
Court of Appeal for Saskatchewan
Docket: CACV4446

**Citation: *Birch Narrows Dene Nation v Duboff
Edwards Schachter Law Corporation,***
2026 SKCA 79

Date: 2026-07-21

Between:

Birch Narrows Dene Nation

*Appellant
(Respondent)*

And

Buffalo River Dene Nation

*Non-Party (Appellant)
(Respondent)*

And

Duboff Edwards Schachter Law Corporation

*Respondent
(Applicant)*

Before: Caldwell, Tholl and Drennan JJ.A.

Disposition: Appeal dismissed

Written reasons by: The Honourable Justice Jerome A. Tholl
In concurrence: The Honourable Justice Neal W. Caldwell
The Honourable Justice Jillyne M. Drennan

On appeal from: 2024 SKKB 193, Regina
Appeal heard: April 14, 2026

Counsel: Josh Morrison and Michael Marschal for the Appellants
Lauren Wihak, K.C., and Steven Barrington-Foote for the Respondent

Tholl J.A.

I. INTRODUCTION

[1] Birch Narrows Dene Nation [Birch Narrows] and Buffalo River Dene Nation [Buffalo River] successfully negotiated a joint settlement with Canada with the assistance of their legal counsel, Duboff Edwards Schachter Law Corporation [DES]. After the settlement funds were paid, Birch Narrows disputed the amount of legal fees to which DES claimed it was entitled. As a result, DES brought an originating application to determine the amount. A decision was rendered by a Court of King's Bench judge in Chambers, which found that \$4 million was owed to DES: *Duboff Edwards Schachter Law Corporation v Buffalo River Dene Nation*, 2024 SKKB 193 [*Chambers Decision*].

[2] Birch Narrows and Buffalo River both appeal from the *Chambers Decision*, but Buffalo River is a nominal or notional appellant only and took no position on the appeal. Birch Narrows asserts that the Chambers judge erred by assessing the fees on a quantum meruit basis, considering an unenforceable agreement, finding the fees were reasonable, and admitting and considering certain expert evidence.

[3] For the reasons that follow, the appeal should be dismissed.

II. BACKGROUND

[4] In approximately 1952, the Cold Lake Air Weapons Range [Range] was established by Canada, and the appellants were excluded from the associated land. In 1996, represented by Bruce Slusar, they commenced an action against Canada, alleging that this conduct infringed their treaty and Aboriginal rights [Claim]. It appears that nothing of substance happened for the next 16 years. In 2012, Canada applied to have the Claim struck for want of prosecution. In 2013, Mr. Slusar enlisted the assistance of Harley Schachter to resist the application, but Mr. Slusar remained as lead counsel. Mr. Schachter had been called to the Manitoba bar in 1984, was a partner in the law firm (which evolved over time into DES), and had been practicing Indigenous law since the early 1990s. When Mr. Schachter was retained, he agreed that he would track his time and bill it monthly to the appellants at an hourly rate of \$375.

[5] In 2014, the appellants decided that they no longer wished to be represented by Mr. Slusar. They formally terminated his services with a band council resolution in early 2015 and retained DES as their counsel for the Claim. There is no written retainer agreement setting out the nature of the legal fees to be charged for taking carriage of and prosecuting the Claim. However, DES continued to render monthly statements, charging the same fees per hour for Mr. Schachter as he had charged while assisting Mr. Slusar. An associate at DES (later a partner), Kaitlyn Lewis, also charged an hourly rate of \$215 per hour, billed to the file and included in the monthly statement. Neither Mr. Schachter nor Ms. Lewis increased their hourly rate charged to the appellants over the life of the Claim. The statements were paid, although the appellants frequently fell behind in doing so, and DES often carried large amounts for fees and disbursements.

[6] Canada's application to dismiss the Claim was successfully opposed in 2015 and the litigation continued. DES took substantive steps to move the matter along, including amending the pleadings, adding a constitutional claim, gathering evidence, obtaining expert reports, and completing document production and discoveries. This also involved negotiations with Canada to obtain some funding up front. A second set of trial dates were set in 2018 to occur in March of 2020, and DES took further steps to prepare for trial.

[7] After Canada's counsel anticipated receiving a mandate to settle the Claim, written exploratory discussions occurred between counsel for the parties. DES provided a settlement brief to Canada. Mr. Schachter, after discussions with the appellants, had informed Canada in the settlement brief that any offer should include a top-up of \$5.1 million for DES's legal fees (i.e., a legal fee top-up of 7%). In September of 2019, Canada offered to settle the matter. In addition to non-monetary items, Canada offered a global amount of \$65 million, which included legal fees. Mediation occurred with a judge of the Federal Court in October of 2019. At mediation, Mr. Schachter negotiated further with Canada, which ultimately offered to pay \$81.5 million, plus a further \$5 million for legal fees. A dispute then arose between Birch Narrows and Buffalo River as to how the \$81.5 million should be split between them, with Birch Narrows requesting \$2 million more than the share that they would be allotted. As a result, Mr. Schachter negotiated a further \$1 million payable by Canada and agreed to cut DES's fees to \$4 million, freeing up an additional \$1 million to go to Birch Narrows. On this basis, the matter was settled.

[8] In addition to the monetary amount, the appellants each received 5,000 acres of land as reserve land, access to the Range for hunting, \$75,000 each for memorialization and feasts, and an apology. The settlement documents expressed the monetary amount of \$87,650,000 as a global figure and did not separate out an amount for legal fees or for memorialization and feasts, nor did they allocate the funds between the appellants. This resolution was approved by the Federal Court and overwhelmingly ratified by the members of each First Nation. The monetary result greatly exceeded the appellants' expectations.

[9] When the payment from Canada was late because of delays in implementing the settlement, Mr. Schachter negotiated an additional payment of \$982,700 to the appellants from Canada.

