Date: 20081021

Docket: A-421-06

Citation: 2008 FCA 315

BETWEEN:

AIDAN BUTTERFIELD

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

ASSESSMENT OF COSTS - REASONS

Charles E. Stinson
Assessment Officer

[1] A copy of these reasons is filed today in each of Federal Court files T-2056-04, T-2057-04 and T-5-05 (the Federal Court Matters) and applies there accordingly. The Federal Court Matters were three discrete applications for judicial review in respect of the suspension of the Appellant's pilot licence. An order dated May 25, 2005 consolidated the Federal Court matters for the purpose of hearing. The Federal Court dismissed them on July 18, 2006 "with costs to the Respondent to be assessed on the basis of Column III, Tariff B, one counsel fee." On September 17, 2007, the Federal Court of Appeal dismissed with costs this appeal of the Federal Court decision. I issued a timetable for written disposition of the assessment of the Respondent's bill of costs presented in each court.

[2] The Appellant argued further to *Urbandale Realty Corp. v. Canada*, [2008] F.C.J. No. 910 (A.O.) that the assessments of costs should be adjourned *sine die* because of the Respondent's delay in pursuing costs and because the Respondent had not complied with the directions for their conduct. I am satisfied on the record that the Respondent did not delay or otherwise hinder conduct of these assessments of costs: they shall proceed.

[3] Consistent with my approach outlined in paragraph 2 of *Halford v. Seed Hawk Inc.*, [2006] F.C.J. No. 629 (A.O.) [*Halford*], my account in these reasons of the respective positions of the parties is at times somewhat summary in nature. It is detailed enough for an understanding of the notion of issues between the parties, but should be read keeping in mind that there are many more nuances and details of the issues in the record, all of which I have read and considered. My findings in *Halford* above, *Biovail Corp. v. Canada (Minister of National Health and Welfare)* (2007), 61 C.P.R. (4th) 33, [2007] F.C.J. No. 1018 (A.O.), aff'd [2008] F.C.J. No. 342 (F.C.) and *Abbott Laboratories v. Canada (Minister of Health)* (2008), 66 C.P.R. (4th) 301, [2008] F.C.J. No. 870 (A.O.) [*Abbott*] (under appeal) set out my views on thresholds of proof for categories of costs and approach to their assessment. Paragraphs 68 - 71 inclusive of *Abbott* summarize the subjective elements of assessments of costs.

[4] Further to my conclusions in *Balisky v. Canada (Minister of Natural Resources)*, [2004] F.C.J. No. 536 (A.O.) at para. 6 and *Aird v. Country Park Village Properties (Mainland) Ltd.*, [2005] F.C.J. No. 1426 (A.O.) at para. 10, I agree with the Appellant that no costs are assessable for orders silent on costs. I also agree with him that the bill of costs for the Federal Court Matters does

not identify the contested motion for which counsel fee item 5 (preparation) is claimed. However, I note two orders (January 11 and March 21, 2005, respectively) entitling the Respondent to costs. I allow the single mid-range claim here of 5 units ($120 per unit). I agree with the Appellant that fee item 2 (preparation of Respondent's material) cannot be claimed for an appeal matter. I agree with the Appellant that item 13 (preparation for trial or hearing) is not assessable for an appeal. However, further to my conclusions in paragraph 10 of *Gardner v. Canada (Attorney General)*, [2008] F.C.J. No. 284 (A.O.), I allow item 27 (other services) instead at the minimum 1 unit.

I. The Federal Court Matters

A. *Counsel Fees*

Fee items 2 (Respondent's record / available range = 4 – 7 units) claimed at 7 units;
13(a) (preparation for hearing / 2 – 5 units) claimed at 5 units;
14(a) (attendance at hearing / 2 – 3 units per hour) claimed at 2 units per hour for 3 hours;
15 (written argument / 3 – 7 units) claimed at 7 units and
26 (assessment of costs / 2 – 6 units) claimed at 3 units

(1) The Respondent's Position

[5] The Respondent argued that, although each of the Federal Court Matters was of average complexity, their combined work warrants the maximum fee item 2 and 13(a) claims. The Appellant's mode of conduct complicated the interlocutory hearings.

