Federal Court of Appeal

Cour d'appel fédérale

Date: 20101119

Docket: A-215-09

Citation: 2010 FCA 317

Present: JOHANNE PARENT, Assessment Officer

BETWEEN:

HARRY WAWATIE, TOBY DECOURSAY, JEANNINE MATCHEWAN AND LOUISA PAPATIE, IN THEIR CAPACITY AS MEMBERS OF THE ELDERS COUNCIL OF MITCHIKANIBIKOK INIK (ALSO KNOWN AS ALGONQUINS OF BARRIERE LAKE)

Appellants

and

MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

Respondent

and

THE ELDERS OF MITCHIKANIBIKOK INIK (ALGONQUINS OF BARRIERE LAKE) LED BY CASEY RATT

Intervener

Dealt with in writing without appearance of parties.

Certificate of Costs delivered at Toronto, Ontario, on November 19, 2010.

REASONS FOR ASSESSMENT OF COSTS BY: JOHANNE PARENT, Assessment Officer

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REASONS FOR ASSESSMENT OF COSTS

JOHANNE PARENT, Assessment Officer

[1] The Appeal from the Order of the Honourable Mr. Justice Harrington was discontinued on March 4, 2010. On May 6, 2010, the respondent Minister of Indian Affairs and Northern Development (the respondent) filed its Bill of Costs. A timetable for written disposition of the

assessment of the respondent's Bill of Costs was issued initially on May 26, 2010 and re-issued for proper service on September 9, 2010. Both parties filed representations in the prescribed timeframe.

[2] Pursuant to Rules 402, 403 and 407 of the *Federal Courts Rules* and in the absence of a Court Order or agreement between parties on the costs of this discontinuance, costs will be assessed in accordance with Column III of Tariff B.

[3] The assessable services claimed by the respondent amount to a total of $4,381.65 plus disbursements of $1,594.00. In support of its Bill of Costs, the respondent filed the affidavit of Virginie Cantave. Paragraph 4 of this affidavit reads:

> All the fees and disbursements provided for in the Bill of Costs (exhibit "A") are reasonable and were justified for the proper conduct of the file.

Two exhibits are attached to the affidavit namely two work orders for parcel services.

[4] It is noted that the respondent, in its reply submissions, amended its claim for costs and disbursements by reducing the three units claimed under Item 27 for the Notice of Appearance to one unit. Additionally, the respondent withdrew the counsel fees claimed for a memorandum of fact and law under Item 21, plus the claim for PST on all legal services.

[5] In their submissions in response, the appellants claimed that the costs sought are not properly justified, are excessive and should be discounted significantly.

[6] In consideration for the work performed in the preparation and filing of the Notice of Appearance and in accord with the parties' submissions, one unit will be allowed under Item 27 (*McRae v. Canada* 2006 FC 801(A.O.) and *Toronto Sun Wah Trading Inc. v. Canada* 2009 FCA 293(A.O.).

[7] Under Item 19, the respondent sought the maximum number of units for the preparation of its Memorandum of Fact and Law. The appellants argue that this is unreasonable considering that it only consisted of 24 pages that do not deal with very complex issues and therefore the minimum number of units should be allowed. In reply, the respondent argues that:

> The factual record was complex and dated back to events and agreements signed between 1996 and 2006. Furthermore, the respondent had to respond to five issues on appeal as outlined by the appellants in their Memorandum of fact and law, some of which were complex in nature, such as the duty to consult arising out of an asserted Aboriginal right to self-government" (paragraph 5).

[8] Having read through the appellants and respondent's Memoranda of Fact and Law, I consider that the work performed regarding the "events and agreements", refers to arguments that were made before the Federal Court for which there has already been compensation. On the other hand, I have carefully reviewed the points in issue introduced by the respondent in light of the issues raised by the appellants and although an undeniable amount of work was performed in the preparation of the Memorandum of Fact and Law, I do not consider this matter highly complex and will allow six units.

[9] Seven units are claimed under Item 5 (Preparation and filing of a contested motion, including materials and responses thereto) along with three units under Item 21 (Counsel fee on a

motion, including preparation, service and written representations or memorandum of fact and law) for the respondent's preparation of a Motion Record in response to the Matchewan Customary Council's Motion to intervene. In response, the appellants argue that those costs are excessive considering that "this is a simple compilation of information that had previously been submitted". The respondent, in reply, leaves the matter in the discretion of the assessment officer.

