Federal Court of Appeal | Cour d'appel fédérale

Date: 20120221

Docket: A-365-09

Citation: 2012 FCA 61

BETWEEN:

LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH CANADA

Appellant

and

HER MAJESTY THE QUEEN, THE ATTORNEY GENERAL OF CANADA, WASYL ODYNSKY

Respondents

ASSESSMENT OF COSTS - REASONS

BRUCE PRESTON - ASSESSMENT OFFICER

[1] On November 12, 2010 the Court dismissed the appeal with costs payable to the Respondent Wasyl Odynsky.

[2] The hearing of the assessment of costs was held on December 12, 2011 by way of teleconference. Counsel for the crown did not participate in the assessment.

[3] During the teleconference counsel for B'nai Brith requested an adjournment as counsel for Mr. Odynsky had submitted case law that morning. On the consent of both parties the hearing of the assessment was adjourned for one hour.

[4] At the hearing of the assessment, counsel for Mr. Odynsky submitted that B'nai Brith (the Appellant) was seeking costs of $1.00. Counsel argued that the Court had awarded costs and that, pursuant to Rule 407 of the *Federal Courts Rules,* Column III of Tariff B was the correct column to use for this assessment. Counsel contended that as a result, an assessment officer lacked the jurisdiction to allow costs of $1.00. In support, counsel for Mr. Odynsky referred to *Madell v. the Queen*, 2011 FCA 105, at paragraph 13 which held:

> a. The Appellant's position, in urging me to effectively strike an award of costs, essentially misconceived the role of an assessment officer: see para 3 of *Marshall v. Canada*, [2006] F.C.J. No. 1282 (AO) [*Marshall*]. I do not have the jurisdiction to vacate or vary a judgment as I am not the "Court" as that term is used in the *Federal Courts Rules*: see *Marshall* above and *Sander Holdings Ltd v. Canada (Minister of Agriculture)*, [2009] F.C.J. No. 720 (AO) [*Sander Holdings*]. With respect, the Federal Court of Appeal having rendered its judgment for costs, I doubt that the relief contemplated by the Appellant's materials before me is available via interlocutory process.

[5] Counsel for Mr. Odynsky contended that the costs claimed in the Bill of Costs were completely reasonable and that the Appellant has made no written submissions concerning the individual Items claimed. Counsel referred to paragraph 14 of *Madell* (*supra*) in support of the argument that the *Federal Courts Rules* do not contemplate a litigant benefiting from having an assessment officer step away from a neutral position to act as the litigant's advocate in challenging given items in a bill of costs. Counsel also submitted that the only fees claimed were those associated with the preparation of the Memorandum of Fact and Law and the hearing of the Appeal.

[6] Referring to *Herbert v. AGC*, 2011 FC 365, counsel for the Appellant conceded that he was unable to argue for an award of $1.00. Counsel argued that as an assessment officer, the range of units under Column III was within my discretion and that the Items claimed should be allowed at the lowest end of the range.

[7] The Appellant relied on the same Written Submissions for the assessment of costs in both the Federal Court and Federal Court of Appeal. In its Written Submissions, the Appellant argues that the factors listed under Rule 400(3) of the *Federal Courts Rules* should be taken into account in assessing costs at the low end of Column III of Tariff B. At paragraphs 23 through 30 of its Submissions as to Costs, the Appellant submits:

> 23. In considering the result of the proceeding under Federal Courts rule 400(3)(a), the Applicant submits that the Court should consider the results of the motions which the respondent Odynsky made in which the Appellant succeeded. The Court should also consider that on the merits, the Appellant succeeded on the issue of standing.
> 24. In considering the importance and complexity of the issues under Federal Court rule 400(3)(c), the Court should consider the need to prevent the Governor in Council from being immune from judicial review. Costs should not become a deterrent that would contribute to immunity.
> 25. In considering the apportionment of liability under rule 400(3)(d), this Court should take into account that success was divided. The respondent Odynsky succeeded on the issue of statutory interpretation but the Applicant succeeded on the issue of standing.
> 26. In considering the amount of work under rule 400(3)(g), this Court should take into account that the effort the Applicant made in opposing the motions in which the respondent failed and the position on standing on which the Applicant succeeded was as substantial as the work involved on the issue of statutory interpretation and then some.
> 27. In considering whether the public interest in having the proceeding litigated justifies a particular award of costs under rule 400(3)(h), this Court should take into account these remarks of Mr. Justice Barnes at paragraph 12:
>
> > There is no question that B'nai Brith has raised a serious issue of statutory construction in this proceeding and the Attorney General did not strenuously argue

> otherwise. Justice Dawson also felt this was a serious issue worthy of further consideration, and I can find no basis for taking issue with her finding.

and these remarks by the Federal Court of Appeal:

> the point raised by the appellant concerning the interpretation of subsection 10(1) has never been put directly to this Court for decision.
>
> 28. In considering rule 400(3)(i), this Court should take into account that the motion to strike and the motion for a stay of the respondent Odynsky tended to unnecessarily lengthen the duration of the proceeding. The motion for a stay was consequent upon the motion to strike.
>
> 29. In considering rule 400(3)(i) and (k), this Court should take into account the fact that the respondent Odynsky failed to admit that the standing of the Applicant was at least fairly arguable. The motion to strike and the motion for a stay were unnecessary. Any issue raised on the unsuccessful motion to strike could have been left to the main application.
>
> 30. In considering rule 400(3)(o), this Court should take into account that
>
> > a) the Applicant represents victims of the Holocaust in general and relatives of victims of the place where the respondent Odynsky was a concentration camp guard,
> >
> > b) revocation proceedings were commenced against the respondent Odynsky on the basis that the Minister of Citizenship and Immigration had concluded that the respondent Odynsky was a person with respect to whom there are substantiated allegations or evidence of direct involvement or complicity in war crimes or crimes against humanity,
> >
> > c) the Federal Court found that the respondent Odynsky obtained his citizenship by false representation or fraud or by knowingly concealing material circumstances.
>
> It would offend justice to order a representative of the relatives of the victims who died at the place where the respondent Odynsky was a concentration camp guard to be ordered to pay substantial sum of money by way of costs to a person such as the respondent Odynsky.

[8] At the hearing of the assessment, counsel for the Appellant also submitted that the public interest aspect of this proceeding related to the relatives of the victims of the concentration camp. Counsel conceded that there was not a broad public interest attached to this proceeding. Counsel argued that the fact the Federal Court granted the Appellant standing is evidence of a public interest issue. Finally, counsel for the Appellant submitted that the issues contained in the appeal were larger than the Holocaust; the issues went to cabinet jurisdiction.

[9] In rebuttal, counsel for Mr. Odynsky submitted that the issue being addressed on the assessment was costs, not the standing of the Appellant. Concerning the issue of public interest,

counsel referred to *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, 2002 FCA 515 at paragraph 10 which held:

> I think that the application of Rule 400(3) factors against the interest of successful litigants would require carefully considered discretion. Rule 409, being permissive, does not bind an assessment officer to exercise discretion exactly as the Court has done and does not automatically require that a public interest factor override all other factors so as to achieve minimum or maximum allowances. In Early Recovered Resources Inc., supra, I tempered the weight given to public interest because it was regional in nature. I doubt that, in these circumstances, I can ignore the Appellants' role in creating scrutiny of the process, but it is also uncontroverted that the Respondent had important responsibilities, including respect for the Appellants' right to proceed. The Respondent, having received the ordinary scale of party and party costs, is not bound by a public interest factor to permit the Appellants to escape completely the consequences of that costs award, ie. by minimum allowances when higher allowances might otherwise be warranted….

Counsel further contended that any issue of public interest was between the Appellant and the Attorney General of Canada. Counsel argued that Mr. Odynsky had been dragged into this proceeding as the dispute between the Appellant and the Attorney General of Canada was his citizenship.

[10] I will commence with this last point. At paragraph 24 of *League for Human Rights of B'Nai Brith Canada v. Canada*, 2008 FC 732 (*League of Human Rights*), the Court held that a person is directly affected if the decision at issue directly affects the party's rights, imposes legal obligation on it, or prejudicially affects it directly. Although I would not characterize Mr. Odynsky's standing as being dragged in, it is clear that he is a person directly affected by the decision under appeal. The question is whether this should have an impact on the issue of costs. I am of the opinion that it does have an impact. Neither the Crown nor Mr. Odynsky, both of whom possessed direct standing, sought an appeal of the decision. This challenge was initiated by a third party who was found not to have direct standing but who possessed public interest standing. When the Appellant applied for a

judicial review of the Governor in Council's decision, and subsequently appealed the decision of the Federal Court to the Federal Court of Appeal, Mr. Odynsky was faced with a challenge to the status of his citizenship by a third party. Faced with this challenge, Mr. Odynsky took steps to protect his rights and this should have a bearing on the assessment of costs.

[11] Several times in its submissions the Appellant addresses Mr. Odynsky's motions for orders striking the Application for Judicial Review and for a stay of the judicial review proceeding. Counsel for the Appellant argued that consideration should be given to the success of the Appellant on all of them and the effort the Appellant expended in opposing the motions in the Federal Court. Counsel contended that these motions unnecessarily lengthened the duration of the proceeding. I do not find these motions to be factors which unnecessarily lengthened this proceeding as they were both argued prior to the commencement of this appeal, therefore they had no bearing on the pace of the appeal process.

