Federal Court of Appeal

CANADA

Cour d'appel fédérale

Date: 20120323

Docket: A-453-08

Citation: 2012 FCA 100

BETWEEN:

ROGERS COMMUNICATIONS INCORPORATED

Appellant

and

SANDRA BUSCHAU, SHARON M. PARENT, ALBERT POY, DAVID ALLEN, EILEEN ANDERSON, CHRISTINE ASH, FREDERICK SCOTT ATKINSON, JASPAL BADYAL, MARY BALFRY, CAROLYN LOUISE BARRY, RAJ BHAMBER, EVELYN BISHOP, DEBORAH LOUISE BISSONNETTE, GEORGE BOSHKO, COLLEEN BURKE, BRIAN CARROLL, LYNN CASSIDY, FLORENCE K. COLBECK, PETER COLISTRO, ERNEST A. COTTLE, KEN DANN, DONNA DE FREITAS, TERRY DEWELL, KATRIN DOLEMEYER, ELIZABETH ENGEL, KAREN ENGLESON, GEORGE FIERHELLER, JOAN FISHER, GWEN FORD, DON R. FRASER, MABEL GARWOOD, CHERYL GERVAIS, ROSE GIBB, ROGER GILODO, MURRAY GJERNES, DAPHNE GOODE, KAREN L. GOULD, PETER JAMES HADIKIN, MARIAN HEIBLOEM-REEVES, THOMAS HOBLEY, JOHN IANNANTUONI, VINCENT A. IANNANTUONI, RON INGLIS, MEHROON JANMOHAMED, MICHAEL J. JERVIS, MARLYN KELLNER, KAREN KILBA, DOUGLAS JAMES KILGOUR, YOSHINORI KOGA, MARTIN KOSULJANDIC, URSULA M. KREIGER, WING LEE, ROBERT LESLIE, THOMAS A. LEWTHWAITE, HOLLY LI, DAVID LIDDELL, RITA LIM, BETTY C. LLOYD, ROB LOWRIE, CHE-CHUNG MA, JENNIFER MACDONALD, ROBERT JOHN MACLEOD,

**SHERRY M. MADDEN, TOM MAKORTOFF,
FATIMA MANJI, EDWARD B. MASON,
GLENN A. MCFARLANE, ONAGH METCALFE,
DOROTHY MITCHELL, SHIRLEY C.T. MUI,
WILLIAM NEAL, KATHERINE SHEILA NIMMO,
GLORIA PAIEMENT, LYNDA PASACRETA,
BARBARA PEAKE, VERA PICCINI, INEZ PINKERTON,
DAVE PODWORNY, DOUG PONTIFEX,
VICTORIA PROCHASKA, FRANK RADELJA,
GALE RAUK, RUTH ROBERTS,
ANN LOUISE RODGERS, CIFFORD JAMES ROE,
PAMELA MAMON ROE, DELORES ROSE,
SABRINA ROZA-PEREIRA, SANDRA RYBCHINSKY,
KENNETH T. SALMOND, MARIE SCHNEIDER,
ALEXANDER C. SCOTT, INDERJEET SHARMA,
HUGH DONALD SHIEL, MICHAEL SHIRLEY,
GEORGE ALLEN SHORT, GLENDA SIMONCIONI,
NORM SMALLWOOD, GILLES A. ST.DENNIS,
GERI STEPHEN, GRACE ISOBEL STONE,
MARI TSANG, CARMEN TUVERA, SHEERA WAISMAN,
MARGARET WATSON, GERTRUDE WESTLAKE,
ROBERT E. WHITE, PATRICIA JANE WHITEHEAD,
AILEEN WILSON, ELAINE WIRTZ, JOE WUYCHUK,
ZLATKA YOUNG**

Respondents

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

Charles E. Stinson
Assessment Officer

[1] These reasons apply here (the A-453-08 matter) as well as to Federal Court files T-898-07, *Sandra Buschau et al v Attorney General of Canada* (the T-898-07 matter) and T-2006-10, *Sandra Buschau et al v Rogers Communications Incorporated* (the T-2006-10 matter).

