity exists in the text of the document. Courts must always have regard to the context, or what commonly is called the "factual matrix", and to the objective evidence of the surrounding circumstances underlying the negotiations. That is because while the dictionary, grammatical or plain meaning of the words used by the parties will be important, and often decisive, in determining the meaning of the document, often the meaning of a document is derived not just from the words used, but also from the context

> or the circumstances in which the words were used. Understanding the meaning of words usually requires knowing the context in which the words were used. As a result, a court needs to read the text of a written agreement in the context of the circumstances as they existed when the agreement was created, including the facts which were known to or reasonably capable of being known by the parties when they entered into the written agreement, the genesis of the agreement, its purpose, and the commercial context in which the agreement was made.
>
> To sort out which facts fall within the rubric of the objective, factual matrix, and which stray over the line into the forbidden realm of the parties' subjective intention, Doherty J.A., in *Dumbrell v. The Regional Group of Companies Inc.*, adopted the following description provided by an English court:
>
> > In sharp contrast with civil legal systems the common law adopts a largely objective theory to the interpretation of contracts. The purpose of the interpretation of a contract is not to discover how the parties understood the language of the text, which they adopted. The aim is to determine the meaning of the contract against its objective contextual scene. By and large the objective approach to the question of construction serves the needs of commerce.[9]

B. Application of the legal principles to the facts

[41] Throughout the course of the relationship between Siskinds and the CIBC, the basis upon which CIBC had paid Siskinds for work performed on "non-opposition" files remained unchanged – CIBC paid Siskinds a commission on all dividends and payments *received* from debtors. Under the 2008 Business Agreement, the commission rate was 10% "applied to all dividends and payments *received* inclusive of all disbursements".

[42] Siskinds acknowledged this commission structure had applied for services performed during the currency of the 2008 Business Agreement, but only in respect of dividends and payments received by the CIBC during that time. Siskinds contended that upon the termination of the 2008 Business Agreement the language found in Section 15(d) enabled it to invoice the CIBC for commissions relating to debtor dividends/payments which were received after the termination date on files on which Siskinds had performed work prior to the termination date.[10]

[43] Although I accept the submission of Siskinds that "the words of the fees and termination provisions are unambiguous" and that evidence of subjective intention plays no role in the interpretation of Section 15(d), I see no merit in its proffered interpretation of Section 15(d).

[44] The language of Section 15(d) does not support such an interpretation. That section entitled Siskinds to "invoice the Bank for Services performed up to the date of termination of the

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[9] 2012 ONSC 7014, paras. 109 to 111; affirmed 2013 ONCA 722; leave to appeal denied 2014 CanLII 17042 (SCC).

[10] Siskinds did not advance an argument based on the principle of *contra proferentem*.

Agreement". Section 2 of the 2008 Business Agreement defined "Services" as "the services set out in the DirectivesProgram and any subsequent updates that the Bank may make from time to time". There was no dispute between the parties about the work, or "Services", which Siskinds performed or provided during the life of the 2008 Business Agreement. Nor was there any dispute that during the currency of that Agreement Siskinds would render monthly invoices to the CIBC which would see it paid commissions on certain dividends or payments actually received by the date of the invoice. In my view, the terms "Services" and "invoice" in Section 15(d) applicable upon the early termination of the agreement bore exactly the same meaning as they did for any other point of time during the life of the 2008 Business Agreement. Consequently, Section 15(d) entitled Siskinds to render to the CIBC, upon termination, the same type of invoice seeking payment of exactly the same type of compensation and on the same basis as had any previous invoice rendered by Siskinds during the course of the relationship between the parties under the 2008 Business Agreement. Whether the debtor's dividend or payment had been directed to the CIBC or to Siskinds was not relevant; what mattered was the timing of the dividend or payment - specifically that it had been received prior to the date of the termination of the 2008 Business Agreement.

