

Federal Court of Canada
Trial Division



Section de première instance de
la Cour fédérale du Canada

Date: 19980313

Docket: T-884-96

BETWEEN:

HASMIG POSSIAN,

Plaintiff

- and -

**CANADIAN OLYMPIC ASSOCIATION, MICHAEL HINES,
CANSTAR SPORTS INC., JAMES YUNKER
and JAMES YUNKER DESIGNS INC.**

Defendants

TAXATION OF COSTS - REASONS

P.P. Pace,
Taxing Officer

[1] This taxation, on behalf of the defendant Canstar Sports Inc., came on before me pursuant to an order of the Court dated October 9, 1997.

[2] This action for copyright infringement was commenced on April 17, 1996 by Statement of Claim. On May 6, 1996, the plaintiff brought a motion against the defendants for an interlocutory injunction, as well as other relief. The Court dismissed the plaintiff's motion as it related to the interlocutory injunction and otherwise adjourned the matter.

[3] On November 20, 1996, motions for summary judgment were brought by the defendants. The Court rendered an order on November 27, 1996 granting summary judgment in favour of Canstar but reserved on the matter of costs. Submissions were later filed on behalf of Canstar on August 11, 1997 with respect to costs. The plaintiff filed submissions in reply on September 24, 1997. On October 9, 1997, the Court awarded costs to Canstar in accordance with column III of Tariff B, Part II.

[4] By letter dated December 16, 1997, counsel for Canstar requested an appointment to tax its costs. I issued an appointment on January 26, 1998 fixing the taxation at Toronto on February 27, 1998.

[5] On the afternoon preceding the taxation, the Toronto office of the Registry received a copy of a letter from Mr. Richard E. Anka, of the law firm of Brans, Lehun and Baldwin, which was addressed to counsel for the defendant Canstar. Mr. Anka advised that he no longer represented the plaintiff in this action and that Ms. Possian had made an assignment in bankruptcy as of January 15, 1998.

[6] Counsel for Canstar attended at the taxation on the appointed date. No one appeared on behalf of the plaintiff. At the commencement of taxation, I drew counsel's attention to subsection 69.3(1) of the *Bankruptcy Act*, R.S.C. 1985 c. B-3. Given the provisions of that subsection, I inquired if it was the defendant's position that this taxation should proceed or whether it was statutorily barred. Subsection 69.3(1) reads as follows:

Subject to subsection (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged.

[7] Counsel expressed the view before me that the taxation should proceed because it is not a fresh step or the continuation of the proceeding. Rather, it is a quantification of the costs which the Court had awarded the defendant. Unfortunately, counsel for the defendant was unable to provide any jurisprudence to support her position. I therefore adjourned the taxation to the following Wednesday, March 4, 1998 in order to allow the defendant to provide further submissions on this issue.

[8] Written representations were later filed on March 2, 1997 and, at the return of the taxation on March 4, counsel for Canstar reiterated her position that subsection 69.3(1) does not operate to prevent the taxation from proceeding. Counsel relied on the annotations to section 69.3 from Houlden and Morawetz, Bankruptcy Law of Canada, 3.d Ed., 1997 at 3-141, and argued that taxation is merely a step to quantify a claim which had come into existence prior to the bankruptcy.

[9] After reviewing the authorities cited, I am in agreement with the position taken by the defendant. I find support for this conclusion in the case of *Fairview Electronics Ltd. v. De Boer International Hunting*, (1983), 48.C.B.r.(N.S.) 102 (Ont. S. C.) where Taxing Officer Donkin of the Ontario Superior Court said:

. . . the taxation itself is not a proceeding for the recovery of a claim, but merely a step to quantify that claim which was already established

[10] Having decided to proceed with this taxation, I raised two issues with counsel about the Bill itself. Firstly, I was concerned with the maximum number of units being sought throughout the defendant's Bill for fees and, secondly, I questioned the disbursement of overtime claimed for secretarial services.

[11] With respect to the claim for maximum units, counsel argued that it is evident from the plaintiff's abandonment of her suit that a cause of action never did exist against Canstar Sports Inc. Extensive dialogue had taken place with the plaintiff in an attempt to convince her not to proceed against the defendant. Canstar was nevertheless brought into the action because, as counsel explained, the defendant was perceived by the plaintiff to "have deep pockets".

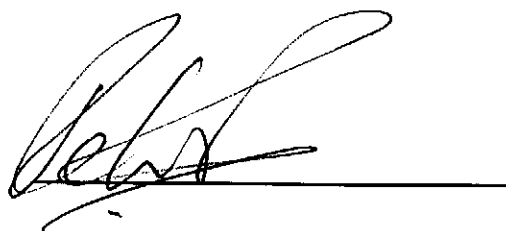
[12] On a review of the Court file, I note that several motions were argued in this proceeding. I appreciate as well that negotiations may have taken place between the parties. Nevertheless, it is a normal part of the process of litigating a proceeding for the parties'

counsel to involve themselves in communications and negotiations. In some instances, agreement is reached leading to a settlement while, in other occasions, no common ground can be found and the litigation goes on. I am unable to conclude, however, that the present action falls within the realm of being extraordinary or overly complicated.

[13] The Court saw fit to award costs to the defendant in accordance with column III of the Tariff after having considered all of the parties' submissions and, undoubtedly, after having also considered the fact this litigation was abandoned by the plaintiff. No other or special directions regarding the matter of costs were given by the Court. With that disposition in mind, and having regard to both the defendant's submissions at taxation as well as the criteria described in Rule 346(1.1), I have reduced the number of units claimed with respect to all fee items in the Bill of Costs with exception of item B-6 for appearance on the motion for an interlocutory injunction, item B-6 for appearance on the motion to strike the defence, item B-6 for appearance on the motion for summary judgment and item G-25 for services after judgment.

[14] As to the amount claimed for secretarial overtime, I am not convinced that this is a proper disbursement. Overtime for the law firm's staff falls within the realm of overhead and should therefore not be allowed as a disbursement - *Red Owl Foods (Alta) Ltd. v. Red Owl Stores Inc. (1971)*, 12 C.P.R. (2d) 266 (Fed T.D.). Consequently, the amount of \$87.50 plus applicable GST will be taxed off.

[15] The defendant, Canstar Sports Inc.'s Bill of Costs presented at \$10,321.70 is therefore taxed and allowed at \$8,409.08. A certificate of taxation will issue in this amount.

A handwritten signature in black ink, appearing to read 'Peter P. Pace', is written over a solid horizontal line.

Peter P. Pace
Taxing Officer

Toronto, Ontario
March 13, 1998

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