Date: 20081027

Docket: A-71-00

Citation: 2008 FCA 327

BETWEEN:

DALLAS IAN HAY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

ASSESSMENT OF COSTS – REASONS

Charles E. Stinson
Assessment Officer

[1] The Court dismissed with costs this appeal from a decision of the Tax Court of Canada denying losses related to farming, taxidermy and writing activities. I issued a timetable for written disposition of the assessment of the Respondent's bill of costs.

I. The Respondent's Position

[2] The Respondent referred to the supporting affidavit of Sarah Armstrong sworn August 5, 2008 (the Affidavit) and noted that her duties as a paralegal in the Tax Law Services section of the Department of Justice include the drafting of bills of costs. The Respondent argued further to s. 222(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) that the bill of costs is timely being

within ten years of the judgment (December 13, 2001). The Respondent argued that the disbursement claim of $638.58 for photocopying was reasonably necessary.

II. The Appellant's Position

[3] The Respondent's bill of costs is unreasonable and unjustified and should be denied with costs to the Appellant. The Appellant argued that the bill of costs is deficient, not having been signed or dated by an authorized assessment officer, and that a delay of several years in advancing it is prejudicial to his rights. Ms. Armstrong did not deal with the Appellant and therefore does not have the personal knowledge requisite to give evidence in support of the bill of costs.

[4] The Appellant argued that the evidence is deficient in that only one of the supporting invoices appended to the Affidavit was stamped as sworn. He asserted that he had never seen them before and that they were excessive and duplicative. The asserted figures in the Affidavit are inconsistent with the individual amounts of the invoices.

III. Assessment

[5] 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 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* above summarize the subjective elements of assessments of costs.

[6] Rule 405 provides that costs "shall be assessed by an assessment officer". The practice is that a draft bill of costs is filed per Rule 406 which often bears a proposed endorsement for the assessment officer. The responding party (here, the Appellant) must be given an opportunity to challenge the bill of costs and its supporting materials, followed by the assessment officer's disposition of each item of costs in turn, i.e. the assessment of costs. It is then that the assessment officer would sign and date the bill of costs.

[7] The Appellant's position on the suitability of Ms. Armstrong to swear an affidavit did not address the admissibility of evidence sworn on information and belief, which Ms. Armstrong did here. Affidavits on information and belief are permissible for interlocutory process, i.e. motions, incidental to the hearing of and judgment on the substantive issues of the lawsuit. An assessment of costs is also an interlocutory process as its function is not to further adjudicate on the substantive issues of the lawsuit, which are *res judicata* further to the judgment, but to transform the costs portion of the judgment to a specific dollar amount.

[8] Paragraphs 1 and 6 of the Affidavit set out the basis of the evidence on information and belief, i.e. the counsel of record for the Respondent. In considering the weight to be given the Affidavit, I have in mind the commentary for Rule 81 (affidavits) relative to personal knowledge and information and belief in Brian J. Saunders et al., *Federal Courts Practice 2008* (Toronto: Thomson Carswell, 2007) at pp. 407 – 410 inclusive. Paragraph 4 of the Affidavit identifies the invoices collectively as Exhibit "A". Rule 80(3) requires that the commissioner of oaths endorse the exhibit with a statement relating it to the affidavit. That was done, but as is common practice, the endorsement was confined to the first page of the seven-page exhibit. The Department of Justice (DOJ) file number and party names on these pages satisfy me as to nexus.

[9] It is not clear to me that s. 222(4) specifically pegs to the date of judgment a ten-year statutory time limit for collection of tax debt. However, the Federal Court of Appeal had the jurisdiction to award (December 13, 2001) costs to the Crown. My considerations in *Urbandale Realty Corp. v. Canada*, [2008] F.C.J. No. 910 (A.O.), on the timeliness of advancing a bill of costs did not address the ten-year limit raised here. It was not argued before me, but Rule 406 does not impose a time limit. Provisions elsewhere such as for collection of an assessed amount may contain time limits, but my role is assessment of costs and not collection of costs.

[10] The Appellant did not address orders silent on costs, but as he expressed opposition to the bill of costs in general and to certain items in particular, I think that I must intervene regardless of the lack of assistance from him on this point. As sometimes happens, a paralegal with ongoing duties to prepare bills of costs for many unrelated matters may not, as the Appellant suggests, be

familiar with every detail of each matter, but is able to extract expenditure details from office records. Here, Ms. Armstrong's attention to detail elicited invoice no. 69568 (reproduction costs of $130.18) with a specified job completion date of February 8, 2001 associated with unspecified documents. The Appellant's position that invoice no. 69568 duplicated the work associated with invoice no. 70876 ($107.63) with a specified job completion date of February 6, 2001 is incorrect. The latter invoice likely addressed the Respondent's Memorandum of Fact and Law filed that day. Invoice no. 69568 likely addressed the Respondent's motion record for Rule 54 directions filed on February 8, 2001. Invoice no. 69568 is slightly more than invoice no. 70768 because the motion record was slightly longer than the Memorandum of Fact and Law.