[2] Paragraphs 1-4 of the Court's Reasons for Judgment dated September 9, 2009 (the Reasons) read:

> **INTRODUCTION**
>
> [1] This appeal is the latest instalment in a long running dispute between Rogers Cablesystems Inc. (now Rogers Communications Inc.) (Rogers) and the employees and former employees (the Employees) of a Vancouver cable company, Premier Communications Ltd., (Premier), which Rogers acquired in 1980. When it acquired Premier, Rogers also acquired the rights and obligations of the employer under the pension plan (the Premier Plan or the Plan), which Premier established for the benefit of its employees in 1974. Shortly after Rogers acquired Premier, it became known that there was a significant actuarial surplus in the Plan. Rogers tried to appropriate that surplus. The Employees claimed it as their own. Rogers and the Employees have been fighting over that surplus ever since.
>
> [2] This appeal arises from the decision of the Acting Superintendent of Financial Institutions dated April 27, 2007 (the Decision), which approved amendments to the Plan to revoke a merger of the Plan with other Rogers' pension plans and to re-open the Premier Plan to new members. The Acting Superintendent has since been appointed Superintendent and so, I will refer to her as such.
>
> [3] The Superintendent dismissed the Employees' application to terminate the Plan and to distribute the actuarial surplus. The Employees' application for judicial review of the Decision was allowed by O'Keefe J. of the Federal Court in a decision reported as *Buschau v Canada (Attorney General) and Rogers Communications Inc*, 2008 FC 1023, [2008] FCJ No 1283. Rogers now appeals to this court from the decision of O'Keefe J. Quite apart from the merits of the Decision itself, one of the major issues is the extent to which the Superintendent's discretion was limited by the decisions of the courts which have considered the case in the course of the long and acrimonious litigation involving this pension plan.
>
> [4] For the reasons which follow, I would allow the appeal and set aside the order of the Federal Court. I would award Rogers its costs in this Court and in the Federal Court.

[3] Paragraph 5 of the Reasons then began a "history of this litigation in the courts of British Columbia and in the Supreme Court of Canada." Ensuing paragraphs referred to the allegation that Rogers Communications Incorporated [RCI] attempted to use the surplus in the Premier Plan to compensate for deficits in pension plans associated with RCI and its corporate affiliates. Paragraphs 23-25 of the Reasons indicated that, after decisions in several courts, including the Supreme Court of Canada, the Premier Plan members applied to the Office of the Superintendent for termination of the Premier Plan, for replacement of RCI as administrator of the Plan and for a winding up and distribution to the Premier Plan members of any surplus funds. RCI opposed this request and sought approval to revoke its merger of the Premier Plan with other RCI plans and to re-open said Plan to new employees.

[4] Paragraphs 26-38 of the Reasons then addressed the proceedings before the Superintendent, including the latter's findings that RCI could re-open the Plan and that the requests by the Premier Plan members should be rejected, effectively ending the latter's attempt for payment out to them of the Plan's actuarial surplus. The Premier Plan members applied for judicial review (the T-898-07 matter) of the Superintendent's decision. Paragraph 39 of the Reasons noted that the Federal Court identified seven issues. Paragraphs 40-42 indicated that the Federal Court went directly to the fifth issue, i.e. did the Superintendent err in refusing to exercise her discretion under subsection 29(2) of the *Pension Benefits Standards Act*, RSC 1985, c 32 (as amended) [PBSA], answered said question in the affirmative, allowed the application for judicial review and remitted the matter to the Superintendent for redetermination.

[5] Paragraph 43 of the Reasons read:

> [43] The key issue in this appeal is whether the Superintendent either improperly exercised her discretion or made a reviewable error of law when she allowed Rogers/Cable Inc. to revoke the merger of the Plan and to amend the Plan to open it to new employees of Cable Inc. In particular, if the Superintendent was entitled to allow Rogers/Cable Inc. to reopen the Plan to new members, then it was not unreasonable for her to find that the "continued existence of the Plan is a worthy goal and that the employer is continuing to provide the promised benefits and complying with solvency requirements." If, on the other hand, the Superintendent was not entitled to allow the amendment to reopen the Plan, then the argument that the continued existence of the Plan serves any of the purposes of the Plan or of the PBSA is harder to sustain.

[6] Paragraphs 44-66 then analyzed the issue, including consideration of the prior proceedings, found the Superintendent's decision to have been reasonable and set aside the Federal Court decision (the T-898-07 matter) with costs here and below. On April 8, 2010, the Supreme Court of Canada denied leave to appeal this Court's decision.

