Court of Queen's Bench of Alberta

Citation: Tallcree First Nation v Rath & Company, 2020 ABQB 592

Date: 20201008
Docket: 1803 05262
Registry: Edmonton

Between:

Tallcree First Nation

Appellant

- and -

Rath & Company and Jeffrey R W Rath

Respondents

Appeal from the Decision of the Review Officer, dated the 7th day of September, 2018

Memorandum of Decision
of the
Honourable Mr. Justice Donald Lee

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Overview

[1] This is an appeal from the Review Officer's ("RO") decision with respect to the Tallcree ("Tallcree") First Nation's Contingency Fee Agreement ("CFA") entered into with Rath & Company and Jeffrey RW Rath ("Rath") of Priddis, Alberta, on or about October 14, 2015. The contingency fee agreement before the RO was a result of an agricultural benefits settlement paid by the Government of Canada to Tallcree in the sum of $57,590,375. The 20% contingency fee amounted to $11,518,075.

[2] Rule 10.13(1) allows a lawyer or a client to request "a review of retainer agreement" or a lawyer's charges, or both. In this particular case, Tallcree filed its appointment on March 15, 2018, to review a retainer agreement, indicating its request only to review the retainer agreement. Tallcree reiterated this position at the hearing before the RO.

[3] The RO determined that while the 20% contingency fee resulted in an extremely high fee that he had never seen before, it was not one that was clearly unreasonable. Tallcree now appeals the RO's decision.

[4] Rule 10.9 does not use the term "clearly" unreasonable. Rather the Rule only refers to the RO determining the "reasonableness" of a retainer agreement:

> 10.9 The reasonableness of a retainer agreement and the reasonableness of a lawyer's charges are subject to review by a review officer in accordance with these rules, despite any agreement to the contrary.

[5] The RO also found that at a 20% contingency fee was essentially a minimum percentage applicable in the simplest of cases, without any legal foundation for accepting that 20% minimum.

[6] Both of these decisions by the RO constitute reversible errors.

Standard of Review

[7] I conclude that in the present appeal there is no binding authority upon me that determines the standard of review for a RO's determination of the reasonableness of a retainer agreement alone, without reviewing the reasonableness of the lawyer's actual account, which is the case here. In fact, no applicable authority was cited by either counsel for this specific situation.

[8] However, ***Ashraf v Zinner Law Office***, 2013 ABQB 730 does deal with the standard of review in an appeal from a RO's assessment of a lawyers account only at paragraph 27:

> [27] The standard of review in an appeal from a review officer has been considered in several recent decisions. In Repchuk v Silverberg, 2013 ABQB 305 at para 38 [Repchuk], Justice Tilleman summarized the standard of review as follows:
>
> A review officer may fall into error in at least the following ways:
>
> 1. erring in fact, for which a party must demonstrate that the fact as found is "clearly in error": Sweetgrass First Nation v Rath & Company, 2013 ABQB 165 at para 27 [Rath & Co], FMC v Kristof Financial Inc, 2012 ABQB 359 at para 17, 215 ACWS (3d) 1010 [FMC], McLennan Ross v Keen Industries Ltd (No 2) (1988), 1988 ABCA 224 (CanLII), 86 AR 311 at para 7 (CA) [McLennan Ross 2];
>
> 2. erring in principle (law), which will be shown if a party can demonstrate that the review officer proceeded on an erroneous principle, failed to apply a required principle or that the award of the review officer is so high or low as to betray an error of principle: Rath & Co at para 27, McLennan Ross 2 at paras 6, 13;
>
> 3. erring in true questions of jurisdiction (law), for which a standard of correctness will apply: Rath & Co at para 20, Panther Petroleum Ltd v Code Hunter, 2002 ABQB 158 at para 16, 112 ACWS (3d) 225, MacKimmie Matthews v Hector (1998), 1998 ABCA 278 (CanLII), 219 AR 163 at para 7 (CA); and
>
> 4. failing to provide a hearing that is procedurally fair, for which a standard of correctness will apply: Anderson v Alberta Securities Commission, 2008 ABCA 184 at para 30, 437 AR 55 [Anderson].
>
> (Emphasis in original).

