# In the Court of Appeal of Alberta

**Citation: Sturgeon Lake Cree Nation v Rath and Company Barristers and Solicitors, 2025 ABCA 65**

**Date:** 20250226
**Docket:** 2401-0148AC
**Registry:** Calgary



**Between:**

**Sturgeon Lake Cree Nation**

Respondent

- and -

**Rath and Company Barristers and Solicitors**

Appellant

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**The Court:**

**The Honourable Justice Michelle Crighton**
**The Honourable Justice Dawn Pentelechuk**
**The Honourable Justice Alice Woolley**

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**Memorandum of Judgment**

Appeal from the Decision by
The Honourable Justice C.D. Simard
Dated the 3rd day of May 2024
(2024 ABKB 258, Docket: 1801-11136)

## Memorandum of Judgment



**The Court:**

[1] The appellant law firm appeals from a chambers decision which determined the contingency fee agreement between the parties and the appellant's statement of account do not substantively comply with the specific requirements in Rule 10.7 of the *Alberta Rules of Court*, Alta Reg 124/2010 and are therefore unenforceable pursuant to Rule 10.8: ***Sturgeon Lake Cree Nation v Rath and Company Barristers and Solicitors***, 2024 ABKB 258.

[2] The appellant accepts the law pronounced in ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53, [2014] 2 SCR 633, and that the interpretation of a contract engages questions of mixed fact and law to which the standard of palpable and overriding error applies. However, it argues there is an extricable question of law in this matter warranting a review for correctness. More specifically, the appellant argues the chambers judge erred in law by applying too stringent a standard in assessing whether any noncompliance with the requirements in Rule 10.7 was substantive, rather than merely technical or minor, and should invalidate the fee agreement. It argues the chambers judge should have applied a more "flexible" approach and considered whether the noncompliance caused any prejudice to the respondent, particularly given the respondent's subjective knowledge about the appellant's set fee at the time of settlement. The appellant proposes that if there is no prejudice any noncompliance is not substantive, and the agreement should be enforceable.

[3] In our view, the language in Rule 10.7 does not support a flexible approach to determining the substantive validity and enforceability of contingency fee agreements. The rule contains mandatory language relative to the preconditions to a valid contingency fee agreement. The preconditions are not new and are not onerous. The rule also contains mandatory language relative to any noncompliance with those requirements. Prejudice cannot and does not drive the analysis of whether a contingency fee agreement is substantively compliant with the rule.

[4] Rule 10.7(1) says all "contingency fee agreement[s] **must (a) be in writing, and (b) be signed by the lawyer and the lawyer's client** or by their authorized representative." Rule 10.7(2) says "**To be enforceable**, a contingency fee agreement **must contain** the following particulars in precise and understandable terms" and goes on to list specific requirements. Rule 10.7(3) says "The contingency fee agreement **must be witnessed** ... and that person **must then swear an affidavit of execution**." Rule 10.7(4) provides the "**client must be served** with a copy of the signed contingency fee agreement within 10 days. . . and **an affidavit of service to that effect must be executed** by the person who served the agreement." Rule 10.7(7) mandates that every statement of 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 contingency fee agreement". Rule 10.8 states that a lawyer who does not comply with these requirements is "entitled only to lawyer's charges determined in accordance with rule 10.2". [Emphasis added]

[5] On a plain, grammatical reading of Rule 10.7, the requirements are mandatory; failure to comply results in an inability to enforce the fee agreement and restricts the lawyer to fair and reasonable compensation determined with reference to Rule 10.2. Flexibility does not fit comfortably with the mandatory language of the rule without eroding its clear intent.

[6] Moreover, as the chambers judge observed, the provisions in Rule 10.7 are consumer protection provisions. They recognize that lawyers who have superior legal knowledge draft their own fee agreements for clients who are often vulnerable litigants facing economic barriers to accessing courts. The purpose of the rule is to promote clarity and certainty surrounding the rights and obligations of the lawyer and the client - a flexible approach is inconsistent with that purpose.

[7] Finally, none of the mandatory requirements are relieved or relaxed if the lawyer demonstrates there is no prejudice to the client arising from the lawyer's noncompliance. In any given case, compliance is largely a question of fact and must be determined by looking at the language in the agreement (read in context and with the words given their ordinary, grammatical meaning) or by assessing what happened, in light of what the rules require. While the facts will vary in each case, and by extension the application of the rules to those facts – the mandatory nature of the rules remains constant.

[8] If the agreement is found not to comply, the presence or absence of prejudice arising from the noncompliance is irrelevant. It is the lawyer who is bound by the requirements in Rule 10.7, and noncompliance cannot be relieved by pleading "no harm, no foul", based on the client's subjective knowledge or otherwise. Allowing room for a prejudice assessment would not only flout the protective aim of the rule but invite complicated court proceedings about enforceability which the rule itself is designed to avoid. The limited resources within the justice system would not be served by such a result.

[9] Prejudice is a relevant consideration only after an account is rendered and where the lawyer omits from the account a notice of the client's right to have it reviewed: Rule 10.7(8). In the event of such an omission, and if the lawyer demonstrates the omission was inadvertent *and* the client was not "misled or prejudiced", the court may, not must, waive the notice requirement. This is the only place in Rule 10.7 that one finds reference to prejudice having any potential to insulate the lawyer from noncompliance with a mandatory requirement. This is logical given that by the time the statement of account is issued pursuant to a valid fee agreement, a court would not lightly set aside a valid contract without good reason. In contrast, to read a prejudice component into the parts of the rule that mandate what an enforceable agreement must contain would be contrary to widely recognized principles of statutory interpretation. The chambers judge did not make a legal error in his identification of the requirements for an enforceable contingency fee agreement under Rule 10.7.

