In the Court of Appeal of Alberta

Citation: Bertram Family Trust v Felesky Flynn LLP, 2025 ABCA 54

Date: 20250214
Docket: 2403-0158AC
Registry: Edmonton

Between:

Bertram Family Trust, 1548199 Alberta Ltd, Tammy Bertram and Robert Bertram

Applicants

- and -

Felesky Flynn LLP

Respondent

Reasons for Decision of
The Honourable Justice Kevin Feth

Application for Permission to Appeal

Reasons for Decision of
The Honourable Justice Kevin Feth

Introduction

[1] The applicants seek permission to appeal an Order of the Court of King's Bench affirming (with a small variation) a review officer's decision that established the reasonable legal fee payable to their lawyers for tax planning advice facilitating the sale of a business: ***Bertram Family Trust v Felesky Flynn LLP***, 2024 ABKB 341 [the *Decision*].

[2] The applicants contend that the appeal judge erred by not finding: a) the review officer exceeded his jurisdiction by interpreting the retainer agreement between the parties; b) the review hearing was procedurally unfair; and c) payments made in 2017 should have been deducted from the final fee. The applicants argue that the appeal judge confirmed an excessive fee payable to the respondent.

[3] For the reasons to follow, permission to appeal is denied.

Background

[4] In 2017, the applicants were selling their manufacturing company and entered into a retainer agreement with the respondent to provide tax planning advice about the structure of the sale. The transaction collapsed when the intended purchaser decided not to proceed. The respondent charged the applicants for the legal work based on the hourly rates of the lawyers on the file, and the applicants paid without dispute. The respondent kept the file open in the event of a future sale.

[5] In 2021, the applicants again wanted to sell their business to the same purchaser and asked the respondent to provide the tax planning advice. No new retainer agreement was signed. The work performed by the respondent in 2017 was not directly transferrable to the new sale. Over several months, while developing and implementing the tax plan for the new sale (involving 14 different entities and 5 different countries), the respondent issued various interim statements of account totalling $205,295 which were paid by the applicants. The accounts issued with the same client file number as the 2017 work. The business ultimately sold for $42,000,000.

[6] In November 2021, the respondent delivered a final invoice with a "Proposed Fee" of $750,000 less the interim payments of $205,295. The Proposed Fee was a final global fee for the work performed throughout 2021, based on value billing as contemplated by the retainer agreement. The agreement expressly identified the criteria to be considered in determining the final fee. The respondent also undertook a "double check" in setting the fee by comparing the amount to the clients' estimated future tax savings. The final fee was equal to a little less than 15%

of the estimated savings. After deducting the interim payments, the balance owing was $544,705 (including disbursements), which was more than twice the value of a fee based on hourly rates.

[7] The applicants objected to the final fee on the basis that they never agreed to a fee structure based on a percentage of tax savings, which they viewed as a disguised contingency fee. They were satisfied with a fee based on the hourly rates set out in the retainer agreement but nothing more.

[8] The respondent referred the dispute to a review officer in accordance with Part 10 of the *Alberta Rules of* Court, Alta Reg 124/2010 and submitted to the review officer and the applicants a "Confidential Evidence for a Review Hearing" package that included the retainer agreement, the interim and final invoices, and client correspondence and emails. A hearing was conducted on November 1, 2022, at which the applicants attended with new counsel. During the hearing, two lawyers from the respondent described the work performed, its complexity, and the methodology by which the final fee was determined. The applicants, through a representative and counsel, expressed their views about the nature and complexity of the sale transaction, the work performed, and the applicants' expectations for a reasonable fee, including that a fee based on the respondent's hourly rates (as set out in the retainer agreement) was acceptable. No one testified under oath.

[9] The review officer found that the retainer agreement was a global fee agreement, which expressly contemplated a final fee based on several factors set out in the agreement. The factors were substantially consistent with the considerations delineated in Rule 10.2 for establishing the "reasonable amount" that a lawyer is entitled to receive for work performed. The review officer did not find that the final fee was determined based on a percentage of the clients' estimated tax savings, although the estimated tax savings was a relevant consideration. Taking into account the lack of shared risk for any future tax liability, some overbilling of hourly rates for interim accounts, the uncertainty about any future tax saved, and whether the respondent contributed to the need for urgency of the work performed, the review officer applied a global reduction to the fees charged of $100,000. He otherwise adopted and approved the methodology used by the respondent to calculate the final fee by reference to the retainer agreement and declined to reduce the final fee by the interim billings in 2017, which were for legal work found to be materially different from and inapplicable to the 2021 legal services performed by the respondent.