[7] On June 30, 2010, the Premier Plan members put to the Superintendent eight questions which they claimed either had not been addressed in her 2007 decision, or which had subsequently arisen. By letter dated November 4, 2010, the Superintendent found that most of the questions concerned or related to the Superintendent's April 27, 2007 decision and that there was no legislative authority to re-open or reconsider a past decision. The Federal Court addressed the Premier Plan members' application for judicial review (the T-2006-10 matter) of the November 4, 2010 decision by dismissing it with costs to RCI.

[8] I issued timetables for written disposition of the assessment of the respective bills of costs of RCI in each matter.

The T-898-07 Matter

Counsel Fees

> Item 2: 7 units ($130 per unit) claimed for the Respondent's record and materials (available range = 4-7 units / hereafter, the available range for each fee item appears in brackets); Item 5: 7 units claimed for preparation and filing of RCI's motion to strike Albert Poy affidavits (3-7 units); Item 6: 15 units claimed for a 5-hour appearance on the motion (1-3 units per hour); Items 13(a) and 13(b): 5 and 3 units respectively claimed for preparation for first day (2-5 units) and second day (2-3 units) of the judicial review hearing; Item 14(a): 34.5 units claimed for the appearance of first counsel on an 11.5 hour-hearing (7 and 4.5 hours respectively for the two days) (2-3 units per hour); Item 25: 1 unit claimed for services after judgment (1 unit); Item 26: 6 units claimed for assessment of costs (2-6 units); GST: $510.25 (5%) and PST: $714.35 (7%)

Disbursements

> Registry fees ($16.96); Courthouse library copies ($88.10); printing ($1,539.38); photocopies ($779.89); couriers ($147.60); computer research ($288.24) and facsimiles ($26.78)

[9] RCI discounted the position of the Applicants (the Buschau litigants) on the proper unit value by arguing further to paras 3-6 of *Bujnowski v Canada*, 2010 FCA 49; para 26 of *Horn v Canada (Minister of National Revenue – MNR)*, 2010 FC 501 and para 3 of *Ferme Avicole Kiamika Inc v Canada (Minister of Agriculture)*, 2006 FC 1392, that the value to be used is the one in effect at the time the request for an assessment of costs is made, i.e. the current $130 per unit.

[10] RCI agreed with the Buschau litigants that only the time spent in court can be claimed for fee items 6 and 14(a). The work under fee items 13(a) and (b) related to general preparation for the hearing of the judicial review and was not limited to "witness items" as asserted by the Buschau litigants.

[11] RCI's affidavit supporting its bill of costs advanced a number of receipts, but noted that receipts for certain disbursements were not available, i.e. computer research and facsimiles. RCI corrected its bill of costs by reducing the claimed courthouse library copies from $88.10 to $69.25.

[12] RCI argued further to para 34 of *Carr v Canada*, 2009 FC 1196 [*Carr*] and para 35 of *Balogun v Canada*, 2010 FCA 202 that photocopy charges whether in-house or external are permissible disbursements; further to para 18 of *Kremikovtzi Trade v Phoenix Bulk Carriers Ltd*, 2009 FCA 182 [*Kremikovtzi*] that courier charges are permissible; further to para 17 of *Kremikovtzi* and para 33 of *Target Event Production Ltd v Paul Cheung and Lions Communications Inc*, 2011 FC 83 that computer research is permissible and not limited by flat rates and further to para 36 of *Carr* that facsimiles are permissible.

[13] The Buschau litigants argued that RCI has, in every instance but one for the three bills of costs, claimed the maximum amount without explanation although these matters were not trials, i.e. no discoveries, witnesses, experts etc., and has provided little evidence. Further to para 21 of *Metis v Canada*, 2007 FC 961, the less that evidence is available, the more one is bound by the discretion of the assessment officer, the exercise of which should be conservative with a view to the sense of austerity that should pervade costs.

[14] The Buschau litigants argued that the case law is clear that the unit value, i.e. $120, in effect in 2008 at the time of this matter, should have been used.

[15] The Buschau litigants asserted that the court record confirms the duration of the motion hearing was 2 hours 6 minutes (10:05 am to 12:11 pm) inclusive of breaks and not the 5 hours claimed for fee item 6.