[10] The appellant further argues the chambers judge erred in finding the fee agreement did not comply with Rule 10.7(2)(e), and that the deficiencies were substantive rather than technical. For the first time on appeal, the appellant also submits that the chambers judge ought to have applied the severance provision contained in the fee agreement to excise anything found to be inconsistent with the stated percentage basis for recovery and the client's right to a review. A new argument may be raised on appeal only in "exceptional circumstances" (see ***R v Campbell***, 2024 SCC 42 at para 143). These arguments are all reviewable on a standard of palpable and overriding error.

[11] With minor exceptions, the appellant restates the arguments the chambers judge considered and rejected. No palpable and overriding error is argued and none is demonstrated on this record.

[12] Rules 10.7(2)(e)(i) and (ii) require that the manner in which a contingency fee is to be calculated and the maximum fee payable or the maximum rate calculable be stated in "precise and understandable terms". A lawyer who fails to comply with these requirements is restricted to charges determined in accordance with Rule 10.2: Rule 10.8.

[13] The contingency fee agreement in question is not clear regarding the maximum fee to be paid by the respondent. While the fee agreement makes clear the appellant's compensation will be based on a percentage that is tied to a litigation continuum, the plain and ordinary meaning of the words used in the fee agreement gives the appellant a unilateral and unqualified right to increase or decrease that percentage based on the stated factors. No other interpretation gives meaning to each of the words used in the contingency fee agreement and we agree with the chambers judge the fee agreement is therefore neither clear nor precise regarding the maximum fee the respondent may expect to pay if the matter resolved at any point in the litigation.

[14] We have reservations regarding the chambers judge's conclusion that compensation based on "a percentage of the 'monetary value'" of "land and economic value of lands, opportunity or other consideration" is sufficiently precise or understandable. While we recognize the issue is not before us, we wish to make clear these reasons should not be read as an endorsement of that finding.

[15] Further, while the contingency fee agreement contains a relatively clear statement of the respondent's right to ask a review officer to review the fee agreement and the statement of account, the inclusion of a mandatory arbitration provision for "any dispute" concerning fees erodes that clarity. The arbitration provision contains no identifiable standard by which the fee dispute should be measured. The absence of any procedural directions and the mandatory nature of the arbitration provision call into question the review officer's jurisdiction. Is it intended that the review officer review the same fee agreement potentially coming to a different conclusion than the arbitrator, or is it intended that arbitration precedes review thereby foreclosing a review, or does the review officer review the arbitrator's findings relative to the dispute? The fee agreement offers no clarity relative to these questions.

[16] We further observe that by the terms of the agreement, whether the respondent elects to have a review officer review the agreement or proceed to binding arbitration, the respondent agrees to pay the appellant their costs on a solicitor and own client basis. This provision serves to discourage the respondent from challenging the agreement or the fee charged and undermines the protection afforded in Rule 10.7. The fact the parties agreed to a review by a review officer is of no moment; it does not address the unfairness of the term, nor its contradiction of the consumer protection Rule 10.7 provides. This serves to further illustrate why lack of prejudice cannot and should not save a substantively noncompliant agreement.

[17] Finally, there is no dispute that contrary to Rule 10.7, the respondent's signature on the contingency fee agreement was not witnessed, a fully executed copy of the fee agreement was never served on the respondent and there are no affidavits of execution or service: Rules 10.7(3), (4), and (5). In our view, the chambers judge correctly identified that these three subrules work together and described the purpose behind the process rules as being for the protection of both parties. As the chambers judge states at paragraph 70:

> . . . The client receives reminders of the heightened solemnity, formality and important consequences of signing a contingency fee agreement and of its limited-time right to terminate without penalty. Both parties will know with certainty when the "cooling off" period began, and when it ended. This is important not only for the client, but also for the lawyer. A contingency fee arrangement will often require a lawyer to expend significant amounts of their own resources, with no expectation of interim or regular payments prior to the successful conclusion of the matter. It is important for the lawyer to know when the agreement is no longer subject to termination by the client, so they can begin expending their own resources with confidence that their financial reward will be the negotiated contingency fee.

In all the circumstances of this case, non-compliance with all three subrules was "serious and substantive".

[18] In conclusion, we agree with the chambers judge that nothing is more fundamental to a fee agreement than a provision that tells the client in "precise and understandable terms" what the maximum fee will be given the stated eventualities. In our view, the chambers judge committed no palpable and overriding error in concluding the contingency fee agreement in this matter does not substantively comply with Rule 10.7 and is therefore unenforceable. He was not required to go on to consider whether there was any prejudice caused by that noncompliance.

[19] This conclusion makes it unnecessary to consider whether the chambers judge was required to waive the notice requirement in the statement of account under Rule 10.7(8) because an account issued pursuant to an unenforceable contingency fee agreement can have no greater legitimacy than the agreement on which it is based.

[20] Lastly, we turn to the new argument raised by the appellant relative to the severance clause in the fee agreement. The appellant submits the chambers judge ignored the severability clause that supports severing the adjustment clause from the fee agreement because it is inconsistent with the percentage basis for compensating the appellant. This argument is untenable. To allow a party to rely on a severability clause to excise the very provision that renders the agreement unenforceable would be contrary to public policy. It would promote careless drafting at best and misleading or opportunistic drafting at worst.

[21] The appeal is dismissed.

Appeal heard on January 13, 2025

Memorandum filed at Calgary, Alberta
this 26th day of February, 2025.

Crighton J.A.

Pentelechuk J.A.

Authorized to sign for: Woolley J.A.

**Appearances:**

P.J. Faulds, KC
for the Respondent

M.S. Poretti
M. Swanberg (no appearance)
for the Appellant