Date: 20080930

Docket: T-874-06

Citation: 2008 FC 1097

BETWEEN:

CAPE COD FISHING CO.

Applicant

and

LOYOLA HEARN, MINISTER OF FISHERIES AND OCEANS CANADA and FISHERIES AND OCEANS CANADA

Respondents

ASSESSMENT OF COSTS – REASONS

Charles E. Stinson
Assessment Officer

[1] Richard Goldney, the principal of the Applicant, brought an application for judicial review of a decision of the Respondent, the Minister of Fisheries and Oceans Canada (the Minister) to introduce a commercial groundfish pilot plan (the Pilot Plan) for the 2006 fishing season in the Pacific region, to include a rockfish allocation formula based on equal share per vessel without consideration of either vessel historical catch or overall length. The judicial review requested various declarations to the effect that the Minister's decision was flawed. The Applicant's memorandum of fact and law requested an order setting aside the Pilot Plan relative to the rockfish

fishery, or alternatively that the matter be referred back to the Minister for re-determination, and in the further alternative that the Applicant be entitled to petition the Minister for reconsideration.

[2] The Applicant filed a notice of discontinuance on November 5, 2007. The hearing date for the judicial review had been set for November 13, 2007. I issued a timetable for written disposition of the assessment of the Respondents' bill of costs presented further to Rule 402. The framing of these reasons and my consideration of the issues are consistent with my approach in paragraph 3 of *Abbott Laboratories v. Canada (Minister of Health)*, [2008] F.C.J. No. 870 (A.O.).

I. The Position of the Parties

[3] Essentially, the Respondents' position in chief was that the Pilot Plan was of substantial significance for the public interest and stewardship of the commercial groundfish fisheries valued in excess of $145 million annually; that the judicial review could have seriously compromised said stewardship; that case preparation was fully complete by the time of the discontinuance, that the judicial review's purpose was to secure a larger quota and that the complex legal and factual issues required much analysis and work. The Respondents noted that although there had been discussions shortly before November 5, 2007 about the possibility of discontinuance, the Applicant did not guarantee that would happen and therefore counsel had to complete hearing preparation (counsel fee item 13).

[4] Essentially, the Applicant's position in reply was that the non-responsiveness of the Minister to submissions on the need to vacate the Pilot Plan necessitated a judicial review application to

preclude prejudice to the Applicant's licence. The Applicant argued that the order dated February 28, 2007 (the Order) determined that its primary argument was that it had a right to make its position known to the Minister before a decision on the Pilot Plan and that departmental officials had interfered with that right. The Applicant argued further to Rules 409 and 400(3)(i) (conduct) that the bill of costs should accordingly be denied or substantially reduced.

[5] The Applicant argued further to Rule 400(3)(a) (result) that its instructions to its counsel to seek further time extensions while attempting resolution by the alternate means of communication with its local member of Parliament (its MP) gave the relief sought in the judicial review: a letter dated September 4, 2007 from the Minister (the Letter), and therefore the Respondent's costs should be denied. An early admission that the Minister had not considered the Applicant's materials in making a decision on the Pilot Plan could have precluded the substantial costs of the preparation for and cross-examination of the Respondents' affiant: see *Dark Zone Technologies Inc. v. 1133150 Ontario Ltd.*, (2002) FCT 1 (F.C.T.D.) [*Dark Zone*] which held that a party should be relieved from costs in comparable circumstances. The Applicant argued further to Rule 400(3)(c) (importance and complexity) and (h) (public interest) that the Respondents' conduct should result in denial of costs.

[6] The Applicant argued that the Respondents effectively acquiesced to discontinuance without costs. That is, the Applicant had verbal assurance from its MP that the Minister was agreeable to a discontinuance without costs although written confirmation of that never did materialize. Further to Rule 400(3)(o) (any other matter considered relevant), costs should not be assessable in those circumstances.

[7] In rebuttal, the Respondents argued that the record does not indicate misconduct. In particular, there is no evidence of interference with the Applicant's efforts to put its position before the Minister. By confirming that it was the Applicant's disagreement with the Pilot Plan's formula which prompted this judicial review, the record undermines the Applicant's assertion that misconduct necessitated the judicial review. The Applicant's memorandum of fact and law confirmed that its purpose was to quash the Pilot Plan and therefore the assertion that the Letter essentially gave the relief sought in the judicial review is incorrect. As well, the Letter did not provide the alternative relief sought, i.e. direct presentation of the Applicant's submissions to the Minister, but rather it simply provided for review and analysis of the Applicant's materials by departmental staff. The Respondents argued that the record does not support the Applicant's assertion that its participation in the November 2006 review of the Pilot Plan could have ended the judicial review nor does it confirm that the Respondents agreed to discontinuance without costs.

[8] The Respondents argued that the record does not support the assertion that their conduct was improper or relevant for this assessment of costs. Rule 400(3)(j) (failure to admit) is irrelevant because there was no evidence of refusal of any request for admissions. Rule 400(3)(k) (improper or unnecessary steps) is irrelevant because the Respondents brought no motions and because there was no evidence that cross-examination of the Applicant's affiant was unnecessary. Public interest as a factor is irrelevant here because the Applicant's interest here was private, i.e. perceived financial drag of the Pilot Plan on its licence. *Dark Zone* is irrelevant because it addressed the power of the Court to refuse costs further to discontinuance if in the interests of justice to do so, which is not the situation here. Further, no order was sought to dispense with the costs authorized by Rule 402.

II. Assessment

[9] Further to my analysis in paragraph 20 of *Urbandale Realty Corp. v. Canada*, [2008] F.J.C. No. 910 (A.O.), I am not "the Court" as that term is used in Rule 402. Therefore, I cannot purport to exercise the authority conferred by Rule 402 on the Court to dispense with the Respondents' entitlement to costs further to discontinuance.

[10] I concluded at paragraph 7 in *Starlight v. Canada*, [2001] F.C.J. No. 1376 (A.O.) that the same point in the ranges throughout the Tariff need not be used as each item for the services of counsel is discrete and must be considered in its own circumstances. As well, broad distinctions may be required between an upper versus lower allowance from available ranges. The bill of costs claims for one less than the maximum value in each assessable counsel fee item, except for items 6 (appearance on motion), 8 (preparation for cross-examination of the Respondents' affiant), 9 (attendance on cross-examination of affiants) and 26 (assessment of costs) each claimed at the maximum value in their respective ranges. I allow fee items 2 (Respondents' record), 5 (preparation for motion), 6, 8 (preparation for cross-examination of the Applicant's affiant), 9 (attendance on cross-examination of Applicant's affiant) and 13 (preparation for hearing) as presented. I reduce items 8 (preparation for cross-examinations of the Respondents' affiant) and 9 (attendance on cross-examination of the Respondents' affiant) by one unit ($120 per unit) each and item 26 by two units. I find the disbursements in order and allow them as presented at $5,586.37.

[11] The Respondents' bill of costs, presented at $13,746.37, is assessed and allowed at $12,666.37.

"Charles E. Stinson"
Assessment Officer

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-874-06
STYLE OF CAUSE:	CAPE COD FISHING CO. v. LOYOLA HEARN et al.

ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES

REASONS FOR ASSESSMENT OF COSTS:	CHARLES E. STINSON
DATED:	September 30, 2008

WRITTEN REPRESENTATIONS:

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