[10] Before a final statement was rendered by DES for its work on the Claim, a further dispute related to the allocation of the settlement funds and the payment of legal fees arose between Birch Narrows and Buffalo River. The bilateral resolution of this dispute between the two First Nations resulted in Birch Narrows receiving an additional amount out of the global settlement but becoming liable to pay all outstanding legal fees and disbursements to DES in relation to the Claim. Birch Narrows was also responsible for any court costs awarded against Buffalo River that resulted from disputing those fees.

[11] On April 26, 2021, DES issued its final statement or invoice on the Claim to the appellants in the amount of \$5,185,334.21. Birch Narrows disputed the account and did not pay it. This resulted in an application to the Court of King's Bench by DES – under s. 64 and s. 67 of *The Legal Professions Act, 1990*, SS 1990-91, c L-10.1 [LPA] – to confirm or, in the alternative, fix the amount of fees. Buffalo River took no position in relation to the fees.

III. CHAMBERS DECISION

[12] The *Chambers Decision* commenced with an introduction of the matter and a description of the background. Birch Narrows had argued that DES was entitled to its hourly fees that had been billed monthly, plus disbursements, and nothing further. DES had asserted that it was entitled to the fees as billed. The amount sought by DES in its originating application was \$5,013,461.18, which was arrived at by adding further disbursements and subtracting a payment of \$375,000 that had been made out of the settlement funds. The additional counsel fee claimed by DES was \$5 million.

[13] The Chambers judge examined the expert evidence filed by each party and stated the principles regarding expert evidence in general, with some further discussion of specific issues related to expert evidence on an assessment under the *LPA*. She then evaluated the evidence of each party's expert. DES had tendered the opinion of the Honourable Richard J. Scott, K.C., regarding the fairness and reasonableness of the legal fees. Over the appellants' objection, he was qualified to provide opinion evidence as tendered. The Chambers judge reviewed his evidence and his conclusion that the legal fees were fair and reasonable. The appellants tendered David Knoll as an expert in the same field without objection, although DES pointed to weaknesses in his qualifications that were noted by the Chambers judge. She then summarized Mr. Knoll's evidence and his conclusion that the question to be answered was whether the "possible bonus ... is fair, reasonable and justifiable under circumstances where Canada is negotiating and settling compensation with First Nations arising from an admitted breach of the Crown's fiduciary obligations" (*Chambers Decision* at para 49).

[14] The Chambers judge then described the relevant evidence from Mr. Schachter, Ms. Lewis, Chief Eileen Morrison of Buffalo River, Elder Freddie Byhette of Buffalo River, Elder Thomas Moberly of Birch Narrows, Chief Elmer Campbell of Buffalo River, Chief Robert Sylvestre of Birch Narrows, Chief Jonathon Sylvestre of Birch Narrows, Councillor Dorothy Sylvestre of Birch Narrows, Economic Development Officer Eric Sylvestre of Birch Narrows, and Alan Jerome Felix [A.J.] (who provided financial consulting services to Birch Narrows). A twelfth witness, Michelle Herboth, simply provided an affidavit, attaching all the invoices sent from DES to the appellants from March 4, 2013, to April 26, 2021.

[15] Moving on to the legal framework to be applied, the Chambers judge set out the relevant portions of s. 64 and s. 67 of the *LPA*, which are as follows (with the addition of s. 65):

Contracts for remuneration

64(1) Notwithstanding any law or usage to the contrary, a member may contract in writing with a person with respect to the remuneration of the member, on a basis other than fee for service, for services rendered or to be rendered to the person.

...

(3) A member or a person who has entered into a fee agreement with a member pursuant to subsection (1) may apply to a judge of the court for a determination as to whether or not the agreement is fair and reasonable.

(4) Where, on an application pursuant to subsection (3), a judge determines that a fee agreement is fair and reasonable, the agreement is deemed for all purposes to be fair and reasonable.

Courts' powers not limited

65 Nothing in this Act limits the powers of the courts with respect to the revision or assessment of a bill of costs.

Application for taxation

67(1) A bill of fees or disbursements with respect to services performed by a member may be assessed:

(a) on application to the court:

(i) by the person charged with the bill, within 30 days after the day on which the person received the bill;

(ii) by the member, if no application is made pursuant to subclause (i); or

(iii) by the person charged with the bill, after the expiration of the time set out in subclause (i), if the court is satisfied that it is in the interests of justice to do so

[16] The Chambers judge found that there were two separate retainers of DES by the appellants. The *Chambers Decision* included the following findings of fact regarding the nature of the initial retainer, the second retainer, fees, and the settlement:

[197] Schachter is an experienced litigator who has focused his career on Aboriginal law. He first became involved with the respondents in 2013 when their then-lawyer, Slusar, sought his assistance. The initial retainer was limited, and Slusar remained as lead counsel. By that point, the Action [Claim] had been dormant for approximately 17 years. Canada had applied to strike the Action for want of prosecution, and Schachter assisted in successfully defending that application. Slusar was terminated in May 2014, and Schachter was retained as sole legal counsel. Each respondent passed a BCR [band council resolution] confirming his retainer. The financial terms of Schachter's retainer as sole legal counsel were silent.

[198] During the period when Schachter was working with Slusar, he charged \$375 per hour and his interim invoices were sent to Slusar. At some point, it became clear to Schachter that Buffalo River did not have the funds to support the litigation. Chief Byhette asked Schachter not to abandon them despite their lack of funds. Schachter agreed and advised Chief Byhette that he sought a fair and reasonable fee, but they would worry about that at the end.

...

[201] The respondents communicated their desire to achieve a collective settlement of \$60 million to resolve the Action. Schachter sought instructions to seek a \$5 million counsel fee for his legal fees from Canada.

[202] The respondents again instructed Schachter to move towards a trial. Trial dates were rescheduled for March 2020, and the trial preparation began. Eventually, on August 28, 2019, Canada advised it had a mandate to settle the Action. At some point before mediation, Canada offered to settle the Action for \$65 million. Mediation dates were set for October 3 and 4, 2019, and Schachter, Lewis, and the respondents' representatives met on October 2, 2019, to strategize and prepare.

[203] On October 2, 2019, the respondents instructed Schachter and Lewis to negotiate a settlement of \$80 million. Eventually, Canada offered \$86.5 million to settle the Action, and the respondents accepted the offer.

