Federal Court of Appeal  Cour d'appel fédérale

Date: 20120326

Docket: A-146-10

Citation: 2012 FCA 102

Before: **JOHANNE PARENT, Assessment Officer**

BETWEEN:

CONSEIL DES INNUS DE PESSAMIT

Applicant

and

ASSOCIATION DES POLICIERS ET POLICIÈRES DE PESSAMIT

Respondent

and

ATTORNEY GENERAL OF QUEBEC

Intervener

Assessment in writing without appearance of the parties.

Certificate issued at Toronto, Ontario, March 26, 2012.

REASONS FOR ASSESSMENT OF COSTS: JOHANNE PARENT, Assessment Officer

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REASONS FOR ASSESSMENT

JOHANNE PARENT, Assessment Officer

[1] On November 12, 2010, the Court dismissed the application for judicial review from a decision of the Canada Industrial Relations Board dated March 4, 2010, with costs. On December 1, 2011, the Attorney General of Quebec filed his bill of costs with the Court. Directions were issued and served on December 7, 2011, informing the parties that the costs would be assessed in writing and setting the deadlines for filing submissions.

[2] In support of his bill of costs, the Attorney General of Quebec (AGC) filed the affidavit of Francis Demers sworn October 26, 2011, with supporting exhibits. Counsel for the applicant submitted within the statutory time limits written submissions against the bill of costs. The Registry received no submissions from the respondent.

[3] According to the affidavit submitted on behalf of the AGQ, all the facts alleged in the bill of costs and the supporting materials are true.

[4] In reply, counsel for the applicant submits the following:

> [TRANSLATION]
> The assessment officer cannot assess a bill of costs filed by the Attorney General of Quebec in this matter because of the definition of "party" at subparagraph (*a*)(iii) of the Rules. This was the type of application referred to in subparagraph (iii) and not a reference.
>
> The AGQ is not the respondent but a party with a right to be heard in respect of constitutional questions (subsection 57(4) of the *Federal Courts Act*).
>
> The AGQ had applied to the Federal Court for respondent status, but the application was denied by Justice Nadon on August 18, 2010.
>
> Consequently, the assessment officer does not have jurisdiction to assess the AGQ's bill of costs under sections 400, 405 and 406 of the Rules ("Awarding of Costs between Parties) and the definition of "party" in the Rules.
>
> This is a question of jurisdiction *ratione materiae* and of public interest that the assessment officer must raise of her own initiative. An assessment of this bill would be *ultra vires* and an excess of jurisdiction.

[5] Under subsection 400(1) of the *Federal Courts Rules*, the Court has "full discretionary power over the amount and allocation of costs and the determination of by whom they are to be

paid". Generally speaking, unless the decision specifies otherwise, the costs between parties, when determined, are awarded to the successful party. In the case at bar, the Court found in favour of the respondent. However, the Court did not indicate to whom, the respondent or the Attorney General of Quebec, the costs were payable, notwithstanding the fact that the respondent had not filed any submissions with the Court or even appeared at the hearing, while the AGQ had filed a record and appeared at the hearing.

[6] The definition of the word "party" at section 2 of the *Federal Courts Rules* reads as follows:

"party" means	« parties »
(*a*) in respect of an action, a plaintiff, defendant or third party;	a) Dans une action, le demandeur, le défendeur et la tierce partie;
(*b*) in respect of an application,	b) dans une demande :
(i) where a tribunal brings a reference under section 18.3 of the Act, a person who becomes a party in accordance with rule 323,	(i) dans le cas d'un renvoi fait par un office fédéral en vertu de l'article 18.3 de la Loi, toute personne qui devient partie au renvoi aux termes de la règle 323,
(ii) where the Attorney General of Canada brings a reference under section 18.3 of the Act, the Attorney General of Canada and any other person who becomes a party in accordance with rule 323, and	(ii) dans le cas d'un renvoi fait par le procureur général du Canada en vertu de l'article 18.3 de la Loi, le demandeur et toute personne qui devient partie au renvoi aux termes de la règle 323,
(iii) in any other case, an applicant or respondent;	(iii) dans tout autre cas, le demandeur et le défendeur;
(*c*) in respect of an appeal, an appellant or respondent; and	c) dans un appel, l'appelant et l'intimé;
(*d*) in respect of a motion, the person bringing the motion or a respondent thereto.	d) dans une requête, le requérant et l'intimé.

[7] In addition to section 2, which defines the word "party", section 104 of the *Federal Courts Rules, 1998* explains the manner in which a person may be joined as a party.

