Court of King's Bench of Alberta

Citation: Bertram Family Trust v Felesky Flynn LLP, 2024 ABKB 341

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Date: 20240611
Docket: 2203 09727
Registry: Edmonton

Between:

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

Appellants

- and -

Felesky Flynn LLP

Respondent

Decision of the
Honourable Madam Justice S.E. Richardson
Appeal from the decision of Review Officer dated November 1, 2022

Introduction

[1] The Appellants appeal the decision of the Review Officer in relation to a legal bill presented by the Respondent. After a half day hearing, the Review Officer reduced the bill by $100,000 and confirmed the remainder of the fees. The Respondent does not oppose this reduction.

[2] As a result of the claimed errors by the Review Officer, the Appellants argue that the decision should be completely negated, and they be refunded the fees overpaid by them in excess of the hourly rates prescribed by the retainer agreement and that they also be refunded half of the earlier fees they paid in 2017. They further argue that the matter be quashed, or remitted for rehearing, or alternatively, set for a trial after fulsome disclosure has been made with a provision for expert evidence regarding the true value of the legal work completed by the Respondent.

[3] The Respondent argues that the Review Officer made no errors, and the appeal should be dismissed. They seek costs of the appeal along with interest on the amount of the overdue account in accordance with the retainer agreement.

[4] For the reasons set out below, the decision of the Review Officer is varied to account for the amount of the overbilling for those hours billed at $900/hour. The remainder of the Review Officer's decision is affirmed.

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Background

[5] The Appellants owned a plastics manufacturing company. In 2017, they planned to sell the business. That year, they retained the Respondent to provide tax planning advice to structure the sale in a way to minimize the tax payable and maximize the capital gains exclusions from the sale of the business. An eight-page retainer agreement was signed by the parties in February 2017.

[6] Pursuant that retainer agreement, the Respondent provided tax planning advice in relation to the sale of the business. The 2017 advice was based on the income tax regime in place at that time.

[7] The 2017 plan involved the sale of 100% of the shares of the corporation, some and not all of the American assets and the incorporation of a special corporation in the Turks and Caicos but resident in Canada (Non-CCPC plan). Non-CCPC plans are created with reference to the unique structure, challenges and goals of a given tax paying entity. The purchaser, uninformed about the Non-CCPC plan, offered to facilitate the development of a 111(4)(e) plan for tax savings to the Appellants. This 111(4)(e) plan required the participation of the purchasers. The Non-CCPC plan did not require the cooperation of the purchaser and thus provided a significant negotiation advantage to the Appellants.

[8] After this legal work was completed, the intended purchaser decided not to proceed with the purchase and the sale of the business was abandoned. The Appellants continued to operate the business. The Respondent kept the file open in the event the sale proceeded in the future. The Respondent provided an invoice for the work that was completed in 2017. This invoice was based on the hourly rates of the lawyers who worked on the project. The Appellants paid this invoice without dispute.

[9] In 2021, the Appellants approached the Respondent as they were once again considering the sale of the same business to the same intended purchaser. The Appellants again sought to structure the sale in a way to minimize their tax liability. No new retainer agreement was suggested by the Respondent. The 2017 retainer agreement governed the 2021 engagement.

[10] Although the Appellants sought advice to reduce their tax liability for the sale of the same business to the same intended purchaser in 2021 as had been the case in 2017, the work completed by the Respondent in 2017 was not directly transferable to the 2021 engagement. There are several reasons for this. The tax landscape had changed by 2021 as the federal government had publicly discussed the possibility of eliminating the option of using a Non-CCPC plan as a tax reduction strategy. The 2021 sale included an employee trust and a US business trust that was unique and not part of the 2017 engagement. The initial advice from the Appellants in 2021 changed from the sale of 30% of the shares of the corporation to 100% of the shares, and this materially altered the tax mitigation issues and options.

