

Date: 20061221

Docket: A-73-06

Citation: 2006 FCA 418

**CORAM: DÉCARY J.A.
NADON J.A.
PELLETIER J.A.**

BETWEEN:

JEAN PELLETIER

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Hearing held at Ottawa, Ontario, on December 19, 2006.

Judgment delivered at Ottawa, Ontario, on December 21, 2006.

REASONS FOR JUDGMENT OF THE COURT BY:

DÉCARY J.A.

CONCURRED IN BY:

**NADON J.A.
PELLETIER J.A.**

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REASONS FOR JUDGMENT

DÉCARY J.A.

[1] This appeal was heard after the appeal hearing in docket A-620-05. Given the lateness of the hour, the parties agreed to rely on their written representations.

[2] The appellant, who was successful on his application for judicial review – which is the subject of the appeal in docket A-620-05 – had not asked for costs in his written pleadings or in his oral argument. Accordingly, the judge refused to order costs. This order was made on November 18, 2005 (2005 FC 1545).

[3] On December 16, 2005, the appellant filed a motion under section 403 of the Rules for an order [TRANSLATION] “for directions regarding costs of the proceedings in this matter, and more particularly, for costs on a solicitor-client basis or, in the alternative, for these costs to be assessed under column V of Tariff B.”

[4] Section 403 of the Rules reads as follows:

403. (1) A party may request that directions be given to the assessment officer respecting any matter referred to in rule 400,
(a) by serving and filing a notice of motion within 30 days after judgment has been pronounced; or
(b) in a motion for judgment under subsection 394(2).

(2) A motion may be brought under paragraph (1)(a) whether or not the judgment included an order concerning costs.

(3) A motion under paragraph (1)(a) shall be brought before the judge or prothonotary who signed the judgment.

403. (1) Une partie peut demander que des directives soient données à l’officier taxateur au sujet des questions visées à la règle 400:
a) soit en signifiant et en déposant un avis de requête dans les 30 jours suivant le prononcé du jugement;
b) soit par voie de requête au moment de la présentation de la requête pour jugement selon le paragraphe 394(2).

(2) La requête visée à l’alinéa (1)*a)* peut être présentée que le jugement comporte ou non une ordonnance sur les dépens.

(3) La requête visée à l’alinéa (1)*a)* est présentée au juge ou au protonotaire qui a signé le jugement.

[5] On February 14, 2006, the judge dismissed the motion essentially on the ground that section 403 cannot be used to obtain costs that were not awarded (2006 FC 191). This is an appeal of that decision.

[6] Section 403 of the Rules permits a party to ask the judge who signed the judgment to give directions to the assessment officer. Therefore, a motion under section 403 assumes that either there

has been a judgment awarding costs – which is the situation referred to in paragraph 403(1)(a) – or that the judgment left the issue of costs open to allow the parties to make representations, and that an order for costs has since been made – which is the situation referred to in subsection 403(2) – or that the judge has asked one of the parties under section 394 to prepare a draft order – which is the situation referred to in paragraph 403(1)(b).

[7] Since the very purpose of a motion under section 403 is to request that directions be given to an assessment officer, it goes without saying that the party bringing the motion must be entitled to costs. Without costs, there can, of course, be no assessment. Section 403 can only be interpreted in light of an assessment officer's duties. Under section 405, an assessment officer "assesses" costs, which assumes that costs have been awarded. Section 406 provides that an officer does this at the request of "a party who is entitled to costs", which again presupposes that an order for costs was made in favour of that party. Under section 407, the officer assesses the costs in accordance with column III of the table to Tariff B "unless the Court orders otherwise." Section 409 provides that "[i]n assessing costs, an assessment officer may consider the factors referred to in subsection 400(3)." In short, the duty of an assessment officer is to assess costs, not award them. An officer cannot go beyond, or contradict, the order that the judge has made. If the judge gives a direction to the officer under section 403, the officer must comply with it.

[8] In this case, the judge quite correctly determined that a party who has been refused costs cannot rely on section 403 of the Rules to obtain them.

[9] Where a request for costs was made in a proceeding and not dealt with in the judgment, a party may take advantage of section 397 of the Rules to ask the Court to reconsider the judgment, or, if necessary, a party may request that a judgment be set aside or varied under section 399. If a request for costs is made, and dismissed by the judge, the party may appeal the judgment. Where costs are awarded in such a way as to bring section 403 into play, the party in whose favour the award was made may ask the judge to give directions to the assessment officer. Where costs are not requested in the pleadings or at the hearing, the judge cannot award them, and no remedy is available to assist the defaulting party.

[10] The cases from this Court that the appellant relies on—*Bayer AG v. Apotex Inc.*, 2005 FCA 128, *Consorzio Del Prosciutto Di Parma v. Maple Leaf Meats Inc.*, [2003] 2 F.C. 451 (F.C.A.), *Maytag Corp. v. Whirlpool Corp.*, 2001 FCA 650, *CCH Canadian Ltd v. Law Society of Upper Canada*, 2004 FCA 278—are all cases where costs have been ordered. More relevant here is the decision of Mr. Justice Strayer in *Canada v. Canadian Pacific Ltd.*, 2002 FCA 98, which dismissed a motion under section 403 of the Rules on the ground that the party was really seeking an award of costs from the Federal Court of Appeal that it had not made. Strayer J. held that section 403 cannot be used to rewrite judgments.

[11] I would dismiss the appeal with costs to be assessed as if there had been no hearing.

“Robert Décary”

J.A.

“I concur.

M. Nadon, J.A.”

“I concur.

J.D. Denis Pelletier, J.A.”

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE FEDERAL COURT OF CANADA DATED
FEBRUARY 14, 2006 (T-668-04)

DOCKET: A-73-06

STYLE OF CAUSE: JEAN PELLETIER v. ATTORNEY
GENERAL OF CANADA

WITHOUT A HEARING: December 19, 2006
**(CONSIDERED ON THE BASIS OF RECORDS
IN THE DOCKET)**

REASONS FOR JUDGMENT OF THE COURT BY: DÉCARY J.A.

CONCURRED IN BY: NADON J.A.
PELLETIER J.A.

DATED: December 21, 2006

APPEARANCES:

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