(2) The Appellant's Position

[6] The Appellant argued further to a number off authorities including *Carlile v. Canada (M.N.R.)* (1997), 97 D.T.C. 5284 (T.O.) [*Carlile*], that the Respondent's evidence did not establish entitlement to indemnification of costs and the relevance and actual amount of work. The Appellant suggested the minimum 4 units for fee item 2.

[7] The Appellant argued that as the record indicates that preparation by counsel for the Respondent for the hearing was confined to her memorandum of fact and law which she simply read at the hearing, fee item 13(a) should be reduced to the minimum 2 units. The record indicates a sitting from 9:30 to 11:55 a.m. The recess time therein of 20 minutes is not assessable. As Tariff B2(2) prohibits the allocation of a fraction of a unit, the remaining 2 hours 5 minutes of hearing time should be reduced to 2 hours for allowance under fee item 14(a) at the minimum 2 units per hour. Nothing should be allowed for fee item 15 as the Respondent's written submissions were non-responsive and exceeded the parameters of the Court's direction. Nothing should be assessed for the Respondent under fee item 26 and instead 2 units should be awarded to the Appellant further to Rule 408(3) because the Respondent advanced several exaggerated and inappropriate claims and failed to act reasonably in the face of the Appellant's proposed settlement of $1,600.

(3) Assessment

[8] I concluded in paragraph 7 of *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 Court's decision confirms that the Respondent had to prepare for three distinct cases and therefore in the circumstances of single fee items 2 and 13(a) claims, I allow 7 and 4 units respectively.

[9] Paragraph 102 of *Abbott* above indicates that I do not agree with the Appellant's position concerning fee item 14 calculations. The restriction in Tariff B2(2) prevents the allocation of a fraction of a unit to a service. Once the allocation for fee item 14(a), i.e. 2 or 3 units, has been made, Tariff B2(2) does not prohibit fractions of hours for the duration of the hearing possibly because it would not be reasonable to preclude an assessment officer's flexibility in addressing hearings, for example, with a duration of 15 minutes or which extend 15 minutes beyond an exact number of hours. I allow 2.65 hours at 2 units per hour. I am satisfied that the circumstances associated with fee item 15 warrant a mid-range allowance of 5 units.

[10] Inexplicably, the Respondent's bill of costs did not include disbursements which instead were listed as part of a supporting affidavit. Although I reject the Appellant's request for costs of the assessment, I think that the Respondent's approach somewhat complicated the process and I therefore allow the minimum 2 units for fee item 26.

B. *Disbursements*

<u>Disbursements to Dye & Durham for service and filing of documents ($281.46); Dynamex and Priority Post to courier documents ($103.64); Quicklaw ($296.15) and Cettec Digital Imaging for photocopying and binding ($1,633.99)</u>

(1) The Appellant's Position

[11] The Appellant argued that nothing should be allowed because of the lack of evidence of relevance and reasonableness. Alternatively, only $16.96 should be allowed for Dye & Durham as Rule 140 permits non-personal service by regular mail. As well, some of the invoices relate to orders denying costs and an amount ($24.61) is claimed twice for the same invoice. Regular mail or facsimiles were reasonable alternatives to couriers. As the evidence does not establish relevance for several of the courier invoices and indicates that some could be associated with an order silent on costs, only $1.56 should be allowed.

[12] The Appellant argued that nothing should be allowed for computer research and photocopying because the evidence does not establish purpose, relevance, necessity, or reasonableness. Although *Carlile* above recognizes that sensible approximation may be necessary to preclude absurd results, the disorganization and vagueness of the Respondent's materials precludes that. The Respondent cannot properly add GST to the total for disbursements.

(2) Assessment

[13] The proof here was vague in some areas. I allow reduced amounts for Dye & Durham ($185); couriers ($75); Quicklaw ($205) and photocopying/binding ($1,250). The *Excise Tax Act* requires third party service providers such as Durham & Dye to bill for GST. Part of my considerations in *Englander v. Telus Communications Inc.*, [2004] F.C.J. No. 440 (A.O.) addressed GST as an indemnity. I am not convinced on the record that the Respondent was liable for GST

claimed on counsel fees. I disallow the GST on counsel fees. The Respondent's bill of costs, presented at $4,197.60, is assessed and allowed at $5,111.00.