[17] Neither of the parties asserted that the alleged oral agreement to pay a \$5 million dollar counsel fee upon obtaining a net settlement of \$60 million was enforceable as a stand-alone contract. However, contrary to Birch Narrows's position that only the hourly rates as billed formed the legal fees owed to DES, the Chambers judge determined that the retainer included a further counsel fee. She then undertook an assessment of the factors set out in *Yule v Saskatoon (City)*, 1955 CanLII 186, 16 WWR 305 [Yule], *Zipchen v Bainbridge*, 2008 SKCA 87 [Zipchen], and *McLean v Canada*, 2019 FC 1077 [McLean], to determine if the \$5 million counsel fee was fair and reasonable and, therefore, also owed to DES from the appellants. Those non-exhaustive factors, as expressed by the Chambers judge, were as follows: "(a) results achieved; (b) risk undertaken; (c) time expended; (d) complexity of the issue; (e) importance of the litigation to the plaintiffs; (f) the degree of responsibility assumed by counsel; (g) the quality and skill of counsel; (h) any relevant agreement between lawyer and client; and (i) fees in similar cases" (*Chambers Decision* at para 211).

[18] Rule 11-23 of *The King's Bench Rules*, as noted by the Chambers judge, confirms that the assessor of a legal account shall consider these factors. These factors have also been expressed, albeit in a slightly different formulation, in the commentary for Rule 3.6-1 of the *Code of Professional Conduct for Lawyers* of the Law Society of Saskatchewan.

[19] The Chambers judge examined each of these factors in detail, with reference to the evidence. I will simply summarize her bottom-line findings. She found that the results exceeded the appellants' expectations and were described by all witnesses as very good or excellent. DES charged at a reduced hourly rate and undertook significant risk. Substantial amounts of time were expended by DES in prosecuting, negotiating, and settling the matter. The Claim was complex throughout. It was uncontroverted that the issues were of great significance to the appellants. There were substantial factual and legal obstacles to overcome, which required DES to take numerous steps and to shoulder a high degree of responsibility to "salvage the action and pursue an acceptable resolution" (*Chambers Decision* at para 242). Mr. Schachter also brought a high level of skill to bear as lead counsel.

[20] Continuing in her analysis of the factors, the Chambers judge also examined whether there was any relevant agreement between DES and the appellants. In this regard, she found that “the topic of DES’ legal fees was discussed on numerous occasions prior to the mediation”, “the respondents and Schachter discussed their goal of achieving a settlement of \$60 million, and if successful, Schachter would receive a counsel fee of \$5 million”, and “he was instructed to seek \$5 million in legal fees from Canada and that he did so” (at para 260). The Chambers judge further found that “Schachter offered to lower his counsel fee to \$4 million to achieve a settlement with Canada and to ensure the respondents were satisfied with the result” (at para 262).

[21] Turning to the remaining factors, the Chambers judge found that a wide range of fees may be fair and reasonable, depending on the facts of each case. She compared the case at hand to several others that were brought to her attention. Ultimately, after considering all the factors and conducting a further analysis, the Chambers judge concluded that a counsel fee of \$4 million, inclusive of all outstanding fees and disbursements, would be fair and reasonable. She ordered the appellants to pay that amount to DES, with leave to speak to costs. This was a reduction of \$1,013,461.18 from the amount claimed by DES.

IV. ISSUES

[22] The following issues arise in this matter:

- (a) Did the Chambers judge err by admitting and considering the expert evidence of Mr. Scott?
- (b) Did the Chambers judge err by assessing the legal fees based on the *Yule–Zipchen* factors or, in other words, on a quantum meruit basis?
- (c) Did the Chambers judge err by considering the oral agreement regarding legal fees?
- (d) Did the Chambers judge err by finding that \$4 million was a fair and reasonable amount for the counsel fee?

V. ANALYSIS

A. Expert opinion evidence of Mr. Scott was admissible

[23] Each party tendered the evidence of an expert witness regarding the fairness and reasonableness of the counsel fee. Birch Narrows objected to the admission of the evidence of DES's expert, Mr. Scott. In its written submissions on appeal, it maintains that objection, asserting that the Chambers judge erred by accepting an opinion which had the effect of "providing an air of legitimacy to what was obviously a ridiculous fee demand". Specifically, Birch Narrows contends that the Chambers judge erred by disregarding its objections to the admissibility of Mr. Scott's evidence, which were as follows:

- (a) Mr. Scott's opinions were not outside the experience or knowledge of a judge and, therefore, lacked the threshold of necessity to justify their admissibility;
- (b) Mr. Scott was opining on domestic law and drawing legal conclusions about the within proceeding, which were inadmissible; and
- (c) Mr. Scott did not have adequate training, experience, or expertise (or all three) in the relevant area of legal fees and Indigenous law litigation and, as such, did not meet the threshold requirements of a qualified expert.

As mentioned, Birch Narrows repeats this threefold set of objections on appeal.

[24] DES argues that absent an error of law, decisions regarding the admissibility of expert evidence are discretionary and must be accorded significant deference. It contends that the Chambers judge referenced the correct legal framework and did not otherwise err in her consideration of the admissibility of Mr. Scott's evidence.

[25] The standard of review for this ground of appeal was described in *R v Whitehawk*, 2024 SKCA 95, leave to appeal to SCC refused 2025 CanLII 25310, as follows:

[101] A determination about whether an expert's opinion is properly admissible involves a question of law insofar as the proper articulation and application of the governing legal test is concerned and, as such, it is reviewable for correctness. However, because of the factual and case-specific nature of determinations concerning the admissibility criteria set out in the *White Burgess* test, a trial judge's decision to admit or reject expert evidence is generally owed deference on appeal, absent an error in principle or a material misapprehension of the evidence ([references omitted]).

[26] The Chambers judge did not err in determining the test for the admissibility of expert evidence. She correctly referenced the two-step process set out in *R v Mohan*, 1994 CanLII 80, [1994] 2 SCR 9 (SCC), and *White Burgess Langille Inman v Abbot and Haliburton Co.*, 2015 SCC 23. That framework was described thus in *White Burgess*:

[23] At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four *Mohan* factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose: [references omitted]. Relevance at this threshold stage refers to logical relevance: [references omitted]. Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement: [references omitted].

[24] At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka J. spoke of the “reliability versus effect factor” (p. 21), while in *J.-L.J.* [2000 SCC 51], Binnie J. spoke about “relevance, reliability and necessity” being “measured against the counterweights of consumption of time, prejudice and confusion”: para. 47. Doherty J.A. summed it up well in *Abbey* [2009 ONCA 624], stating that the “trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence”: para. 76.

[27] Birch Narrows asserts that the Chambers judge erred in her application of that two-step process. I would first deal with Birch Narrows’s assertion that Mr. Scott did not have adequate training, experience, or expertise in the area in which he was tendered as an expert. Notwithstanding Birch Narrows’s lengthy submissions regarding its view that Mr. Scott was not qualified to provide an expert opinion, the Chambers judge found that Mr. Scott had the necessary qualifications to opine on the issues at hand, and I have identified no basis to interfere with that conclusion. Her determination in this regard was well supported by the following reasons, which do not reveal an error (*Chambers Decision*):

[25] Mr. Scott is the former Chief Justice of the Court of Appeal for the province of Manitoba. He is the independent chairperson of the Discipline Committee of the Law Society of Manitoba, a litigator, arbitrator, and mediator. He is counsel with the civil litigation firm Hill Sokalski Walsh in Winnipeg, Manitoba, and prior to being appointed, he practiced as a civil litigator and was elected as a Bencher and President of the Law Society of Manitoba.

[26] Mr. Scott’s curriculum vitae is attached as Exhibit A to his affidavit filed on September 8, 2022 [Scott Affidavit]. He was appointed to the Manitoba Court of Queen’s Bench in 1985, and appointed Associate Chief Justice of the Manitoba Court of Queen’s Bench a few months later. He was appointed Chief Justice of Manitoba July 31, 1990. He was a member of the Canadian Judicial Council from 1985 until he retired in 2013.

[27] Mr. Scott acted as chairperson of the governing body of federally appointed judges, the Judicial Independence Committee of the Canadian Judicial Council. His judicial and legal experience is extensive. Mr. Scott certified that he knows the duty of expert witnesses under *The King's Bench Rules* 5-37(1) and (2), and prepared his report in compliance with *The King's Bench Rules*.

[28] Birch Narrows challenged Mr. Scott in respect of his experience in Aboriginal law. Mr. Scott has never worked as lead counsel on an Aboriginal law file. In response, Mr. Scott noted he has the advantage of experience and understanding of litigation and the different fee arrangements in various matters.

[29] While there may be some intricacies in practicing Aboriginal law, Birch Narrows' objection to Mr. Scott's lack of experience in Aboriginal law is narrow. Fairness and reasonableness apply to a lawyer's fees regardless of the type of law. Mr. Scott purports to give opinion evidence on the time expended and complexity of the litigation, and this is reasonable.

[30] I believe Mr. Scott's expert opinion is relevant and removes Schachter from a self-serving position arguing against his own client. Given that there is no precise calculation of appropriate legal fees, Mr. Scott's evidence may assist the Court in that his opinion will encompass a broad range of litigation and other experience. His current role as independent chairperson of the Discipline Committee of the Law Society of Manitoba allows him insight into the complexities of legal billing and the billing pitfalls that plague lawyers.

[28] Thus, the Chambers judge qualified Mr. Scott to provide expert evidence on the topics on which he opined.

[29] Secondly, Birch Narrows argues that there was no need to have Mr. Scott's opinion because the area in which DES sought to tender it was not outside the experience or knowledge of a judge. On this aspect, the issues raised were matters that cannot be presumed to be encompassed by the experience or knowledge of a judge and could not be excluded on that basis. Canadian jurisprudence includes many cases where such evidence was admitted: see, for example, *Nathanson, Schachter & Thompson v Levitt*, 2006 BCSC 730 at paras 89-90, and *Pedlow v Hellner*, 2013 BCSC 1038 at paras 137-140. I would further note that deference is owed to the Chambers judge's determination that the evidence was necessary in the matter at hand: *R v Ukabam*, 2024 SKCA 15 at para 168. There is no error revealed in this regard.

[30] Lastly, Birch Narrows asserts that the Chambers judge erred by accepting Mr. Scott's opinion evidence, characterizing it as "nothing more than a legal opinion or argument masquerading as expert opinion". It argues that the opinion was "written as though it was a judgment of the Court" as opposed to providing an expert opinion based on the relevant facts. However, this was not the view of the Chambers judge who was attuned to its proper purpose and did not use it as a template for her judgment: see paragraphs 19, 20, 22, and 31 of the *Chambers Decision*.

[31] An overall reading of the *Chambers Decision* demonstrates that the Chambers judge did not simply adopt Mr. Scott's opinion; but instead, she engaged in a full analysis of the relevant factors and reached her own independent conclusions. The judge accepted Mr. Scott's opinion as evidence. The judge did not treat it as a disguised argument, and I do not see any basis to conclude that it was. The evidence Mr. Scott provided was also relevant. It was not properly subject to exclusion on the basis of Birch Narrows's view that it was "a shallow legal analysis" tendered by DES "hoping that the Court would merely adopt the assessment rather than engage in an independent inquiry; which is sadly what happened". It was, instead, accepted and used as one piece of evidence in a comprehensive analysis of the entirety of the case, with weight assigned to it as the Chambers judge determined to be appropriate.

[32] A full examination of the *Chambers Decision* reveals that the evidence provided by Mr. Scott was far from determinative of the primary question of whether the counsel fee was fair and reasonable. In this regard, see the comments on Mr. Scott's evidence at paragraphs 33 to 36, 214, 236, 246, and 268 of the *Chambers Decision*, which, among other things, reflected Mr. Scott's opinion in relation to the results achieved, the importance of the action, its complexity, and the skill displayed by Mr. Schachter. At the same time, while Mr. Scott's evidence was of some assistance, it was only one relatively minor piece of the overall analysis, and it did not usurp the role of the Chambers judge. This is reinforced by the fact that the Chambers judge did not ultimately accept Mr. Scott's opinion that a \$5 million counsel fee was fair and reasonable in the circumstances of this matter. No error is revealed by the admission of the evidence on the basis of the assertion that it was merely a legal opinion dressed up as an expert report.

[33] This ground of appeal cannot be given effect.

B. Quantum meruit analysis was appropriate

[34] Birch Narrows submits that the retainer agreement provided that DES's fair and reasonable legal fees would consist only of the hourly fees that were billed monthly. In written submissions, it argues that the Chambers judge failed to engage with "the substantive factual and legal issues that this case posed, instead defaulting to a superficial quantum meruit analysis". Birch Narrows says that the hourly billing arrangement precluded an assessment of a fair and reasonable fee on a quantum meruit basis. It urges this Court to find that the amount owed to DES is \$13,461.18.

[35] DES contends that the Chambers judge found that a second retainer had come into effect and that a term of it was that DES would receive a fair and reasonable counsel fee over and above the hourly rates. Having made these factual finding, it submits that the proper course of action was to analyze the fee charged on a quantum meruit basis by applying the *Yule–Zipchen* factors.

[36] Birch Narrows’s assertion that it was an error for the Chambers judge to apply the *Yule–Zipchen* factors and conduct a quantum meruit analysis raises a question of law, which is reviewable on the standard of correctness. In addition, Birch Narrows asserts errors of fact, which are reviewable on the standard of palpable and overriding error. However, where a finding of fact is based on no evidence, a failure to consider relevant evidence, or a misapprehension of evidence, the resulting error is one of law, reviewable on the correctness standard: see *Housen v Nikolaisen*, 2002 SCC 33; *Brandt Properties Ltd. v Saskatoon (City)*, 2021 SKCA 19 at para 37, leave to appeal to SCC refused 2021 CanLII 54458; and *Yapi ve Kredi Bankasi Anonim Sirketi v Arslan*, 2026 SKCA 6 at para 28.

[37] As a starting point, I agree that a quantum meruit analysis would not apply for the purposes of assessing the propriety of an additional counsel fee if there is a retainer agreement that contains a term stipulating that the work is to be remunerated *only* on an hourly basis. That supposition is not in contention: see *Phillips Legal Professional Corporation v Vo*, 2017 SKCA 58 at paras 59-60. But that is not the situation that was found to exist here. In the matter at hand, the Chambers judge found that an additional counsel fee was to be paid over and above the hourly amounts billed to the appellants.

[38] Much of Birch Narrows’s submissions focus on evidence that is inconsistent with the facts found by the Chambers judge and, therefore, must be taken to have carried no weight in her fact-finding. It points to several pieces of evidence that the Chambers judge did not mention, which it asserts were material. The bulk of Birch Narrows’s arguments under this ground of appeal depends on this Court taking a different view of the evidence and relying on facts that run counter to those found by the Chambers judge based on the evidence as a whole. Absent a palpable and overriding error in the factual findings or a legal error, this Court is not permitted to engage in the exercise that Birch Narrows has suggested.

[39] The most crucial part of Birch Narrows's argument in this regard is its submission that there was only one retainer and it consisted of an hourly fee being charged with no provision for an additional counsel fee. This was the situation that was established when Mr. Schachter was initially retained and Mr. Slusar remained lead counsel. Birch Narrows says this arrangement never changed. However, to the contrary, the Chambers judge found that a new retainer arose after Mr. Slusar's services were terminated and DES took sole carriage of the matter.

[40] Despite numerous references to conflicting evidence, Birch Narrows has failed to establish palpable and overriding error in three crucial factual findings, which I summarize as follows:

- (a) a *second* retainer came into existence when DES took carriage of the Claim;
- (b) the hourly rates of lawyers from DES were billed at reduced rates under the second retainer; and
- (c) under the second retainer, a fair and reasonable counsel fee would be charged by DES to the appellants *over and above* the hourly billings (this term in the second retainer was not inserted for the first time at the mediation and was discussed, agreed to, and in existence long before the final settlement was being negotiated).

[41] Here, there was ample evidence upon which the Chambers judge could make these findings of fact, as summarized in the following paragraphs: 34, 43, 54, 55, 58, 60, 62, 65 to 79, 88 to 94, 98 to 99, 104 to 110, 113 to 120, 123 to 128, 133, 135, 140, 146, 152, and 161 of the *Chambers Decision*. The Chambers judge also extensively canvassed the evidence to the contrary. It is not the role of this Court to second-guess those determinations or to re-examine and re-weigh the evidence and arrive at a different set of facts. There is no palpable and overriding error in these findings.

[42] Birch Narrows further asserts that the Chambers judge erred in law by misapprehending or overlooking evidence. It points to numerous averments from its affidavits and documents, but this amounts to no more than an invitation for this Court to wade into the evidence and substitute its view for that of the Chambers judge.

[43] Birch Narrows is unable to establish that material evidence was ignored or misapprehended by the Chambers judge. The evidence it urges this Court to find as determinative simply provides instances of evidence that was not accepted in the face of other contradictory evidence.

[44] For example, Birch Narrows contends that the Chambers judge ignored a May 30, 2014, email from Mr. Schachter to Chief Byhette in which there is no mention of an additional fair and reasonable fee. It further asserts that the band counsel resolution also does not refer to such an additional fee (although it does not refer to hourly fees either). However, there are numerous averments in various affidavits that state there were such oral discussions and an agreement about an additional fee. It must be recalled that there is no requirement for a judge to summarize or refer to every piece of evidence placed before them: *A.M. v Ministry of Social Services*, 2020 SKCA 114 at para 81, and *R v Bramley*, 2009 SKCA 49 at para 39.

