

Federal Court



Cour fédérale

Date: 20110104

Docket: T-1427-06

Citation: 2010 FC 1336

Toronto, Ontario, January 4, 2011

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

JAZZ AIR LP

Plaintiff

and

**TORONTO PORT AUTHORITY, CITY
CENTER AVIATION LTD., REGCO
HOLDINGS INC., PORTER AIRLINES INC.,
and ROBERT J. DELUCE**

Defendants

and

PORTER AIRLINES INC.

**Plaintiff by
Counterclaim**

and

AIR CANADA AND JAZZ AIR LP

**Defendants to
the
Counterclaim**

REASONS FOR ORDER AND ORDER AS TO COSTS

[1] These reasons and order pertain to the requests made by the various parties to these proceedings that the Court fix liability for and the quantum of costs payable as a result of the

various discontinuances that have been filed by each of them in these proceedings. Both the action and the counter-claim now have been discontinued. Only the question of costs remains outstanding.

[2] The present proceedings are only a part of ongoing legal battles between one or more of these parties in this Court and in the Ontario Superior Court. On July 21, 2010 in proceedings T-488-10 and T-692-10 in this Court I gave Reasons for Judgment (2010 FC 774) in which I outlined a number of the events relating to the disputes that some of these parties have been litigating relating to the operation of an airport at Toronto Island as administered by the Toronto Port Authority (TPA) and commercial access to that airport by Porter Airlines, Air Canada and Jazz Air.

[3] Some of the events in respect of the litigation between the parties include:

1. The Ontario Action

- February 23, 2006 - Jazz commenced an action in the Ontario Superior Court (06-CV-306679 PD3) naming Toronto Port Authority (TPA) and Porter (in fact a number of related entities and an individual) as defendants.
- February 27, 2006 - Spence J. of the Ontario Superior Court dismissed an injunction application brought by Jazz (2006 Carswell Ont. 3111).

- May 24, 2006 - Spence J. issued brief reasons as to costs (2006 Carswell Ont 6104). He awarded Porter \$160,000 before GST in respect of the injunction application.
- October 26, 2007 - Porter counterclaimed against Air Canada and Jazz.
- October 16, 2009 – Morawetz J. of the Ontario Superior Court made an Order discontinuing the main action brought by Jazz and staying the counterclaim brought by Porter until final disposition of this present Federal Court action T-1427-06 with costs to be addressed separately.
- June 9, 2010 – Morawetz J. issued a Costs Endorsement. He awarded Porter costs in the amount of \$145,000 inclusive of taxes and disbursements and TPA the sum of \$130,000 inclusive of taxes and disbursements. This award was in respect of the discontinuance of the main action only. In making this Order Morawetz J. stated that he was aware that proceedings had been taken in the Federal Court and that some of the work done for the Ontario proceeding could be used in the Federal Court proceedings which he said “...*had led me to the conclusion that the amounts claimed have to be significantly reduced.*”
- Porter’s counterclaim as against Air Canada and Jazz remains a live issue. I understand that the matter is scheduled to be heard in 2011.

Federal Court Proceedings T-488-10 and T-692-10

- March 31, 2010 – Air Canada filed an application for judicial review in the Federal Court T-488-10, naming TPA and Porter as respondents. This application had been filed out of time (previously designated as 10-T-6). By an Order of the Court, late filing was permitted.
- April 13, 2010 – At Air Canada’s request a case management conference was held at which time Air Canada indicated that it may seek an interlocutory injunction.
- May 1, 2010 – Air Canada filed a further application for judicial review T-692-10.
- July 6 & 7, 2010 - The two applications were heard together on an expedited basis.
- July 27, 2010 – Judgment was given dismissing both applications, costs to be spoken to.
- Contemporaneous with the release of these reasons and order, reasons and order as to costs in T-488-10 and T-692-10 will be released.
- An appeal has been taken by Air Canada with respect to the Judgment of July 27, 2010.

Federal Court Proceedings T-431-06

- March 3, 2006 – Jazz filed an application for judicial review in the Federal Court (T-431-06) naming TPA and a number of Porter affiliates as respondents.
- June 6, 2006 – Prothonotary Milczynski gave Reasons and an Order, on a motion brought by TPA and Porter, converting the application to an action. She called the application a “square peg made to fit a round hole” (2006 FC 705).
- July 20, 2006 - Rouleau J. dismissed an appeal from Prothonotary Milczynski’s Order. On November 27, 2006 Rouleau J. awarded costs of the appeal to Porter in the sum of \$30,000 inclusive of disbursements.
- On November 29, 2007 Rouleau J. awarded costs of the appeal to TPA in the sum of \$30,000 inclusive of disbursements.
- August 8, 2006 – Jazz discontinued this action.
- March 8, 2010 – Prothonotary Milczynski awarded costs in the sum of \$100,000 to each of TPA and Porter for the discontinued action.