[10] The applicants appealed the decision to the Court of King's Bench pursuant to Rule 10.26, arguing that the review officer exceeded his jurisdiction in finding that the retainer agreement applied to the 2021 work and allowing a "bonus fee" beyond the hourly rates set out in the agreement. Further, the applicants complained that they were not afforded procedural fairness at the hearing because no sworn evidence was taken, and they did not appreciate that the hearing would result in a final decision. Additionally, the applicants contended that the review officer erred by not deducting the 2017 payments from the final fee.

[11] In upholding the review officer's decision, the appeal judge concluded:

> [20] Of importance are the sections on accounts and fees. Section 8 of the retainer agreement is entitled **Interim and Final Accounts**. This section provides in part that the Respondent "may issue interim accounts, usually on a monthly basis" and further "At the conclusion of our engagement, we will issue a final account which sets out our final fee. At that time, the total amount of our fees may be adjusted up or down to a fair and reasonable amount, taking into account any interim invoices that have been issued and the factors stated above."
>
> [21] The "factors" referenced in the interim and final account section are found in the preceding section, entitled **Fees**. This section includes that "when determining our final fee we consider many factors to ensure that this final fee is fair and reasonable in a given case, which include but are not limited to: (a) The nature, importance and urgency of the matter; (b) Time and effort expended (our hourly rates range from $175 to $775 per hour); (c) Results obtained; (d) The experience and ability of the lawyers rendering the services; (e) Services rendered on a rush or priority basis; (f) The dollar amount involved or the value of the subject matter; (g) the magnitude of the risk of pursuing the matter; (h) The value you receive from our work on your behalf; (i) Any agreement between Felesky Flynn LLP and the [Appellants]; and (j) Any estimate or range of fees given provided by Felesky Flynn LLP." [Emphasis in original]

[12] The appeal judge rejected the applicants' argument that the review officer had interpreted rather than applied the retainer agreement. First, the appeal judge noted that the retainer agreement expressly referred to a "final fee" that was to issue at the end of the parties' engagement, and that the total fees "may be adjusted up or down to a fair and reasonable amount, taking into account any interim invoices... and the factors stated above": *Decision* at para 50.

[13] Second, the appeal judge upheld the review officer's finding that no other agreement governed the work done by the respondent in 2021. She concluded that the "parties were well informed that the 2017 retainer agreement governed the 2021 work." She observed that the same client file number was maintained for both transactions, the same business was being sold, and the "same general instruction governed the 2021 relationship: devise a tax plan that minimize global tax liability of the Appellants .... The Appellants were billed according to the 2017 retainer agreement, and they paid those interim invoices in 2021." She found no merit to the assertion that the 2017 retainer agreement was not the contract in place in 2021: *Decision* at para 53.

[14] The appeal judge also rejected the applicants' argument that they had not been afforded procedural fairness during the hearing because "no evidence" was called and the decision was

rendered on the "bare submissions by the parties and counsel". The appeal judge reviewed the standard for analyzing procedural fairness and the rules governing the hearing, including Rule 10.17(1) which provides that evidence heard by the review officer may be sworn. She found that evidence was tendered through filed materials, which were reviewed "in detail" at the hearing and counsel for the applicants "never averred to a desire to provide additional material". All parties and their counsel were given the opportunity to speak. Moreover, when counsel for the applicants was asked by the review officer whether he had anything further to add at the conclusion of argument, he stated: "The dispute ... begins and ends with the retainer letter. It also begins and ends with were the fees charged reasonable? And we have given you all of the information and evidence that I think you need to make an appropriate decision in this case": *Decision* at paras 58-63; Hearing Transcript at 37, ll 20-25.

[15] The appeal judge also rejected the applicants' claim that the review officer delivered a final decision without notice of his intention to do so; there "was no suggestion during the hearing that the Review Officer would make an interim decision": *Decision* at para 62. She concluded that the review officer gave all parties "a full, uninterrupted opportunity to provide their submissions ... The Review Officer reviewed the retainer agreement that was agreed by both parties to be the only retainer agreement in place. There were no disputed facts that the Review Officer ignored. The hearing provided by the Review Officer was procedurally fair": *Decision* at paras 63-68.