[9] The Supreme Court of Canada's most recent wide-ranging administrative law decision ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 stated that the standard of review should be "palpable and overriding error", where the legal principle is not readily extricable such as in a question of mixed fact and law:

> [31] We wish to emphasize that because these reasons adopt a presumption of reasonableness as the starting point, expertise is no longer relevant to a

> determination of the standard of review as it was in the contextual analysis. However, we are not doing away with the role of expertise in administrative decision making. This consideration is simply folded into the new starting point and, as explained below, expertise remains a relevant consideration in conducting reasonableness review.
>
> [32] That being said, our starting position that the applicable standard of review is reasonableness is not incompatible with the rule of law. However, because this approach is grounded in respect for legislative choice, it also requires courts to give effect to clear legislative direction that a different standard was intended. Similarly, a reviewing court must be prepared to derogate from the presumption of reasonableness review where respect for the rule of law requires a singular, determinate and final answer to the question before it. Each of these situations will be discussed in turn below.
>
> …
>
> [37] It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable) (underlining added): see *Housen*, at paras. 10, 19 and 26-37. Of course, should a legislature intend that a different standard of review apply in a statutory appeal, it is always free to make that intention known by prescribing the applicable standard through statute.

[10] Presumably where the RO made an extricable error of law or principle, the standard of "correctness" still applies, as stated in ***Housen*** supra at paragraph 36:

> 36 To summarize, a finding of negligence by a trial judge involves applying a legal standard to a set of facts, and thus is a question of mixed fact and law. Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general

> rule, as stated in Jaegli Enterprises, supra, is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

[11] Accordingly, I conclude that the standard of review in this appeal is:

a) "Correctness", if the RO proceeded on an erroneous principle, failed to apply a required principle, or the award of the RO in allowing the entire $11,518,075 fee was so high as to betray an error of principle, as these situations would constitute a reversible error; and

b) "Palpable and overriding error," if the legal principle is not readily extricable such as in a question of mixed fact and law.

[12] If a reversible error is found in the RO's decision, Rule 10.27(1) applies:

> 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.

[13] In determining the standard of review, I note that pursuant to Rule 10.26(2), this is an appeal on the Record, and is not a *de novo* hearing:

> 10.26 (2) The appeal from a review officer's decision is an appeal on the record of proceedings before the review officer.

[14] Pursuant to Rule 10.26(3), the "Record" consists of the following:

> 10.26(3) The record of proceedings is
>
> (a) Form 42 served under rule 10.13(2),
>
> (b) the material the parties filed to support or oppose, or that was required for, the review,
>
> (c) the transcript of the proceedings before the review officer, unless the judge waives this requirement, and
>
> (d) the review officer's certificate.

New Ground of Appeal

[15] There was a new ground of appeal raised by Tallcree before me that was not presented to the RO, specifically that Rath's lawyers account does not comply with Rule 10.7(7) which reads as follows.

> 7) Every account rendered under a contingency fee agreement must contain a statement that at the client's request a Review Officer may determine both the

> reasonableness of the account and the reasonableness of the contingency fee agreement.

[16] Rath's February 16, 2018, one-page legal account, was rendered approximately two and a half years after the retainer agreement, and did not contain a statement that the client could request a review of the retainer agreement and/or lawyer's charges as required under Rule 10.7(7) cited above.

[17] Tallcree's evidence is that it has received independent legal advice from its present appellant counsel, Ms. Kennedy, and it was aware of the review process since April or May of 2017.

[18] The issue is whether this defect in Rath's one page legal billing is sufficient to trigger the application Rule 10.8 which reads as follow:

> 10.8 If a lawyer does not comply with rule 10.7(1) to (4), (6) and (7), the lawyer is, on successful accomplishment or disposition of the subject-matter of the contingency fee agreement, entitled only to lawyer's charges determined in accordance with rule 10.2 as if no contingency fee agreement had been entered into.

[19] Part of the problem in introducing a new issue at the appeal stage that was not before the RO is that this new issue has never been addressed by Rath. Presently, I have no evidence before me as to why Rath did not comply with the requirement of Rule 10.7(7). However given my decision herein, I do not need to deal with this new ground of appeal.

Analysis

[20] The taxation of accounts pursuant to the new *Rules of Court* which came into effect in November 2010 specified that the reasonableness of the contingency agreement is to be determined at the time the retainer agreement was entered into:

> Rule 10.19(2)
> (2) A review of a retainer agreement must be based on the circumstances that existed when the retainer agreement was entered into.