[12] Another preliminary issue is public interest. When considering Rule 400(3)(h), I agree with the Appellant that the nature of this proceeding is such that, for a portion of the population, public interest could be very high. However, as was held in *Bow Valley Naturalists Society (supra),* a public interest factor should not override all other factors so as to achieve minimum or maximum allowances and the weight given to public interest may be tempered due to a regional interest. Although the case before me does not have a regional limitation, I agree with counsel for the Appellant that the scope of public interest may not be overly broad and may be limited to those whom the Appellant represents. On the other hand, I agree with counsel for Mr. Odynsky that, in this particular proceeding, public interest is primarily an issue which is between the Applicant and

the Respondents Her Majesty the Queen and the Attorney General of Canada. The judicial review of the decision of the Governor in Council, which is the subject of this appeal, was launched by the Appellant and the decision is defended by the Crown. As was found at paragraph 10, above, Mr. Odynsky was faced with a challenge to his citizenship and took steps to protect his rights but the public interest aspect of the judicial review emanated from the Appellant's challenge, not Mr. Odynsky's participation. In summary, although there is an obvious public interest, that interest is limited in nature and not related to steps Mr. Odynsky's took to protect his rights. Consequentially, I find that the impact of the public interest aspect of this proceeding should not have any impact on the assessment of Mr. Odynsky's costs.

[13] When considering the Appellant's submissions concerning Rule 400(3)(o) (any other matter), assessment officers occasionally conduct assessments involving parties facing challenging circumstances. However, notwithstanding the gravity of these situations, assessments must be conducted pursuant to the Rules and Tariff of the *Federal Courts Rules*. Therefore, I find the fact that the Appellant represents families of victims of the Holocaust is not a factor which I can consider in this assessment of costs.

[14] In the light of these factors, I will now address the individual Items and disbursements claimed.

[15] As mentioned above, the only argument concerning assessable services that was put forward by the Appellant was that the Items claimed should be allowed at the low end of Column III. In *Starlight v. Canada*, 2001 FCT 999, it was held:

> **7** The structure of the Tariff embodies partial indemnity by a listing of discrete services of counsel in the course of litigation, not necessarily exhaustive. The Rules are designed to crystallize the pertinent issues and eliminate extraneous issues. For example, the pleading and discovery stages may involve a complex framing and synthesizing of issues leaving relatively straightforward issues for trial. Therefore, each item is assessable in its own circumstances and it is not necessary to use the same point throughout in the range for items as they occur in the litigation. If items are a function of a number of hours, the same unit value need not be allowed for each hour particularly if the characteristics of the hearing vary throughout its duration. In this bill of costs, the lower end of the range for item 5 and the upper end of the range for item 6 are possible results. Some items with limited ranges, such as item 14, required general distinctions between an upper and lower assignment in the range for the service rendered. (emphasis added)

In keeping with the findings in Starlight, I will assess each Item claimed based on the merits of the individual items.

[16] Concerning Item 19 (Memorandum of Fact and Law), having reviewed the record of this proceeding, Mr. Odynsky's Memorandum of Argument comprised 11 pages, four pages of which were Overview and Background. Further, counsel for Mr. Odynsky adopted the position of the Attorney General on the issue of standard of review. Finally, the issues under appeal were not overly complex relating to standing and whether the Judge hearing the application made a reversible error. Taking these factors into consideration, I would ordinarily allow Item 19 at 4 units. However, in keeping with my findings above, and considering the unique position Mr. Odynsky found himself in, I find that the circumstances of this proceeding warrant an allowance of costs at a higher level. Therefore, I allow Item 19 at 5 units.

[17] Concerning Item 22 (a) (first counsel fee per hour on hearing of appeal), once again, I find that the unique position Mr. Odynsky found himself in warrants an allowance of costs at a higher level. As Item 22 has a range of 2 – 3 units, I will allow it at 3 units for 4 hours as claimed.

[18] As the Appellant has not provided any submissions concerning the disbursement claimed, and having reviewed the claims for photocopying and delivery and service of document, I find the amounts claimed to be reasonable and necessary given the circumstances of this proceeding. Therefore, as Mr. Odynsky has justified these disbursements they are allowed as claimed.

[19] For the above reasons, the Bill of Costs of Mr. Odynsky is assessed and allowed at $3,045.69. A Certificate of Assessment will be issued in that amount.

"Bruce Preston
Assessment Officer

Toronto, Ontario
February 21, 2012

Federal Court of Appeal | Cour d'appel fédérale

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-365-09
STYLE OF CAUSE:	*LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH CANADA v. HER MAJESTY THE QUEEN, THE ATTORNEY GENERAL OF CANADA, WASYL ODYNSKY*

ASSESSMENT OF COSTS WITH PERSONAL APPEARANCE OF THE PARTIES

PLACE OF ASSESSMENT:	TORONTO, ONTARIO
REASONS FOR ASSESSMENT OF COSTS:	BRUCE PRESTON
DATED:	FEBRUARY 21, 2012

APPEARANCES:

David Matas	FOR THE APPELLANT
Barbara Jackman	FOR THE RESPONDENT (WASYL ODYNSKY)

SOLICITORS OF RECORD:

David Matas Barrister and Solicitor Winnipeg, MB	FOR THE APPELLANT
Jackman and Associates Toronto, ON	FOR THE RESPONDENT (WASYL ODYNSKY)