[45] Birch Narrows invites this Court pick and choose the evidence that supports its position and ignore the reality that the Chambers judge extensively canvassed the evidence and did not come to the factual conclusions that it urges upon us. However, there is no basis upon which this Court could interfere with the crucial findings of fact made by the Chambers judge, which I have set out in paragraph 40 of these reasons. Birch Narrows has not established that the Chambers judge overlooked or misapprehended any material evidence in arriving at her findings of fact, nor has it demonstrated palpable and overriding error.

[46] With those factual findings in place, it was incumbent on the Chambers judge to engage in a quantum meruit analysis by applying the *Yule–Zipchen* factors, absent some principle that otherwise excluded or modified such an assessment. Here, the analytical framework applies because the analysis of the various factors is conducted with the purpose of protecting *clients* through allowing access to a process where legal fees can be assessed to ensure that they are fair and reasonable. First Nations are entitled to, and subject to, this same process. In this regard, see *Cowessess First Nation No. 73 v Phillips Legal Professional Corporation*, 2018 SKQB 156 at paras 87-89, *aff'd* 2020 SKCA 16, leave to appeal to SCC refused 2020 CanLII 50443, and *Maurice Law, Barristers & Solicitors v Sakimay First Nation*, 2017 SKCA 36 [*Maurice Law*].

[47] As a final point, Birch Narrows argues that each monthly bill was intended to be final, which precludes a *Yule–Zipchen* analysis. It relies on *Samson Cree Nation v O’Reilly & Associés*, 2014 ABCA 268, for this proposition. However, this argument does not account for the fact that the additional counsel fee was not billed monthly and only appeared on the final account, which was not paid. Again, Birch Narrows’s argument on this issue relies on a view of the facts that was not found by the Chambers judge. The potential issue of not being able to challenge an invoice because of finality does not arise in the circumstances at hand.

[48] A *Yule–Zipchen* analysis was appropriate because there was no other reasonable way to determine whether the additional counsel fee charged by DES in its final billing was fair and reasonable. This ground of appeal cannot be given effect.

C. Consideration of an oral agreement was appropriate

[49] The parties agree that a contingency fee agreement must be in writing to be enforceable: see s. 64(1) of the *LPA*, Part 19 of the *Law Society of Saskatchewan Rules* (2020), and s. 3.6-2 of the *Code of Professional Conduct for Lawyers* of the Law Society of Saskatchewan. In its factum, Birch Narrows further and strenuously asserts that the “agreement to a multi-million dollar bonus” was also unenforceable because it was unfairly obtained. However, DES is not trying to enforce a stand-alone oral contract to pay a \$5 million fee. It agrees that s. 64(1) precluded such a result. DES applied for an assessment of whether its claimed counsel fee of \$5 million was fair and reasonable and, if not, to have one imposed that was fair and reasonable. The stand-alone enforceability of the oral agreement is not in dispute. All that potentially remains of this ground of appeal is the question of whether the agreement could be taken into account as one of the *Yule–Zipchen* factors. This is a question of law, subject to review for correctness.

[50] While many of Birch Narrows’s arguments on this issue overlap with the previous ground of appeal and mainly address the non-issue of the enforceability of the oral agreement as a stand-alone contract, part of its argument appears to be an assertion that it was an error to consider the oral agreement at all because it was unfairly obtained. However, most of this argument was focussed on enforceability rather than on whether the agreement could be considered here as one of the *Yule–Zipchen* factors. DES contends that the Chambers judge made no error in her identification or application of the factors.

[51] Simply because an agreement is unenforceable – resulting from a statutory requirement that it be in writing – does not mean that it cannot be considered in a *Yule–Zipchen* analysis. Birch Narrows provided no authority otherwise, and there is no principled reason why the expectations, understandings, and agreements of the parties should not be considered in a quantum meruit analysis. An examination of the legal fees under assessment will automatically consider the fairness of any such agreement because the goal of the exercise is to determine whether the fees charged are *fair* and reasonable. It is open to a judge to put little to no weight on an agreement that is unfair and arrive at a fair and reasonable determination of fees that closely resembles such an agreement or bears no resemblance at all to it. The weight to be assigned to such a factor remains to be determined in each case because it is one factor among many. But, as a matter of law, it can be considered in a *Yule–Zipchen* analysis. There is no room for appellate interference on this ground of appeal.

D. \$4 million was a fair and reasonable amount

[52] While my reasons have referred to the *Yule–Zipchen* factors up to this point, I note that the considerations are set out slightly differently in *Yule* than they were in *Zipchen*, which were also slightly different than the factors articulated in the *Chambers Decision* on the basis of *McLean*. Neither party has asserted any issue with the formulation of the factors by the Chambers judge. In any event, the various formulations are substantially the same. As noted earlier, Birch Narrows maintains that it was an error to conduct a quantum meruit analysis and apply any of the factors at all, but it is not quibbling with the distinctions between *Yule*, *Zipchen*, and *McLean*.

[53] In the event that this Court does not accept its earlier arguments regarding the nature of the retainer, Birch Narrows critiques the Chambers judge’s findings on some of the *Yule–Zipchen* factors. It asserts the *Chambers Decision* contains “major misapprehensions of the evidence” and “faulty analysis” and “is so clearly wrong that it amounts to an injustice”. Overall, Birch Narrows submits that “for a lawyer to risk nothing, getting paid along the way, and then collect a multi-million dollar bonus upon conclusion is outrageous and defies basic common sense”. Birch Narrows does not engage with the issue of what amount for an additional counsel fee might be fair and reasonable because of its steadfast position that no additional counsel fee should be payable at all.

[54] In addition, Birch Narrows submits that there is no automatic entitlement to charge a bonus at the conclusion of a matter on the basis of quantum meruit. This argument misses the mark. The Chambers judge determined that DES was *entitled* to an additional counsel fee and that it was her job to decide whether the \$5 million charged on this basis was fair and reasonable and, if not, to determine the amount that was. There is no indication in the *Chambers Decision* that this exercise involved an assumption on the part of the Chambers judge that obtaining an excellent result automatically entitled DES to a success bonus.