[45] CIBC's interpretation of the termination payment called for by Section 15(d) was consistent with the manner in which the parties had calculated the firm's compensation during the course of the 2008 Business Agreement. By contrast, Siskinds' proffered interpretation would necessitate a radical change in the methodology for calculating its compensation. Its interpretation would regard Section 15(d) as enabling the last invoice rendered by the firm to be calculated using a methodology radically different from that employed for any prior calculation of compensation during the course of the 2008 Business Agreement. The magnitude of such a radical change in methodology was pointed out by the CIBC in its evidence: Siskinds was claiming compensation upon termination of in excess of $4 million as compared to total compensation since the start of the contract in 2008 of $5.1 million. In my view, common commercial sense dictates that the language of a contract should clearly point out that such a significant type of change in compensation methodology would occur upon early termination, rather than attempting to tease such a radical shift in methodology out of an exegesis of the term "invoice".[11]

[46] CIBC's interpretation was also consistent with the other provisions in Section 15(d). Siskinds' termination payment methodology would require giving it access following the termination date to the Bank's information about the transferred files so that Siskinds could calculate its post-termination on-going entitlement to commissions. But the second and third sentences in Section 15(d) required Siskinds to transfer all file data to the CIBC upon termination, making it difficult to see how Siskinds could hope to calculate the on-going commissions to which it contended the firm was entitled. The more harmonious interpretation of all parts of Section 15(d) was the one advanced by the CIBC.

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[11] *CH2M Hill Energy Canada, Ltd. v. Consumers' Co-operative Refineries Ltd.*, 2010 SKCA 75, paras. 31 and 33.

[47] Siskinds advanced several reasons why acceptance of the CIBC's interpretation of Section 15(d) would result in unfairness and an interpretation inconsistent with commercial reality. Let me deal with each in turn.

[48] First, Siskinds argued that the CIBC had dictated the terms of the 2008 Business Agreement. While it is true that the CIBC was not prepared to accept material deviations from its standard form of service provider agreement, the simple commercial reality was that Siskinds accepted those terms, so I do not see the relevance of this argument.

[49] Second, Siskinds contended that the fact it usually invested the majority of its work into a file shortly after its referral from the CIBC supported its interpretation or made the Bank's interpretation an unfair one. I accept Siskinds' evidence that as a general practice the receipt of dividends and payments upon which commissions were earned trailed the work performed by Siskinds, most of which generally took place in the early years of a file. Nevertheless, I do not see the relevance of the characteristics of this "work/commission payment profile" to the interpretation of Section 15(d).

[50] Both parties clearly understood when they entered into the 2008 Business Agreement that Siskinds would be paid a commission upon receipt of debtor dividends or payments, not upon some calculation of forecast future receipts or some fee-for-service basis. By contrast, Siskinds received a higher level of compensation from the Bank on the other "opposed" debtor payment work which more closely resembled legal services typically provided by a law firm than the basically commoditized collections work performed by it under the 2008 Business Agreement. As well, the evidence supports the finding that certainly Siskinds was aware, at the time it entered into the 2008 Business Agreement, that it would spend more time "up-front" on a file, with commission payments trailing over later years as receipts came in. Armed with that information, it nonetheless agreed to be paid compensation based upon the timing of the receipt by the Bank of dividends or payments from its debtors.

[51] The 2008 Business Agreement was for a fixed term of three years, ending in October, 2011. Siskinds knew that the CIBC was under no obligation to renew the agreement. Siskinds can be taken to have known that in the event the agreement expired in accordance with its terms and Siskinds was not able to negotiate a renewal of the arrangement, it would have to transfer back to the Bank, or its designate, the files on which the firm was working. Section 15 would have no application in those circumstances and the agreement contained no discrete provision dealing with compensation upon its expiry.[12] Accordingly, Siskinds could not reasonably expect upon expiration to receive any compensation other than that calculated in accordance with the

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[12] Although Siskinds argued at paragraph 3 of its Responding Factum dated January 15, 2014 that it would be entitled to invoice the CIBC for services performed "up to the date of termination of the Agreement, whether CIBC terminated the Agreement early or the Agreement terminated by expiration of its natural term", Siskinds did not point to any contractual provision in the 2008 Business Agreement which would work that result on an expiration. As Sections 15(a), (b) and (c) made clear, "Termination" within the meaning of Section 15 meant only early termination, not expiration in accordance with the terms of the Agreement. Section 36 clearly distinguished "early termination" from "expiration".

standard commissions-upon-receipt-of-dividend methodology. That was a commercial risk accepted by Siskinds.

[52] Both parties were very sophisticated commercial entities. If Siskinds was prepared to accept the risk that upon the expiration of the agreement it would only receive compensation based upon the timing of the receipt of dividends, but was not prepared to do so in the event of an earlier termination of the agreement – in this case a few months before the expiry date – then one can reasonably expect a sophisticated commercial party to deal expressly in the contract with its refusal to accept such a risk. Siskinds did not do so. That leads, in my view, to the inference that Siskinds was prepared to accept such risk, viewing the amount of commission it would receive during the life of the 2008 Business Agreement as adequate compensation for such risk.