[21] Accordingly, I am limited to determining the RO's determination on the Record of the issue of the reasonableness of the retainer agreement at the time it was entered into, as no review of the account has been sought. This represents a somewhat unique situation given that all of the authorities cited generally address the review of a retainer agreement and a lawyer's account, or the lawyer's accounts alone.

[22] ***MS v DM***, 2014 ABQB 702 describes at paras [33] through [39] some of the important general considerations when dealing with CFA's:

> [33] The court's jurisdiction to deal with those issues was explained by the Alberta Court of Appeal in the case of Morrison v Rod Pantony Professional Corporation, 2008 ABCA 145 at paras 12-13, 429 AR 259:

> [12] With respect to contingency fee agreements, the court has a dual jurisdiction:
>
> (a) It has its normal jurisdiction to interpret and enforce contracts; and
>
> (b) It has an exceptional jurisdiction under R. 619(4) to "vary, modify or disallow the agreement".
>
> The power to vary a contract found in the Rule is not one available to the court at common law.
>
> [13] As a general rule, issues regarding the interpretation of a contingency fee agreement should be resolved first by the ordinary rules respecting contractual interpretation. Once the proper legal interpretation of the retainer agreement has been established, the Taxing Officer (and the court) can then review it for unreasonableness or unconscionability under R. 619(4).

[34] The authority given by rule 619(4) for the Court to vary, modify, or disallow the agreement is now found in rule 10.18(3)(b) of the Rules of Court.

[35] The Law Society of Alberta Code of Conduct, rules 2.06(2), also addresses contingency agreements. The Rule and commentary provide:

> 2.06 (2) Subject to Rule 2.06 (1), a lawyer may enter into a written agreement in accordance with governing legislation that provides that the lawyer's fee is contingent, in whole or in part, on the outcome of the matter for which the lawyer's services are to be provided.
>
> Commentary
>
> In determining the appropriate percentage or other basis of a contingency fee, a lawyer and client should consider a number of factors, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it and the amount of the expected recovery. Party-and-party costs received by a lawyer are the property of the client and should therefore be accounted for to the client in accordance with the Alberta Rules of Court, Rule 10.7. The test is whether the fee, in all of the circumstances, is fair and reasonable.
>
> . . .

[36] There are other important considerations when dealing with contingency fee agreements.

[37] The aim of contingency fees is to make court proceedings available to people who could not otherwise afford to have their legal rights determined. This goal should be encouraged and a flexible approach should be taken to problems arising from contingency fee arrangements in order to facilitate access to the courts for more Canadians: Rusk (Next Friend of) v Medicine Hat (City), 2001

> ABQB 1020 at para 15, 305 AR 332 [Rusk], citing Coronation Insurance v Florence, [1994] SCJ No 116 at para 14 (SCC).
>
> [38] That said, one must also consider that the people who rely on contingency fee arrangements are often vulnerable due to poverty, impact of injuries, educational status, or other social disadvantages. The Alberta Rules of Court, Alta Reg 124/2010, Law Society Code of Conduct, and jurisprudence related to contingency fee agreements and other legal fee arrangements offer some protection for this potentially vulnerable segment of the population.
>
> [39] Accordingly, when considering applications that challenge the interpretation or fairness of a contingency fee agreement, the necessity and importance of encouraging this form of legal fee arrangement should be balanced with the need to safeguard the citizens who rely on contingency fee agreements in order to have access to justice.
>
> (Emphasis added)

[23] I conclude that given the sensitive nature of CFA's with respect to vulnerable members of the community and their ability to access justice, amongst other reasons, the onus is on Rath to satisfy the Court that the CFA is fair and not unreasonable at the time it was entered into.

Facts

Rule 10.19(2) The Circumstances that Existed when the Retainer Agreement was Entered Into:

Tallcree's Economic Circumstances Due to the Rapid Unemployment Related to the Collapse of the Alberta Oil and Gas Exploration Industry. Tallcree First Nation Requires This Money Urgently on an Emergency Basis.

[24] The best evidence of the circumstances that existed when the CFA was entered into on October 14, 2015 can be found in Rath's own letter, written by him less than two months afterwards. Rath's letter dated December 10, 2015 to the federal Minister of Indigenous and Northern Affairs, and to the federal Minister of Justice, has been reproduced in its entirety as part of the Schedule A documents to this decision.