[55] DES says that the Chambers judge applied the appropriate factors to her findings of fact and made no error in determining that a fair and reasonable counsel fee was \$4 million. It submits that there is no room for this Court to disturb this discretionary and fact-dependent decision.

[56] In reviewing this ground of appeal, findings of fact are subject to the standard of palpable and overriding error, as noted above. A determination of whether the fee was fair and reasonable upon an application of the *Yule–Zipchen* factors is a discretionary decision subject to a deferential standard of review. This standard of review was discussed in *Maurice Law* at para 67 and *Kot v Kot*, 2021 SKCA 4 at para 20.

[57] Birch Narrows seeks to recharacterize the effect of each factor by critiquing the Chambers judge’s factual findings. It calculates the hourly rate as \$1,800 per hour, when the \$4 million counsel fee is factored in, and provides its own analysis of the situation faced by DES when it had carriage of the Claim. Birch Narrows attempts to categorize the Chambers judge’s preference for evidence that did not support its position as a misapprehension of the evidence, a disregard of the evidence, and a failure to acknowledge material facts. It concentrates its submissions on the risk faced by DES in the conduct of the Claim and, pervasively throughout its submissions, on the alleged oral agreement.

[58] Birch Narrows asserts that the Chambers judge erred in her consideration of the risk undertaken by DES and offers its own conclusion that there was no risk to DES at any time. It argues that the only time that DES carried a *significant* balance for fees and disbursements was after Canada had admitted liability and guaranteed a \$4 million minimum payment as damages to be paid on day one of any trial if the claim was not settled. Birch Narrows admits that the account balance was escalating in 2013 but notes it was fully paid off by July of 2014. The account balance

was paid, again, by April of 2015, after rising again. It argues that it was only after this point, when Canada had admitted liability, that DES carried a continuous significant balance for fees and disbursements. Further, Birch Narrows submits that the Chambers judge failed to recognize that the First Nations were using funds received from Canada to pay legal fees over the course of the file. Overall, in its view, there was never any financial risk to DES.

[59] However, all of these assertions rely on taking a view of the evidence urged by Birch Narrows, which the Chambers judge did not share. It was her conclusion that there was significant financial risk to DES. In this regard, she found as follows (*Chambers Decision*):

[216] The risk undertaken by Schachter and DES includes carrying significant disbursements and not receiving full payment for their legal fees. While A.J. indicated that Birch Narrows had planned to obtain financing to fund litigation, this did not occur until 2019. By that point, Schachter had carried the file, had done the work, and had incurred significant legal fees and disbursements since 2013.

[217] Schachter received payment or partial payment for his legal fees with exploratory meeting funds paid by Canada to the respondents. Until Canada agreed to engage in the exploratory discussions in 2015, it was unclear if Schachter would receive any interim payment towards his legal fees and disbursements.

[218] In addition, Schachter engaged the services of other lawyers from DES, including Lewis, to assist him. Lewis attested, and I accept, that Schachter directed her to bill her time at a lower hourly rate than she would typically charge. Lewis, and ultimately DES, took on the risk that Schachter and Lewis may never be fully compensated for their time working on the Action [Claim].

[219] Schachter did not know how long it would take for the Action to be resolved by a settlement or a trial decision. This unknown time increased the risk of DES carrying unpaid fees and disbursements for an unknown period. Schachter risked receiving compensation at a reduced hourly rate, and even at reduced rates, it wasn't clear that the invoices for legal fees would be fully paid.

[220] Schachter knew he might never recover the counsel fee and full payment for his services, yet he continued to pursue the Action on the respondents' behalf. I view this as significant and do not accept Birch Narrows' argument that DES was paid in full along the way.

[221] In its argument, Birch Narrows relied on the decision *Tallcree First Nation v Rath & Company*, 2022 ABCA 174 [*Tallcree*]. Mr. Scott states that *Tallcree* is distinguishable in that the Settlement of the Action was larger, Schachter acted for a longer period, took on significant risk, and achieved a "remarkable settlement for his clients".

[222] The risk contemplated is not the ordinary risk a lawyer faces of not being paid as remuneration on an hourly fee basis, which is not a guarantee of fair and reasonable compensation (*Gottfriedson v Canada*, 2019 FC 462 [*Gottfriedson*]; and *Tk'emlúps te Secwepemc First Nation v Canada*, 2021 FC 1020 [*Tk'emlúps*]). The fees also reward effectiveness, among other things, in addition to time spent.

[223] I found the *Tk'emlúps* decision informative as counsel billed at a reduced hourly rate and was limited to those reduced rates if unsuccessful. The Court determined that a counsel fee was “a well-earned premium” (*Tk'emlúps* at para 39). Schachter argued that he and Lewis billed at reduced hourly rates and took on the same risk that they would be limited to those reduced rates if unsuccessful. I found Lewis’ testimony in this regard to be compelling. I accept that they would have increased their hourly rates over time if there was no agreement in place. I have some difficulty accepting that Lewis’ rate, as a partner in a law firm, and a six or seven year lawyer’s usual rate, was \$215 per hour in 2019.

[60] All of these findings have a basis in the evidence. Birch Narrows has not established that the Chambers judge ignored or misapprehended any material evidence in finding that DES took on significant risk. Absent such a legal error, these are findings of fact that cannot be disturbed without the presence of palpable and overriding error. No such error exists here. Birch Narrows is, in effect, asking this Court to re-weigh the evidence of risk and come to a different conclusion. That is not our role.

[61] Regarding the disputed oral agreement, the Chambers judge used its existence as one of the factors when considering the fairness and reasonableness of the additional counsel fee. In this regard, she made the following findings:

[260] The preponderance of evidence suggests that the topic of DES’ legal fees was discussed on numerous occasions prior to the mediation. I accept that between 2015 and 2019, the respondents and Schachter discussed their goal of achieving a settlement of \$60 million, and if successful, Schachter would receive a counsel fee of \$5 million. I further accept that he was instructed to seek \$5 million in legal fees from Canada and that he did so. I do not accept that the first time the counsel fee was raised was during the mediation discussions but that the counsel fee was discussed in greater detail before and during the mediation.