[16] In upholding the review officer's decision that the final fee reduced by $100,000 was reasonable, the appeal judge concluded that review officers are well-positioned to determine the reasonableness of fees under Rule 10.19. She found that the review officer reasonably determined the work completed by the respondent was "complicated and extremely important" to the applicants, involved a "huge commercial transaction with large potential tax consequences", the respondent had specialized knowledge of this complicated area of law, and the tax plan developed was "complex, sophisticated, involved enormous sums of money, including the potential tax savings". She also found that the review officer correctly considered interim overbilling at an hourly rate exceeding the retainer agreement (capped at $775/hr). The appeal judge noted that some overcharging of hourly rates was overlooked by the review officer, so she reduced the fees by another $3,295 plus GST. Importantly, the appeal judge rejected the applicants' argument that they did not agree to any additional fees beyond the fixed hourly rates; the retainer agreement clearly provided for a final fee exceeding the hourly rates for work completed. Lastly, she found no error in the review officer's decision not to reduce those fees by the amount paid for the 2017 work, which was a separate matter that had been properly excluded from the assessment of the final fee. Accordingly, the review officer's decision about the fee was reasonable and owed deference: *Decision* at paras 69-83.

Test for permission to appeal

[17] The applicants request permission to appeal pursuant to Rule 14.5(1)(i):

> **14.5(1)** Except as provided in this rule, no appeal is allowed to the Court of Appeal from the following types of decisions unless permission to appeal has been obtained:
>
> …
>
> (i) any decision of the Court of King's Bench sitting as an appeal court under rule 10.26, 10.44 or 12.71.

[18] Rule 14.5(1) requires permission to appeal for several categories of decisions, including: decisions of a single appeal judge; pre-trial decisions about adjournments, time periods and time limits; consent orders; decisions involving monetary controversies estimated at no more than $25,000 (excluding costs); and costs awards. Subrule (i), in particular, addresses three kinds of appeal decisions: an appeal from a review officer's decision (Rule 10.26), an appeal from an assessment officer's decision (Rule 10.44), and an appeal from a decision made under the *Family Law Act*, SA 2003, c F-4.5 (Rule 12.71).

a) An appeal under Rule 10.26 from a review officer's decision

[19] The appeal decision before me was made under Rule 10.26, which states in part:

> **10.26(1)** A party to a review officer's decision under this Division may appeal the decision to a judge.
>
> **(2)** The appeal from a review officer's decision is an appeal on the record of proceedings before the review officer.

[20] An appeal judge under Rule 10.26 may make the following orders:

> **10.27(1)** After hearing an appeal from a review officer's decision, the judge may, by order, do one or more of the following:
>
> (a) confirm, vary or revoke the decision;
>
> (b) revoke the decision and substitute a decision;
>
> (c) revoke all or part of the decision and refer the matter back to the review officer or to another review officer;

(d) make any other order the judge considers appropriate.

[21] While an appeal judge's remedial powers under Rule 10.27 are broad, the appeal hearing is not *de novo* and the review officer's decision is entitled to deference: ***Betser-Zilevitch v Prowse Chowne LLP***, 2021 ABCA 129 at para 13 [***Betser-Zilevitch***]. A review officer "is in the best position to assess and weigh the evidence": ***Rocks v Ian Savage Professional Corporation***, 2015 ABCA 77 at para 15. Further, given a review officer's specialized knowledge and experience in assessing the reasonableness of a retainer agreement and a lawyer's charges, interference will only be warranted if the decision discloses "an error in principle or palpable and overriding error", or the "award is inordinately high or low": ***Dear v McLennan Ross***, 2008 ABCA 137 at para 1, 429 AR 75; ***Mercantile Bank of Canada v Keen Industries Ltd***, 1988 ABCA 224 at paras 12-14, 86 AR 311. Whether the retainer agreement or the legal charges were unreasonable is measured objectively "having regard to the risks, facts and prospects underlying" the retainer; "[a]n unexpectedly high fee does not necessarily mean that the agreement is unreasonable. Clients should not routinely be able to walk away from agreements they have made with their lawyers": ***Tallcree First Nation v Rath & Company***, 2022 ABCA 174 at para 58 [***Tallcree 2022***].

b) Second appeals

[22] Generally, there is only one appeal as of right and granting permission for a second appeal is an exception, not the rule: ***R v Lofstrom***, 2020 ABCA 286 at para 6; ***Pilgrim v True-Line Contracting Ltd***, 2023 ABCA 126 at para 17. Reviewability on a second appeal is substantially constrained. Permission to appeal is from the decision of the appeal judge, not the review officer's decision. "A permission to appeal application and a second possible appeal is not a blanket opportunity to raise the same arguments and evidence again, in the hope that a different and more beneficial decision will result": ***Biernacki v Alberta (Land and Property Rights Tribunal)***, 2022 ABCA 56 at para 20. "Appeals are expensive and introduce delay": ***Mudrick Capital Management LP v Lightstream Resources Ltd***, 2016 ABCA 401 at para 11. Here, a review officer and a judge of the Court of King's Bench, acting as an appeal court, have already carefully reviewed the retainer agreement and the law firm's account, and a restrictive approach must be taken in assessing whether a further appeal should be granted. Moreover, deference is owed by this Court if the appeal judge identified and applied the proper standard of review to the review officer's decision and the review process, and there was no misstatement of the law: ***Carbone v Burnett***, 2021 ABCA 432 at para 20 [***Carbone***].

