

Date: 20080919

Docket: A-207-07

Citation: 2008 FCA 280

BETWEEN:

**B-FILER INC., B-FILER INC. doing business as
GPAY GUARANTEED PAYMENT and NPAY INC.**

Appellants

and

THE BANK OF NOVA SCOTIA

Respondent

ASSESSMENT OF COSTS - REASONS

**Johanne Parent
Assessment Officer**

[1] The respondent was fully successful in responding to a Section 75 application under the *Competition Act* and in seeking orders that lead to the final judgment of the Court dismissing the appeal with costs on February 13, 2008. A timetable for written disposition of the assessment of the respondent's bill of costs was issued on July 15, 2008 and sent by facsimile and mail to all representing counsel.

[2] Counsel for the respondent filed supporting affidavit and written submissions within the prescribed timeframe. Submissions in reply on behalf of the appellants were not received by the

Registry of the Court in the allocated timeframe, nor was any request to extend the time to file said submissions received. As stated by my colleague in *Dossa v. Canada* (A-657-04):

The *Federal Courts Rules* do not contemplate a litigant benefiting by 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. However, the assessment officer cannot certify unlawful items, i.e. those outside the authority of the judgment and the tariff. I examined each item claimed in the bill of costs and the supporting materials within those parameters.

In accordance with the above referenced comments, despite the lack of challenge by the opposing party, I am prepared to determine the weight that should be given to all factors submitted in the respondent's bill of costs.

[3] In considering the respondent's success and the importance and complexity of the issues, the assessable services claimed under Tariff B of the *Federal Courts Rules* for the preparation of the responding memorandum of fact and law (Item 19) and for counsel fee for preparation of motion for security for costs (Item 21) will be assessed as claimed.

[4] With regard to the claim for counsel fee for the preparation of a motion for confidentiality order, the Court's order of November 22, 2007 is silent as to costs. In *Janssen-Ortho Inc. and Daiichi Pharmaceutical Co., Ltd v. Novopharm Limited*, 2006 FC 1333, the Court determined that, "any pre-trial order that is silent as to costs means that no costs have been awarded to any party". Consequently, item 21 for this motion will not be allowed.

[5] The number of units claimed for the preparation of the bill of costs will be allowed as claimed, but under Item 26 of the Tariff, not 27. The respondent claims the maximum number of units under Item 27 for research in preparation for appeal (3 units) and for consulting with expert Frank Mathewson in preparation for appeal (3 units). Although amounts claimed under Item 27 may be allowed for any services not covered by items 1 to 26 of the Tariff, in my view the above mentioned fees pertain to the preparation of the respondent's memorandum of fact and law, which has already been claimed under Item 19. These claims will therefore not be allowed.

DISBURSEMENTS

[6] I examined each disbursement claimed along with the supporting material and the Court file. The disbursements for courier charges (\$46.85), facsimile charges (\$3.45), computer searches (\$117.78) and process services (\$439.50), as claimed in the respondent's bill of costs, are all charges deemed necessary to the conduct of this matter. The amounts are reasonable and are therefore, allowed.

[7] Further to my review of the respondent's documents in support of the bill of costs, there is no evidence in support of the amount claimed for photocopies and print room binding charges. I am however, allowing these disbursements at \$640 and \$100 respectively as in my view they were necessary expenses.

[8] The respondent claims in its bill of costs \$4,197.56 for expert fees. This claim is not supported by any evidence or any arguments as to the usefulness or necessity of the expert's opinion in the appeal process. I have had the opportunity to read the respondent's memorandum of fact and law and the material in support of the motion for security for costs, and cannot find any reference to experts but for quotation of evidence before the Competition Tribunal. Experts have a valid role in giving advice on technical matters beyond counsel's expertise but such service must meet the threshold of necessity and reasonableness. While it may well be that it was reasonable for the respondent to obtain expert advice before the Competition Tribunal, there is no evidence establishing that the disbursements claimed were necessary and specifically related to the case at bar. Consequently, I disallow this disbursement in its entirety.

[9] The bill of costs is allowed at \$ 2,907.58 plus GST (\$145.38) for a total amount of \$3,052.96.

“Johanne Parent”
Assessment Officer

Toronto, Ontario
September 19, 2008

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-207-07

STYLE OF CAUSE: *B-FILER INC., B-FILER INC. doing business as GPAY
GUARANTEED PAYMENT and NPAY INC. v. THE BANK
OF NOVA SCOTIA*

**ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF
THE PARTIES**

**REASONS FOR ASSESSMENT
OF COSTS:** JOHANNE PARENT

DATED: SEPTEMBER 19, 2008

WRITTEN REPRESENTATIONS:

No appearance FOR THE APPELLANTS

F. Paul Morrison FOR THE RESPONDENT
Lisa M. Constantine

SOLICITORS OF RECORD:

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