Federal Court  Cour fédérale

Date: 20120627

Docket: T-1407-10

Citation: 2012 FC 821

BETWEEN:

MUGFORD, KAITLIN

Applicant

and

FIRST MINISTER, NUNATSIAVUT GOVERNMENT

Respondent

ASSESSMENT OF COSTS - REASONS

Bruce Preston - Assessment Officer

[1] By way of Reasons for Judgment and Judgment dated October 20, 2011, the Court granted the application for judicial review with costs to the Applicant. Further, by way of Order dated February 3, 2012, the Court held;

> ….the Court will dismiss the applicant's motion for a lump sum award of costs. The applicant is entitled to party-and-party costs under Tariff B of the *Federal Courts Rules* as provided in paragraph 32 of the Reasons for Judgment and Judgment in this matter. In this award of costs, the costs will be under Column III at the mid-range of the number of units for each applicable service provided in Tariff B.

[2] On February 21, 2012, the Applicant filed her Bill of Costs. Further to the Directions issued on March 1, 2012 and May 3, 2012, the parties have filed their submissions as to costs. Therefore, I will proceed with the assessment.

[3] Concerning the standard of proof to be used on an assessment of costs, at paragraph 3 of the decision in *Merck and Co. v Apotex Inc.*, 2006 FC 631, the Court held:

> In general a successful party is entitled to recover costs to be assessed on a Column III basis together with disbursements that are reasonable and necessary for the conduct of the proceeding. The Court may give specific directions as to specific matters and general directions to the taxing officer as to the criteria to be applied in assessing costs and disbursements. I propose to provide such directions in these Reasons. (Emphasis added)

In keeping with this decision, and following the directions of the Court as set out in the Order dated February 3, 2012, I will only allow such fees which the Applicant has claimed and is entitled to and which are claimed at the mid-range of the units under Column III to the Table in Tariff B of the *Federal Courts Rules*. Further, I will only allow such disbursements that I find to be reasonable and necessary.

[4] At paragraph 4 of the Respondent's Reply to the Applicant's Bill of Costs (Respondent's Reply), it is submitted that the Respondent does not take issue with the majority of the Items in the revised Bill of Costs. However, the Respondent does raise concerns about Item 24, Item 25, Item 27 and the disbursements claimed. Therefore, I will assess these Items and disbursements first.

[5] Concerning Items 24 and 25, travel and preparation for the re-hearing of the matter, the Applicant submits that costs should be awarded according to the geographic location of the rehearing of the Applicant's matter and that for an Applicant to be awarded advanced costs, a

factual foundation that the proceeding is capable of being proved must be established for the proceeding. In support, the Applicant relies on *Jackson v Ucluelet Princess (The)*, 77 F.T.R. 266 (*Jackson*) and *Bernath v Canada*, 2009 CF 341 (*Bernath*).

[6] By way of reply, the Respondent submits that Items 24 and 25 should not be allowed. At paragraph 6 of the Respondent's Reply, it is submitted that:

> Costs were awarded for the judicial review hearing before Justice Kelen. The Applicant is seeking additional costs in relation to the re-hearing of the Applicant's matter by the Membership Appeals Board. The Respondent submits that there is no relevant authority provided for same and further, this is not what the award of costs in the Judicial Review was intended to address.

[7] Then, at paragraphs 8 and 9 of the Respondent's Reply, it is submitted that:

> ….*Jackson v Ucluelet* was a personal injury case where additional costs were awarded for issues dealing with the location of counsel and parties, the costs of discoveries which required additional preparation, etc., and was fact specific to that case. It is clear that these costs occurred prior to the hearing, and not after. It is submitted that this case does not stand for the proposition that the Applicant herein would be entitled to additional costs for her matter being reheard by the Membership Appeals Board after a determination by this Court.
>
> 9. Similarly, *Bernath* was a case where interim costs were sought to allow the matter to proceed to trial. The remedy was not granted in that case, as such an award was stated to be exceptional in nature. The Applicant seems to be suggesting that Bernath stands for the proposition that the Applicant is entitled to "advance costs", presumably for the re-hearing before the Membership Appeals Board. The Respondent, with respect, disagrees with this interpretation.

