Date: 20071219

Docket: T-1168-96

Citation: 2007 FC 1338

Ottawa, Ontario, this 19th day of December, 2007

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ALLISON G. ABBOTT, MARGARET ABBOTT, and MARGARET ELIZABETH McINTOSH

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

ORDER FOR COSTS AND REASONS

OUTSTANDING ISSUES

[1] The Crown has conceded that if it is awarded costs the initial assessment of $60,923.04 should be discounted by the amount of the Plaintiffs' assessed costs for the Crown's motion, and by an additional amount of $4,100.00 for costs related to the CP intervention.

[2] The questions remaining for the Court are:

1. Should the parties be left to bear their own costs; and

2. In the event that costs are awarded to the Crown, should the assessment be reduced to take into account:

    (a) Costs claimed for examinations for discovery; and

    (b) Costs of second counsel.

BASIC DISPOSITION

[3] The Plaintiffs recognize that a successful party is ordinarily awarded costs but say that the facts of this case make it appropriate that the parties should be left to bear their own costs.

[4] The Plaintiffs advance the following arguments for this position:

1. Notwithstanding the result in favour of the Crown, the Court should take into account the relative "blameworthiness" of the parties when exercising its general discretion over costs; and
2. The Court should recognize that the Plaintiffs were advancing a novel proposition of law and in a situation where there was some public interest in having the matter litigated.

[5] I have carefully reviewed the principals and authorities put forward by the Plaintiffs in their written materials and their oral arguments but I do not think there is sufficient justification on the facts of the present case to depart from the usual practice of awarding costs to follow the event.

[6] In my reasons for the action, I really did not make any findings that would allow me at this stage to ascribe a weight of blame to the Crown, or to say that the Plaintiffs would have been entitled to succeed but for the delay in bringing the action.

[7] All I said was (para. 26) that "I am in agreement with the Plaintiffs that the assignment documentation is sufficiently comprehensive to create a possible chain of interest between original holders of perpetual renewal leases and the Plaintiffs sufficient to give them standing to bring this claim…"

[8] In other words, this was merely a finding that the Plaintiffs had standing to make the claim and were not excluded on the basis that they had no possible interest to assert.

[9] The Court certainly recognized that the Plaintiffs were alleging wrongful and unlawful actions by the Crown, but the Court made no findings in this regard because the assertions, even if true, were not new and the law of limitations made it unnecessary to examine the merits: "Consequently, there is little to be gained, in my view, from a review of the Crown's conduct in requiring the surrenders and the new leases." (para. 39). The Court makes it clear at paragraph 74 of its reasons that it has not examined the merits of the Plaintiffs' assertions. Consequently, for purposes of considering costs, the Court cannot engage in an examination of relative blameworthiness or say that, but for the passage of time, it would have found the Crown culpable and the Plaintiffs' claims valid. As the Plaintiffs say in their own brief, their arguments on this point

are “conjecture” and I don’t think I can use that conjecture as a basis for departing from the usual practice of having costs follow the event.

[10] Similarly, I do not find the Plaintiffs novel point of law arguments provide sufficient justification to depart from the usual practice.

[11] The basis of my decision was that, under the Manitoba *Limitations of Action Act*, the Plaintiffs were simply out of time. That involved applying the relevant limitations provision to the facts before me. It is true that the Plaintiffs raised extremely able arguments as to why the statute should not apply in this case but, in the end, I simply explained why I could not accept those arguments and why I applied the provisions of the statute. I do not believe that novel points of law were raised and I do not believe there was really a national or extra-provincial dimension to the case that was before me. Those additional dimensions may have been raised in other contexts but, as my reasons make clear, I simply followed advice from both sides that “the relevant limitations statute in this case is the Manitoba *Limitations of Action Act* …” and I applied it accordingly.

[12] The fact of there being no case to cite that was directly on point does not, in my view, raise a novel point of law.

[13] There is a clear policy behind limitations statutes: the state believes that claims should be brought in a reasonably timely manner and that there should be an end to the threat of litigation after a certain time. The court found in the present case that previous owners were aware of the

limitations issues and, after receiving legal advice, chose to pursue a political solution and not a legal one. Applying the relevant limitation period as a justification for barring a claim will not, in my view, discourage litigation; it will merely send a message that claims must be commenced within a certain time. Potential litigants have to make up their minds and they did so in this case after obtaining legal advice.

[14] All in all, and after considering the Plaintiffs' arguments and authorities, I think there is insufficient reason on these facts to depart from the usual practice that costs should follow the event.

