

In the Court of Appeal of Alberta

Citation: Hudy Inc v Rosowsky, 2025 ABCA 51

Date: 20250214
Docket: 2401-0299AC
Registry: Calgary

Between:

Hudy Inc., Hudy Inc., as Administrator acting on behalf of the Trustee of the Hudy Group Trust, Hudy Soil Services Inc., Hudy Farms Inc., Hudy Energy Inc., Hudy Energy LLC, Hudy Group LP, Hudy Management LLC, Hudy Farms US Inc., Nutri RX Inc. and 101234125 Saskatchewan Ltd.

Applicants

- and -

James Rosowsky and James Rosowsky Professional Law Corporation

Respondents

**Oral Reasons for Decision of
The Honourable Justice Jolaine Antonio**

Application for Permission to Appeal and to Extend Time to File Notice of Appeal

**Oral Reasons for Decision of
The Honourable Justice Jolaine Antonio**

[1] The applicant seeks permission to appeal a decision denying it costs associated with the preparation and appearance of two expert witnesses.

[2] The applicant brought an action against the respondents, the applicant's former lawyer and his professional corporation, claiming that several impugned agreements drafted by the lawyer were a breach of his fiduciary duties. The Court of King's Bench dismissed the action finding no breach of fiduciary duties. This Court reversed that decision: *Hudye Inc v Rosowsky*, 2022 ABCA 279.

[3] Since the decisions of both courts were silent as to costs, the parties sought direction from this Court on costs. The applicant was awarded taxable costs under column 5 (less 10%) for the trial and the appeal, plus reasonable disbursements (the Costs Direction).

[4] The respondents filed an Appointment for Assessment of Costs, submitting the same Bill of Costs the applicant had provided to this Court at the time of the Costs Direction. Before the assessment officer, the applicant submitted an amended Bill of Costs, revised to include fees for two expert witnesses which, through oversight, had been omitted from the initial Bill of Costs. The assessment officer granted the applicant the amount reflected on the amended Bill of Costs.

[5] The respondents appealed the assessment officer's decision to the Court of King's Bench. Among other things, they argued the assessment officer had exceeded his jurisdiction in awarding the expert fees, because "reasonable and proper costs" awarded by an assessment officer do not include expert fees "unless a court otherwise orders": Rule 10.41(2)(e) of the *Alberta Rules of Court*, Alta Reg 124/2010. The chambers judge agreed, writing in a desk endorsement, "The Court of Appeal did not expressly include expert fees and, as the submissions of the Hudye Group to the Court of Appeal did not include expert fees, the Court could not even have considered them." The applicant seeks leave to appeal from this aspect of the chambers judge's decision.

[6] Permission is required because the proposed appeal concerns costs only: Rule 14.5(1)(e). To obtain permission, the applicant must satisfy the following criteria:

- (i) the applicant must identify a good, arguable case having enough merit to warrant scrutiny by this court;
- (ii) the issues must be important, both to the parties and in general;
- (iii) the appeal must have some practical utility; and
- (iv) the court should consider the effect of a delay in proceedings caused by the appeal.

If the applicant does not establish all the criteria, the application will fail: *Alberta Health Services v Wang*, 2019 ABCA 328 at para 8; *Brill v Brill*, 2017 ABCA 235 at para 3.

[7] Permission to appeal a costs award “should be granted sparingly, and a party seeking permission to appeal such an award must meet a high threshold”: *Bun v Seng*, 2015 ABCA 165 at para 4. Because costs awards are discretionary, they are owed significant deference on appeal: *Optrics Inc v Lloyd’s Underwriters*, 2022 ABCA 26 at para 38.

[8] The applicant does not dispute the applicability of Rule 10.41(2)(e) to the fees at issue. Rather, it submits the chambers judge failed to appreciate she had discretion under Rule 10.45(1)(d) to order payment of expert fees, because a judge hearing an appeal from an assessment officer may “make any other order the judge considers appropriate”. It submits she erred by focusing on the limits of the assessment officer’s jurisdiction and by not considering the breadth of her own. It says the “critical issue” was whether the expert fees were among the “reasonable disbursements” awarded by the Court of Appeal.

[9] In this context, the role of the chambers judge was to implement this Court’s Costs Direction, not to exercise her own discretion afresh. Therefore, in my view, the question at the core of this matter is the interpretation of the Costs Direction: did this Court intend that the costs and disbursements to be assessed would include the expert fees? The Costs Direction was issued without reasons; therefore, interpreting its meaning is not akin to interpreting a judgment. Rather, the intention behind the Direction could only be discerned by reference to the surrounding context, as the chambers judge did. Her conclusion is one of fact or mixed fact and law. In either event, a deferential standard would be applied to the proposed ground of appeal. This is relevant to my assessment of the first criterion for leave.

[10] The nature of the proposed issue is also relevant to my assessment of the second criterion. Interpreting the Costs Direction, which itself has no precedential value, is not a question of general importance. A question of general importance involves “a matter of policy, principle or law that might have precedential value” and that “transcends the interests of the immediate parties”: *Vysek v Nova Gas International Ltd*, 2002 ABCA 112 at para 34; *Sharma v Edmonton (Police Service)*, 2020 ABCA 308 at para 12.

[11] The applicant has attempted to frame broader issues, asserting this Court should answer questions about “the procedure to follow when expert fees are sought” and “the scope of the courts’ discretionary power to award expert fees.” I am not satisfied that these questions are central to the proposed appeal, nor that they are of general importance. The proposed appeal stems from a unique set of facts, and absent these facts, the proposed questions would not have arisen.

[12] The applicant also submits the amount at issue – approximately \$155,000 – lends sufficient importance to the proposed appeal to justify a hearing by a panel of this Court. Certainly, “where a costs award raises more general issues, or large sums are involved, a further appeal may well be justified”: *1985 Sawridge Trust v Kennedy*, 2017 ABCA 368 at para 5. This authority does not suggest that “large sums” will necessarily justify a second level of appeal. For example, in *Cold Lake Industrial Park GP Ltd v Abt (Estate)*, 2022 ABCA 23, permission to appeal was denied where the amount involved was \$500,000.

[13] The applicant has not satisfied all the criteria for permission, and I am not satisfied that a hearing by a panel of this Court is justified in this case. Therefore, the application for permission to appeal is denied.

Application heard on December 19, 2024

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

Antonio J.A.

Appearances:

P.J. Stein, KC (no appearance)

T.C. Burnett, KC
for the Applicants

L.G. Vogeli, KC

R. Gregg
for the Respondents