[16] The Buschau litigants argued for minimum allowances for fee items 13(a) and (b) given a judicial review does not require the work listed in the Tariff for those items, i.e. preparation of witnesses, subpoenas and direct examinations or cross-examinations.

[17] The Buschau litigants argued that, just as for fee item 6, RCI has inflated the duration for fee item 14(a), i.e. 7 hours claimed for the first day given the court record indicates 9:37 am to 4:35 pm inclusive of the lunch break and recesses and 4.5 hours claimed for the second day given the recorded duration was 9:30 am to 2:09 pm inclusive of the lunch break and recesses. Fee item 14 is restricted to “in Court” time because fee item 13 already compensates for preparation time. Similarly, the maximum fee item 26 claim is excessive given litigation without witnesses, experts or expert reports with complicated disbursement issues. The only complexity in this assessment of costs stems from RCI’s unjustified claims for maximum amounts and from its inflated claims for hours.

[18] The Buschau litigants asserted that RCI did not establish the per page cost of photocopies. Further to *Abbott Lab v Canada*, 2009 FC 399 [*Abbott Lab*], *Janssen-Ortho v Novopharm*, 2006 FC 1333 and *Windsurfing v Bic Sports* (1985), 6 CPR (3d) 526, there must be evidence of the actual cost, what was copied and its relevance, none of which RCI even attempted to provide.

[19] The Buschau litigants argued further to *Denmar Equipment v 342699 Ltd*, 2004 BCSC 1169 that there was no evidence of the necessity for computer research and that a litigant cannot recover more than the normal per search fees if its lawyer pays a flat monthly fee.

[20] The Buschau litigants argued generally further to para 15 of *Abbott Lab* that assertions as here by counsel in a supporting affidavit, i.e. everything was reasonable and necessary, are actually unhelpful and unnecessary because it is the assessment officer who must make such determinations. The claimed fees of $10,205 (78.5 units x $130 per unit) should be reduced: items 2 (4 units); 5 (3 units); 6 (2 hours x 2 units per hour = 4 units); 13(a) and (b) (2 units each); 14(a) (5 and 3 hours at 2 units per hour = 16 units); 25 (1 unit) and 26 (0 units) for a total of 32 units x $120 per unit = $3,840. Nothing should be allowed for printing, photocopies and computer research.

Assessment

[21] Paragraphs 15 and 16 of *Madell v Canada*, 2011 FCA 105, set out my general approach for assessments of costs and for counsel fee items respectively. In the circumstances particular to a matter, assessment officers necessarily exercise broad discretion and opposing parties must both contribute to the narrowing of costs issues: see *Holzapfel v Matheusik*, 14 BCLR (2d) 135.

[22] I have examined the respective Records and other materials that were before the Court. A decades-long struggle of this sort means that the parties and their legal representatives should have been, further to the continuum of litigation, very familiar with the overarching issues between them. However, the substantive rulings on each piece of litigation between these parties set the stage for new litigation and presumably fresh issues. I am assessing only in the context of the T-898-07

matter and not those of other matters. I allow 5 units for fee item 2. RCI has correctly stated the law on unit value. I therefore apply $130 per unit.

[23] Paragraph 6 of *Armstrong v Canada (Attorney General)*, 2010 FC 1189 outlines generally my approach in resolving fee items 13, 14 and 15 (written argument). By extension, as circumstances require, I use a similar approach for fee item 5 and 6 issues, including apportionment of hours and units.

[24] I have examined the respective materials before the Court for both the motion to strike the Poy affidavits and the hearing of the application for judicial review. Their respective differing issues varied the demands on counsel. This litigation began in the third decade of what is now, before me, the fourth decade of the struggle between these litigants for control of pension monies. While that struggle was significant enough at stages to engage Supreme Court of Canada disposition of certain issues, that does not automatically mean maximum costs for all interlocutory, corollary or consequent issues as they arise. I allow 5 units for fee item 5.

[25] Relative to start and end times of 10:05 am and 12:11 pm respectively for the Poy motion, I find that a duration of 2.5 hours is appropriate for the fee item 6 calculation to account for counsel getting settled in the courtroom. Paragraphs 26 and 36 of *Cockerill v Fort McMurray First Nation #468* [*Cockerill*], 2010 FC 1002 and paragraph 21 of *Shields Fuel Inc v More Marine Ltd*, 2010 FC 228 are examples of the use of fractions for hearing cost calculations. I allow 3 units per hour.