[25] I conclude that Rath's December 10, 2015 letter specifically sets out as closely as possible the circumstances that existed less than two months prior at the time the CFA was entered into. These circumstances, as stated by Rath himself, read as follows:

> Pursuant to Prime Minister Trudeau's statement on December 8, 2015 that "(i)t is time for a renewed, nation-to-nation relationship with First Nations peoples, one that understands that the constitutionally guaranteed rights of First Nations in Canada are not an inconvenience but rather a sacred obligation", our client's view is that it would be not only immoral and in bad faith, but in breach of the Honour or the Crown and the Crown's Constitutional and fiduciary duties for the Government of Canada to continue to withhold monies that it has acknowledged

> for over 10 years are owing. In continuing to do so, the Government would continue along the path of its predecessor in creating an unfair advantage in settlement negotiations by withholding funds from some of Canada's poorest citizens as a means of extracting an unfair or unreasonable settlement on the basis of poverty that Canada itself has created and supported through its previous refusals to honour its "sacred obligations".
>
> . . .
>
> Our clients are in dire economic circumstances due to the rampant unemployment related to the collapse of the Alberta Oil & Gas Exploration Industry. Tall Cree First Nation requires this money urgently on an emergency basis.
>
> It is the respectful view of our clients that a failure to immediately undertake payment of this amount would be nothing more than a continuation of the immoral and unlawful conduct of the previous 10 years of failed First Nations policy.
>
> . . .
>
> On behalf of Tallcree First Nation, we request your most immediate response to this letter.
>
> (Emphasis added)

Tallcree's Understanding of the Circumstances at the time of the CFA

[26] I accept that Tallcree was aware of the terms of the CFA, was aware as to the possible range of recovery, and was aware of the 20% fee that would accompany that general range of recovery between approximately $50 to $80 million dollars.

[27] However, Tallcree was unaware at the time of the CFA about how long such a recovery would take. How lengthy a process the settlement would take, and how quickly the settlement could be reached, were critical factors for Tallcree in determining the reasonableness of the CFA, as is evident from the Band Administrator's evidence quoted below:

> Page 37, line 30 to Page 38, line 16
>
> THE REVIEW OFFICER: So when the contingency fee agreement was entered into, you probably know roughly what kind of moneys are at stake here. MR.
>
> CARDINAL: I would say yes to that. What we didn't understand is the timeframe. You understand, our claim started with Miller Thomson back in 2000, 2001, somewhere in that vicinity. We understood in entering into this contingency fee agreement that this could potentially take years. This could potentially take an undisclosed amount of time in which case Rath & Company would have, in our view, been quite entitled to take 20 to 35 percent if they had to go to Court, had to call experts and I think it was explained by Mr. Rath at that time, if we do have to call experts in, it is going to cost, you know, potentially thousands and thousands of dollars to be able to provide litigation at the highest level in this country, potentially all the way to - -
>
> THE REVIEW OFFICER: And the timeframe was what, 2015.

MR. CARDINAL: October, 2015.

THE REVIEW OFFICER: Okay. And it went right through to 2017 before the settlement was achieved; is that right?

MR. CARDINAL: The first settlement came in in 2017, yes -- or the offer came in 2017 which the –

THE REVIEW OFFICER: So that's two years anyway.

MR. CARDINAL: Not quite. October of 2015 and so you're not quite two years. So you're a little better than 18 months

. . .

Transcript: Page 42, line 27 to Page 43, line 7

THE REVIEW OFFICER: Okay. And you also did say that, you know, you knew you were looking at a range of possible recovery or benefit of, you know, between 50 some million and 80 some million which was the counteroffer in that letter. So you knew the range, you had the percentage so you could have sort of sorted out in your mind what this is going to cost in the end.

MR. CARDINAL: I could have sorted it out, absolutely, when we believed at the time that this could take potentially years.

THE REVIEW OFFICER: Okay, so it is the issue of the timing.

MR. CARDINAL: It's the issue of how much time was spent and how much risk was really involved in Rath taking on this case. That's why we're saying, like, this happened so quickly that, you know, 20 percent seems outrageous. And if we felt at any point in time that we could have approached Mr. Rath and re-negotiated that – I mean, he stood up in public meetings and basically said, you know, whether this goes ahead or not he is going to get paid and he is going to get paid his 20 percent and he said that at the very first meeting before we really got going with any offers or anything on the table. Basically, you know, when membership stood up and asked him, what are your fees going to be? It's 20 percent. And, you know, and he stood -- he stood behind that. We felt at any point in time we could have negotiated with him to something a little more what we felt would have been reasonable.

