Federal Court		Cour fédérale

Date: 20100506

Docket: T-2241-95

Citation: 2010 FC 501

BETWEEN:

MARGARET HORN

Plaintiff

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
AS REPRESENTED BY THE MINISTER OF NATIONAL REVENUE

Defendant

ABORIGINAL LEGAL SERVICES OF TORONTO

Intervener

and

Docket: T-2242-95

BETWEEN:

SANDRA WILLIAMS

Plaintiff

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
AS REPRESENTED BY THE MINISTER OF NATIONAL REVENUE

Defendant

ABORIGINAL LEGAL SERVICES OF TORONTO

Intervener

ASSESSMENT OF COSTS – REASONS

Bruce Preston
Assessment Officer

[1] By way of Reasons for Judgment and Judgment dated October 16, 2007 the Court awarded the Defendant party and party costs separately against each Plaintiff.

[2] By way of letter dated December 23, 2009 the Defendant requested the assessment of the Bill of Costs dated July 6, 2009 by way of written submission.

[3] Pursuant to the Direction of February 12, 2010 the parties have filed their submissions concerning costs.

[4] From the correspondence submitted it is apparent that there have been at least three versions of the Bill of Costs and that the parties have been unable to resolve the issue of costs despite several attempts. Further, having reviewed the submissions of the parties it is clear that there are only two issues before me:

1. Should costs be assessed at the low end of Column III due to public interest, and;
2. Should the disbursement for Professor Beaulieu's report be allowed?

Column III

[5] The Plaintiffs submit that pursuant to Rule 400(3) (h) of the *Federal Courts Rules* an Assessment Officer may consider whether the public interest in having a proceeding litigated justifies a particular award of costs. In support of this the Plaintiffs refer to *Harris v. Canada* 2001 FCT 1408 at paragraph 222:

> **222** In its Report on Standing (Toronto: Minister of the Attorney General, 1989) the Ontario Law Reform Commission proposed criteria to determine the circumstances where costs should not be awarded against a person who commences public interest litigation. Those criteria were:
>
> a) The proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved.
>
> b) The person has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically.
>
> c) The issues have not been previously determined by a court in a proceeding against the same defendant.
>
> d) The defendant has a clearly superior capacity to bear the costs of the proceeding.
>
> e) The plaintiff has not engaged in vexatious, frivolous or abusive conduct.

[6] The Plaintiffs rely on criteria a), d) and e) in arguing that costs should be assessed based on the lowest values in the range set out in Column III.

[7] Concerning criterion a) the Plaintiffs submit that the Plaintiffs' cases were selected to be test cases heard in the Federal Court. The Plaintiffs further submit:

> The Plaintiffs' actions involved the test for determining whether employment income of a status Indian is "situated on a reserve" within the meaning of s. 87 of the *Indian Act* and is therefore exempt from taxation. The Tax Court of Canada has described the law regarding the application of section 87 of the *Indian Act* as subjective and leading to unpredictable results. The Plaintiffs' cases sought to

> bring clarity to this area of law, which at that time and to this day remains uncertain. Seeking such clarification is clearly in the broader public interest particularly as it involves a matter affecting the livelihoods and tax-planning of status Indians throughout Canada.

[8] Concerning criteria d) and e) the Plaintiffs submit that they are individual taxpayers and that they did not engage in any improper conduct.

[9] In reply to the Plaintiffs' submissions the Defendant submits:

> The test case agreement to which the Plaintiff refers to in his submissions were commenced with the unilaterally filing of four Statements of Claim in the Federal Court Trial Division in the fall of 1995 on behalf of Vicky Clarke, Margaret Horn, Margaret Taibossigai and Sandra Williams to determine if the taxpayers' employment income was exempt from taxation under Section 87 of the *Indian Act*. The parties agreed to litigate four test cases on the understanding that the four cases would be representative of all the situations of OI/NLS workers. The *Taibossigai* case was later replaced by the *Rachel Shilling* case and the Clarke action was later resolved.
>
> Rachel Shilling
>
> The Federal Court Trial Division found Shilling to be entitled to a Section 87 exemption for her income from NLS. The Crown appealed this decision to the Federal Court of Appeal which allowed the Crown's appeal on June 4, 2001. Shilling sought leave to appeal to the Supreme Court of Canada and on March 14, 2002, Shilling's first Application for Leave to Appeal was denied.

[10] The Defendant further submits that the connecting factors test for Section 87 exemption was already well established and has been universally applied by the Federal Court of Appeal since the Supreme Court of Canada decision in *Williams v. Canada*, [1992] 1 S.C.R. 877.

[11] In addition, the Defendant submits that even though the *Shilling* case had been decided the Plaintiffs carried on with their appeals, that none of the other NLS/OI employees considered themselves bound by *Shilling* and that each employee wanted their individual facts and particular circumstances presented on appeal to be heard individually by the Tax Court of Canada.

[12] The Defendant's final submission on this point is that Native Leasing Service, through employee deductions, supported the Aboriginal and Treaty Rights Defence Fund which was used to fund challenges to the taxation of status Indians' employment income. Counsel submits that the Plaintiffs are well supported in their capacity to pay costs.