104. (1) At any time, the Court may (*a*) order that a person who is not a proper or necessary party shall cease to be a party; or (*b*) order that a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined be added as a party, but no person shall be added as a plaintiff or applicant without his or her consent, signified in writing or in such other manner as the Court may order. (2) An order made under subsection (1) shall contain directions as to amendment of the originating document and any other pleadings.	**104.** (1) La Cour peut, à tout moment, ordonner : a) qu'une personne constituée erronément comme partie ou une partie dont la présence n'est pas nécessaire au règlement des questions en litige soit mise hors de cause; b) que soit constituée comme partie à l'instance toute personne qui aurait dû l'être ou dont la présence devant la Cour est nécessaire pour assurer une instruction complète et le règlement des questions en litige dans l'instance; toutefois, nul ne peut être constitué codemandeur sans son consentement, lequel est notifié par écrit ou de telle autre manière que la Cour ordonne. (2) L'ordonnance rendue en vertu du paragraphe (1) contient des directives quant aux modifications à apporter à l'acte introductif d'instance et aux autres actes de procédure.

[8] In addition to defining the word "party", the *Federal Courts Rules, 1998* specifically describe the manner in which a person can be joined as a party, distinguishing this process from the manner in which the Court may grant leave to any person to intervene. In the case at bar, the Court in its decision dated August 18, 2010, relying on section 57 of the *Federal Courts Act*, dismissed the AGQ's application to be joined as a respondent. However, in its decision dated November 12, 2010, the Court wrote at paragraph 3 that "[o]nly the Attorney General of Quebec

. . . intervened and filed a record. At the hearing, the Court ordered that the Attorney General of Quebec be named as intervener in the style of cause".

[9] Section 109 of the *Federal Courts Rules* describes the manner in which a person may intervene in a proceeding.

109. (1) The Court may, on motion, grant leave to any person to intervene in a proceeding. (2) Notice of a motion under subsection (1) shall (*a*) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and (*b*) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding. (3) In granting a motion under subsection (1), the Court shall give directions regarding (*a*) the service of documents; and (*b*) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.	**109.** (1) La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance. (2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir : a) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant; b) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance. (3) La Cour assortit l'autorisation d'intervenir de directives concernant : a) la signification de documents; b) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

[10] According to the Court's decision dated August 18, 2010, the AGQ was therefore not considered to be a party in the proceeding, and, in its decision dated November 12, 2010, the AGQ was granted leave to intervene. However, in this last decision, I cannot find any directions,

as required by paragraph 109(3)(*b*), regarding ". . . the role of the intervener, including costs . . ." (emphasis added).

[11] Seeking to establish the Court's intention as to costs in the present matter, I, like my colleague at paragraph 115 of *Halford v. Seed Hawk Inc.*, 2006 FC 422, reviewed the reasons for the decision dated November 12, 2010. I was, however, unable to find a clear indication there allowing me to conclude that the costs awarded by the Court concerned the AGQ.

[12] Lastly, I performed a cursory review of past Federal Court of Appeal and Federal Court decisions examining cases where interveners were involved and where, in the decisions resulting from these cases, the court in question had dealt with costs. On the basis of the decisions identified through this review, I conclude that the costs concerning interveners are usually clearly indicated by the court: *Jazz Air LP v. Toronto Port Authority*, 2007 FC 976; *Quigley v. Canada*, 2003 FCJ No 368; *Humber Environmental Action Group v. Canada*, [2002] FCJ No 529 (FC) and [2002] FCJ No 1041 (AO); and *Abbott v. Canada* [2001] 3 FC 342 (FC) and 2004 FC 739 (AO).

[13] In light of all of the above, it is my opinion that I do not have the necessary jurisdiction to assess the Attorney General of Quebec's bill of costs. In that respect, the following certificate will be issued:

UPON the applicant's objection to the assessment of the intervener's bill of costs on the grounds that the assessment officer does not have the necessary jurisdiction to assess the costs between the applicant and the intervener since the Attorney General of Quebec is not a party to the proceeding within the meaning of the *Federal Courts Rules*;

AFTER CONSIDERING the submissions of the solicitors of record;

I CERTIFY that I do not have the necessary jurisdiction to assess the Attorney General of Quebec's bill of costs in this matter.

"Johanne Parent"
Assessment Officer

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-146-10
STYLE OF CAUSE:	CONSEIL DES INNUS DE PESSAMIT v. ASSOCIATION DES POLICIERS ET POLICIÈRES DE PESSAMIT v. ATTORNEY GENERAL OF QUEBEC

WRITTEN ASSESSMENT OF COSTS WITHOUT APPEARANCE BY THE PARTIES

REASONS FOR ASSESSMENT BY:	JOHANNE PARENT, Assessment Officer
DATED:	March 26, 2012

WRITTEN REPRESENTATIONS BY:

Jocelyn Dubé	FOR THE APPLICANT
No written representations	FOR THE RESPONDENT
Francis Demers	FOR THE INTERVENER (Attorney General of Quebec)

SOLICITORS OF RECORD:

J. Dubé & Associates Montréal, Quebec	FOR THE APPLICANT
Ken Rock Mani-Uténam, Quebec	FOR THE RESPONDENT
Bernard, Roy Justice Quebec Montréal, Quebec	FOR THE INTERVENER (Attorney General of Quebec)