[11] Ultimately, the sale occurred in 2021 on schedule. The sale price was $42,000,000.00. The plan that was developed and implemented by the Respondent was complicated and sophisticated. It involved 14 different entities: individuals, trusts, corporations and partnerships, and was global in reach, involving entities in Canada, the United States, China, Hong Kong and Turks and Caicos.

[12] During the work in 2021, the Respondent issued seven separate invoices styled "Interim Statement of Account". These invoices were based on the hourly rate and the hours worked by different lawyers at the Respondent firm. All these interim invoices were paid by the Appellants without dispute. These interim invoices amounted to $205,295.

[13] On November 17, 2021, the Respondent emailed an invoice styled as a "Proposed Fee" to the Appellants. This invoice set out the criteria from the February 2017 retainer agreement and detailed the Respondent's conclusion that the fee for their work totalled $750,000. The email explained this proposed final fee was "approximately 15% of the income taxes saved". The Respondent subtracted from this final invoice, the amounts paid on the earlier seven interim invoices from 2021 ($205,295) leaving a balance owing of $544,705 (exclusive of GST). This final invoice also included disbursements (and GST on same). The Appellants do not dispute the amount of the disbursements.

[14] The final invoice email also detailed the tax liability without the Respondent's tax planning advice, and the tax liability on the sale with their advice and noted a tax savings of $4,973,558.

[15] In their written submissions on this appeal, the Respondent indicates that this tax savings figure "failed to mention the additional $2,300,000 to $4,600,000 future tax liability avoided" in relation to a global tax liability savings to the individual Appellants as a result of the Respondent's advice to use a 111(4)(e) plan regarding the employee trust. An appeal of a Review Officer's decision is an appeal on the record, not a *de novo* hearing: R 10.26(2)). Accordingly, as this information of additional tax liability avoided was not before the Review Officer, it will not be considered on this appeal.

[16] The Appellants responded to this email with the proposed fee the same day and indicated that they were "not happy about this proposal at all" saying they had paid the firm as invoiced for the time the lawyers spent working on the file and they "never did agree to any sort of fee structure that was a percentage of savings".

[17] The Respondent sought an appointment with the Review Officer, and a hearing was held on November 1, 2022.

The Retainer Agreement

[18] The only retainer agreement between the Appellants and the Respondent was the one signed in February 2017. No new retainer agreement was completed in 2021. The Respondent relies upon the terms of the retainer agreement to support the provision of a final invoice in November 2021. The Appellants argue that any fees over and above the hourly rates in the interim invoices are not contemplated by the retainer agreement. The Appellants argue that they have paid the full fees contemplated by the retainer agreement through satisfying the seven interim invoices in 2021. The Appellants further argue that some of the fees they paid in 2017 ought to have been used to offset the work completed in 2021.

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[19] The retainer agreement is a comprehensive eight-page document setting out the subject matter of the engagement, the fees and billing procedures, the risk that aggressive tax planning strategies are likely to be reviewed by the authorities, and reporting and confidentiality clauses.

[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."

[22] As well, section 13 contains a liability disclaimer, insulating the Respondent from sharing in any risk for their advice to the Appellants. The Appellants shouldered all the risk of this aggressive tax planning, the risk being an audit by the CRA.

The Review Officer's Decision

[23] The hearing before the Review Officer was conducted on November 1, 2022 with his decision coming at the end of a half day of submissions and after he had reviewed the filed "Confidential Evidence for a Review Hearing" material.

[24] The same counsel appeared before the Review Officer as on this appeal.

[25] Before the Review Officer, counsel for the Appellants advanced many of the same positions as taken on this appeal. Chief among them is that the retainer agreement is a veiled contingency agreement that does not comply with the rules surrounding such agreements as so the retainer is invalid. The Review Officer rejected this argument on the basis of the combination of the following: the retainer did not permit the Respondent to collect a specific percentage of any award or recovery by the Appellants, the Respondent did not shoulder any risk in the event of no award or recovery by the Appellants, the suggestion by the Respondent of quantifying the value of their work at 15% of the tax savings was well below usual contingency fee range of 20% – 25%, and the retainer did not comply with the *Rules of Court* regarding contingency fees.

