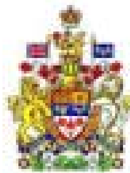
Federal Court of Appeal



Cour d'appel fédérale

Date: 20120117

Docket: A-512-09
A-513-09

Citation: 2012 FCA 15

A-512-09

BETWEEN:

SIMPSON STRONG-TIE COMPANY, INC.

Appellant

and

PEAK INNOVATIONS INC.

Respondent

A-513-09

BETWEEN:

SIMPSON STRONG-TIE COMPANY, INC.

Appellant

and

PEAK INNOVATIONS INC.

Respondent

ASSESSMENT OF COSTS - REASONS

Charles E. Stinson
Assessment Officer

[1] The Court dismissed with a single set of costs these appeals of the judgment of the Federal Court concerning a decision of the Trade-Marks Opposition Board which had addressed trade-mark

applications for fastener brackets for attaching deck boards. The Court had previously ordered that the two appeals be heard together [the Consolidation Order]. I issued a timetable for written disposition of the assessment of the Respondent's bill of costs. The Appellant conceded counsel fee item 18 ($130 for review and consent to the Appeal Book contents) and binding ($81.32).

Counsel Fees

Item 19 (Memorandum of Fact and Law claimed at 6 units / range = 4-7 units; hereafter, the numbers following the description of the fee item represent the available Column III range of units in the Tariff)

[2] The Respondent argued that the Appellant's characterization of this matter as a "simple" appeal was incorrect by noting that the Court's Reasons for Judgment indicated that this case involved the relatively extensive issue of the registrability of a colour trademark. As a memorandum of fact and law was filed for each appeal, the single claim of 6 units at $130 per unit is modest.

[3] The Appellant argued that, as there was no evidence that this was not a simple appeal and that the special Rule 400 factors should engage the discretionary powers of the Assessment Officer, fee item 19 should be assessed at the low to mid-range of Column III, i.e. no more than 4 units or $520.

Assessment

[4] Paragraphs 15 and 16 of *Madell v Canada*, 2011 FCA 105 (AO) set out my general approach for assessments of costs and for counsel fee items respectively. Although there were several issues to address, the Court resolved them in nine succinct paragraphs. I would not characterize these matters as particularly complex. However, the Consolidation Order, although

providing that the appeal book in file A-512-09 was deemed to have been filed in file A-513-09, also provided for a supplementary appeal book in A-513-09. I find that 6 units ($780) are reasonable in these circumstances.

Item 21(a) (Reply to the Appellant's Motion to Consolidate claimed at 3 units / 2-3 units)

[5] The Respondent argued there is no evidence justifying the lower value of 2 units as opposed to the higher value of 3 units. The Appellant argued that the lower value of 2 units should be allowed for a motion filed only in court file A-513-09.

Assessment

[6] The work required of the Respondent was straightforward. The preamble of the Consolidation Order indicated opposition by the Respondent on the basis of lapse of time limits for appeal books. I allow only 2 units ($260).

Item 22(a) (Appearance by Counsel at the Hearing of the Appeals claimed at 3 units per hour for 2.5 hours / 2-3 units per hour)

[7] The Respondent argued that the Tariff does not limit the compensation for each counsel to the actual speaking time for each. Counsel was required to be present throughout regardless of who was speaking. That the Respondent's submissions may have been more effective than those of the Appellant does not justify assessing fee item 22(a) other than relative to the hearing's actual duration.

[8] The Appellant argued that the hearing was not long or difficult. Counsel for the Appellant did most of the argument with opposing counsel called upon only briefly. This item should be assessed at the low end, i.e. 2 units per hour instead of the claimed 3 units per hour.

Assessment

[9] Counsel for the Respondent had to be present and vigilant throughout the hearing. Paragraph 6 of *Armstrong v Canada (Attorney General)*, 210 FC 1189 (AO) outlines generally my approach in resolving fee item 13, 14 and 15 issues, and by extension fee item 22 issues. I find that the hearing itself, following careful preparation by counsel for the Respondent, was straightforward. I allow only 2 units per hour.