[23] On a second appeal, the standard of review is governed by the framework described in ***Housen v Nikolaisen***, 2002 SCC 33, [2002] 2 SCR 235. Questions of law and extricable questions of law are subject to review on a correctness standard. Questions of fact or mixed fact and law (absent an extricable legal question) are reviewed for palpable and overriding error: ***Betser-Zilevitch*** at para 13.

c) Test for permission to appeal under Rule 14.5(1)(i) – Review of retainer agreements and lawyer's charges

[24] The applicants and the respondent submit that the test for permission to appeal under Rule 14.5(1)(i) is described in ***Szakaly v Smith***, 2024 ABCA 171 at para 5, which directs the applicants to demonstrate: a) there is an important question of law or precedent; (ii) there is a reasonable chance of success on appeal; and (iii) the delay will not unduly hinder the progress of the action or cause undue prejudice. However, that test was developed when Rule 14.5(1)(i) dealt exclusively with permission to appeal from appeal decisions made pursuant to Rule 12.71 and the *Family Law Act*. While the appeal court in such matters has the same remedial powers under Rule 12.70 as found under Rule 10.27, permission to appeal to this Court may only be granted on "a question of law or jurisdiction, or both": Rule 12.71(1). Further, while a Rule 12.71 appeal decision is typically on the record, an appeal judge retains the discretion to order more evidence where necessary, after putting in place sufficient safeguards to ensure a fair and just result: Rule 12.68; ***Wandler v Crandall***, 2017 ABCA 391 at para 33. Consequently, the nature of a Rule 12.71 appeal is different from an appeal under Rule 10.26.

[25] Rule 14.5(1)(i) was amended effective January 1, 2024, to add appeals from decisions under Rules 10.26 and 10.44: *Alberta Rules of Court Amendment Regulation*, Alta Reg 126/2023. Unlike Rule 12.71(1), nothing in the *Rules* expressly limits permission to appeal a decision under Rule 10.26 (or Rule 10.44) to a question of law or jurisdiction.

[26] This application for permission to appeal appears to be the first from a King's Bench appeal decision under either Rule 10.26 or Rule 10.44 since the amendment to Rule 14.5(1)(i). Second appeals from review and assessment decisions involve different considerations compared to Rule 12.71 *Family Law Act* appeals which frequently involve matters of interim relief and are largely guided by the "overriding consideration of the 'best interests of the child'". However, in all such permission to appeal applications, "regard should be had to the resources of the [parties], as well as the courts, to ensure that all appeals are in the interests of justice": ***Mckerness v Whitson***, 2017 ABCA 207 at para 7. This accords with the principle that second appeals are exceptional.

[27] I must therefore consider whether a discrete permission to appeal test is necessary for appeals under Rule 10.26. The jurisprudence addressing how such appeals were handled in the past offers some assistance. However, general consistency with other tests for permission to appeal under Rule 14.5(1) is desirable.

[28] Prior to the amendment to Rule 14.5(1)(i), the authorities conflicted about whether second appeals from decisions under Rules 10.26 and 10.44 required permission to appeal. Some authorities held that a second appeal from a review or assessment decision is an appeal from a costs decision and therefore captured by the permission to appeal requirement in Rule 14.5(1)(e)

dealing with a decision "as to costs only": see as examples ***Matt, Owens, Stinchcombe, Sattin & Coultry v Neilson***, 1980 ABCA 349, 27 AR 85, and ***Kohut v Wilson***, 2002 ABCA 247 at para 6, 317 AR 377 (both under the old *Alberta Rules of Court*, Alta Reg 390/1968); ***Cold Lake Industrial Park GP Ltd v Abt (Estate)***, 2022 ABCA 23 at paras 1, 21 [***Cold Lake***], and ***Carbone*** at paras 11-12, 15. A contrary conclusion was reached about such appeals in ***Tallcree First Nation v Rath & Company***, 2020 ABCA 433 at paras 14-16 [***Tallcree 2020***], and ***Fazel v Singer (Wilson Laycraft)***, 2022 ABCA 259 at paras 45-56 [***Fazel***]. While the amendment to Rule 14.5(1)(i) has now clarified that permission to appeal is required, the applicable test for considering whether to grant permission is not prescribed in the *Rules.*

[29] In ***Carbone***, which held that permission was required for a second appeal from an assessment decision, the four-part test for permission to appeal "as to costs only" was applied, relying on the factors described in ***Bun v Seng***, 2015 ABCA 165 at para 4:

> i) a good arguable case having sufficient merit to warrant scrutiny by this Court;
>
> ii) issues of importance to the parties and in general;
>
> iii) that the costs appeal has practical utility; and
>
> iv) no delay in proceedings caused by the costs appeal.

