Docket: 2003-3554(GST)G

BETWEEN:

CANADA TRUSTCO MORTGAGE COMPANY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

CERTIFICATE OF COSTS

I CERTIFY that I have taxed the party and party costs of the Appellant in this proceeding under the authority of subsection 153(1) of the *Tax Court of Canada Rules* (General Procedure) and I ALLOW THE SUM OF $66,225.28.

Signed at Ottawa, Canada, this 12th day of September 2007.

"Alan Ritchie"

Taxing Officer

Citation:2007TCC500
Date:20070912
Docket: 2003-3554(GST)G

BETWEEN:

CANADA TRUSTCO MORTGAGE COMPANY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR TAXATION

Alan Ritchie, T.O., T.C.C.

[1] This matter came on for hearing by way of a telephone conference call on Thursday, June 21st, 2007. It follows a judgment of the Honourable Chief Justice Bowman of this Court dated December 17th, 2004, which allowed the appeal, with costs to the Appellant.

[2] The Respondent was represented by Mr. John McLaughlin, and the Appellant by Ms. Martha MacDonald.

[3] The Appellant submitted a Bill of Costs in the amount of $95,228.28. The only items in dispute were two amounts claimed as disbursements for the services of two expert witnesses who prepared reports and appeared at trial.

David C. Allan

(expert report on the nature and purpose of asset securitization)

Expert Witness Report:	10 hours @ $1,500 per hour	$15,000
Court Attendance:	8 hours @ $1,000 per hour	$ 8,000
GST		$ 1,610
Total		**$24,610**

Loraine D. McIntosh
(expert report on accounting and financial reporting requirements with respect to securitized assets)

(Below is a summary of documentation provided at the taxation hearing)

Meetings re: nature of engagement, etc.	3 hours
Preparation of expert report, meetings, final review	26 hours
Trial preparation, comment on Facts and Arguments documents, notes, reference materials	14 hours
Attendance in Court	11 hours
Total: 54 hours @ $874* per hour	$47,200
GST	$ 3,304
Total	**$50,504**

* $825 per hour plus 6% administrative charge

[4] Counsel for the Respondent objected to the amounts claimed with respect to the number of hours charged as well as the hourly rates charged, as it was his contention that they were excessive and unreasonable.

Hourly Rates

[5] With respect to the hourly rates charged by the two experts, counsel for the Respondent characterized them as extravagant and as being the "Cadillac" of experts - when in fact other experts could have been retained. He noted that the only mention of the experts testimony or reports was at paragraph 30 of the judgment, where the trial judge simply reproduced a definition of securitization. He questioned whether their contribution was "essential" – that the question was only whether GST should be applied or not to the servicing of mortgages sold by Canada Trustco; he noted that the trial judge had made that determination based on provisions of the *Excise Tax Act* and the facts.

[6] Counsel for the Respondent also noted that the testimony of Mr. Allan, in particular, had been characterized by Appellant's counsel at trial as "motherhood" information that would not be contentious. He also found that there was considerable overlap and commonality between the reports produced by the two experts. He questioned why there was such a difference between the hourly rates charged by the two experts. He argued that the Respondent should not be responsible for the six per cent administrative surcharge. Finally, he noted that much of what was presented was included in a partial Agreed Statement of Facts appended to the judgment.

[7] Counsel for the Respondent cited *AlliedSignal Inc. v. Dupont Canada Inc. et al.*,(1998), 81 C.P.R.(3d) 283 (Fed Ct., T.D.), in which the taxing officer noted that the unsuccessful party should not necessarily be responsible for bearing the costs of such a witness when other expert witnesses were available and charged lower fees. He also cited the decision in *Apotex Inc. v. Syntex Pharmaceuticals International Ltd. et al.*, (1999) 176 F.T.R. 142, in which this premise was applied and the hourly fees charged by a particular expert were found to be excessive and outrageous. He suggested that an hourly rate of $350 would be more reasonable, in line with the amount allowed in the Ontario Courts for the services of a senior lawyer. He acknowledged that the expert witnesses were leaders in their field, but suggested that other witnesses could have been used.

[8] Counsel for the Respondent summarized his position and made reference to *Engine and Leasing Co. et al. v. Atlantic Towing Ltd.*, (1995), 93 F.T.R. 181 at paragraph 4:

> I should observe at the outset that we are dealing with party-and-party costs. It is well established that parties cannot recover all their costs under that kind of award. Also, compensation of an expert witness during trial at the hourly rate allowed for preparation may be found to be too generous. Further, there is no foundation for the notion that counsel may incur any expert witness costs for which, in the event of success, they will be fully compensated.