[26] I allow fee items 13(a) and (b) at 4 and 2 units respectively. I find that durations of 6 and 4 hours respectively are appropriate for the two days associated with the fee item 14(a) calculation. I am not inclined to apportion the available values in the range among those 10 hours. I allow 3 units per hour.

[27] I routinely allow fee item 25, as I will here, unless I think that counsel would not have reviewed the judgment and explained its implications to the client. There were some synergies between the issues of the respective bills of costs. RCI claimed fee item 26 for each bill. I do not think that a single fee item 26 allowance, to be apportioned among the three bills of costs, is appropriate given these were discrete pieces of litigation albeit with a common source. I allow 3 units for item 26 in the T-898-07 matter.

[28] Disbursements are payments for disinterested third-party services charged to the client and which are not surviving or ongoing benefits to a law firm or its subsequent clients: see paras 28-31 of *Peerless Ltd v Aspen Custom Trailers Inc*, 2010 FC 618. Paragraph 65 of *Abbott Laboratories v Canada (Minister of Health)* (2008), 66 CPR (4^{th}) 301 [*Abbott*] summarizes my practice for photocopies, including the need "to strike the appropriate balance between the right of a successful litigant to be indemnified for its reasonably necessary costs and the right of an unsuccessful litigant to be shielded from excessive or unnecessary costs." The proof here was less than absolute. Over $1,200 of the printing claim addressed Poy motion materials and RCI's Record. An invoice dated July 19, 2007 for $154.26 is unexplained, but likely related to RCI's motion record filed the next day to strike the Poy affidavits. Another invoice for $134.59, dated March 4, 2008, bears the note "To make another copy of Applicants' Authorities," the specific justification for which could have

been made in the supporting affidavit, but was not. I reduce the printing claim by $134.59 to $1,404.79.

[29] There was activity in the fall of 2007 associated with setting this matter down. RCI filed a motion on December 12, 2007 for an extension of time to file its Record. The Court's order dated December 19, 2007 granting the extension on consent was silent on costs. Orders silent on costs do not give rise to entitlements to costs: see *Falcon Ventures Ltd v Echoes (The)*, [1982] FCJ No 703; *British Columbia Forest Products Ltd v Canada (Minister of Industry, Trade and Commerce)*, [1982] FCJ No 910; *Industrial Milk Producers Assn v British Columbia Milk Board*, [1988] FCJ No 537 and *Metaxas v Galaxies (The)*, [1989] FCJ No. 564. As well, the judgment on the substantive issues of a lawsuit cannot purport to vary an interlocutory order silent on costs by adding a direction that costs are now payable: see paragraphs 34-35 of *Cockerill* above. The supporting affidavit asserts that the courthouse library copies were part of preparation for the hearing of the judicial review. Some occurred about the time of the extension motion. I allow them at the reduced amount of $69.25 proposed by RCI. The evidence supporting the claim of $779.89 is that the law firm's "records indicate that over the period in question there was $1039.97 [*sic*], before tax of in-house photocopying done in relation to this file." No details are given. I allow $675.

[30] The courier receipts seem in order except for the two dated December 12, 2007 totalling $21 for deliveries to opposing counsel and to the Registry, likely the time extension motion. I remove $21 leaving $126.60 allowed for couriers. I allow Registry fees and facsimiles as presented at $16.96 and $26.78.

[31] Paragraph 111 of *Abbott* above outlines my usual concerns with computer research. A law office program of disbursement listings generally affords limited information on relevance and necessity. The evidence here is that the records for computer research, and for facsimiles, cannot be located. I allow a reduced amount of $190.

The A-453-08 Matter

Counsel Fees

> Item 1: 7 units claimed for preparation and filing of originating document, other than a notice of appeal to the Federal Court of Appeal, and application records (4-7 units); Item 2: 7 units claimed for preparation and filing of all replies, i.e. RCI'S reply to the cross-appeal of the Buschau litigants (4-7 units); Item 17: 1 unit claimed for preparation, filing and service of notice of appeal (1 unit); Item 18: 1 unit claimed for preparation of appeal book (1 unit); Item 19: 7 units claimed for memorandum of fact and law (4-7 units); Item 20: 1 unit claimed for requisition for hearing (1 unit); Item 13(a): 5 units claimed for preparation for hearing (2-5 units); Item 22(a): 15 units claimed for the appearance of first counsel on a 5-hour hearing (2-3 units per hour); Item 25: 1 unit claimed for services after judgment (1 unit) and Item 26: 6 units claimed for assessment of costs; GST: $331.50 (5%) and PST:$464.10 (7%)