A similar approach was adopted in ***Cold Lake*** at para 21. However, whether these factors are well-suited to considering permission for second appeals from review decisions was not discussed.

[30] Rule 14.5(1)(e) was also amended at the same time as Rule 14.5(1)(i). Rule 14.5(1)(e) now provides that permission to appeal is required for "a decision as to a *costs award* only", rather than "as to costs alone" (emphasis added). "Costs award" is a defined term in the *Rules*, and "means the amount payable by one party to another". Lawyer's charges are not a "costs award", but rather "fees charged by a lawyer for services performed. . . any disbursements paid or payable by the lawyer in performance of [those] services", and "other charges, if any, by a lawyer": *Rules*, DEFINITIONS. In this respect, the findings of Watson JA in ***Fazel*** at paragraphs 45 and 49 are apt:

> In the case at bar, the concept of "costs" was expressly distinguished from the concept of "charges" by the framers of the revamped *Rules of Court.* Indeed, the word "costs" only makes the occasional appearance in Division 1 of Part 10 of the *Rules of Court* dealing with the "charges" of lawyers and when it does, it relates to matters such as contingency fee agreements might allow lawyers to receive costs as ordered by courts. The Review Officer's decision was under Rules 10.9, 10.10

> and 10.18 and Part 10 of the Alberta Rules of Court, entitled "Lawyers' Charges, Retainer Agreements and Right of Review".
>
> ...
>
> Moreover, engagement of counsel by clients are contractual agreements, albeit very special ones which are subject to supervision by courts, in part because of the longstanding tradition that lawyers are officers of the court ....

[31] As stated in ***Tallcree 2020*** at paragraph 14, a dispute about the recovery of "lawyers' fees between a lawyer and his or her client" is distinct from "the payment of costs between parties to litigation". Importantly, a discretionary costs award can occur at any point during litigation (see Rules 10.29 and 10.30), raising procedural concerns that an appeal will delay the underlying litigation. In contrast, a review officer's decision related to a lawyer's charges is a final decision that generally arises after either the conclusion of litigation or the lawyer's participation in the proceedings.

[32] As similarly noted in ***1985 Sawridge Trust v Kennedy***, 2017 ABCA 368 at para 4 [***1985 Sawridge***] concerning costs awards, the *Rules* contain various presumptions about lawyer's charges. In particular, Rule 10.2 provides that a "lawyer is entitled to be paid a reasonable amount for the services the lawyer performs for a client", considering *inter alia*, "the nature, importance and urgency of the matter", "the client's circumstances", the "manner in which the services are performed", and "the skill, work and responsibility involved". Rule 10.5 further provides that a lawyer may make a retainer agreement with a client "about the amount and manner of payment of the whole and any part of past or future lawyer's charges for services performed", and the amount to be "paid may be determined in any appropriate way", including *inter alia* an hourly rate, a gross sum, commission or percentage. Lawyer's charges that are consistent with the "presumptions, guidelines and rules set out in the *Rules of Court* are resistant to appellate review, making appeals inappropriate. That is one reason that permission is required to appeal".

[33] Finality in determining a lawyer's charges remains another key consideration when deciding whether to permit access to a second appeal. Litigation efficiency, judicial economy and certainty must prevail at some point through finality, particularly where matters concerning the reasonableness of fees will be largely, if not wholly, fact-driven, and will not involve issues of any importance to the public or the practice. Further, the review and appeal provisions under the *Rules* concerning a lawyer's charges are meant to streamline the review process and underscore the aim of quick and efficient resolution between the parties.

[34] The test for permission to appeal a decision "as to costs alone" (now "costs awards") is not specifically limited to questions of law or precedent. However, an assessment of whether an appeal

raises "issues of importance to the parties *and in general*" properly means that questions of fact unique to the parties will rarely warrant a second appeal. Another appeal may only be justified where "more general issues, or issues of principle, or large sums are involved": ***1985 Sawridge Trust*** at para 5. Similarly, the need for finality and the exceptional nature of second appeals support a comparable restriction for Rule 10.26 review decisions.