[11] Again, the Appellant's position that invoice no. 117006 ($332.55) duplicated the work associated with invoice no. 69568 was of no assistance because the order dated April 3, 2001 disposed of the motion associated with invoice no. 69568 meaning no further work was needed in that area. Invoice no. 117006 in fact indicated that the work request was made on October 31, 2001, with a specified completion date of November 1, 2001. It was for Books of Authorities.
The Respondent filed the Book of Authorities on November 8, 2001, for the hearing of the appeal.

[12] The order dated April 3, 2001 was silent on costs. Further to my conclusions in paragraph 73 of *Abbott* above, I disallow the $130.18 (invoice no. 69568) associated with it. I allow the remaining counsel fees as claimed and the balance ($508.40) of the disbursements as I am satisfied that the latter were not associated with orders silent on costs and were modest and reasonable in the

circumstances. The Appellant's position was erroneous in its analysis of given items, but did invite me to resolve discrepancies (Appellant's Written Reply filed September 3, 2008). I have done so.

[13] For example, the Appellant examined invoice no. 16188 dated November 1, 2001 for copies from the courthouse library (the Library Invoice) and concluded that he was owed $91.80 with accrued interest from said date. His rationale was that the 12 individual charges therein totalled $234.00 exclusive of a 13th entry confirming an account payment of $325.80, which did not accord with the $1,265.20 noted as amount due at the end of said invoice. I think it understandable that a lay litigant may have difficulty in construing evidence of this sort as he is likely unfamiliar with the many forms, i.e. prior art, patent file wrappers etc., of disbursements in litigation. Sometimes, a supporting affidavit explains the internal payment and accounting practices of a law firm to facilitate understanding of a bill of costs. That the Affidavit did not do so here is not a serious omission as it seems apparent that the DOJ internal file number 3-177602 (the DOJ Number) assigned to the Appellant's appeal was Ms. Armstrong's key in isolating relevant items of costs.

[14] Paragraph 4 of the Affidavit claims $638.58 (which I have reduced above by $130.18) for reproductions and appends as Exhibit "A" the invoices underlying that without specifying how many there are. Exhibit "A" comprises seven pages. The Appellant erroneously understood each page as a discrete invoice. I think that each of the first five pages is a discrete invoice for a discrete piece of work. Each contains the DOJ Number.

[15] The seventh page, entitled ‘Litigation Billing Information’, might be viewed as an invoice, but is more a certification to the client of DOJ that a charge of $5 meets the requirements of s. 34 of the *Financial Administration Act*, R.S., c. F-10, s. 1. That section is part of the financial controls in place for disbursement of public funds for work, goods or services. It requires that, before payment can be made, an authorized person (by an instrument of delegation) certify that the work was done and that the proposed charge is reasonable (the latter does not preclude my consideration of reasonableness further to Rule 405). The individual making this certification also prepared one of the earlier invoices from the first five pages of Exhibit “A”.

[16] Thus, the seventh page is not as the Appellant suggests “the total bill for the Respondent’s legal services”. Its amount of $5 was used in the calculation of $638.58. The source of the $5 is the sixth page of Exhibit “A” which is the Library Invoice. I surmise from it that DOJ has a standing account with the library identified as DJUS2 for ongoing requests for copies of case law. The Library Invoice lists 12 amounts ranging from $5.00 to $91.80 for copies on various dates. It would be inefficient for both DOJ and the courthouse to process an individual invoice for each of these transactions. The 12 amounts are cross-referenced to various internal DOJ file numbers, the 11th of which is the DOJ number for copies of case law costing $5 on October 31, 2001, a date consistent with the preparation of the Book of Authorities. It is the $5 referred to on the seventh page of Exhibit A. Therefore, the $1,265.20 is the accrued amount owing as of November 1, 2001 on the library account no. DJUS2. It includes the $234.00 (current charges) and $325.80 (credit for a payment), the balance presumably resulting from previous invoices.

[17] The Respondent's bill of costs, presented at $2,198.58, is assessed and allowed at $2,068.40.

"Charles E. Stinson"
Assessment Officer

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-71-00

STYLE OF CAUSE: DALLAS IAN HAY v. HMQ

ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES

REASONS FOR ASSESSMENT OF COSTS: CHARLES E. STINSON

DATED: October 27, 2008

WRITTEN REPRESENTATIONS:

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Eric Douglas	FOR THE RESPONDENT

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