Disbursements

> Registry fees ($203.30); UBC library copies ($56); Courthouse library copies ($94.35); agent's fees ($118.30); printing ($1,024.10); Appeal Book ($3,348.42); couriers ($133) and photocopies ($382.49)

[32] RCI's submissions corrected the claim for printing from $1,049.33 to $1,024.10 and relied on the authorities cited above in the T-898-07 matter for its disbursements in this matter. RCI conceded the assertion of the Buschau litigants that fee items 1 and 2 are not allowable, i.e. fee item 1 specifically excludes a notice of appeal and fee item 2 by its definition does not apply to a notice of cross-appeal.

[33] RCI argued that, although the language used in the bill of costs for fee item 13(a) is the default description contained in Tariff B, general hearing preparation is clearly being claimed. RCI accepted as above that fee item 22(a) is limited to the actual time in court. RCI relied on the receipts exhibited to its supporting affidavit and the latter's assertion that the disbursements were necessary and reasonable for this matter.

[34] The Buschau litigants argued as above that, as this was not a trial and no review of transcript evidence, preparation of witnesses and issuance of subpoenas were required, as for example contemplated in the Tariff B wording for item 13(a), the claimed maximum counsel fees are not justified. As above, the 5 hours claimed for fee item 22(a) are excessive given the court record indicated a 9:30 am start and a 2:37 pm finish inclusive of the lunch break and recesses. Only 3 hours at 2 units per hour should be allowed. As above, there is no explanation of the per page or internal cost of photocopies nor what was copied. The Buschau litigants argued that the claimed fees of $6,630 (51 units x $130 per unit) should be reduced: (their suggested formula included fee item 1, which I have removed) items 17 (1 unit); 18 (1 unit); 19 (4 units); 20 (1 unit); 13(a) (2 units); 22(a) (3 hours x 2 units per hour); 25 (1 unit) and 26 (0 units) for a total of 16 units x $130 per unit = $2,080. The Buschau litigants objected generally to disbursements because of the absence of proof of their relevance and reasonableness.

Assessment

[35] The submissions before me did not mention the impact, if any, of the cross-appeal (which asked for an order terminating and winding up the Premier Pension Plan and alternatively remitting the matter back to the Superintendent for that purpose) on issues associated with the bill of costs.

The Reasons did not refer to or use the term “cross-appeal”. Paragraphs 24 and 32-38 did refer to the subject matter of the cross-appeal, i.e. termination of the Plan, in the context of a summary of the Superintendent’s decision. Paragraph 43 set out above alludes to the subject matter of the cross-appeal, i.e. if “the Superintendent was not entitled to allow the amendment to reopen the Plan, then the argument that the continued existence of the Plan serves any of the purposes of the Plan or of the PBSA is harder to sustain.” The finding in paragraph 65 “that the application of *res judicata* does not prevent the Superintendent from allowing Rogers/Cable Inc. to revoke the merger of the Premier Plan into the consolidated Rogers plan and to reopen the Premier Plan to new employees of Cable Inc.” precluded any disposition of the cross-appeal favourable to the Buschau litigants.

[36] I think further to *Genpharm Inc v The Minister of Health et al*, [2003] 1 FC 402 (FCA) at para 8, referring to *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development*), [2001] 4 FC 452 (FCA) at para 38, that I can look at reasons of the Court to determine the intent of a judgment, which here did not specifically mention the cross-appeal. Paragraph 15 of the Memorandum of Fact and Law of the Attorney General of Canada addressed the relief sought by the cross-appeal. The Buschau litigants filed a Memorandum of Fact and Law addressing both RCI’s appeal and their cross-appeal. I find it difficult to believe that the Court somehow overlooked its paragraphs 109-111 (comprising a separate section under the subheading “Cross-Appeal – The Respondents Seek an Order for Termination”) asserting that this Court should “direct the Superintendent to do the right thing”; this “case has now become a ‘theatre of the absurd’’; there is no guarantee that the Superintendent would “do the right thing given the manner in which she dealt with this matter in the first place”; whatever “she does, the loser will almost certainly apply for another judicial review – which the loser will almost certainly appeal!”; this

"merry-go-round which could easily go on for another 10 years benefits only the lawyers" and that this Court should definitively end litigation not in the public interest and which brings the judicial system into disrepute. RCI filed its Memorandum of Fact and Law on December 19, 2008. After the Buschau litigants had filed their Memorandum of Fact and Law on January 19, 2009, RCI filed, on February 17, 2009, a Memorandum of Fact and Law "In Response to Respondents' Buschau and Others, Cross Appeal", a document longer than the one filed on December 19, 2008.

