Date: 20081001

Docket: T-2108-02

Citation: 2008 FC 1103

BETWEEN:

INTERNATIONAL TAEKWON-DO FEDERATION and the CANADIAN TAEKWON-DO FEDERATION INTERNATIONAL FEDERATION CANADIENNE DE TAEKWON-DO INTERNATIONAL

Applicants

and

JUNG HWA CHOI

and

HUNG HI CHOI and JUNG HWA CHOI, A JOINT VENTURE TRADING AS I.T.F. TAEKWON-DO and THE REGISTRAR OF TRADEMARKS

Respondents

ASSESSMENT OF COSTS - REASONS

Charles E. Stinson
Assessment Officer

[1] The Court struck from the register two trade-mark registrations by the Respondents with costs to the Applicants. The Respondents did not appear at the hearing or file written argument. The Applicants properly served a notice of appointment for a hearing of the assessment of their bill of costs. The Respondents did not appear or file reply materials. The Respondents still had not

appeared after I delayed commencement of the hearing for one hour consistent with superior court practice.

[2] I raised concerns with counsel for the Applicants on my jurisdiction to allow certain claims notwithstanding the absence of objections from the Respondents. I indicated that the record satisfied me on the conclusions urged by his materials on the extent of the work required and the relevance of the disbursements incurred. I assess the maximum in the available range for each counsel fee item allowed.

I. Item 1 (originating documents and application records)

A. *The Applicants' Position*

[3] Item 1 provides for preparation "and filing of originating documents … and application records." The Applicants claimed item 1 eight times respectively for the notice of application, application record, book of authorities, each of three affidavits (claimed twice for one affidavit) and the memorandum of fact and law. The Applicants argued further to *Block Parent Program of Canada Inc. v. Edmonton Block Parent Assn.*, [2007] F.C.J. No.170 at para. 3 (A.O.) [*Block Parent*] that an assessment officer must remain neutral and should not challenge items on behalf of an absent litigant. The significant difference between item 2, which provides for preparation "and filing of all defences, replies, counterclaims or respondents' records and materials" [emphasis added] and item 1 is that the word "all" does not appear in the wording for the former. Therefore, further to *Flag Connection Inc. v. Canada (Minister of Public Works and Government Services)*, [2006] F.C.J. No. 22 (A.O.), item 1 may be awarded for each of several discrete services.

B. *Assessment*

[4] In the absence of a full canvass of this item, the Applicants' position is tenuous, but arguable. I allow the various claims under item 1 (except that item 1 is allowed only once for the Russell MacLellan affidavit), but note that said result might have been different in the face of objections from the Respondents.

II. Item 5 (preparation of motion) and 6 (attendance on motion)

A. *Assessment*

[5] The Applicants claimed for a dispute resolution conference under items 5 and 6 instead of under items 10 (preparation for conference) and 11 (attendance on conference) because an order for costs resulted, asserted to be unusual for such conferences. I think that a dispute resolution conference (a proactive effort by the Court to broker resolution of the substantive dispute between the parties) differs fundamentally from a motion (an attempt by one party to gain relief on an interlocutory issue). The issuance of an order does not turn a conference into a motion. I replace items 5 and 6 with items 10 and 11 respectively, leaving the attendance amount unchanged (ranges for items 6 and 11 are identical) but reducing the preparation amount by 1 unit ($120 per unit) (item 10 range maximum is one less than that for item 5).

III. Items 15 (written argument), 25 (services after judgment), 26 (assessment of costs) and 27 (such other services as may be allowed by the assessment officer)

A. *The Applicants' Position*

[6] The Applicants claimed item 15 for preparation of their written representations for the assessment of costs and twice more for each of a response to notice of status review and reply

submissions to the Respondents' materials for notice of status review; item 25 for each of the Respondents' motion for return of security for costs and briefing client on the judgment; item 26 for preparation of the bill of costs and item 27 for each of service of the notice of appointment for assessments of costs and attendance per hour on the hearing. The Applicants argued that directions to prepare written materials in conjunction with service of the notice of appointment places the written argument within the parameters of item 15 which provides for preparation "and filing of written argument, where requested or permitted by the Court" even if I am not the "Court". Item 15 applies to the notice of status review because the Court requested materials in the nature of written argument.

[7] The Applicants argued that although the motion addressing security for costs was a formality, work on it was still necessary and therefore I should stretch my discretion to allow item 25. Items 4 and 27 might be alternative categories for this work. Item 27 should be permitted for attendance on the hearing of the assessment consistent with items such as 9, 11, 14, 21, 22 etc. Many assessments for costs are done in writing. Item 26 does not account for attendance on an oral hearing. Item 23 (attendance on a reference, an accounting or other like procedure not otherwise provided for in this Tariff, per hour) could be used as attendance on the hearing of an assessment of costs fits its wording. The Tariff has a theme of providing for attendance fees per hour for hearings. The Tariff does not refer to the work for service of a notice of appointment and therefore item 27 should be used.

B. *Assessment*

[8] Item 15 is positioned in the Tariff under the subheading ‘E. Trial or Hearing’. The latter term applies to the hearing here of the substantive issues of the lawsuit, but does not apply to assessments of costs and notices of status review because they are interlocutory events incidental to the trial or hearing. I allow item 27 for each piece of work associated with status review resulting in a reduction because the maximum value in the range for item 27 is less than that for item 15.

[9] The Applicants’ submissions for items 23, 26 and 27 concerning the assessment of costs are compelling. My difficulty is that I have addressed this before: see *Abbott Laboratories v. Canada (Minister of Health)*, [2008] F.C.J. No. 870 at para. 104 (A.O.) [*Abbott*]. As well, a preparation item generally immediately precedes an attendance item in the Tariff. However, that does not occur for item 23. I am reluctant to infer that there is a pattern suggesting that attendance fees should be added additional to item 26 for attendance on assessment of costs. I allow only item 26. The order for return of security for costs was silent on costs. Further to para. 73 of *Abbott*, I disallow the claimed costs.

IV. Second counsel (claimed throughout the bill of costs)

A. *The Applicants’ Position*

[10] The Applicants argued further to para. 156 of *Abbott* that I should stretch my discretion to permit second counsel in the circumstances here of the record confirming necessity. The Applicants did not unreasonably inflate their bill of costs by claiming second counsel for every item. It is clear

that item 24 (travel time of counsel) requires a direction of the Court, but several other items do not meaning I have discretion to allow second counsel.

B. *Assessment*

[11] Again, I find the Applicants' submissions attractive in the absence of a full canvass of the matter. I held in *Block Parent* that I cannot certify unlawful items, i.e. those outside the authority of the judgment and the Tariff. To accept the Applicants' position, I might have to conclude that the Tariff imposed a requirement for directions from the Court for services such as item 14(b) (second counsel at trial) because they were deemed beyond my capacity, but other items were within my capacity without the need for guidance from the Court. However, I think this would require me to read too much into the Tariff. I disallow the claims for second counsel.

[12] I allowed the Applicants to add before me an amount of $315.56 for disbursements associated with the assessment of costs. The Applicants' bill of costs, presented at $56,803.65, is assessed and allowed at $41,936.21 together with interest as requested from December 5, 2006 (the date of judgment) further to s. 37 of the *Federal Courts Act* and s. 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43.

"Charles E. Stinson"
Assessment Officer

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2108-02
STYLE OF CAUSE:	INTERNATIONAL TAEKWON-DO FEDERATION et al. v. JUNG HWA CHOI et al.
PLACE OF HEARING:	Toronto, ON
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REASONS FOR ASSESSMENT OF COSTS:	CHARLES E. STINSON
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APPEARANCES:

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