[9] Counsel for the Appellant argued that the full amounts should be allowed as claimed, including the administrative surcharge, as those were both reasonable and represented the amounts actually disbursed. She cited *3664902 Canada Inc. et al. v. Hudson's Bay Co.*, (2003), 169 O.A.C. 283 at paragraph 17, in which the Ontario Court of Appeal noted that under party-and-party costs, witness fees should be based on what was actually spent, reduced if appropriate to what was reasonably spent. She noted that the rates charged were those currently borne by the market for experts of

this calibre, and that counsel for the Respondent had presented no evidence that there were in fact other experts with commensurate experience available. She also cited *AlliedSignal* at paragraph 83, in which fees for what was described as the "Cadillac" of experts were ultimately allowed in that instance as the taxing officer felt the disbursement necessary to the conduct of the appeal. She also cited *L. & M. Wood Products (1985) Ltd. v. The Queen*, 98 DTC 4140 (T.C.C.), in which fees for an expert were allowed as they were in line with market rates.

[10] Counsel for the Appellant referred to section 154 of the *Tax Court of Canada Rules* (General Procedure) ("the Rules") which outlines what the taxing officer should consider at taxation. She noted that the amount in issue was significant for this Court, some 2 million dollars; that it was a test case for many other similar files before the Revenue Agency; and that there were very complicated financial arrangements under consideration involving at least four major GST issues. This resulted in a large volume of work for the conduct of the appeal, and that this should all be considered by the taxing officer.

[11] Counsel for the Appellant disagreed with the Respondent's suggestion of a rate comparable to fees for a lawyer before the Ontario Court. She noted that it is well established that charges for expert witnesses and their reports should be treated as disbursements and not fees, and furthermore that in the present case we were dealing with investment bankers and accountants – not lawyers.

Number of Hours Claimed

[12] Counsel for the Respondent objected to the number of hours claimed for the appearance of Mr. Allan as an expert witness at trial, as he was both a material and an expert witness and should not be entitled to expert fees for providing lay testimony. His position was that a few hours' attendance as an expert should be allowed, and not the full eight hours claimed.

[13] Counsel for the Respondent objected to the 26 hours claimed by Ms. McIntosh for the preparation of the expert report, noting that Mr. Allan had only claimed 10 hours for the preparation of a report of similar length and - in his view – content. He also was of the view that some of the 14 hours for trial preparation should be taxed off as the review of, and comment on, Facts and Arguments documents did not fall within the role of an expert witness.

[14] In general, Counsel for the Respondent raised questions as to the usefulness of the two experts' reports and testimony at trial, again implied that there were

significant similarities and overlap between them, and disputed the need for the Appellant to retain both experts. He noted that the Tariff is clear that disbursements must be essential for the conduct of the proceeding and referred to *AlliedSignal* (*supra*) at paragraph 81, in which the taxing officer outlined a three-pronged test for assessing the reasonableness of expert testimony. He was of the view that it was reasonable to hire the experts, however that did not constitute a blank cheque for an award and that there was little evidence of the reliance placed on their testimony by the trial judge.

[15] Counsel for the Appellant stated that the appearance of the experts and the preparation of their reports were critical to her client's case. She noted that there were only a handful of experts in Canada who could provide the context on securitization that Mr. Allan had, and that Ms. McIntosh then provided expert input on the accounting treatment of such securitized assets. Her view was that the reproduction of a significant extract of Ms. McIntosh's report in the judgment spoke to its relevance and that she had provided critical testimony on the financial statements that were the basis for the Crown's assessment.

[16] Counsel for the Appellant noted that the Respondent had provided no basis for which the number of hours claimed could be considered unreasonable. With respect to preparation time, she cited *Comsense Inc. v. The Queen*, (2000), [2000] 3 C.T.C. 2790, 2000 DTC 2345 (T.C.C.), in which 68 hours for preparation was allowed. With respect to attendance in Court, she noted that the experts could have been called at any time and that it was more than reasonable that they be available as a result.

[17] In summary, counsel for the Appellant noted that the factors to be considered by the taxing officer under section 154 of the *Rules* should result in her client being fully indemnified if the test of reasonableness was met, which she believed it was as noted in paragraph 10 above. The witnesses called were recognized as experts by the Court, and there is no evidence that they were not useful to the Court at hearing.

Decision

[18] The charges claimed for the services of the expert witnesses must be found to be both essential for the conduct of the proceeding and reasonable. This determination falls under the discretion of the taxing officer as set out in section 157 of the *Rules*.