[37] The claim for fee item 2 refers to the cross-appeal. The rest of the bill of costs, and the body of the supporting affidavit, do not refer to the cross-appeal. However, the printing claim includes $53.02 (Invoice # VASL00230) associated with the cross-appeal (the February 17, 2009 filing). There are three courier invoices totalling $39, none of which refer to the cross-appeal, but which indicate deliveries to the Registry, to counsel for the Buschau litigants and to counsel for the Attorney General of Canada, all on February 17, 2009. My findings in *Halford v Seed Hawk Inc* (2009), 69 CPR (4^{th}) 1, 2006 FC 422 reflected an awareness of the distinction between a main action and a counterclaim in circumstances of costs awarded in one but not the other. Rule 190 reinforces the notion in the case law that a counterclaim is an action independent of the main action, both being housed in one court file. An appeal and a cross-appeal are simply appeals from the same judgment, each however seeking a different disposition: see Rule 341(1)(b). Rule 342(1) provides that unless "the Court orders otherwise, where more than one party appeals from an order, all appeals shall be consolidated." This indicates to me that the Reasons addressed both appeals, which from the perspective of RCI were integral to supremacy in this extended struggle. I find that the maximum 7 units are appropriate for fee item 19. I allow fee items 17, 18, 20 and 25 as presented.

[38] My finding in paragraph 10 of *Gardner v Canada (Attorney General)*, 2008 FCA 67 was that in the context of what I perceived as general opposition to the bill of costs, fee item 13 cannot be claimed for an appeal, but something could be claimed under fee item 27 (such other services as may be allowed by the assessment officer). I made similar allowances in *Butterfield v Canada (Attorney General)*, 2008 FCA 315 at para 4, and *Dumont v Canada*, 2009 FCA 159 at para 3. Such considerations were not argued before me. The Buschau litigants conceded 2 units for fee item 13(a), being the mid-range value of fee item 27, which I allow.

[39] The hearing duration inclusive of any breaks was five hours, seven minutes. As above, I hold that consideration must be given for counsel getting settled in the courtroom, time which is not part of formal case preparation. I allow fee item 22(a) at 3 units per hour x 4.5 hours = 13.5 units. I think the assessment process for the T-898-07 matter somewhat simplified the assessment of costs in this matter, but there were still issues particular to the latter matter. I allow 3 units for fee item 26.

[40] As for the disbursements, their individual categories and amounts appear appropriate for the circumstances of this appeal, but consistent with my usual concerns for the relevance or necessity of photocopies either of documents or of case law, I reduce the claimed disbursement subtotal of $5,305.96 by $80 to $5,225.96.

The T-2006-10 Matter

Counsel Fees

> Item 2: 7 units claimed for the Respondent's record and materials (4-7 units); Item 13(a): 2 units claimed for preparation for the judicial review hearing and a notice of motion (2-5

units); Item 14(a): 18 units claimed for the appearance of first counsel on a 6-hour hearing (2-3 units per hour); Item 14(b): 9 units claimed for the appearance of second counsel where the Court directs (50% of item 14(a)); Item 26: 2 units claimed for the assessment of costs (2-6 units) and HST: $592.80 (12%)

Disbursements

Taxable: photocopying @ $0.25 per page ($1,400); facsimiles @ $0.35 per page ($5.25); Pacific Coast Registry Agent ($65); local courier ($81); Federal Express courier ($21.21); printing ($296.60) and HST ($225.49)

Non Taxable: taxes paid on fees ($6,803.50)

[41] Paragraphs 1-3 of the Reasons for Judgment and Judgment dated July 21, 2011 read:

> [1] This application arises in the context of a long-running dispute between Rogers Communications Inc. (the respondent) and a group of former employees (the applicants) over an actuarial surplus that has accumulated in a defined benefit employee pension plan. The applicants claim that they are entitled to it. The respondent disagrees and argues that they have the right to open the pension plan to new members and rely upon the actual surplus to take contribution holidays with respect to those new members.
>
> [2] The dispute, at various stages and in various forms, has been before the Supreme Court of British Columbia, the British Columbia Court of Appeal, the Supreme Court of Canada, this Court and the Federal Court of Appeal.
>
> [3] The applicants are now applying for judicial review of a decision, dated November 4, 2010, of a senior supervisor in the Private Pension Plans Division of the Office of the Superintendent of Financial Institutions Canada. The applicants had requested that eight questions be answered regarding their dispute with the respondent. The senior supervisor found in essence that the bulk of the arguments submitted by the applicants had already been decided and that the Superintendent did not have legislative authority to re-open or reconsider the matter.

[42] Paragraphs 4-46 reviewed the history of the struggle and litigation between these parties. Paragraph 47 outlined the issues underlying this judicial review, i.e. errors relating to a finding that questions were already decided, to absence of legislative authority, to entitlement to legal costs and

to disclosure. Paragraphs 48-104 disposed of the judicial review, including findings on the doctrine of issue estoppel.

[43] RCI relied on its positions above. It did not file an amended bill of costs as it was clear that it did not intend to claim the $6,803.50, referred to as an “admitted overstatement” by the Buschau litigants, shown for non-taxable disbursements. It conceded the position of the Buschau litigants that the requisite direction for second counsel was not made and that, as above, the calculation for fee item 14 must be confined to the hearing duration.

[44] The Buschau litigants argued as above that the maximum claimed for fee item 2 is excessive given a hearing without witnesses, subpoenas, discoveries etc. There is nothing to support the claim for fee item 13. As above, the claimed duration of 6 hours for the fee item 14(a) calculation exceeds the duration of 5 hours 7 minutes reflected in the court record. As above, there was nothing to substantiate the $1,410 claimed for photocopies, representing 5,640 pages for a single judge hearing. Similarly, nothing should be allowed for printing. The Buschau litigants argued that the claimed fees of $4,940 (38 units x $130 per unit) should be reduced: items 2 (4 units); 13(a) (2 units); 14(a) (4 hours x 2 units per hour); 14(b) (0 units) and 26 (0 units) for a total of 14 units x $130 per unit = $1,820.

Assessment

[45] There were issues unique to this judicial review. I should not assess the bill of costs for the T-2006-10 matter as if an extension or part of the above matters. However, I think that certain materials underlying this judicial review had already received close scrutiny at this stage of the protracted struggle between the litigants. I allow 5 and 4 units for fee items 2 and 13(a) respectively. The Buschau litigants' materials specifically referred to the start and end times, i.e. 9:30 am and 4:00 pm respectively, in asserting a duration of 5 hours 7 minutes inclusive of all breaks. I think that those times yield 6.5 hours as the actual figure. As above, I reduce this to 5.45 hours, to be apportioned at 2 units and 3 units per hour for 3 and 2.45 hours respectively. I allow fee item 26 at 2 units as claimed. I reduce the $1,410 for photocopies to $1,250, but otherwise I find the claimed disbursements appropriate in a party and party context and allow them as claimed.

[46] RCI's bill of costs for the T-898-07 matter, presented at $14,316.55, is assessed and allowed at $10,881.38. RCI's bill of costs for the A-453-08 matter, presented at $12,756.79, is assessed and allowed at $9,521.16. RCI's bill of costs for the T-2006-10 matter, presented at $14,440.85, is assessed and allowed at $5,470.71.

"Charles E. Stinson"
Assessment Officer

Vancouver, BC
March 23, 2012

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-453-08
STYLE OF CAUSE:	ROGERS COMMUNICATIONS INC v SANDRA BUSCHAU et al

ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES

REASONS FOR ASSESSMENT OF COSTS:	CHARLES E. STINSON
DATED:	March 23, 2012

APPEARANCES:

Peter P. Senkpiel	FOR THE APPELLANT
John N. Laxton, QC	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Nathanson, Schachter & Thompson LLP Vancouver, BC	FOR THE APPELLANT
Laxton Gibbens & Company Vancouver, BC	FOR THE RESPONDENTS