Federal Court Proceedings T-1427-06
(the proceedings at issue here)

- August 8, 2006 – this proceeding was brought as an application for judicial review. T-1427-06 by Jazz naming TPA as respondent.
- September 6, 2006 – at the request of Porter the Court added Porter (several related parties) as intervenors in the application.

- February 1, 2007 – Prothonotary Milczynski struck out the application.
- June 12, 2007 – Hugessen J. heard an appeal from the above Order. He allowed the appeal and directed that the proceedings proceed by way of an action with costs to be spoken to.
- June 29, 2007 – Jazz filed a Statement of Claim naming TPA and Porter as defendants.
- September 28, 2007 – Hugessen J. issued an Order with Reasons as to the costs respecting his earlier Order. He awarded TPA and Porter each the sum of \$50,000.00 stating “...*the Court must make it clear that it will not allow its processes to be abused...*”
- October 26, 2007 – Porter filed a Defence to the action together with a counterclaim against Air Canada and Jazz. It is common ground that this counterclaim is virtually identical to that filed by Porter in the Ontario action except that the Ontario action also included certain tort based allegations against the defendants – by – counterclaim.
- March 10, 2009 – Prothonotary Milczynski granted an Order at the request of TPA and Porter, staying this action until final disposition of the Ontario action; costs were to be spoken to. On March 9, 2010 she made an Order awarding costs payable by Jazz to TPA in the sum of \$7,265.85 and to Porter in the sum of \$25,000.00.

- October 14, 2009 – On an appeal from Milczynski P.'s Order I was advised that Jazz would be discontinuing its Ontario action as a result of which the Order of Milczynski P. would be moot, I reserved as to costs.
- October 30, 2009 – I awarded Porter costs and disbursements in the sum of \$31, 679.32 plus GST and TPA costs and disbursements in the sum of \$11,042.47 plus GST. In my reasons, paragraph 14, I stated that I had found the conduct of Jazz to be abusive.
- March 29, 2010 – Jazz discontinued this action as against TPA and Porter – the counterclaim by Porter remained.
- March 29, 2010 – I ordered that the trial date fixed in this action remain as scheduled, January 17, 2011 without prejudice to any party to seek costs against Jazz in respect of its discontinuance.
- May 14, 2010 – Porter discontinued its counterclaim as against Air Canada and Jazz.
- Each of Jazz, Air Canada, TPA and Porter are now seeking costs as a result of the various discontinuances.

ISSUES

[4] The issues relate to the awarding of costs in this proceeding T-1427-06 arising by reason of:

1. Jazz's discontinuance of the main action as against TPA and Porter.

2. Porter's discontinuance of its counterclaim as against Air Canada and Jazz.

[5] Taking the claims of the respective parties at their highest:

- TPA requests the sum of \$478,271.00 from Jazz, inclusive of disbursements.
- Porter requests the sum of \$788,155.43 from Jazz, inclusive of disbursements.
- Air Canada requests the sum of \$788,096.00 from Porter, inclusive of disbursements.
- Jazz requests the sum of \$397,431.50 from Porter, inclusive of disbursements.

[6] The parties against whom costs are sought argue that no costs or only a nominal sum should be awarded.

ANALYSIS

[7] All parties submit that I should dispose of the issues as to costs. Rule 402 of the Federal Courts Rules provides that in the event of a discontinuance of a proceeding, the party against whom the proceeding was taken *is entitled* to costs:

402. *COSTS OF DISCONTINUANCE OR ABANDONMENT – Unless otherwise ordered by the Court or agreed by the parties, a party against whom an action, application or appeal has been discontinued or against whom a motion has been abandoned is entitled to costs forthwith, which may be assessed and the payment of which may be enforced as if judgment for the amount of the costs had been given in favour of that party.*

[8] Rule 400 provides the Court with full discretionary power as to the amount and allocation of costs and provides for a number of factors which may be taken into consideration, including sub- rule 400(3)(o) any other matter:

400. *DISCRETIONARY POWERS OF THE COURT -*

(1) *The Court shall have full discretionary power of the amount and allocation of costs and the determination of by whom they are to be paid.*

...

(3) *Factors in awarding costs – In exercising its discretion under subsection (1), the Court may consider*

...

(o) *any other matter that it considers relevant.*

[9] Each of the parties has provided the Court with lengthy submissions, regrettably filled with rhetoric, much of which is unhelpful. What is particularly of concern is the

submission by Jazz and Air Canada that there were certain “agreements” between the parties that resulted in certain actions being stayed, pressed forward or discontinued. No evidence by way of an affidavit has been submitted by any party. I have the lengthy lawyers’ arguments and booklets filled with tabbed copies of Court Orders, correspondence between solicitors and the like. No party has submitted actual evidence as to expenditures, costs thrown away, agreements made between the parties or otherwise.