[35] The involvement of a large sum alone does not necessarily satisfy the test for permission to appeal: ***Cold Lake*** at paras 28-29. However, consideration may be given to whether such a case involves taking advantage of a vulnerable client. Similarly, allegations about the abuse of the lawyer's position as an officer of the court or a breach of fiduciary duty, and the general repute of the justice system may be factors in determining whether permission to appeal is warranted. These considerations may well raise questions of importance to the parties, but also to the public.

[36] In developing a specific test for second appeals from review decisions, guidance is also found in the tests utilized by the other categories of appeals requiring permission under Rule 14.5(1), such as Rules 14.5(1)(a), (b), (d), (f) and (j). The test for obtaining permission to appeal under these Rules is generally that:

a) There is an important question of law or precedent;

b) There is a reasonable chance of success on appeal; and

c) The delay will not unduly hinder the progress of the action or cause undue prejudice.

The test manifests itself slightly differently for each category "depending on the subject matter of the appeal and the overall context, but these basic principles apply to all types of applications for permission to appeal": ***Thompson v Procrane Inc (Sterling Crane)***, 2016 ABCA 71 at para 7.

[37] Common to most variations of the test is a requirement that the question for appeal have importance beyond the parties' interests. This will usually involve an unsettled issue of law or one of jurisprudential significance. More specifically, a "question of general importance involves a matter of policy, principle or law that might have precedential value. It requires more than a disagreement with a factual interpretation or a quarrel with an exercise of discretion." The absence of an issue of general or public importance will militate against granting permission to appeal: ***Ardmore Properties Inc v Sturgeon School Division No 24***, 2024 ABCA 88 at para 5.

[38] The requirement for a reasonable chance of success respects the higher threshold for a second appeal and the general proposition that "only appeals meeting some standard of worthiness should receive permission to proceed": ***Kimberley Management Ltd v Klammer***, 2000 ABCA 271 at para 3, 281 AR 158 (referring to the Honourable RP Kerans, *Standards of Review Employed*

by Appellate Courts (Edmonton: Juriliber Ltd, 1994) at 70). The administration of justice is not served by granting permission for a second appeal that has no reasonable prospect of success: ***Sorenson v Stewart***, 2024 ABCA 336 at para 25. Further, the standard of review applicable to each ground of appeal is a consideration in determining whether it has a reasonable chance of success: ***Thompson v International Union of Operating Engineers Local No 995***, 2017 ABCA 193 at para 16. Another factor may be whether a discretion has been unreasonably exercised or whether conflicting decisions exist on the point, including between the original decision-maker and the appeal court below: ***Wong v Giannacopoulos***, 2011 ABCA 277 at para 4. A second appeal is less likely to be warranted where the jurisprudence is well aligned.

[39] As reviews are final determinations and usually separate from the context of any ongoing litigation, the risk of hindering the progress of an underlying action arises infrequently. However, a final determination can be relevant to related proceedings – for example, commercial litigation where the distribution of funds, such as sale proceeds or seized monies, is subject to the payment of a party's reviewed legal fees.

[40] Finally, a second appeal must respect the purpose of Part 10 of the *Rules*, which is to resolve disputes about a lawyer's charges through a simplified, timely, and economical process. Any consideration of undue prejudice will largely be driven by this purpose, including the expense of a further appeal relative to the value of the legal charges in dispute. The more modest the sum in dispute, the less likely a second appeal will be proportionate to the financial interests at play. When interpreting the *Rules*, proportionality is a foundational principle to be considered in exercising a discretion to grant a remedy, including access to a further appeal: Rule 1.2(4). Proportionality is similarly reflected in Rule 14.5(1)(g) which requires permission to appeal a money dispute involving $25,000 or less, exclusive of costs.

[41] Based on the foregoing, the conventional three-part test for permission to appeal under Rule 14.5(1) should be varied here to respect the exceptional nature of second appeals, the absence of a strict requirement for a question of law or jurisdiction, and the objectives of the simplified, timely, and economical process for reviews contemplated by Part 10 of the *Rules.* The ultimate inquiry is whether a second appeal serves the interests of justice. Accordingly, the test for permission to appeal under Rule 14.5(1)(i) from a Rule 10.26 appeal decision considers whether:

a) There is a question of general or public importance that warrants another appeal;

b) There is a reasonable chance of success on appeal; and

c) The delay will not unduly hinder the progress of a related proceeding or cause undue prejudice to the simplified, timely and economical process contemplated for the review of a lawyer's charges.

The factors are reviewed holistically, and the burden rests with the applicant to demonstrate that a second appeal has a reasonable chance of success and is warranted.

Analysis

[42] The parties canvassed the substance of these elements in their submissions before me. Based on the application materials and the decisions of both the review officer and the appeal judge, I conclude that the applicants have not met the test for permission to appeal.