[53] Moreover, when notified in late November, 2010 by the CIBC of the early termination, it was always open to Siskinds to indicate its unwillingness to accept any new files because it considered its "up-front" work was unlikely to be recovered adequately by associated commissions on dividends or payments received from the relevant debtor prior to the date of termination and to engage the CIBC in discussions on the point. Siskinds made a business decision not to do so and, as a result, continued to receive commission payments for about seven months. I reject Siskinds' submission that "CIBC was compelling (and expected) Siskinds to do the substantial up-front work on those files". The record was devoid of any evidence of such compulsion by one sophisticated commercial actor against another sophisticated commercial actor.

[54] Further, at the early stages of its relationship with the Bank in 1999 and 2000, Siskinds had enjoyed the benefit of receiving commissions on files transferred by the Bank to it on which it had not performed the "up-front" work, but on which debtors made payments or dividends after Siskinds had received the file. CIBC adduced evidence that when the Bank first entered into a collections agreement with Siskinds, the firm was paid a contingency fee on all files transferred to it, even several thousand "old files" that had been opened before the Collection Account Agreement took effect, where the initial work had already been done by CIBC's National Collections unit, but where the payments were received by Siskinds. Siskinds stated that only 2,100 "old files" had been transferred to it between 1999 and 2001, with associated billings approximating $58,000. While Siskinds pointed out that the number of files it had so accepted at the start of its relationship with the Bank paled in comparison to the number of files it transferred to the new service provider in June, 2011, a consistent contractual compensation principle was applied to Siskinds at the start and at the end of its business relationship with the Bank – commissions payable were based upon the timing of the receipt of dividends/payments from the Bank's debtors.

[55] Third, I do not accept Siskinds' argument that the Bank's interpretation of Section 15(d) would result in a "windfall" to it. The evidence disclosed that the Bank would pay a commission on any particular dividend or payment received from its debtor whether made before or after the change in service providers at the end of June, 2011. If the amount of the commission payable to the new service provider was lower than that previously paid to Siskinds, that would result from the bank's ability to negotiate better terms of a collections services agreement with the new service provider, not from any unfair treatment of Siskinds. It had invited Siskinds to bid on the work for the next period of time, but the firm's bid obviously was not as competitive as the one

made by the new service provider. Vohra deposed that that was all he meant by his discussion of "benefits" in his March 1, 2011 email to Jonathan Smith, and I accept his evidence on that point.

[56] Fourth, I attach no weight to Siskinds' argument that since some debtors or trustees continued to send payments to it after June 30, 2011, it should be entitled to commissions on those payments. Siskinds' entitlement to commissions ceased on June 30, 2011 and was limited to commissions on dividends or payments received up until that date. Invariably when a creditor changes its collection agent, as occurred here, some transitional confusion will arise amongst debtors as to whom to send payments. That does not alter the terminated collection agent's entitlement to commissions.

[57] Fifth, I see little useful role in the interpretative exercise for Section 18 of the 2008 Business Agreement dealing with the recall of files. It dealt with a completely different circumstance. In any event, Section 18 did not create the type of compensation entitlement in the event of recall similar to the one advocated by Siskinds, so the section provides no support for Siskinds' argument.

[58] Finally, I see little if any resemblance between the work performed by Siskinds under the 2008 Business Agreement and that performed by lawyers under traditional contingency fee arrangements because Siskinds performed largely clerical, administrative debt monitoring and collection work using non-legal staff under its agreement with the CIBC. In any event, Siskinds was bound by the compensation deal it had agreed to under the 2008 Business Agreement, and the firm cannot, after the fact, try to argue for better compensation by analogy to some other business circumstance.

VI. Summary and Costs

[59] For the reasons set out above, I dismiss the motion by Siskinds for partial summary judgment and I grant the motion by the CIBC for summary judgment. Consequently, I dismiss this action.

[60] I would encourage the parties to try to settle the costs of this motion. If they cannot, the CIBC may serve and file with my office written cost submissions, together with a Bill of Costs, by June 13, 2014. Siskinds may serve and file with my office responding written cost submissions by June 30, 2014. The costs submissions shall not exceed three pages in length, excluding the Bills of Costs.

(original signed by)

D. M. Brown J.

Date: May 28, 2014