Item 25 (Services after Judgment claimed at 1 unit / 1 unit)

Assessment

[10] I reject the Appellant's position, i.e. that nothing should be allowed given no evidence of any service performed. The Respondent asserted in rebuttal that this fee item normally includes receiving and reviewing the Court's decision and docketing and tracking appeal periods, I routinely allow fee item 25, as I will here, unless I think that responsible counsel would not have reviewed the judgment and explained its implications to the client.

Item 26 (Assessment of Costs claimed at $600 / 2-6 units)

[11] The Respondent argued that this assessment required preparation of an affidavit and a bill of costs, including a breakdown of disbursements, the collection of records and the presentation of submissions. The claimed $600 is a fraction of the actual costs, but is fair relative to the Tariff.

The Appellant argued that this assessment, having been directed to proceed in writing, was simple and straightforward and therefore warrants only the minimum 2 units ($260).

<u>*Assessment*</u>

[12] The Respondent's claimed $600 is not an even multiple of $130. The use of 4 and 5 units gives $520 and $650 respectively. I think that this was an average assessment of costs warranting a mid-range value of 4 units.

Item 27 (Such other Services as May be Allowed by the Assessment Officer: (a) preparation, filing and service of a notice of appearance in each matter, (b) Submissions on Venue, claimed at 2 units and 1 unit respectively / 1-3 units)

[13] The Respondent argued that there is nothing to warrant an allowance of less than the claimed mid-range value of 2 units ($260) for the Notice of Appearance. The Respondent argued that there is no rule prohibiting the assessment of costs for correspondence (on venue) to the Court. Rather, it is the nature of the work that engages an entitlement for the work. The minimum 1 unit ($130) claimed here is modest and fair relative to the Tariff.

[14] The Appellant noted that, although a Notice of Appearance is a simple and straightforward single-page document, the case law has permitted costs for it which, if allowed here, should be restricted to the minimum 1 unit. The Appellant argued that correspondence to the Court is not an assessable service.

Assessment

[15] Paragraphs 23-24 of *Shields Fuels Inc v More Marine Ltd*, 2010 FC 228 (AO) indicate my views on fee item 27 parameters. I have allowed fee item 27 for status review work (*International Taekwon-Do Federation v Choi*, 2008 FC 1103). I allow fee item 27 at 1 unit for the Notice of Appearance because, although it would have required prior instructions from the client, its execution was straightforward.

[16] The tariffs of some superior courts of record provide for assessable costs for correspondence. The *Exchequer Court of Canada Rules* (amended to April 8, 1969) in item 20 of Tariff A provided for up to $20 for all "proper correspondence pending suit." Such provision for correspondence did not make its way into the Federal Court of Canada, I am not inclined in the circumstances of this matter to open that door and therefore I disallow the claimed 1 unit.

Disbursements

Trial Transcript ($287.30)

[17] The Respondent argued that review of the trial transcript by lead counsel was a normal part of appeal case preparation, argument and ultimate success. The Appellant argued that the trial transcript was strictly for the use of lead counsel and is therefore not assessable.

Assessment

[18] In paragraph 157 of *Halford v Seed Hawk Inc*, 69 CPR (4th) 1, I discussed a threshold for assessment of the costs of trial transcript, i.e. whether they were essential for a successful result. As this expense usually occurs after a trial ends and is associated with appeal case preparation

and appeal record filings, it is generally allowed in an appellate level bill of costs: see para 17 of *Culhane v ATP Aero Training Products Inc*, 2004 FC 1530 (AO). I allow the $287.30 claimed.

Photocopies ($0.25 per page for a total of $717)

[19] The Respondent discounted the Appellant's position on the cost of photocopies, i.e. no supporting evidence, by referring to the explanation and breakdown of the in-house charges in the affidavit of disbursements and by arguing that the claimed rate of $0.25 per page is very modest by today's standard if compared, for example, to the Registry's charge of $0.45 per page.