[43] While the magnitude of the financial dispute is of extraordinary interest to the parties, I reject the applicants' contention that the quantum of the final fee alone warrants scrutiny by a panel of this Court, or that the method of calculating the fee contemplated an indeterminate outcome. The applicants further contend that the appeal judge erred in law by finding that the review officer did not exceed his jurisdiction in concluding: a) the retainer agreement governed the legal work performed in 2021; and b) the parties contemplated a final fee based on the factors set out in the retainer agreement rather than hourly rates. The applicants further assert the appeal judge failed to recognize that the review hearing was procedurally unfair because the evidence collected was not sworn and they were unaware of the final nature of the review proceeding. Lastly, the applicants contend that the appeal judge erred in affirming the review officer's decision not to deduct the 2017 interim billings from the final fee. While the allegation of procedural unfairness raises a question of law and therefore possibly an issue of general or public importance, the remaining issues do not. Importantly, none of the issues has a reasonable chance of success.

[44] Given these conclusions, a second appeal is also unduly prejudicial to the simplified, timely and economical resolution of the legal charges owed to the respondent.

a) The magnitude of the final fee does not warrant a second appeal

[45] Under Rule 10.9, a review officer may review the reasonableness of a retainer agreement, and the reasonableness of a lawyer's charges. The applicants contend that the magnitude of the fee dispute is sufficient to warrant another appeal. The final amount owing to the respondent exceeded $540,000, which was "more than double the actual time spent" by the respondent, so the dispute involves more than $250,000.

[46] The review officer found that the final fee, as adjusted downwards by $100,000, was reasonable. That finding is owed deference absent an error of principle or an overriding or palpable error. As the appeal judge found, no such errors are supported on the record nor was the fee imposed by the review officer inordinately high. No arguable error is shown in the appeal judge's reasoning. Consequently, no reasonable chance of success exists having regard for the standard of review.

[47] The applicants also assert that the method of calculating the fee in this matter means "that there is no limit on what a lawyer can charge", and that the review of such a "bonus" or "premium" on the fee needs to be clarified. They offer no arguable reasoning in support of these claims.

[48] The fee charged in this matter was neither limitless nor indeterminate. The calculation was based on the provisions in the retainer agreement, and when the applicants did not agree with the final fee charged, the review provisions in the *Rules* were employed by the parties to assess its reasonableness. Indeed, the fee was reduced by both the review officer and the appeal judge. The applicants' dissatisfaction with what was ultimately found by the review officer and upheld by the appeal judge to be a reasonable agreement, and a reasonable fee does not demonstrate an arguable error by the appeal judge nor an issue of general or public importance.

b) The review officer did not exceed his jurisdiction

[49] Under Rule 10.18, a review officer "must refer any question arising about the terms of a retainer agreement to the Court for a decision or direction." The Court addresses the interpretation and enforceability of the agreement's terms, not a review officer.

[50] In dismissing the applicants' appeal, the appeal judge found the review officer did not interpret the 2017 retainer agreement, but properly applied it after finding that all parties acknowledged it was the only agreement between them in 2021. The retainer agreement provided for a "final fee" allowing for an adjustment (up or down) to a fair and reasonable amount for legal services rendered. More specifically, the appeal judge found no error in the review officer's conclusion that the relationship between the parties was governed by the retainer agreement created in 2017, and that the contractual terms about the final fee were clear.

[51] The applicants continue to argue that they did not *concede* before the review officer that the 2017 retainer agreement was still operative in 2021. However, they asserted that the maximum hourly rate applicable in 2021 was $775, and that this cap should have been applied by the review officer to all the work. Significantly, that rate was established by the retainer agreement. Consequently, by their conduct and their original hearing submissions, the applicants acknowledged that the retainer agreement governed the relationship with the respondent in 2021. The review officer was entitled to find that the final account was reasonable and in keeping with that 2017 agreement, after reducing the final fee to adjust for hourly fees exceeding the maximum rates set out in the retainer agreement. Moreover, the applicants took the benefit of that adjustment without complaint. The appeal judge did not err, even arguably, in deferring to the review officer's findings, and the record contains no contrary evidence suggesting legal or palpable and overriding error.

[52] The applicants further assert that the appeal judge erred in failing to find the review officer should have referred the issue about the method for calculating the fees to the Court pursuant to Rule 10.18. This argument is without merit. The applicants never asked for any interpretation issues to be referred to the Court and submitted to the review officer that he had "all of the information and evidence. . . to make an appropriate decision in this case". The appeal judge concluded that the review officer "did not interpret the retainer agreement" in making his decision because the agreement's terms were "simply and clearly articulated": *Decision* at paras 45-46, 48, 63. The final fee was determined in accordance with the criteria expressly stated in the retainer agreement, and the parties otherwise acknowledged that the retainer was not a contingency fee agreement. No arguable error is identified in the appeal judge's analysis that the retainer agreement did not require interpretation and that the review officer properly applied it in finding the final fee as adjusted, was reasonable.