[26] The Review Officer concluded that the retainer agreement on its face was a global fee agreement, and that "it is quite acceptable…based on those other factors [in Section 7 of the retainer agreement] to issue a final account that exceeds time spent, and sometimes by quite a margin."

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[27] The Review Officer also rejected the Appellants' argument that the Respondent's fees should be found to be unreasonable on the basis of a comparison to what the Appellants paid to their counsel who acted on the sale of the business and what the purchaser paid for legal fees for the transaction, finding that the solicitor work on a commercial sale was not comparable to the complexity of the tax planning advice on a commercial sale of this magnitude.

[28] The Appellants pointed the Review Officer to the itemized fee schedule that revealed that some hourly fees were charged above the $775 rate referred to in the 2017 retainer agreement. The Review Officer opined that hourly rates are often increased annually, but since the 2017 retainer agreement capped the hourly rate at $775, any fees charged in excess of that amount were not reasonable. The Respondent advised the Review Officer that the amount of this overcharging was $10,800. The Appellants accepted that figure.

[29] The Appellants also resisted the Respondent's assertion before the Review Officer that there was a last-minute rush to get the work done. The Review Officer agreed that since the Respondent was reengaged in April 2021, they could have done more earlier in the engagement in asking the Appellants the expected closing date so that they were not rushed to complete the work in August 2021.

[30] The Review Officer also took into account the fact that there was no estimate of fees or percentage of tax savings in the retainer agreement. While the retainer agreement contemplated a final fee above the hourly rate, the agreement did not set a mathematical way to quantify the final fee as a percentage of taxes saved.

[31] The Review Officer also took into account that since taxes can be reviewed by the CRA going back several years, there could be no absolute certainty under the results obtained factor as to the full estimate of taxes saved.

[32] The Review Officer took into account the lack of any shared risk, the overbilling of the hourly rates, the lack of certainty or finality to the estimate of tax savings and the failure of the Respondent to obtain a deadline for the work from the Appellants and applied a global reduction to the fees charged to reflect reasonableness. He reduced the final bill by $100,000 plus the associated GST.

[33] The Review Officer declined the Appellants position that the legal fees paid in 2017 for the work done on the abandoned sale of the business be applied to the 2021 fees or included in the assessment of the reasonableness of the 2021 fees. He decided that the limitation period applied to the ability of the Appellants to launch a complaint about those fees. As well, he found that the work done in 2021 was materially different than the work done in 2017, despite the fact that the impetus for the work in 2021 was the intended sale of the same business enterprise.

[34] Finally, the Review Officer adopted and approved the methodology used by the Respondent in the November 17, 2021 email to the Appellants setting out the final invoice for the legal services in 2021. The Review Officer concluded that this methodology complied with the terms of the retainer agreement, and that it was proper to determine the final fee by reference to the factors set out in that retainer agreement.

Standard of Review

[35] The standard of review applied to an appeal of a Review Officer's decision under Rule 10.26(1) is deferential, given the Review Officer's specialized knowledge and experience in

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assessing the reasonableness of a lawyer's account. As the person hearing the submissions and examining the materials, the Review Officer is in the best position to assess and weigh evidence: ***Rocks v Ian Savage Professional Corporation***, 2015 ABCA 77 at para 15, leave denied [2015] SCCA No 204, citing ***McLennan Ross v Keen Industries Ltd (No 2)*** (1988), 86 AR 311 (CA).