III. Federal Court of Appeal File A-421-06

A. *Counsel Fees*

Items 19 (memorandum of fact and law / available range = 4 – 7 units) claimed at 5 units; 22(a) (attendance at hearing / 2 – 3 units per hour) claimed at 2 units per hour for 2 hours; and 26 (assessment of costs / 2 – 6 units) claimed at 2 units

B. *Disbursements*

Disbursements totalling $1,059.77 claimed for service and filings; computer research; photocopying and binding

(1) The Respondent's Position

[14] The Respondent argued that the costs were moderate for a proceeding of average complexity. The Respondent countered the Appellant's position concerning a book of authorities by arguing that the Appellant was made aware of the nature of the work. The Respondent did not amend the bill of costs, but did add via supporting materials two invoices ($18.02 and $31.80) for filing of documents.

(2) The Appellant's Position

[15] The Appellant argued that fee item 19 should be restricted to the minimum 4 units because the memorandum of fact and law was essentially a reproduction of the one used in the Federal Court Matters. As above for item 14(a), the hearing duration used for the item 22(a) calculation should be reduced to 1 hour. As above, the Appellant should be awarded costs (2 units) of the assessment.

Further to *MacDonald v. Canada (A.G.)* 2006 FC 1068 (A.O.), the Respondent cannot claim GST for counsel fees.

[16] As above, the Appellant argued that the disbursement claims should be sharply reduced because regular mail or facsimiles were viable alternatives for the delivery of documents. Several items relate to the order dated December 6, 2006, which directed that there "be no costs of this motion." Further to Rule 400(3)(k) (unnecessary or negligent conduct), the Appellant should not be responsible for costs associated with missed deadlines, i.e. the consent to extend time to file the memorandum of fact and law. Collation of documents ($49.80) is overhead and not assessable. Nothing should be allowed for the costs ($3.00 and $724.81) associated with the Respondent's book of authorities because the record indicates that it was unnecessarily duplicative of the Appellant's materials.

[17] The Appellant argued that the added claims via the supporting materials rather than an amended bill of costs did not meet the threshold of *Seiveright (c.o.b. Bev's Pets 'N' Gifts) v. D. & A.'s Pet Food 'N More Ltd.*, [2005] F.C.J. No. 1056 (A.O.), i.e. that a bill of costs may be amended only if the opposing party has sufficient opportunity to respond to the changes. Alternatively, regular mail ($0.52) was sufficient in place of the charge ($18.02) for service of the bill of costs. For the reasons above, the charge ($31.80) for the book of authorities should be denied.

(3) Assessment

[18] The Federal Court of Appeal decision was brief. That case preparation here was likely not difficult did not relieve the need for diligence on the part of counsel for the Respondent. I allow the 5 units claimed for fee item 19. The hearing, which began at 2:00 p.m. and concluded at 3:30 p.m., included a break of 20 minutes during which the Court deliberated and then reconvened to deliver its decision. I think that 1.75 hours for the fee item 22(a) calculation is appropriate. I allow the minimum 2 units claimed for fee item 26. As above, I disallow the GST claimed for counsel fees.

[19] Although the proof of disbursements is somewhat problematic, I disagree with elements of the Appellant's position. For example, the order dated December 6, 2006 extended the deadline for the filing of the Respondent's Notice of Appearance. The charge ($17.49) associated with filing it was a direct consequence of said leave, but was not in any way a cost of the motion within the parameters of the denial of costs in the order. In other words, the event of the motion was mutually exclusive of the event of the Notice of Appearance. The matter of a cheaper alternative to the $17.49 is a different issue. I considered such issues in *Aduvala v. Canada*, 2008 D.T.C. 6523, F.C.J. No. 1055 (A.O.). I conclude that $925.00 is a reasonable total for disbursements.

[20] The Respondent's bill of costs, presented at $3,476.57, is assessed and allowed at $2,305.00.

"Charles E. Stinson"

Assessment Officer

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-421-06

STYLE OF CAUSE: AIDAN BUTTERFIELD v. ATTORNEY GENERAL OF CANADA

ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES

REASONS FOR ASSESSMENT OF COSTS: CHARLES E. STINSON

DATED: October 21, 2008

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