[10] Therefore, in establishing what costs should be awarded to a party against whom an action or counterclaim has been discontinued, I have determined that I will be guided by the following:

- Costs should be awarded in respect of work done and disbursements made in this proceeding T-1427-06 only.
- To the extent that costs have already been awarded in this proceeding, no further award or “top-up” should be made.
- To the extent that costs and disbursements have been incurred respecting the issues raised in the Porter counterclaim, which issues (and more) remain live issues before the Ontario Superior Court, those costs have not been “thrown away”. The Ontario Court should be free to make an appropriate disposition as to costs respecting all issues upon final determination of proceedings in that Court.
- The overlapping issues in the several actions in this Court, as well as the Ontario Court, make it difficult, if not impossible, given the lack of proper evidence, to sort out what costs and disbursements have properly been

incurred in these proceedings (T-1427-06) as opposed to one or more of the other proceedings.

- The litigation in the present proceedings, as well as the other proceedings, has been highly tactical, probably a tribute to the forensic skills of the barristers involved, but not a credit to the legal system. More than nominal costs should be awarded, but given the constraints previously recited, the amounts should not be overly large.

[11] With these factors in mind, I have looked at the proceedings at hand:

- The defendants in the main action, TPA and Porter, have received cost awards in respect of various Court proceedings, as enumerated, up to October 30, 2009.
- Porter sought to enter these proceedings as a party respondent or intervenor and, when the proceedings were converted to an action, Porter became a defendant and, in that role, counterclaimed.
- It was appropriate for Porter to counterclaim in this action, given the state of doubt as to whether this action or the Ontario action would proceed first. Porter discontinued the counterclaim in this action promptly.
- Air Canada and Jazz both assert that much of their expenditures arising out of the counterclaim were due to document review. This expenditure is equally applicable to the Ontario counterclaim and can be dealt with in the disposition of that proceeding by that Court.

- To the extent that there were expenditures by any party unique to the proceedings in this Court that have not otherwise been compensated, they relate to relatively minor pleading and procedural issues.
- Given the lack of specificity and evidence, it is impossible to assess an exact or even roughly approximate sum to each party's efforts not otherwise compensated or compensable.

DISPOSITION

[12] In the result, I approximate that the uncompensated, or in the case of the Ontario proceedings, yet to be compensated costs and disbursements can only be dealt with very roughly. I will largely ignore the rhetorical complaints of Counsel for each party as to its tactics of Counsel for an opposite party. There has already been much said by the Courts in this regard and appropriate compensation as to costs awarded.

[13] Therefore, I award:

- To TPA, costs in the sum of \$10,000.00, plus disbursements in the sum of \$10,000.00, to be paid by Jazz forthwith by reason of Jazz's discontinuance of the main action.
- To Porter, costs in the sum of \$10,000.00, plus disbursements in the sum of \$10,000.00, to be paid by Jazz forthwith by reason of Jazz's discontinuance of the main action.
- To Jazz, costs in the sum of \$10,000.00, plus disbursements in the sum of \$10,000.00, to be paid by Porter forthwith by reason of Porter's

discontinuance of its counterclaim. However, this award is to be offset by the above award to Porter, as a result of which neither party shall pay the other any sum of money for costs or disbursement.

- To Air Canada costs in the sum of \$10,000.00, plus disbursements in the sum of \$10,000.00, to be paid by Porter forthwith by reason of Porter's discontinuance of this counterclaim.

[14] The costs and disbursements awarded include applicable taxes. There will be no additional costs or disbursements arising by reason of this Order.

ORDER

FOR THE REASONS provided:

THIS COURT ORDERS that costs shall be awarded in the manner set out in the
Disposition provided in the Reasons.

“Roger T. Hughes”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1427-06

STYLE OF CAUSE: JAZZ AIR LP (Plaintiff) v. TORONTO PORT AUTHORITY, CITY CENTER AVIATION LTD., REGCO HOLDINGS INC., PORTER AIRLINES INC., and ROBERT J. DELUCE (Defendants) and PORTER AIRLINES INC. (Plaintiff by Counterclaim) v. AIR CANADA AND JAZZ AIR LP (Defendants to the Counterclaim)

SUBMISSIONS IN WRITING (COSTS)

**REASONS FOR ORDER
AND ORDER AS TO COSTS:** HUGHES J.

DATED: JANUARY 4, 2011

WRITTEN REPRESENTATIONS BY:

FOR THE PLAINTIFF, JAZZ AIR LP
(DEFENDANT BY COUNTERCLAIM)

FOR THE DEFENDANT, TORONTO PORT
AUTHORITY

FOR THE DEFENDANT, CITY CENTER
AVIATION LTD.

FOR THE DEFENDANT, PORTER AIRLINES INC.
(PLAINTIFF BY COUNTERCLAIM)

FOR THE DEFENDANT TO THE
COUNTERCLAIM, AIR CANADA

SOLICITORS OF RECORD:

