

Federal Court



Cour fédérale

Date: 20141021

Docket: T-2274-12

Citation: 2014 FC 1005

BETWEEN:

**CHIEF R. DONALD MARACLE IN HIS
PERSONAL CAPACITY AND IN A
REPRESENTATIVE CAPACITY ON BEHALF
OF THE MEMBERS OF THE MOHAWKS OF
THE BAY OF QUINTE, CHIEF WILLIAM
MONTOUR IN HIS PERSONAL CAPACITY
AND IN A REPRESENTATIVE CAPACITY
ON BEHALF OF THE MEMBERS OF THE
SIX NATIONS OF THE GRAND RIVER,
CHIEF JOEL ABRAM IN HIS PERSONAL
CAPACITY AND IN A REPRESENTATIVE
CAPACITY ON BEHALF OF THE MEMBERS
OF THE ONEIDA NATION OF THE
THAMES, AND CHIEF HAZEL FOX-
RECOLLET IN HER PERSONAL CAPACITY
AND IN A REPRESENTATIVE CAPACITY
ON BEHALF OF THE MEMBERS OF
WIKWEMIKONG UNCEDED INDIAN
RESERVE**

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ASSESSMENT OF COSTS

BRUCE PRESTON – ASSESSMENT OFFICER

[1] By way of Judgment and Reasons dated May 30, 2014, the Court dismissed the Application with costs payable to the Respondent at the middle of Column III.

[2] On July 24, 2014, the Respondent filed a Bill of Costs. Upon contacting the Respondent, it was determined that this was an assessment which could proceed in writing. Therefore, on July 30, 2014, a direction setting a schedule for the exchange of submissions was issued. As the parties have filed their submissions concerning costs, I will proceed with the assessment.

[3] In the Respondent's Submissions Regarding Costs, counsel submits that the Items claimed at the upper-middle of Column III are reasonable given the factors enumerated in Rule 400(3) of the Federal Courts Rules, namely, the Respondent's success and the importance and complexity of the issues. Then at paragraph 14, counsel refers to *Simpson Strong-Tie co v Peak Innovations Inc*, 2012 FC 63, at paragraph 43 and *Bayer Healthcare AG v Sandoz Canada Inc*, 2009 FC 691, at paragraph 12, in support of the contention that what constitutes the middle of Column III is open to interpretation and that an Assessment Officer is not bound by the same unit number in respect of different items in Tariff B. Counsel also submits that although the Assessment Officer in *Simpson* allowed a unit value below the mid-point of the range, the particulars of that case do not remove the general ability of an Assessment Officer to decide the appropriate number of units to be allowed in respect of each Item claimed. Concerning disbursements, counsel argues that the amounts claimed are supported by the Affidavit of

Jennifer Multari, affirmed July 24, 2014 and represent a fair and reasonable claim given the volume of materials.

[4] In their Submissions Regarding Costs, the Applicants submit that the Bill of Costs is excessive because the Respondent claimed counsel fees at the upper range of Column III while the Court ordered fees to be assessed at the middle of Column III. Counsel argues that the Court's award permits an exception to Tariff B2(2) (concerning fractional units) and that the Respondent's costs should be allowed "at the middle of Column III" and where the middle results is a fractional unit, the Assessment Officer must allow costs at the mid-point of Column III in accordance with the Courts decision. In support of this contention, counsel refers to *Mercury Launch & Tug Ltd v Texada Quarrying Ltd*, 2009 FC 331, at paragraph 2 and *Aird v Country Park Village Properties (Mainland) Ltd*, 2005 FC 1170, at paragraph 6. In the alternative counsel for the Applicants submits that an Assessment Officer should consider the factors set out in Rule 400(3), specifically Rule 400(3)(c) (complexity) and Rule 400(3)(g) (amount of work). Counsel argues that, based on the factors set out in Rule 400(3), Item 2 should be allowed at 5 units as the Respondents Record contained only one affidavit, Item 13(a) should be allowed at 3 units as this matter was a judicial review with no witnesses and Item 14(a) should be allowed at 2 units per hour. Finally, counsel argues that Item 14(b) should not be allowed as the Court has not awarded costs for second counsel.

[5] Concerning disbursements, the Applicants submit that the Respondent has claimed \$965.66 for photocopies but has not provided evidence of the purpose or reasonableness of the photocopying. Counsel asserts that three of the invoices for photocopying were either irrelevant

or unnecessary for the proceeding because neither their dates nor their descriptions match the sequential steps of the proceeding. Concerning the two invoices dated March 28, 2013, the Applicants contend that these costs were incurred only after the Applicants were served with the Respondent's Affidavit of Marc Roy. Concerning the invoice dated May 24, 2013, the Applicants argue that there was not a three volume Record filed in the proceeding and the date does not correspond with a step in the proceeding. The Applicants do not contest the other disbursements claimed. Counsel concludes by submitting that photocopying should be allowed at \$566.68 and that the Bill of Costs should be allowed for a total of \$2,630.93.

[6] In the Respondent's Rebuttal Submissions, counsel withdraws the claim for Item 14(b). Counsel reiterates that an Assessment Officer is entitled to interpret the "middle of Column III" to mean the upper middle unit value in the range and that an Assessment Officer may be guided by the factors enumerated in Rule 400(3), specifically the result of the hearing and complexity. Also, referring to *Hoffman-La Roche Ltd v Apotex Inc*, 2013 FC 1265, at paragraph 7, counsel submits that each item is assessable in its own circumstances and that it is not necessary to use the same point throughout the range for each Item.

[7] Concerning photocopies, in the Respondent's Rebuttal Submissions, counsel submits that the disbursements are particularized in the Affidavit of Jennifer Multari and supported by invoices from an external service provider. Counsel contends that as the Applicants have not provided evidence to support their contention that "neither their dates nor their descriptions match the sequential steps of the proceeding". Counsel continues by arguing that a cross reference between the dates in the recorded entries and the invoice dates indicates a correlation.

At paragraph 8 of the Respondent's Rebuttal Submissions, counsel provides a table setting out this correlation.

Assessment

[8] As noted above, counsel for the Respondent has withdrawn the claim for second counsel under Item 14(b). Concerning the remaining fees claimed by the Respondent, It is noted that, although the Applicants have contested the number of units claimed for each Item, they have not contested the individual Items included in the Bill of Costs. The parties' dispute centers on the parties' interpretation of the award. In the assessment before me, the Court has awarded costs "at the middle of Column III". In both *Aird (supra)* and *Mercury Launch (supra)*, the Court awarded costs at the mid or middle "range" of Column III. At paragraph 6 of *Aird*, the Assessment Officer held that the costs decision "permits ... an exception to Tariff B2(2) concerning fractions of units" and allowed all assessable services at the mid-point of the range of Column III, including fractions. A similar approach was taken in *Mercury Launch*. In *Simpson (supra)*, the Court awarded costs "in accordance with the middle of Column III" and, as indicated by the Respondent, the Assessment Officer allowed costs below the mid-point of the range. Taking these decisions into account, it is of note that the Assessment Officer in *Aird* and *Mercury Launch* held that the award "permitted" an exception to Tariff B2(2). Although I find that when the Court awards costs "at the middle of Column III", it permits an Assessment Officer to allow fractions of units, I do not read this as requiring an Assessment Officer to allow costs at the "mid-point" in all circumstances. On the other hand, I find that while the approach taken in *Simpson* may appear to be inconsistent with the approaches taken in *Aird* and *Mercury Launch*, it

is consistent with *Bayer (supra)* and *Hoffman (supra)* which held that Assessment Officers are not bound by the same unit number in respect of different items in Tariff B. Therefore, I find that faced with an award of costs “at the middle of Column III”, it is open to an Assessment Officer to allow individual Items at the points in the middle of the range (ie: for a range of 4 to 7 the middle points of the range would be 5 or 6 units) but does not prohibit an allowance at the mid-point of the range (ie: 5.5 units). Having reached these conclusions, I will assess each item claimed individually.