(Emphasis added)

Other Relevant Circumstances at the Time of the CFA

[28] Rath points out that Tallcree was a sophisticated First Nation that owned a number of operating businesses in 2018. Tallcree's financial circumstances at the time of the CFA in October 2015 were not clear from the Record except for Rath's representation in December 2015 to the two federal Ministers that Tallcree was in "dire economic circumstances" and needed the settlement monies "urgently on an Emergency basis". However one can assume that some or all of their 2018 businesses were operating in October 2015, but that the substantial financial

settlement it received of over $57.5 million in 2017 had improved its financial standing by the 2018 fiscal year.

[29] Other relevant circumstances that existed at the time of the Retainer Agreement was entered into included that Tallcree had previously retained another law firm Ackroyd for approximately eight years from 2007 on an hourly fee basis to negotiate these agricultural benefits claims with the Government of Canada.

[30] Tallcree was dissatisfied with its previous lawyers Ackroyd because they had not made much progress on the claims and allegedly had not reported on a regular basis since 2013.

[31] However, as referenced by Rath in his December 2015 letter to the two Federal Ministers, this was probably not Ackroyd's fault entirely because it appears that no claims were being dealt with during this time by the Government of Prime Minister Stephen Harper:

> However, these settlement negotiations were shelved by the Government of Canada under Prime Minister Stephen Harper, and as a result, these claims have since languished or been opposed by Canada, including in the Specific Claims negotiation process and before the Specific Claims Tribunal. It is our client's sincere hope that, in the light of Prime Minster Trudeau's recent address to First Nation leaders that "constitutionally guaranteed rights of First Nations in Canada are not an inconvenience but rather a sacred obligation", the new Government of Canada will take action to remediate this state of affairs.

[32] Tallcree had a draft of the proposed CFA for a period of approximately one year before they executed it. At that time, as found by the RO, Tallcree had the opportunity to have other legal counsel go over the proposed CFA. It appears that Tallcree did not actually have the draft reviewed by any other legal counsel before signing it (Hearing Transcript at page 111, lines 14 to 21; and page 133, lines 32 to 34 to page 134, line 4).

[33] However, Tallcree argues that Rath withheld critical information from Tallcree at the time of the CFA that strongly suggested that the agricultural benefit settlement that they were seeking would be resolved favourably and quickly. In hindsight, this was predictable as a result of statements made by Prime Minister Justin Trudeau, who appeared to promise to resolve these types of claims as soon as possible, as referenced in Rath's December 2015 letter quoted from earlier. Tallcree notes that all Rath ever told them was that they had close connections to the Trudeau government.

[34] While Tallcree's previous legal counsel had filed formal claims for the unfulfilled Treaty promises related to agricultural benefits on behalf of Tallcree in 2012, I conclude that Rath was essentially only successful in settling those claims in short order after the CFA because of the change in government. Rath would have been aware of this fortuitous change in the attitude of the Federal government at the time the October 14, 2015 retainer agreement was entered into, as a fixed date election was legislated by *S.C. 2000 c.9* to occur on October 19, 2015.

[35] In this regard, I understand that there were approximately 20 other First Nations who settled their agricultural benefits claims around the same time Tallcree did, represented by Rath or other legal counsel, nine of which were settled by Tallcree's prior legal counsel Ackroyd. These other similar settlements by Rath and other law firms establish that these settlements were clearly attainable at the time the CFA was entered into.

Rath's after the fact time records were only $391,900 versus a fee charged of $11,518,075

[36] The RO considered Rath's statement of account issued on February 16, 2018. It consisted of two lines referencing the settlement and the contingency fee as can be seen in Schedule A. Tallcree quite properly raised the issue of a more detailed account with Rath. Tallcree had retained present legal counsel for this appeal in approximately May 2017. Six months later on August 15, 2018, the Respondents submitted their time records, which were only an estimate of the work completed on the agricultural benefits settlement matter since the Respondents did not keep actual contemporaneous time records on this file. The total of $391,900 in time records based on an average $500 hourly rate showed an estimate of $298,800 claimed by Jeffrey Rath and $93,100 claimed by the other lawyers at Rath & Company. Rath was a small six-member firm situated in Priddis, Alberta. These time records total $391,900, approximately 1/29 or 3% of the contingency fee amount received by Rath of over $11.5 million.