[8] Concerning Item 24, travel by counsel to attend a trial, hearing, motion, examination or analogous procedure, at the discretion of the Court (emphasis added), I have held on several occasions that absent an exercise of the Court's discretion under Item 24, I am without jurisdiction to allow a claim for costs for travel by counsel (see: *Mohawk Community of Kanesatake v Canada*, 2010 FC 831; *Bayer AG v Novopharm Ltd*, 2009 FC 1230; *Carr v Canada*, 2009 FC 1196). Given

this, I find that prior to reaching a determination concerning the Applicant's claim under Item 24 for travel related to the re-hearing, I must determine whether the Court has exercised its discretion under Item 24. I have reviewed the file, specifically the Reasons for Judgment and Judgment and Order mentioned in paragraph 1 above, and I find no indication that the Court exercised its discretion to award travel by counsel under Item 24. This being the situation, I find that I lack jurisdiction to allow the claim under Item 24. Therefore, the Applicant's claim under 24 is not allowed.

[9] Concerning the claim under Item 25, services after judgment not otherwise specified, the Applicant has specifically claimed for advance costs for preparation for the re-hearing of the Applicant's matter. The Supreme Court of Canada decision in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 (*Okanagan*) is the seminal decision which establishes the three part test to be used when awarding interim or advance costs. At paragraphs 40 and 41 of Okanagan, the Supreme Court held:

> …. I would identify the criteria that must be present to justify an award of interim costs in this kind of case as follows:
>
> - 1.
>
> The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial -- in short, the litigation would be unable to proceed if the order were not made.
>
> - 2.
>
> The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
>
> - 3.

> The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.
>
> **41** These are necessary conditions that must be met for an award of interim costs to be available in cases of this type. The fact that they are met in a particular case is not necessarily sufficient to establish that such an award should be made; that determination is in the discretion of the court. If all three conditions are established, courts have a narrow jurisdiction to order that the impecunious party's costs be paid prospectively. Such orders should be carefully fashioned and reviewed over the course of the proceedings to ensure that concerns about access to justice are balanced against the need to encourage the reasonable and efficient conduct of litigation, which is also one of the purposes of costs awards. When making these decisions courts must also be mindful of the position of defendants. The award of interim costs must not impose an unfair burden on them. In the context of public interest litigation judges must be particularly sensitive to the position of private litigants who may, in some ways, be caught in the crossfire of disputes which, essentially, involve the relationship between the claimants and certain public authorities, or the effect of laws of general application. Within these parameters, it is a matter of the trial court's discretion to determine whether the case is such that the interests of justice would be best served by making the order. (emphasis added)

Following the decision in *Okanagan,* I find that it is within the jurisdiction of the Court to determine whether the conditions required have been met and whether; in those circumstances, the Court finds that the case is such that the interests of justice would be best served by making such an order. I have held on many occasions that assessment officers are not members of the Court (See: *Herbert v Canada (Attorney General),* 2011 FC 365; *Mathias v Long Point First Nations,* 2012 FC 165; *Bayer AG v Novopharm Ltd.*, 2009 FC 1230; *Simpson Strong-Tie Co. v Peak Innovations Inc.*, 2009 FCA 203). Having determined that I am not a member of the Court, I am only able to allow advance costs if they have been previously awarded by the Court.

[10] A review of the Court file revealed that a request for advance costs was before the Court in the Applicant's motion filed December 21, 2011. In the Order dated February 3, 2012, the Court held that costs are to be assessed under Column III at the mid-range of the number of units for each applicable service provided in Tariff B. The Court does not mention advance costs. Therefore, the

Court having considered the advance of costs in the motion before it and having rendered a decision which did not award advance costs, I find that I am without jurisdiction to allow any costs related to the re-hearing of the Applicant's matter. Therefore, Item 25 is not allowed.

