Federal Court  Cour fédérale

Date: 20160420

Docket: T-193-15

Citation: 2016 FC 445

BETWEEN:

SHANE CRAWLER

Applicant

and

WESLEY FIRST NATION

Respondent

REASONS FOR ASSESSMENT OF COSTS

[1] On November 16, 2015, the Court declared the application for judicial review well founded, awarding costs to the Applicant. Upon receipt of the Applicant's Bill of Costs on December 14, 2015, directions were issued informing the parties that the assessment of costs would proceed in writing and of the deadline to file their representations.

[2] In the written submissions in response to the Bill of Costs, the Respondent argues that the Items claimed should be assessed at the mid-point of Column III to Tariff B of the *Federal Courts Rules* (the Rules) and that the circumstances of this matter do not warrant the maximum

number of units claimed. Counsel submits that, pursuant to subsection 400(3) of the Rules, the following factors should be taken into consideration: (a) the result of the proceeding, (b) the amount claimed and the amount recovered and (k) whether any step in the proceeding was unnecessary. With regard to the arguments discussing these factors, counsel alleges that in the decision of November 16, 2015, the Court "granted the Application but specifically chose to exercise its discretion not to award the Applicant any remedy". Counsel further argues that the monetary value of the Application was not recovered. Counsel also contends that the current Application for judicial review was unnecessary (subsection (400(3)(k)) in consideration of the fact that the Applicant was removed from the council of the Wesley First Nation and the fact that the issues before this Court "are to be fully and completely resolved in the Applicant's Provincial Court of Alberta lawsuit" and the Applicant's second judicial review application (Court file T-1095-15). Discussing Item 1 (preparation of originating documents), the Respondent argues that five units should be allowed as this matter was not complex, and the length of the Notice of Application was of two pages while the Applicant's only affidavit was of three pages (excluding exhibits). With respect to Item 8 (preparation on examinations), it is argued that three units should be allowed as the scope of the cross-examinations "was extremely narrow and limited in nature", the Applicant chose not to question the affiants on the full content of the affidavits or exhibits and the three cross-examinations were completed within 45 minutes. Regarding the claim under Item 9, counsel submits that a unit value of one multiplied by the actual time in Court would be appropriate in consideration of the rational provided under Item 8 and the actual duration of the cross-examinations. Counsel further argues that the claims under Item 13(a) and 14(a) should be reduced taking into account the lack of complexity of this matter and the fact that the Applicant's Memorandum of Fact and Law was only two pages long and cited one

authority. The Respondent does not dispute the claim under Item 25 (services after judgment) nor the disbursements. Discussing the five percent GST claim on counsel's fees, the Respondent argues that it is GST exempt pursuant to Section 87 of the *Indian Act* as it is one of the three First Nations that comprise the Stoney Nakoda Nations, a band as defined under Section 2 of the *Indian Act*. It is alleged that GST on counsel fees is not a permissible cost as the "Respondent does not pay GST on, inter alia, legal services".

[3] In his representations in reply, the Applicant submits that the Application was for an "order declaring invalid the January 1, 2015 resolution", and that the Court held the resolution to be invalid. Counsel further argues that contrary to the Respondent's argument, the Applicant did not request a judgment in the amount of $25,600. With respect to the particular Items claimed in the Bill of Costs, counsel contends that the Affidavit of the Applicant included nine exhibits for a total of thirty-two pages while the Applicant's Record contained one hundred and sixty pages. With respect to the claims under Items 8 and 9, counsel argues that three individuals were cross-examined on affidavits that were comprised of 56 pages (including exhibits). No issue is taken with regard to the Respondent's allegation concerning the duration of those cross-examinations to be forty-five minutes. Considering that the preparation for the hearing (Item 13) necessitated the reading of the Respondent's Record that was comprised of 391 pages, counsel contends that a claim for the maximum number of units is not unreasonable as it was necessary to ensure adequate representations at the hearing. With respect to the arguments regarding GST, counsel contends that the GST should be included in the costs "since costs are a partial indemnity to the Applicant for amounts payable by the Applicant to his own lawyer for fees services provided to

the Applicant, disbursements incurred by his own lawyer on the Applicant's behalf and GST thereon, which must be paid by the Applicant (who is not exempt from GST)…"

I. Assessment

[4] Rule 407 states that party-and-party costs shall be assessed in accordance with Column III of the table to Tariff B unless the Court orders otherwise. This file does not display any directions of the Court that would sanction the assessment officer to depart from Column III. As referred to by the Respondent in his representations, the decision in *Truehope Nutritional Support Ltd. v Canada (Attorney General)*, 2013 FC 1153 summarizes the state of the jurisprudence regarding the assessment officer authority to allow units within the full range of Column III. With regard to the application of the factors found at subsection 400(3) of the Rules, I have reviewed the Court decision along with the Application for Judicial Review. Despite the Respondent's argument, the only remedy sought in the Application was "an order declaring invalid and setting aside, in its entirety, the Resolution of the Council of Wesley First Nation dated January 19, 2015". In the decision of November 16, 2015, the Court considered appropriate to declare the application well founded, leaving the monetary aspect of the matter to be dealt with in the Provincial Court of Alberta. In light of the above, I consider that the arguments made with regard to subsections 400(3)(a) and (b) do not support the reduction of the number of units claimed under Column III. I further find that the argument as presented under subsection 400(3)(k) not to be satisfactory when paragraph 32 of the Court's decision is considered.

[5] However, in consideration of Rule 409 and the factors referred to in subsection 400(3)(c): the importance and complexity of the issues paired to the amount of work necessitated in the litigation (400(3)(g)), I regard the maximum number of units claimed by the Applicant not to be representative of this litigation which I consider, after a thorough review of the documents on file, not to be complex or having necessitated an inordinate amount of work. Therefore, the maximum number of units claimed under Item 1 (originating document) will be reduced to five, Item 8 (Preparation for Examinations) to three, Item 9 (Attendance on Examinations) to one multiplied by one hour, Item 13(a) (Preparation for hearing) to three and Item 14(a) (attendance at hearing) to six units/hours. The unit claimed under Item 25 for services after judgement is allowed as claimed.

[6] The Applicant asks that GST be calculated on the Items claimed for assessable services in the Bill of Costs in view of the fact that applicable GST on his counsel fees and some disbursements had already been charged. The Respondent alleges being exempt in light of Section 87 of the *Indian Act*, (R.S.C., 1985, c. I-5). The issue as I see it is whether, by virtue of section 87 of the *Indian Act*, the Respondent is exempt from reimbursing the GST on the assessed legal services as performed by the Applicant's counsel and as claimed in the Bill of Costs filed in this matter.

[7] The Applicant's argument that "the costs awarded belong to the Applicant" is supported by subsection 400(7) of the *Federal Courts Rules*:

400(7) Costs shall be awarded to the party who is entitled to receive the costs and not to the party's solicitor, but they may	400(7) Les dépens sont adjugés à la partie qui y a droit et non à son avocat, mais ils peuvent être payés en fiducie à

be paid to the party's solicitor in trust.	celui-ci.

[8] With regard to the Respondent's contention that it is except from GST, the Applicant has argued that "counsel for the Applicant is required to charge the Applicant GST on his fees and some of the disbursements and the Applicant is obligated to pay GST to his own lawyer". As per the evidence of disbursements provided by solicitor (subsection 1(4) of Tariff B to the Rules), I find that GST was paid on the legal services provided in this matter. Further, I am of the view that by reimbursing the GST paid by the Applicant to his counsel, the Respondent is not paying GST but compensating the Applicant for his actual costs. Therefore, considering the decision of the Court to award costs to the Applicant and the evidence that GST was paid by the Applicant to his counsel, GST will be allowed to reflect the revised assessable Items allowed under Tariff B.

[9] The disbursements claimed by the Applicant have not been contested and are considered reasonable charges in the course of this litigation. They are therefore allowed as claimed.

[10] The Bill of Costs is allowed for a total amount of $3,128.19. A Certificate of Costs will be issued for that amount.

"Johanne Parent"

Assessment Officer

Toronto, Ontario
April 20, 2016

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-193-15
STYLE OF CAUSE:	SHANE CRAWLER V WESLEY FIRST NATION
REASONS FOR ASSESSMENT OF COSTS:	JOHANNE PARENT
DATED:	APRIL 20, 2016

ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES

SOLICITORS OF RECORD:

Larry S. Heald Calgary, Alberta	FOR THE APPLICANT
W. Tibor Osvath Rae and Company Calgary, Alberta	FOR THE RESPONDENT