[37] From the Record, my review of the actual work performed by Rath shows that even this "after the fact time estimate" still overstated the actual time spent on this file. I reach this conclusion because Rath's legal work in this case essentially consisted of filing a formal claim in Federal Court, and sending the three-page letter less than two months after the CFA dated December 10, 2015 to the two federal Ministers in Ottawa on behalf of Tallcree, proposing an offer of settlement in the amount of approximately $83,000,000.

[38] After some minor negotiations and a one-year bureaucratic delay between the government negotiators and Rath, a settlement figure of $57,590,375 was finalized at the end of 2016, and the ratification process began. I conclude based on my review of the Record that the bulk of Rath's efforts consisted of outstanding paperwork and efforts by Rath to comply with federal government administrative processes and documentation of no particular complexity or uniqueness, usually authored or signed off on by Rath's paralegal.

The RO's Decision

[39] The factors applied in this case by the RO emanate from ***Rusk v Medicine Hat (City of)***, 2001 ABQB 1020, which was a decision of this Court under the *Rules* in force prior to November 2010. Under the pre-November 2010 Rules, "reasonableness" could be looked into on the date the work was completed, presumably when the final account was rendered. In this case, the difference in time between the Retainer Agreement dated October 14, 2015 and February 16, 2018 when the account was issued, was a period of almost 2 ½ years.

[40] The RO applied the ***Rusk*** factors from paragraph 32 of that decision:

1. the financial circumstances of the plaintiff;
2. whether the law firm carried the disbursements;
3. the complexity of the issues;
4. the experience and competence of defendants' counsel;
5. the degree of risk assumed by plaintiffs' counsel;
6. the experience and competence of plaintiffs' counsel;
7. the time expended by plaintiffs' counsel;
8. the timing of the settlement;
9. the importance of the case to the plaintiffs; and
10. whether the settlement was a good one.

[41] I accept the RO's conclusion that to obtain the settlement of $57,590,375 did require a specialized knowledge of the history of these claims and treaties that only a few lawyers who practice extensively in the area would have necessarily been aware of.

[42] However, the RO was concerned in his reasons for judgment that the quick settlement may have resulted in an unreasonable fee:

> Transcript, Page 38, Lines 17 – 25
>
> The only factor in all of this that did cause me to pause is the one paragraph in one of Mr. Molstad's authorities. Let's see if I can find it, where the suggestion was that, I am not sure I can find it, but there was a suggestion there that if circumstances changed, what might have been a reasonable contingency fee agreement at the time may result in an unfair fee. I can't find it, but I am sure that you all heard what it was and you will be able to find it later if you need to. So I paused a little bit. I paused on that because the amount here is high. Although a lot of work was put in to getting the result, it probably was not the amount of work that was contemplated by either side. Yes, the objective was to get things done as quickly as possible but it just seemed that the fee was extremely high.

[43] Nevertheless the RO found that although the CFA resulted in an extremely high fee that he had never seen before, it was not clearly unreasonable as he states below in his official Decision:

> **(RO's) Rule 10.19 Decision:** The provision in the contingency fee agreement for the calculation of fees was found to be reasonable and the resulting fee of $11,518,075.00 was not "unexpectedly unfair" or clearly unreasonable on the facts in this case. For these reasons and because a Review Officer is bound to give substantial deference to a contingency fee agreement, the fee claimed by the Law Firm is allowed in full. (Emphasis added)

[44] The RO further found in his Reasons for Judgment that a 20% contingency fee was acceptable because it was "not clearly unreasonable", and because it was at the low end of contingency fees applicable in the simplest of "slam dunk" cases where liability was not in issue, as he stated below in his reasons:

> Transcript Page 137, Lines 34-41
>
> At what point during the conduct of the matter was it resolved? That is not in issue here because we are dealing with the low percentage, the 20 percent. So that's for the 20 percent is the percentage applied to really the initial steps in getting things done. If this were litigation, it could have gone on with the next stage up to another percentage and so on. Twenty percent is on the low end of contingency fee agreements. In personal injury actions, a 20 percent fee, if you see one, would be applied to cases where liability is not in issue. It is a clear-cut case. You are going to win, you know, it is just a matter of how much work it is going to take to get there and then you go up from there.
>
> . . .
>
> Transcript Page 139, Lines 3-9

> And then those are the factors that are considered by a Review Officer when there is no contingency fee agreement. So that is why I often say if it is in the agreement, unless it is clearly unreasonable, I have to respect it. Twenty percent, although it produces a high fee, I cannot say it is clearly unreasonable.
>
> So for all of these reasons, I find that the 20 percent is reasonable and the fee generated from the 20 percent is not clearly unreasonable. . . .
>
> (Emphasis added)

Conclusion

[45] The standard of review herein is such that I can vary or revoke the RO's decision if the RO made a "palpable and overriding error" with respect to a question of mixed fact and law; and "correctness" with respect to an extricable error of law or principle, or with respect to the $11.5 million-dollar fee award that betrays such error in principle.

[46] In my analysis, the reasons and decision of the RO are reversible for "correctness", and also contain "palpable and overriding errors" of mixed fact and law.

[47] Firstly, Rule 10.9 mandates a review based on whether the CFA is "reasonable", not whether it is "clearly unreasonable":

> 10.9 The reasonableness of a retainer agreement and the reasonableness of a lawyer's charges are subject to review by a review officer in accordance with these rules, despite any agreement to the contrary.

[48] Requiring that the CFA be shown to be "clearly unreasonable", is definitely a lower standard for Rath to meet. Determining the "reasonableness" of the CFA is not the same as the RO's decision that the resulting fee of $11,518,075 was not "unexpectedly unfair" or "clearly unreasonable" on the facts in this case.

[49] The RO's decision that the CFA was reasonable because of the resulting fee "was not unexpectedly unfair" or "clearly unreasonable" on the facts in this case is not the same as determining the "reasonableness" of a retainer agreement pursuant to Rule 10.9. This decision by the RO represents a reversible error of law.

[50] Secondly, it was also a palpable and overriding error for the RO on the facts as he found them to set a 20% contingency fee essentially as a minimum. Setting a 20% contingency as a reasonable low-end minimum percentage without question and without any caselaw precedent, automatically justified the $11.5 million-dollar legal fee in the RO's mind, as of course it was a simply mathematical calculation (20% x Amount Recovered). However, accepting 20% as a minimal contingency fee ignored other factors critical in the determination of the reasonableness of the CFA, for example, the actual time Rath spent on the file, and how quickly and how easily the settlement was reached. I note as well that Rath was a small six-lawyer law firm practicing in Priddis, Alberta, at all material times herein, and I have found that most of the work product found in the Record are actually simple emails created and signed by his paralegal.

[51] I conclude that both of the RO's decision on these two issues constitute reversible errors. There is no proper legal basis or foundation for the RO to have limited or fixed his low-end minimum contingency fee amount at 20% of any amount recovered, which is why the RO's

decision resulted in an incredibly high legal fee that even he had never seen before, as he stated. Furthermore, the RO's standard of "clearly unreasonable" is not the "correct" legal standard with which to review the CFA.

[52] Having found two reversible errors, Rule 10.27(1) and (2) applies. Pursuant to Rule 10.27(1)(b), I will revoke the RO's decision and substitute with my decision:

> 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.
>
> (2) If the amount of lawyer's charges payable pursuant to the decision of the review officer has been paid and, after payment, is reduced on appeal, the lawyer may be ordered to return the excess and, if the lawyer fails to do so, the lawyer, in addition to being liable for that amount, may be found guilty of a civil contempt.
>
> (Emphasis added)

My Post Decision Requirements

[53] Before deciding on the appropriate amount of the Respondent's account, I will give each party a further opportunity to provide me with written submissions as to the appropriate final amount of Rath's fee, based on the facts that I have found, and based on the Record that was before the RO. Tallcree submits that a one or two-million-dollar fee is appropriate in these circumstances.

[54] Any new evidence that the parties wish to reply on will have to comply with the ***Palmer v The Queen*** test:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases;
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[55] I ask each counsel to supply me with their written argument with respect to the final amount of Rath's fee no later than October 30th, 2020.

Heard on the 20th and 21st days of February, 2020.
Supplemental Submissions August 18th and August 28th, 2020.

Dated at the City of Edmonton, Alberta this 8th day of October, 2020.

Donald Lee
J.C.Q.B.A.

Appearances:

Priscilla Kennedy
of Priscilla Kennedy Law
for Appellant, Tallcree First Nation

Edward Molstad, QC and Allie Larson
of Parlee McLaws LLP
for the Respondents

The “Schedule A” can be found on the Court file.