Federal Court  Cour fédérale

Date: 20150106

Docket: T-494-08

Citation: 2015 FC 14

Ottawa, Ontario, January 6, 2015

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

TPG TECHNOLOGY CONSULTING LTD.

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS
(Costs)

[1] At paragraph 214 of the Judgment and Reasons, I wrote:

> Although TPG proved unfairness, it was not successful in this action and, failing any relevant offer to settle, the Crown will be awarded costs. As indicated at the close of trial, the Court will retain jurisdiction on the issue of costs, if the parties are unable to reach agreement.

[2] The parties were unable to agree on costs and have filed submissions with the court. They do agree that it is preferable that the court make a lump sum award of costs rather than have the costs taxed.

[3] The Plaintiff submits that the court should decline to award costs. I agree with the Defendant that the issue of entitlement to costs has already been determined. The Crown is entitled to its costs; the only issue outstanding is the quantum.

[4] The Crown submits that it ought to be awarded costs beyond the Tariff and calculated at 60% of actual fees on the basis of (a) one senior counsel and one junior counsel for pre-trial procedures, and (2) two senior counsel and one junior counsel for the trial, less the costs the Plaintiff is entitled to recover from the summary judgment motion, plus disbursements. If allowed, that would represent a payment of $1,065,100.60. It submits that such an increased award of costs is appropriate because:

i. The Crown advanced a written Offer to Settle on April 24, 2014, offering a dismissal of the action without costs, which was not accepted by the Plaintiff;

ii. "From 2008 to 2014, the Plaintiff advanced broad and sweeping allegations of bad faith, misconduct, bias, fraud and unconscionability against the Crown" which were abandoned prior to trial;

iii. "Given the breadth of the claim and the severity of the allegations, the production and discovery process was extensive" amounting to 52½ hours over 17 days;

iv. "As a result of the Plaintiff's repeated amendments to its allegations, the Crown was forced to amend its Statement of Claim twice, and 14 separate case and pre-trial conferences were needed to prepare this matter for trial;"

v. The court found that the Plaintiff ought to have engaged the Canadian International Trade Tribunal rather than commence this litigation; and

vi. "The Plaintiff increased the length and costs of the trial by leading extensive evidence to which the Crown was forced to respond, and which was irrelevant to the Plaintiff's actual claim – a breach of Contract A."

[5] The Plaintiff submits that in abandoning many of its allegations, it shortened the trial and made an earlier trial date possible. It submits that it is inappropriate that the Crown now seek its costs of the abandoned allegations when it consented to that course of action. I do not accept that submission. The scope of the action was always a matter fully within the control of the Plaintiff and although it was admirable that it abandoned aspects of the claim to be in a position to secure an earlier trial date, its reasons were its own.

[6] It also alleges that an order for escalated costs is inappropriate absent abusive conduct, which has not been found here. I agree that there is no such conduct; however, that is but one situation where an increased costs award is appropriate.

[7] It further alleges that many of the pre-trial proceedings were required because of the Crown's resistance to disclose and produce records and notes that it "was successful in all its

requests." I note that this litigation was hard-fought by both parties and this allegation cuts both ways as pre-trial procedures also dealt with some of the issues later abandoned by the Plaintiff.

[8] The Plaintiff also submits that discovery was auxiliary to the Crown's motion for summary judgment and notes that it was awarded its costs of that proceeding in any event of the cause. Even if true, the discovery process also advanced and was a part of the trial proceeding. It would not have been done away with had the motion for summary judgment not been brought.

[9] The Plaintiff also submits that the offer to settle is irrelevant because it is not a true offer but represents an offer to the Plaintiff to capitulate. I disagree. Although delivered just prior to trial, it represented a substantial financial saving to the Plaintiff in the costs incurred to that date by the Crown in defending the litigation.

[10] Lastly, it says that the case raised several new and important issues and says that it "has brought a case which has provided guidance in the law of benefit to the public and indeed the Government of Canada."

[11] The Crown has provided a summary of its fees under four scenarios (and applying Rule 420 for items after the offer to settle was delivered on April 24, 2014) as follows:

Tariff Column IV	Tariff Column V	Partial Indemnity 60%	Full Indemnity
$500,500.00	$633,220.00	$954,297.60	$1,590,496.00

[12] I have considered Rule 400 in determining an appropriate award of costs. The Plaintiff claimed $250,000,000 and the Crown was entirely successful in defending the case. The issues

raised were complex, even in the truncated form at trial, and 21 days were required to hear all of the evidence and submissions. There is no doubt that the teams representing each party were required to spend a considerable amount of time and do a considerable amount of work preparing the case for trial and conducting the trial. In this respect, each party had a team of lawyers, paralegals and law clerks, and it was obvious to the court that their efforts resulted in a smoother and faster trial. The court has also considered the offer to settle, which is found to be a valid offer. Substantial fees had been incurred by the Crown at the date it was delivered and an offer to forego those fees in exchange for dismissal of the action constituted a considerable financial offer. Lastly, the court must consider the actions of the parties. Although the trial was shortened by the Plaintiff's abandonment of many of its allegations, I find that to be of little relevance given that it was done only after years of litigating those issues.

[13] In my view, a fair and reasonable assessment of costs in light of the parties' submissions and evidence is to award the Crown its costs at Column IV ($500,500.00) taking into account the offer to settle, less the costs it owes the Plaintiff arising out of its summary judgment motion and appeal ($46,500.00), plus its disbursements ($157,303.16). Accordingly, the Crown is awarded costs of $611,303.16.

ORDER

THIS COURT ORDERS that the Defendant is awarded its costs in the amount of $611,303.16.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-494-08
STYLE OF CAUSE:	TPG TECHNOLOGY CONSULTING LTD. v HER MAJESTY THE QUEEN
PLACE OF HEARING:	OTTAWA, ONTARIO
DATES OF HEARING:	MAY 12-15, 20-22, 26-29, 2014 JUNE 02-04, 09-11, 17-18, 25-26, 2014
ORDER AND REASONS:	ZINN J.
DATED:	JANUARY 6, 2015

APPEARANCES:

Peter N. Mantas Leslie J. F. Milton Alexandra Logvin Sean Stephenson Leslie E. Wilbur	FOR THE PLAINTIFF
Peter J. Osborne Monique J. Jilesen Brian Harvey	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Fasken Martineau DuMoulin LLP Barristers and Solicitors Ottawa, Ontario	FOR THE PLAINTIFF
Lenczner Slaght Royce Smith Griffin LLP Barristers and Solicitors Toronto, Ontario	FOR THE DEFENDANT