[261] The only witness present who did not recall these discussions was Chief [Jonathon] Sylvestre. Chief Sylvestre’s evidence was less reliable than most others given his lack of memory on key issues.

[262] Schachter offered to lower his counsel fee to \$4 million to achieve a settlement with Canada and to ensure the respondents were satisfied with the result. After consulting with the respondents, he negotiated an additional \$1 million from Canada and gave up \$1 million of his counsel fee so the matter would settle. All witnesses present for the mediation agreed that this discussion took place, that there was a dispute over the allocation of funds, and that Schachter offered to reduce his counsel fee to \$4 million to secure a settlement.

[263] In my view, the evidence supports that the respondents agreed to pay Schachter a \$5 million counsel fee. They instructed Schachter to seek payment of the counsel fee from Canada, and he was successful in doing so.

[264] Chief [Jonathon] Sylvestre and Chief Campbell swore affidavits that were filed on the Federal Court file T-2111-96. Both affidavits in paragraph 14e state that \$4 million of the Settlement was to be paid to DES (see Joint Book of Documents, page 0116 for Birch Narrows and page 0228 for Buffalo River). Why would Chief Sylvestre and Chief Campbell swear to this if they had not agreed to it?

[265] Presumably, the information included in Chief Sylvestre's and Chief Campbell's affidavits filed on Federal Court file T-2111-96 was communicated to their respective Nations and accepted in the ratification votes. Based on the motion filed and the affidavits of Chief Sylvestre and Chief Morrison sworn on February 18, 2021, the Settlement was approved by Canada pending ratification.

[266] Birch Narrows argued that there could be no agreement to pay the counsel fee because it was not confirmed or ratified by BCR [band council resolution]. I take issue with this for three reasons. First, Chief Sylvestre and others were on the negotiating committee instructing Schachter throughout. Elder Thomas, a Birch Narrows Elder, was clear that they agreed to pay Schachter the \$5 million counsel fee. Buffalo River's Elder Freddie shared a similar sentiment. Second, Dorothy [Sylvestre] may have mentioned the requirement of a BCR specific to the legal fees paid once. Otherwise, there is no evidence that a separate BCR was required or considered for a \$4 or \$5 million counsel fee. Finally, a BCR was passed, and the Settlement was accepted by 98% of the members. As noted above, the Settlement included the counsel fee payable to DES as confirmed by Chief Sylvestre and Chief Campbell.

[62] While this agreement was not enforceable as a stand-alone contract, it was an important factor to be taken into account. In this regard, I note that the Chambers judge had summarized the evidence of two of the persons immersed in the matter for the First Nations over the life of DES's involvement with the Claim as follows:

[111] Elder Freddie is an Elder with the respondent, Buffalo River, and was a member of the instructing team for the settlement meetings with Canada. ...

[112] Elder Freddie attended all but one of the strategy and planning meetings. He avers that, since approximately 2016, the respondents' goal was to collectively receive \$60 million in compensation to settle the [Claim].

[113] Elder Freddie confirmed numerous occasions when the respondents agreed to pay Schachter \$5 million for DES' work if Schachter could collectively achieve a \$60 million settlement. Elder Freddie states that the \$5 million was a counsel fee but notes that he viewed it more like a bonus for achieving the outcome desired.

[114] Elder Freddie avers that the respondents were happy with the agreement to pay DES the counsel fee because the respondents could not pay DES for their work along the way.

...

[120] Elder Freddie stated that the leadership of each respondent promised Schachter that they would pay him a \$5 million counsel fee if he secured a \$60 million settlement. He further states that when Schachter later offered to lower the counsel fee to \$4 million, the respondents promised to pay him the \$4 million counsel fee instead. He states, "In our culture, oral promises are solemn".

...

[122] Elder Thomas is an Elder with the respondent, Birch Narrows. He confirms he was a part of the team that attended the settlement meetings with Canada and participated in all strategy and planning meetings and the settlement meetings.

[123] Elder Thomas attests to the agreement to pay Schachter a \$5 million counsel fee if he could negotiate a collective settlement of \$60 million. Elder Thomas states that Schachter was instructed to negotiate a “top-up” in addition to the \$60 million for his legal fees. He acknowledges that Birch Narrows did not have the funds to pay for the legal fees and disbursements over the years and along the way.

...

[128] Elder Thomas avers that the respondents solemnly promised to pay Schachter \$4 million as a counsel fee. He explained that promises are dealt with orally in Indigenous culture and noted, “Ours is a culture of oral history”. He further testified that when they make a promise and give their word, the promise is not written down. Instead, they give their word, pray, and smudge.

[129] Elder Thomas testified that Schachter did a great job and that the Settlement was very important to Birch Narrows.

[63] In these circumstances, there is no basis to suggest that the oral agreement was given inappropriate weight or factored into the overall assessment in an improper manner.

[64] Birch Narrows has not asserted error in the Chambers judge’s assessment of the other *Yule–Zipchen* factors. This included a finding that the results achieved were excellent and exceeded the First Nations’ expectations, that significant time was expended by DES in producing high quality work on the Claim, that the Claim was complex from the start, that the Claim was crucially important to the First Nations, that DES took on a high level of responsibility to salvage and pursue the Claim, and that Mr. Schachter brought a high level of skill and quality to the prosecution of the Claim.

[65] The Chambers judge did not simply accept DES’s asserted claim to a specific amount for a counsel fee. She extensively analyzed the appropriate factors, took them all into account, and exercised her discretion to determine that a fair and reasonable fee was \$4 million, which, as noted, was \$1,013,461.18 lower than the amount billed by DES. There is no scope to interfere in this discretionary decision.

VI. CONCLUSION

[66] The appeal is dismissed, with costs payable from Birch Narrows to DES for the appeal, calculated on column 4 of the Tariff of Costs. There are no costs awarded in relation to Buffalo River.

“Tholl J.A.”

Tholl J.A.

I concur.

“Caldwell J.A.”

Caldwell J.A.

I concur.

“Drennan J.A.”

Drennan J.A.