[20] The Appellant asserted that there was no evidence to support this cost and referred to the finding in paragraph 21 of *Métis National Council of Women v Canada (Attorney General)*, 2007 FC 961 (AO) that assessment officers, faced with real and essential expenditures to advance litigation, but scant proof, exercise conservative discretion with a sense of austerity to achieve equitable assessed costs and preclude an absurd result of zero dollars. The Appellant conceded that the Respondent did incur photocopy costs, a reasonable allowance for which would be $200.

Assessment

[21] Paragraph 65 of *Abbott Laboratories v Canada (Minister of Health)* (2008), 66 CPR (4th) 301 (AO) [*Abbott*] summarizes my practice for photocopies, including the need "to strike the appropriate balance between the right of a successful litigant to be indemnified for its reasonably necessary costs and the right of an unsuccessful litigant to be shielded from excessive or unnecessary costs." The proof here was less than absolute, but I am satisfied that the amount of $717, which I allow, is reasonable in the circumstances of this litigation.

Online Computer Research ($121.45)

[22] The Respondent asserted that the online computer research addressed both the interlocutory motion and the Memorandum of Fact and Law. The Appellant argued that such amounts are law firm overhead to be absorbed in counsel fees charged to the client and therefore should be disallowed.

Assessment

[23] Paragraph 111 of *Abbott* above outlines my usual concerns with computer research, a charge which I find fits the definition of a disbursement, i.e. a disinterested third party service charged to the client and which is not a surviving or ongoing benefit to a law firm or its subsequent clients. The evidence here includes a typical law office computer program of disbursement listings by category affording limited information on relevance and necessity. I allow a reduced amount of $95.

Couriers ($130) and Long-Distance Telephone ($10.92)

[24] The Respondent asserted that the Appellant's position on couriers appeared to confuse the necessary service of documents on opposing counsel in Toronto with the necessary filing of such documents in Vancouver (the location of the Respondent's solicitor). The use of couriers or process servers for local filings is a normal out-of-pocket litigation disbursement. The Appellant argued that there was no evidence to support this cost. The Appellant conceded an amount of $86.66 to reflect appropriate costs for service in another city, but to exclude the costs of local filings which should be absorbed in overhead.

[25] The Respondent asserted that long-distance charges ($10.92) were necessary for this matter and included discussions with opposing counsel. The Appellant argued that nothing should be allowed as there were no supporting details in the evidence.

Assessment

[26] I agree with the Respondent's position on the use of couriers, but I concede the Appellant's difficulty in the face of no invoices. I allow $110. I accept the Appellant's explanation for the relevance of the calls, but note that given the absence of details, I might have been inclined to disallow this item. However, I allow $5.

[27] I accept the Respondent's explanation, in response to the Appellant's position that HST charged at source should not be allowed as a separate item claimed at $161.76, that the pre-tax amount of each disbursement is set out in the bill of costs separate from its relevant tax reflected in the HST claim of $161.76. I have adjusted the $161.76 down to $155.47 to reflect my reductions of pre-tax amounts.

[28] The Respondent's bill of costs, presented at $5,306.55, is assessed and allowed at $4,363.09.

"Charles E. Stinson"
Assessment Officer

Vancouver, BC
January 17, 2012

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-512-09 and A-513-09
STYLE OF CAUSE:	SIMPSON STRONG-TIE COMPANY, INC. v PEAK INNOVATIONS INC.

ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES

REASONS FOR ASSESSMENT OF COSTS:	CHARLES E. STINSON
DATED:	January 17, 2012

WRITTEN REPRESENTATIONS:

Kenneth D. McKay	FOR THE APPELLANT
Paul Smith	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Sim, Lowman, Ashton & McKay LLP Toronto, ON	FOR THE APPELLANT
Smiths IP Vancouver, BC	FOR THE RESPONDENT