[9] Concerning Item 2, the Respondent has claimed 6 units. I have reviewed the Judgment and Reasons of the Court and Respondent’s Record. Although the Respondent’s Record contains two volumes, as indicated by the Applicants, it contains only one Affidavit and a Memorandum of Fact and Law. Further, although the complaint before the Court was broad, affecting several First Nations in Ontario, the two issues before the Court were procedural fairness and whether the screening decision of the Canadian Human Rights Commission was reasonable. As a result, I find that there is nothing to indicate that an allowance at the high end of the mid-range is warranted. Therefore, Item 2 is allowed at 5.5 Units.

[10] Concerning Item 13(a), the Respondent has claimed 4 units. As submitted by the Applicants, the matter before the Court was a judicial review application. Given the nature of judicial review hearings, there is no viva voce evidence and therefore no witnesses to prepare for the hearing thereby reducing the complexity of the work required to prepare for the hearing. For this reason, I find that an allowance at the low end of the mid-range is warranted. Therefore, Item 13(a) is allowed at 3 units.

[11] Concerning Item 14(a), the Respondent has claimed 3 units per hour for 2 hours. It is noted that the Applicants have contested the number of units claimed but not the duration of the hearing. In keeping with my decision concerning Item 2 above, I find that there is nothing about the nature of this matter which would justify an allowance of costs at the high end of the mid-range of Column III, there were two legal issues to argue and no witnesses to examine or cross-examine. Therefore, Item 14(a) is allowed at 2.5 units per hour for 2 hours.

[12] Concerning photocopying, I have reviewed the submissions of both parties and the invoices attached to the Affidavit of Jennifer Multari and as argued by the Applicants and confirmed by the Respondent, the invoice dated March 28, 2013 relates to the Affidavit of Marc Roy, served by the Respondent on March 27, 2013. Even though the Respondent has confirmed the step in the proceeding to which the invoice relates, counsel has not explained the necessity of producing photocopies, totaling \$215.89, the day after the affidavit was served on the Applicants. For this reason, I find that the photocopies from March 28, 2013 have not been justified as being reasonable and necessary for the advancement of the proceeding and are not allowed. As the Respondent's Rebuttal Submissions satisfactorily clarifies the necessity for the remaining expenditures, all other photocopies claimed are allowed as presented in the Bill of Costs.

[13] As the Applicants have not contested the other disbursements claimed, I have reviewed the materials and file and find the claims to be reasonable and necessary. Therefore, the claims for process server and courier services are allowed as presented.

[14] For the above reasons, the Respondent's Bill of Costs is assessed and allowed at \$2,744.02. A Certificate of Assessment will be issued.

"Bruce Preston"
Assessment Officer

Toronto, Ontario
October 21, 2014

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2274-12

STYLE OF CAUSE: CHIEF R. DONALD MARACLE IN HIS PERSONAL CAPACITY AND IN A REPRESENTATIVE CAPACITY ON BEHALF OF THE MEMBERS OF THE MOHAWKS OF THE BAY OF QUINTE, CHIEF WILLIAM MONTOUR IN HIS PERSONAL CAPACITY AND IN A REPRESENTATIVE CAPACITY ON BEHALF OF THE MEMBERS OF THE SIX NATIONS OF THE GRAND RIVER, CHIEF JOEL ABRAM IN HIS PERSONAL CAPACITY AND IN A REPRESENTATIVE CAPACITY ON BEHALF OF THE MEMBERS OF THE ONEIDA NATION OF THE THAMES, AND CHIEF HAZEL FOX-RECOLLET IN HER PERSONAL CAPACITY AND IN A REPRESENTATIVE CAPACITY ON BEHALF OF THE MEMBERS OF WIKWEMIKONG UNCEDED INDIAN RESERVE v ATTORNEY GENERAL OF CANADA

ASSESSMENT OF COSTS WITHOUT PERSONAL APPEARANCE OF THE PARTIES

PLACE OF ASSESSEMENT: TORONTO, ONTARIO

REASONS FOR ASSESSEMENT OF COSTS BY: BRUCE PRESTON

DATED: OCTOBER 21, 2014

WRITTEN REPRESENTATIONS:

Paul Champ/Bijor Roy

FOR THE APPLICANTS

Alexander Gay/Helen Gray

FOR THE RESPONDENT

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FOR THE RESPONDENT