[36] A Review Officer may err by: failing to consider the evidence and or representations; making a finding of fact that is clearly in error; proceeding on an erroneous principle; failing to apply a required principle; awarding an amount so high or low as to betray an error of principle; incorrectly determining a true question of jurisdiction or failing to provide a hearing that is procedurally fair: ***Rath & Co v Sweetgrass First Nation***, 2014 ABCA 426, leave denied [2014 SCCA No 67, ***Nichols v Field Law***, 2018 ABQB 238, ***CIBC Mortgages Inc v Sicoli***, 2013 ABQB 451, ***Repchuk v Silverberg***, 2013 ABQB 305, ***Fraser Milner Casgrain LLP v Kristof Financial Inc***, 2012 ABQB 359.

[37] Recently the Alberta Court of Appeal held that the standard of review from ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65, applied to an appeal of a Review Officer's decision such that questions of law are reviewed on a correctness standard and questions of fact are determined on the palpable and overriding error standard: ***Tallcree First Nation v Rath & Co***, 2020 ABQB 592, aff'd 2022 ABCA 174, at para 9.

[38] Issues of jurisdiction and procedural fairness are questions of law and attract a correctness standard of review. The assessment of the reasonableness of a lawyer's fees attracts a deferential standard of review and the Review Officer's decision on this point can only be interfered with where the record betrays an erroneous finding of fact and where the correct finding of fact would have affected the Review Officer's decision on reasonableness.

[39] On appeal, a Court may interfere with the Review Officer's decision if any of these errors are clearly made on the record of the hearing. Where interference is so justified, the Court on appeal may reassess the account or return it for a new assessment, among other remedies: ***McLennan Ross***, at para 6, Rule 10.27(1).

Issues

1. Can the Appellants raise issues at the oral argument stage that are not found in the Notice of Appeal?
2. Did the Review Officer exceed his jurisdiction?
3. Were the Appellants afforded procedural fairness in the hearing before the Review Officer?
4. Did the Review Officer err in finding that the fees charged by the Respondent were reasonable?

Can the Appellants raise new issues in oral argument on appeal?

[40] During this appeal, the Appellants raised issues not found in their filed Notice of Appeal or in their written argument supporting the appeal. These issues were discussed with counsel at the conclusion of their oral arguments and the Court sought further written submissions on the following issues: can new issues be raised in oral argument where they are not articulated the

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Notice of Appeal or written submissions? If yes, did the Review Officer exceed his jurisdiction and was the duty of procedural fairness breached by the Review Officer?

[41] The Appellants argue that these twin issues are found by implication throughout their initial written argument on this matter. The Respondent argues that the Notice of Appeal is akin to a pleading and as such, no new issues can be raised without leave of the Court and that if permission is granted to allow the Appellants to raise these two issues, the Respondent will suffer prejudice.

[42] I disagree with both assertions by the Respondent. A Review Officer's decision-making ability is constrained by the authority granted by the *Rules of Court*. Likewise, the *Rules* dictate that any appeal from a decision of a Review Officer is limited. One of the permitted grounds of appeal is that the Review Officer exceeded his jurisdiction. In the Appellants' initial written argument, they argued that the Review Officer interpreted the retainer agreement, and he was not permitted to do so. This is a jurisdictional complaint. The Respondent is not caught unaware of the jurisdictional ground of appeal. Likewise, procedural fairness is embedded into our system of justice and informs the actions of all judicial and quasi-judicial decision makers. The fact that the Appellants raised this only in oral argument is not a bar to this Court considering this claim. Finally, the Respondent is not prejudiced by permitting the Appellants to raise these two issues, because the Court sought and received additional written argument from both parties on both issues.

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Did the Review Officer exceed his jurisdiction?

[43] The Appellants suggest that Review Officer exceeded his jurisdiction by interpreting the retainer agreement to the extent that the "bonus fee" over and above the hourly rates was part of the contract. They also argue that the Review Officer exceeded his jurisdiction by interpreting the 2017 retainer agreement as the contract that governed the 2021 engagement notwithstanding his conclusion that the 2017 fees were billed to the Appellants for a different matter. Finally, the Appellants argue that the Review Officer exceeded his jurisdiction by not providing a procedurally fair hearing.

[44] The Respondent argues that the retainer agreement was clearly and plainly written and did not require any interpretation by the Review Officer.

[45] *Rule* 10.18(1)(a) requires that "a review officer must refer any question arising about the terms of a retainer agreement to the Court for a decision and direction". The terms of a retainer agreement cannot be decided by the Review Officer, and this includes questions of interpretation, implied retainer agreements and oral agreements: ***Sweetgrass First Nation v Rath & Co***, 2013 ABCA 165.

[46] The Review Officer did not interpret the retainer agreement. There is no error in the Review Officer applying the retainer agreement signed in 2017 to the fees charged in 2021.

[47] A review of the February 2017 retainer agreement submitted in evidence before the Review Officer establishes that it was signed by both Tammy and Robert Bertram on behalf of each of the Appellants.

[48] The terms of the eight-page agreement are simply and clearly articulated. There is an absence of legal jargon. Tammy and Robert Bertram are sophisticated clients, growing and operating a multinational business for two decades and that eventually sold for $42,000,000.

They were familiar with retaining lawyers and engaged several different firms for different aspects of the sale of the business in 2021.

[49] The fees are set out in a separate section, and outline in bullet form, 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; the value you received from our work on your behalf; (i) any relevant agreement between the Felesky Flynn LLP and the [Appellants]; and (j) any estimate or range of fees given provided by Felesky Flynn LLP." No estimate of fees was ever given in this case and there is no other agreement that governs the work done by the Respondent.

[50] Even though the retainer agreement includes reference to a "final fee", the distinction between interim and final accounts is clearly set out the section immediately following the fees section. The retainer agreement states that "we may issue interim accounts" and "At the conclusion of our engagement, we will issue a final account which sets out our final fees. 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 [in the fees section]."

[51] A clear reading of this retainer agreement betrays that there are two types of invoices, interim and final. All the hourly rate invoices were styled "interim statement of account". Reference to a "final invoice" in this agreement includes when it will be issued and what factors will go into setting this amount, and how the payment of any interim invoices will apply to the final fee.

[52] The Review Officer also did not fall into error by interpreting the retainer agreement from 2017 as the contract that governed the 2021 engagement.

[53] All parties were well informed that the 2017 retainer agreement governed the 2021 work. The Respondent maintained the same file number as between 2017 and 2021. The Appellants reengaged the Respondent in relation to the sale of the same business enterprise. The same general instruction governed the 2021 relationship: devise a tax plan that minimize global tax liability of the Appellants. The Appellants as clients were identical, but for the addition of the employee trust. The same principals were involved. The Appellants were billed according to the 2017 retainer agreement, and they paid those interim invoices in 2021. There is no merit the claim that the 2017 retainer letter was not the contract in place in 2021.

Was the Appellant afforded procedural fairness?

[54] The Appellants assert that they were not afforded procedural fairness in the hearing before the Review Officer because "there was no evidence at all" in the hearing, and "the Review Officer simply listened to bare submissions by the parties and counsel", that the Review Officer "indicated in several places that he was in control of the proceedings", that "the Review Officer rendered his decision which was without warning as to its finality", and "the Review Officer ignored the disputed factual accounts put forward by the parties".

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[55] Procedural fairness is always an animating feature of every judicial and quasi-judicial process. In ***Baker v Canada (Minister of Citizenship and Immigration)***, 1999 SCC 699, the Supreme Court of Canada established the considerations when analyzing procedural fairness. The closer an administrative process resembles a judicial process, the more procedural protections are necessary. In the present case, the review hearing is an informal process, therefore less protections are required. The second factor is whether the statutory regime attracts a right of appeal. More procedural protections are required where there is no right of appeal. A hearing before a Review Officer attracts a statutory right of appeal, therefore fewer procedural protections are required. The third factor is the importance of the decision to the individual affected. The greater the impact on a person's liberty, the greater protections are required. The decision of a Review Officer does not engage liberty interests, it is an assessment of the value of the legal services provided. The fourth factor is the doctrine of legitimate expectations, which involves the expectation that a decision maker will follow its regular procedures. This factor is engaged in a hearing before a Review Officer. Finally, the last factor is respect for the procedural choices made by the decision maker. Since there are few procedures established in statute upon Review Officers, procedural protections do not need to be robust.

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[56] The assertion that the hearing before the Review Officer was rendered procedurally unfair because there was no "right to call witnesses and cross examine them" and because "in a technical sense there was no evidence at all, in that there were no affidavits filed by either party, no evidence taken under oath in any fashion, and certainly no right of cross-examination extended to any party" is without merit.

[57] The *Rules of Court* permit the Review Officer to take evidence either by affidavit or orally under oath or both, but do not require this: R 10.17(1). Evidence heard by a Review Officer need not be sworn: ***Fraser Milner Casgrain v Kristof Finl***, 2012 ABQB 359, para 24.

[58] The Appellants are incorrect that there was no evidence at all. Hearings before a Review Officer require the applicant to file materials. In this case, on June 22, 2022, the Respondent filed a volume of documents entitled "Confidential Evidence for a Review Hearing". This filed material included the lawyers accounts, the retainer agreement and other relevant materials (e.g. email correspondence, receipts, copies of cheques, etc.).

[59] As well, this filed document also notes that "additional materials may be attached by the Review Officer if any are produced during the hearing and are found to be confidential and relevant". This was notice to the Appellants that at any time, including during the hearing itself, the process permits the Review Officer to receive new material. It is the responsibility of the parties to provide the Review Officer with the material they believe is relevant to their position.

[60] It is clear from the record that the Review Officer had reviewed the material in detail. The Review Officer had a refreshed and current command of the material submitted, referring to it frequently, seeking clarification on some points, and drawing counsel to portions of the material throughout the hearing. Counsel for the Appellant never averred to a desire to provide additional material.

[61] The argument that the Review Officer "rendered his decision, which was without warning as to its finality" and that counsel for the Appellants "was surprised that the Review Officer made a decision" is contradicted by the record of proceedings.

[62] As to the finality of the decision of the Review Officer, counsel were experienced and all parties were focused on the issue to be determined: the reasonableness of the proposed final fee. There was no suggestion during the hearing that the Review Officer would make an interim decision. The process operated toward a final decision by the Review Officer. As well, at the conclusion of his decision, the Review Officer took the time to explain the process and associated deadlines in the event either party wished to appeal his decision.

[63] All parties were given the opportunity to speak, including the Appellants despite the fact they were represented by counsel. The Review Officer navigated the virtual appearances of everyone fairly and respectfully. At the conclusion of the morning sitting, the Review Officer stated: "Unless there is something anyone has to add relatively briefly, at 1:30 I will start to give my analysis of the issues here and a decision. So we will be breaking very shortly. But before we do, is there anything you want to add, Mr. Pruski, before we take the lunch break?". Counsel for the Appellants summarized his main argument briefly, then stated: "We have given you all of the information and evidence that I think you need to make an appropriate decision in this case. And so unless you have any questions, Sir, I am inclined to leave it that way."

[64] Finally, the Appellants seem to assert that the Review Officer did not afford them an audience, as in their Supplemental Written Argument they complain that the Review Officer "indicated in several places that he was in control of the proceedings by directing the parties to speak and even drawing attention to certain issues over others". There is no merit to the suggestion that the Review Officer did not provide a fair hearing.

[65] The hearing was conducted virtually, with some participants on the telephone, others over WebEx. The telephone participants included counsel for the Appellants. In this environment it was incumbent on the Review Officer to "control the proceedings" otherwise a record of proceedings could be compromised by people speaking over top of each other. As well, the participants on the telephone did not have the benefit of seeing the Review Officer, so when he needed to make notes during the hearing, he had to "control the proceedings" by telling all parties he needed a moment to "catch up with his notes". This advice was given multiple times.

[66] The Review Officer gave everyone a full, uninterrupted opportunity to provide their submissions. He raised questions he had and sought the positions of counsel on those issues. He ensured that he understood all arguments by verballing signally to counsel and by reference to the material he had received and reviewed in advance.

[67] The Appellants argue that the Review Officer ignored disputed facts and thus rendered the hearing procedurally unfair. The dispute at the hearing was not over "facts" but rather the fees, and whether the retainer agreement permitted billing in excess of the prescribed hourly rates. 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.

[68] The hearing provided by the Review Officer was procedurally fair.

Were the fees reasonable?

[69] The Appellants argue that the fees charged by the Respondent were not reasonable in that the amount of the final fee is on its own unreasonable and the final fee ignores the fees they paid to the Respondent in 2017.

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[70] The Respondent asserts that the Review Officer considered all the evidence and properly determined the quantum of fees.

[71] Review Officers are experts in the field, and they are best placed to assess the reasonableness of the fees under R 10.19. This necessarily involves an assessment of the value of the legal services provided.

[72] In ***Steinke v Hajduk Gibbs***, 2014 ABQB 34, the Court set out the principles that govern the assessment of lawyer's fees. These include that the court must hold the lawyer and the client to promises made in a retainer agreement regarding amounts a lawyer may charge and a client must pay for legal services in the absence of a compelling reason not to; unless there is a contrary position in the retainer agreement, a client must pay for a legal service which increases the likelihood the purpose of the retainer agreement will be achieved; the client is not responsible for the cost associated with unnecessary steps; a client who instructs a lawyer to take a step which increases the likelihood the objective of the retainer will be achieved but will not likely present a benefit which justifies the cost or does not increase the likelihood of success is responsible for the fees associated with this service; to ensure that those obliged to pay for legal services are treated reasonably by their counsel, taking all circumstances into account; a client who contests their lawyer's charges at the outset of the hearing must particularize their complaint; and finally, it is the lawyer who bears the burden of persuading the review officer that the amount charged is appropriate.

[73] The Appellants argue that the final fee is unreasonable for the work provided. In support of this position they point to the fees that the purchaser paid for their legal advice on the purchase of the business, the fees the Appellants paid to their accountant, their corporate lawyer, and Stikeman Elliott, all in relation to the sale of the business.

[74] The Review Officer properly dismissed the argument that there was any symmetry between the work of the Respondent and other counsel involved in this transaction, whether for the Appellants or the purchaser of the business. The purchaser was not Canadian or domiciled in Canada. His legal fees had nothing to do with mitigating the tax liability on the sale of a long term privately held business, and the multiple associated legal entities of the Appellants. In relation to the fees charged by other counsel on this transaction, the Review Officer said that these "do not always equate" as they are "different firms, different lawyers, have different methods of billing…But more importantly, the work is different…tax planning work is considerably different than work done putting together documents and necessary non tax related documents to complete the transaction and close the sale…So I cannot really take whatever some other lawyer has charged for a different type of service and somehow apply it to the fees being charged here". This reasoning betrays no error.

[75] The Review Officer properly assessed the work completed by the Respondent as complicated and extremely important to the Appellants, involving a huge commercial transaction with large potential tax consequences. It involved specialized knowledge of the Canadian and international tax codes, the development and registration of offshore entitles to move assets into, it was global in scope and involved corporations, individuals, partnerships and trusts. The work completed by the Respondent involved specialized knowledge of a complicated area of the law. The plan developed by the Respondent was complex, sophisticated, involved enormous sums of money, including the potential tax savings.

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[76] The Appellants also argue that the fees were not reasonable in part because they never agreed to any fees in excess of the hourly rate, which was fixed as between $175 - $775 per hour.