[10] Separate claims were made under Items 5 and 21. Given that this is an appeal to the Federal Court of Appeal under Rule 335 of the *Federal Courts Rules,* I will only consider the claim made under Item 21. However, I note that the Order of the Honourable Mr. Justice Sexton dated December 15, 2009 dismissed said motion making no reference as to costs. The assessment officer has no jurisdiction to order costs. As per Rule 400(1) of the *Federal Courts Rules*, only the Court has the "full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid". Further in *Janssen-Ortho Inc. v. Novopharm Ltd.*, 2006 FC 1333 (FC), the Court determined that "any pre-trial Order that is silent as to costs means that no costs have been awarded to any party". Considering, that Justice Sexton's Order is silent as to costs, the claim for the Motion Record in response is denied.

[11] Fees are claimed under Item 25 for services after judgment. The appellants request that this claim be disallowed considering this matter was terminated through a notice of discontinuance and that "Item 25 contemplates the review and the reporting of the final Court decision to the client" (paragraph 11). In reply, respondent's counsel argues that the claim is justified considering that she had to report back to the client as she was in the process of preparing for the hearing which was to

be held less than two weeks after the date of the filing of the discontinuance. Referring to the decision in *MacMillan v. Canada* 2006 FCA 149 (A.O.), the respondent further argues that “a broad reading of Rule 402 permits such a claim”. I note that there was no final decision made in this Court file. However, considering the decision in MacMillan and the argument raised by the respondent, I am of the opinion that the service of reporting back to the client in this particular case justifies the allowance of the one unit claimed.

[12] The maximum number of units is claimed under Item 26 for the Assessment of Costs. In keeping with previous decisions and considering the affidavit and submissions filed by the respondent, I allow four units.

[13] The fees for assessable services are allowed in the amount of $1,560 plus GST.

[14] The respondent seeks $1,306 in disbursements for the reproduction of two Books of Authorities: November 12, 2009 - $280 and February 2, 2010 - $1,026. The appellants in response submit that the respondent is responsible for the failure of their attempt to file a Joint Book of Authorities due to the respondent’s failure to provide the necessary input in a timely manner. Given this unsuccessful attempt, the appellants argue that the claims should be disallowed or alternatively discounted “by the time spent by the appellants on the Books of authorities”. The respondent in response submits that its responsibility for “the parties to agree to a joint book of authorities is not supported by the evidence provided in the affidavit of Emily Whetung-MacInnes” (paragraph 9). Concerning the discount argument, the respondent states that “an adjustment of costs by way of set-

off is not available unless the applicants have been themselves awarded costs" (paragraph 12). On this last point and for the argument raised, I agree with counsel for the respondent, set-off is not possible. Regarding the appellants' argument concerning their attempt to file a Joint Book of Authorities, I cannot find anything in the affidavit filed in support of this argument that would justify my intervention in the disbursements engaged by the respondent. I examined the disbursement claimed for the reproduction of the Book of Authorities filed on February 2, 2010 along with the supporting material on file and find the claimed charge necessary for the conduct of this matter. The amount is reasonable and it is allowed, as requested, at $1,026.

[15] Considering that costs for the Motion for leave to intervene had not been awarded to either party, I have no authority to allow associated disbursements and I, therefore, disallow the claim for the reproduction of the Book of Authorities ($280) filed November 12, 2009 along with the reproduction costs of the Motion Record in response to the appellants' Motion for leave to intervene ($222) and the costs for service ($5).

[16] The disbursements claimed for the reproduction of the Memorandum of Fact and Law and its courier service are not contested. They are considered necessary charges for the conduct of this matter, are reasonable and they are, therefore, allowed.

[17] The Bill of Costs is allowed for a total amount of $2,725.00.

"Johanne Parent"
Assessment Officer

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-215-09
STYLE OF CAUSE:	HARRY WAWATIE, TOBY DECOURSAY, JEANNINE MATCHEWAN AND LOUISA PAPATIE, IN THEIR CAPACITY AS MEMBERS OF THE ELDERS COUNCIL OF MITCHIKANIBIKOK INIK (ALSO KNOWN AS ALGONQUINS OF BARRIERE LAKE) v. MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT v. THE ELDERS OF MITCHIKANIBIKOK INIK (ALGONQUINS OF BARRIERE LAKE) LED BY CASEY RATT

ASSESSMENT OF COSTS DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ASSESSMENT OF COSTS BY:	JOHANNE PARENT, Assessment Officer
DATED:	November 19, 2010

WRITTEN REPRESENTATIONS BY:

David C. Nahwegahbow	FOR THE APPELLANTS
Virginie Cantave Julia Rys	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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