[19] At the outset, I note that I am not an expert in securitization of assets nor am I familiar with the market rates charged by experts or consultants in various fields of

expertise. The discretion exercised will therefore attempt to strike a reasonable balance based on the arguments presented by counsel at the taxation hearing.

[20] I have no reason to question the fact that the Appellant found it essential to hire the two experts in question in support of their position. Despite the claim by the Respondent that there were commonalities between the reports and the experts' testimony, they were recognized by the Court as expert witnesses and ultimately contributed to some degree to the success of the appeal.

[21] I also agree with counsel for the Appellant, that, with respect to the factors set out in section 154 of the *Rules*, this matter met most if not all tests to a significant degree:

> Where party and party costs are to be taxed, the taxing officer shall tax and allow the costs in accordance with Schedule II, Tariff B and the officer shall consider,
> (*a*) the amounts in issue,
> (*b*) the importance of the issues,
> (*c*) the complexity of the issues,
> (*d*) the volume of work, and
> (*e*) any other matter that the Court has directed the taxing officer to consider.

[22] There is no doubt that the two witnesses in question are highly qualified individuals who assisted the Court by way of their reports and testimony. In no way does what follows put that in question; however the nature of their relationship with the Appellant needs to be examined.

[23] Could the Appellant have called upon other experts, charging lower rates, and have achieved the same result? Arguments made at the taxation hearing were inconclusive. I can surmise that the financial means at the disposal of the Appellant might lead counsel to seek out the most highly qualified experts available with less concern for cost and value for money than would be the case for the lay litigant. The premise that the account submitted by the experts by default represents the going or market rate for experts of the calibre needed to support this particular case is open to question.

[24] Similarly, the accounts submitted by the experts were accepted and paid in full. I note from the documentation that in the case of Ms. McIntosh two bills were presented in November and December 2004 for lump sums of $22,000 and $25,200 plus GST respectively, with no breakdown of hours charged, work performed, etc. That breakdown was only provided by Ms. McIntosh to counsel for the Appellant by

way of an email in August 2005. It would appear on the surface that the accounts were likely paid before the breakdown of services rendered was produced.

[25] I find the hourly rates of $1,500 and $1,000 charged by Mr. Allan for preparation of his report and attendance at trial to be quite high. I find the rate charged by Ms. McIntosh - $874 per hour for all services rendered – to be more reasonable. The rates suggested by counsel for the Respondent were in the range of $350 or $400 per hour and were not based in any way on the market rates for highly qualified experts, and I find them to be too low.

[26] Any attempt to strike a reasonable balance will be to a large extent arbitrary and subjective. However, in the absence of conclusive arguments by the two parties with respect to appropriate rates, I see no alternative.

[27] I will allow the hourly rate charged by Ms. McIntosh of $825, including the 6% administrative surcharge, for a total of $874 per hour. This amount was paid by the Appellant, and the fact that the administrative surcharge is explicitly noted as opposed to being rolled into in the hourly rate I find of no consequence.

[28] I will allow $1,000 per hour for the services of Mr. Allan, both for the preparation of the expert report and for attendance at trial.

[29] I note from the minutes of the proceedings that Mr. Allan was called as an expert at 11 a.m. on the first day, and concluded that testimony at approximately 3:00 p.m. He continued thereafter as a factual witness. I will therefore allow 6 hours for his attendance as an expert at trial. The full 10 hours charged for the preparation of his report is allowed. The amount allowed for the services of Mr. Allan is 16 hours, for a total of $16,000 plus $1,120 GST.

[30] I will allow the 11 hours claimed by Ms. McIntosh for attendance at trial. She testified the morning of the second day, and I find it reasonable that she be expected to attend from the outset of the proceedings in order to be available to testify depending on the conduct of the litigation.

[31] I agree with counsel for the Respondent that some of the charges claimed by Ms. McIntosh are not directly related to the preparation of her report or her attendance at trial in the context of a taxation of costs hearing. A total of 43 hours was charged for work done prior to her attendance at trial. Preparatory meetings, comments on various documents, taking of notes – these may be helpful to the

Appellant but are not directly related to the drafting of the report. I will allow 20 hours for the preparation of the report.

[32] The total amount allowed for the services of Ms. McIntosh is therefore 31 hours for a total of $27,094 plus $1,897 GST.

[33] The Appellant's Bill of Costs in the amount of $95,228.28 is taxed, and $66,225.28 is allowed.

Signed at Ottawa, Canada, this 12th day of September 2007.

"Alan Ritchie"

Taxing Officer