[13] On April 27, 2010 counsel for the Plaintiff submitted a letter in response to the Defendant's submissions in which he disagrees with the Defendant's argument that the financial resources of Native Leasing Services (NLS) should be taken into account when considering the ability of the Plaintiffs to pay costs. Counsel submits that an award of costs that is targeted at the financial resources of NLS would have a chilling effect on other organizations that assist individual litigants. Counsel relies on *Pauli v. ACE INA Insurance Co.*, 2004 ABCA 253 in support of this submission.

[14] Although I am of the opinion that the submissions contained in the letter of April 27, 2010 should not be considered as they are outside the provisions of the Direction of February 12, 2010, it is of little consequence as the matter addressed in the letter is not determinative of the public interest issue.

[15] In their submissions the Plaintiffs refer to parts (a), (d) and (e) of a five part test to be used when making a determination as to whether the criteria exist to determine that a matter is of public interest. Based on the criteria submitted by the Plaintiff it may be arguable that the matter before me could be of public interest. Although not mentioned, the Plaintiffs may also have an argument under part (b) of the test; however it is part (c) that is determinative of the issue.

[16] Part (c) of the test as set out in *Harris* (supra) requires that the issues have not been previously determined by a court in a proceeding against the same defendant. At paragraph 89 of the Reasons for Judgment and Judgment the Court finds:

> The issue of NLS's operation and tax exempt status of its employees was considered by the Federal Court of Appeal in *Shilling.* Despite the fact that that case is somewhat distinguishable from this case in that some of the evidentiary deficiencies identified by the Court have now been filled in (what aspects of NLS's business are conducted on-reserve, whether employees are reserve residents, and what benefits to the reserve), the Court of Appeal and its comments on key factors is binding on this Court.

[17] It is clear that the issues have been previously determined by a Court in a proceeding against the same defendant and it is for this reason that the Plaintiffs contention that the present cases are of public interest is not accepted.

[18] Having determined that this is not a matter where public interest is a factor in determining costs, and the Plaintiffs not having presented submissions concerning the individual

Items claimed, I have reviewed the Items claimed by the Defendant and I find the number of units claimed for each Item to be reasonable in the circumstances of this case.

Professor Beaulieu

[19] The Plaintiffs submit that the report of Professor Beaulieu did not solely relate to the present case and was essentially the same as a report filed in *Benoit v. Canada.* The Plaintiffs further submit:

> Indeed, the August 5, 2005 letter of instruction from the defendants to Professor Beaulieu… suggests the potential duplication with the report provided in the *Benoit* case and states: "We have reviewed your opinion in the *Benoit* case. We believe this opinion addresses in large measure the issue of concern to us." Furthermore, on cross examination at trial… Professor Beaulieu confirmed that historically the report filed in the Horn and Williams proceedings was "pretty much the same" as the report that was filed in the *Benoit* case.

[20] The Plaintiffs further submit that the historical analysis in this proceeding was substantially identical to the analysis provided in *Benoit* and cannot be reasonably claimed as part of the disbursements in this proceeding.

[21] The Plaintiffs rely on *Biovail Corporation v. Canada (Minister of Health and Welfare),* 2007 FC 767 to support their argument that the first invoice of Professor Beaulieu related to his general research and, therefore, should not have been claimed on each Bill of Costs.

[22] In reply the Defendant submits that "the expert report prepared by Professor Beaulieu for this litigation, although similar in nature to his previous report, was geared specifically to the circumstances of Horn and Williams".

[23] Although the Defendant submits that there were differences between the previous Benoit report and the report filed here, they do not provide specific evidence of what those differences are.

[24] On the other hand the Plaintiffs have provided specific references suggesting the reports were "pretty much the same". Faced with this circumstance, I will apply the decision of the assessment officer in *Métis National Council of Women v. The Attorney General of Canada* [2007] FC 961 at paragraph 21:

> The less that evidence is available, the more that the assessing party is bound up in the assessment officer's discretion, the exercise of which should be conservative, with a view to the sense of austerity which should pervade costs, to preclude prejudice to the payer of costs.

[25] The Defendant having not produced evidence to counter the evidence of the Plaintiffs, the $3,904.61 claimed on each file for further research is not allowed.

[26] The Defendant has requested that the unit value be adjusted to reflect the current Tariff B unit value of $130.00. As the unit value to be used for assessments is that in effect at the time of the assessment, this request is allowed.

[27] For the above reasons, the Bills of Costs are allowed at $47,739.23 (T-2241-95) and $47,304.97 (T-2242-95) respectively. Certificates of assessment will be issued.

"Bruce Preston"

Assessment Officer

Toronto, Ontario
May 6, 2010

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-2241-95 / T-2242-95
STYLE OF CAUSE:	MARGARET HORN v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF NATIONAL REVENUE SANDRA WILLIAMS v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF NATIONAL REVENUE

ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES

PLACE OF ASSESSMENT:	TORONTO, ONTARIO
REASONS FOR ASSESSMENT OF COSTS:	BRUCE PRESTON
DATED:	MAY 6, 2010

WRITTEN REPRESENTATIONS:

Maxime Faille	FOR THE PLAINTIFF
John Shipley	FOR THE DEFENDANT

SOLICITORS OF RECORD:

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Myles Kirvan Deputy Attorney General of Canada	FOR THE DEFENDANT