[77] The Review Officer took into account that there were numerous hourly billing amounts in excess of the top hourly rate of $775 provided for in the retainer agreement. During an interruption in the oral decision counsel for the Respondent indicated that they had "done the math" for those hours calculated at $875/hour and that overbilling amounted to $10,800. No party disputed this amount. However, this exchange did not give effect to those hours billed in excess of $875/hour. In fact, the interim hourly billing invoices indicate that 31.4 hours were billed at the rate of $900/hour. This was never raised with the Review Officer. Since the Review Officer clearly took into account the overbilling at the $875/hour amount, I must assume that the $900/hour amount was not taken into account in the global reduction of the bill by $100,000 as concluded by the Review Officer. This is an error that will be corrected in this decision. The sum outstanding will be reduced by $3,925 + GST (31.4 hours billed at $125/hour above the maximum rate permitted in the retainer agreement).

[78] It is incorrect to say that the Appellants did not agree to any fees in addition to the fixed hourly rate. The Appellants point to the fact that in 2017, they were never presented with a final fee or invoice in addition to the interim invoices for hourly work completed. This is correct. However, given that the sale in 2017 did not proceed, there was no potential tax savings to the Appellants. The fact that no final invoice was presented to them in 2017 does not impact the assessment of the reasonableness of the fees claimed in 2021, when the sale proceeded and hence, the plan developed by the Respondent was put into place, with consequential financial benefits in the form of tax savings to the Appellants.

[79] It is correct that there was nothing in the retainer agreement to estimate the final fee. The retainer agreement did articulate that the final fee would be based on a number of factors, including "the results obtained", "the dollar amount involved or the value of the subject matter" and "the value you received from our work on your behalf". The Respondent fixed the proposed final fee as "being approximately 15% of the income taxes saved".

[80] The Appellants signed a retainer agreement that clearly contemplates a final fee in excess of the hourly rate paid for work completed. The absence of an estimate of that final fee, or any reference in the percentage of taxes saved, was one of the reasons that the Review Officer concluded that the $750,000 proposed fee was unreasonable. In the end result, this was a reason why the Review Officer reduced the final fee by $100,000. His conclusion in this respect is owed deference, and the record does to establish any erroneous finding of fact that would have affected his decision to reduce the fees by this amount.

[81] Secondary reasons for the reduction in the final fee were the Review Officer's conclusion that the Respondent bore some responsibility for the rush nature of the work completed on this file and the fact that there was no quantifiable tax benefit in this case given that the tax plan put into place can be subject to audit by the CRA.

[82] Finally, the Appellants argue that the final fee, above the hourly rates, is not reasonable as it does not take into account the hourly rate interim invoices they paid in 2017. The Review Officer considered this argument and dismissed it and declined to consider any of the 2017 fees for the following reasons: they were all based on time spent, there was no consideration of the factors considered from section 7 (except for the hourly rate) of the retainer agreement, the hourly rates would have conformed to the hourly rates in the retainer, the 2017 fees are not

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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. No error is established on the Review Officer's decision on this point.

[83] The record does not betray any error in the Review Officer's conclusion that the final fee, as reduced by $100,000, was reasonable.

Conclusion

[84] The Review Officer's decision is altered by a further reduction in fees in the amount of $3,925 + GST to account for the hourly overbilling. The remainder of the Review Officer's decision is affirmed.

[85] The outstanding fees are subject to interest at a rate of 12% per annum as afforded by section 8 of the retainer agreement. This interest will be payable to the date of the oral argument on this appeal, November 7, 2023.

[86] The Respondent is awarded costs on this appeal. If counsel cannot agree on costs, you may contact the Court within 30 days of this decision to make arrangements for argument on this issue.

Heard on the 7th day of November, 2023, with written argument received on November 24, 2023 and December 15th, 2023.
Dated at the City of Edmonton, Alberta this 11 day of June, 2024.

S.E. Richardson
J.C.K.B.A.

Appearances:

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For the Appellants

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For the Respondents

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