QUANTUM

[15] I have reviewed the Crown's draft bill of costs and, as an exercise of my own discretion under the *Federal Court Rules*, I think the amounts claimed are generally appropriate – subject to the reductions already agreed to by the Crown – and that I only need to examine the issues raised by the Plaintiffs with regard to examinations for discovery and the costs of second counsel.

[16] While I can accept the Crown's arguments that discovery was necessary to establish factual commonality and to make the trial more efficient, I do have a concern over the preparation time. The maximum number of units for preparation time is claimed in each case and, in the absence of an explanation, common sense suggests to me that, where repetitive questions were asked in order to arrive at an agreed set of facts, preparation time should not have been the same in each instance

and the preparation time should have diminished as the process unfolded. Hence, I think the total units for preparation for discovery should be 15 rather than 30.

[17] Using a unit value of $100.00, this results in a reduction of $1,500.00 for preparation time.

[18] As regards the costs of second counsel, the Crown has claimed 93 units at 50% for a total of $5,115.00. I do not think there is much of an analogy with the *Sidorsky* case as regards the cost of the legal brief. However, the principal is well established that there is a difference between what is reasonable and what a party may choose to do because it has the resources. In *Sidorsky* the Court declined to allow costs for third and fourth counsel, but the Court did think that a second counsel fee was reasonable. So I think I have to ask myself in this case whether the second counsel fee is reasonable.

[19] *Sidorsky* enunciates a principal that costs are not based on the assumption that litigants have identical resources available to them. Something may be a good idea from the point of view of strategy but this does not mean that the full expenditure should be allowed when costs are considered. It would seem to me that the obverse is also true: i.e. just because one litigant cannot afford, or does not choose, to do something does not mean it was unreasonable for the other side to do it and claim costs. The complexity of a case may justify additional counsel even though one side decides to only use single counsel, as is the case with the Plaintiffs on these facts.

[20] Looking at the complexity of the issues and the division of labour that occurred in the present case I do not think I can really say that the use of second counsel was unreasonable given that the Crown has discounted the value by 50%.

[21] The parties have agreed and have advised the Court as follows:

(a) The amount of the Plaintiffs' bill of costs, as submitted, should be deducted from the amount of the Crown's claim for costs. Such set-off will be effected by deducting the cost portion of the Plaintiffs' bill of costs against the Crown's costs as claimed, and the disbursements portion of the Plaintiffs' bill of costs shall be deducted from the disbursement portion of the Crown's claim;

(b) Any further adjustments to the Crown's "net" costs resulting from the application of the reduction described in (a) above shall result in an adjustment to the net disbursements of the Crown by an amount equal to 20% of the costs adjustment. This means, for example, that if the Crown's cost claim is reduced by $1,000.00 then this will require a $200.00 reduction in the Crown's disbursement claim.

[22] Putting all of this together, the Court's calculation of the costs due to the Crown is as follows:

(a) Crown's Original Claim

Costs	$50,585.00
Disbursements	$10,338.04
Total	$60,923.04

(b) Plaintiff's Set-Off Bill of Costs

Costs	$11,663.00
Disbursements	$ 1,313.11
Total	$12,976.11

(c) Further Cost Reductions

Crown costs of CP Intervention	$ 4,100.00
Reduction for Preparation of Time	$ 1,500.00
Total	$ 5,600.00

(d) Further Disbursement Reduction

($5,600.00 x 20%)	$1,120.00

[23] Applying the rules agreed to by the parties, this means a total reduction of $17,263.00 against the Crown's initial cost assessment and a total reduction of $2,433.11 against the Crown's initial disbursement assessment, for a final total of $41,226.93 ($33,322.00 + $7,904.93).

ORDER

THIS COURT ORDERS that

1. The Defendant shall have its costs and disbursements in this matter fixed at $41,226.93.

"James Russell"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	**T-1168-96**
STYLE OF CAUSE:	**ALLISON G. ABBOTT, MARGARET ABBOTT, and MARGARET ELIZABETH McINTOSH** **Plaintiffs** **- and-** **HER MAJESTY THE QUEEN** **Defendant**
PLACE OF HEARING:	**WINNIPEG, ALBERTA**
***This hearing was held by way of Teleconference**	
DATE OF HEARING:	**OCTOBER 17, 2007**
ORDER FOR COSTS AND REASONS:	**RUSSELL, J.**
DATED:	**DECEMBER 19, 2007**

APPEARANCES:

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