[11] Concerning the claim under Item 27, the Applicant specifies that the claim is for solicitor-client fees. At paragraph 15 of her Written Representations, the Applicant submits that solicitor-client costs have been awarded where the tribunal had denied the applicant natural justice. At paragraph 10 of the Respondent's Reply, it is submitted that:

> The Applicant is also seeking solicitor-client fees. Item 27 in Tariff B is discretionary, however it is submitted that given the clear wording of the Order made by Justice Kelen on February 3rd, 2012 that the Applicant is not entitled to costs on a higher scale than party-party.

[12] Pursuant to the Order of February 3, 2012, costs are to be under Column III at the mid-range of the number of units. The effect of this Order is that I am limited to allowing assessable services under Column III at the mid-range of the number of units and I am without jurisdiction to allow any costs which are claimed as being solicitor-client. This being the circumstance, given that the Applicant has claimed Item 27 for solicitor-client fees, and has provided no other justification, I am without jurisdiction to allow such a claim. Therefore, Item 27 is not allowed.

[13] Concerning disbursements, the Applicant has claimed Registry fees ($50.00) and photocopying ($804.53). On December 21, 2011 the Applicant filed an affidavit confirming that the disbursements as claimed in the Bill of Costs were made and payable. In the Respondent's Reply it is incorrectly submitted that there is no affidavit. The Respondent further argues that:

> The Respondent has no way to determine if these disbursements are related solely to the judicial review before Justice Kelen or whether some of the amounts sought

> relate to matters after same as the Applicant is seeking costs for the re-hearing. Without verification, these disbursements should not be considered.

[14] Tariff B 1(4) provides that fees paid to the Registry may be claimed without proof. Therefore, the Registry fee claimed is allowed.

[15] Concerning photocopies, although the Respondent was mistaken concerning the affidavit, I find the Applicant's statement that the disbursements were made and payable does not constitute sufficient support to prove that the photocopies claimed were reasonable and necessary. On the other hand, having reviewed the file, it is clear and obvious that the Applicant was required to make photocopies to advance the proceeding. Further, it is also evident that a claim of over $800.00 is excessive given the nature of the proceeding and the documentation filed and served. Therefore, having reviewed the Applicant's Record and Book of Authorities filed in support of the Application, and considering the materials filed in support of the Bill of Costs, photocopying is allowed at $575.00.

[16] The remaining Items claimed in the Bill of Costs were not contested by the Respondent. In *Reginald R. Dahl v. HMQ*, 2007 FC 192, at paragraph 2, the assessment officer held:

> "Effectively, the absence of any relevant representations by the Plaintiff, which could assist me in identifying issues and making a decision, leaves the bill of costs unopposed. My view, often expressed in comparable circumstances, is that the *Federal Courts Rules* do not contemplate a litigant benefiting by an assessment officer stepping away from a position of neutrality to act as the litigant's advocate in challenging given items in a bill of costs. However, the assessment officer cannot certify unlawful items, i.e. those outside the authority of the judgment and the Tariff."

In keeping with this decision, I have reviewed the file and find all other fee Items claimed to be within the authority of Tariff B and the Judgment. Therefore, all other fee Items are allowed as claimed.

[17] In keeping with these Reasons, the Applicant's Bill of Costs is assessed and allowed at $3,122.30. A Certificate of Assessment will be issued.

"Bruce Preston"
Assessment Officer

Toronto, Ontario
June 27, 2012

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1407-10
STYLE OF CAUSE:	MUGFORD, KAITLIN v. FIRST MINISTER, NUNATSIAVUT GOVERNMENT

ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES

PLACE OF ASSESSMENT:	TORONTO, ONTARIO
REASONS FOR ASSESSMENT OF COSTS:	BRUCE PRESTON
DATED:	JUNE 27, 2012

WRITTEN REPRESENTATIONS:

Violet Ford	FOR THE APPLICANT
Raman Balakrishnam	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Violet Ford Law Office Stittsville, ON	FOR THE APPLICANT
O'Dea, Earle St. John's, NL	FOR THE RESPONDENT