[53] The applicants' contentions about the review officer exceeding his jurisdiction do not raise an issue of general or public importance and have no reasonable chance of success.

c) The hearing before the review officer was procedurally fair

[54] The applicants complain that the review officer did not have "evidence" before him because the evidence tendered for the hearing was not sworn. However, there is no requirement that the evidence must be sworn. Rule 10.17 permits a review officer to "take evidence either by affidavit or orally under oath, or both", but the rule is permissive not mandatory: ***Fraser Milner Casgrain LLP v Kristof Financial Inc***, 2012 ABQB 359 at para 24. The receipt of records and representations in this manner is consistent with the simplified, timely and economical aspects of the process contemplated by Part 10 of the *Rules*. Further, the applicants' proposition that evidence must invariably be sworn is incorrect. Numerous exceptions exist, including for many administrative proceedings.

[55] Further, the appeal judge correctly observed at paragraph 58 of the *Decision*: "The [applicants] are incorrect that there was no evidence at all ... the Respondent filed a volume of documents entitled 'Confidential Evidence for Review Hearing' ... [which] included the lawyers accounts, the retainer agreement and other relevant materials (e.g. email correspondence, receipts, copies of cheques, etc.)." The records were provided in advance of the hearing and the parties were permitted to supplement the contents. As the appeal judge found, counsel "for the [applicants] never averred to a desire to provide additional material": *Decision* at para 60.

[56] During the review hearing the applicants' lawyer referred to the filed materials as "evidence", did not ask for any materials or oral representations to be sworn, and did not ask to cross-examine the respondent's lawyers. Furthermore, before me, the applicants' counsel conceded that the credibility of the witnesses was not at issue. In short, no reasonable confusion

arose about the nature of the materials and representations tendered at the review hearing and the applicants were not prejudiced by the way the review officer received the evidence.

[57] As for the applicants' complaint that they did not appreciate the review officer's decision would be a final determination, the appeal judge correctly concluded that this argument was "contradicted by the record of proceedings": *Decision* at para 61. "There was no suggestion during the hearing that the Review Officer would make an interim decision. The process operated towards a final decision by the Review Officer", and "the Review Officer took the time to explain the process and associated deadlines in the event either party wished to appeal his decision": *Decision* at para 62. The review process under Part 10 of the *Rules* does not preclude a review officer from making a final decision: ***MacPherson Leslie & Tyerman LLP v Moll***, 2014 ABCA 45 at para 44.

[58] The applicants' allegations about procedural unfairness are wholly without merit and do not have a reasonable chance of success.

d) No error in refusing to deduct the 2017 interim billings

[59] The applicants complain that the review officer failed to deduct the 2017 interim invoice payments from the final fee of $750,000. In their view, if the retainer agreement covered all the work performed from 2017 to 2021, the final fee was for the same work and all interim billings needed to be deducted.

[60] The appeal judge found that the review officer recognized the 2017 and 2021 work as discrete matters covered by the same retainer agreement. The final fee was determined as the value billing for the 2021 work alone, so the 2017 invoices were irrelevant to the net amount payable in 2021. The appeal judge held that the review officer rejected the applicants' argument for several reasons including that "the 2017 fees are not interim accounts on the 2021 matter given that the 2017 sale was not completed, and the 2017 matter was over and it is a separate matter": *Decision* at para 82. No error arises in finding that a retainer agreement addresses more than one project or transaction over time.

[61] The review officer made a factual finding about the nature of the work covered by the final fee in 2021. No arguable issue about palpable and overriding error is identified and no issue of general or public importance is engaged. The proposed ground of appeal does not have a reasonable chance of success.

Conclusion

[62] Given my conclusion that none of the proposed grounds of appeal has a reasonable chance of success, the application also does not satisfy the third element of the test. I therefore need not

conduct a more detailed analysis of whether the proposed appeal would be unduly prejudicial to a related proceeding, or the simplified, timely and economical review and appeal process under Part 10 of the *Rules*.

[63] The application for permission to appeal is dismissed.

[64] The respondent shall have its costs of this application.

Application heard on December 12, 2024

Reasons filed at Edmonton, Alberta
this 14th day of February, 2025

Feth J.A.

Appearances:

M. Pruski
for the Applicants

R.A. Neilson
J. Fuller
for the Respondent