Federal Court  Cour fédérale

Date: 20130205

Docket: T-582-12

Citation: 2013 FC 123

BETWEEN:

AMIR ATTARAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ASSESSMENT OF COSTS - REASONS

Bruce Preston – Assessment Officer

[1] On May 30, 2012, the Applicant discontinued his Notice of Application.

[2] On October 2, 2012, the Respondent filed its Bill of Costs. Further to a direction issued June 29, 2012, the parties have filed their submissions as to costs. It is noted that on October 30, 2012, the Respondent filed an Amended Bill of Costs. It is this Amended Bill of Costs which will be assessed.

Assessable Services

[3] The Respondent has claimed 7 units under Item 5 (contested motion) for the determination of the Respondent's Rule 318 (2) objection, pursuant to Rule 318 (3) of the *Federal Courts Rules*.

The Respondent submits that the Court routinely awards costs for Rule 318 motions. In support of this, the Respondent submits several cases in which the Court awarded costs after a determination under Rule 318: *Yeager v Canada (Public Safety and Emergency Preparedness)*, 2009 FC 813, *Lafond v Ledoux*, 2008 FC 1369, *Western Canada Wilderness Committee v Canada (Minister of the Environment)*, 2006 FC 786, *Canadian Artic Resources Committee Inc v Diavik Diamond Mines Inc*, [2000] FCJ No 910 and *Pauktuutit Inuit Women's Assn v Canada*, 2003 FCT 165. Further, the Respondent contends that this particular motion related to an application which was moot and therefore vexatious and that, by forcing a motion to determine the Respondent's objection, the Applicant put the Respondent to unnecessary effort to contest the motion.

[4] In response, the Applicant submits that the motion was not concluded as the Applicant discontinued the application in its entirety and that, since there was no disposition, there was no award of costs by the Court. The Applicant argues that, under these circumstances, the Assessment Officer has no jurisdiction to allow any costs to the Respondent under Item 5. In support of this, the Applicant refers to three decisions; *Haghparast-Rad v Canada (Attorney General)*, 2011 FC 1072, *Canada v Uzoni*, 2006 FCA 344 and *Halme and Fex v Caisse Populaire de Hearst Ltee*, 2011 FC 916.

[5] By way of Rebuttal, the Respondent argues that the Applicant has mischaracterized the nature of the motion and relies on jurisprudence which has no application in the circumstances; the motion is not for an extension of time on a preliminary file (*Haghparast-Rad*), there is no disposition without an order as to costs (*Uzoni*) and this is not a Respondent's motion which was not

ultimately heard prior to the discontinuance of the proceeding by the Applicant (*Halme*). Then at paragraph 3 of the Respondent's Rebuttal Submissions, it is contended:

> The Rule 317 motion was brought by the Applicant, not the Respondent. It was the Applicant who requested directions for the filing of submissions on the Rule 318 objection and the Court directed the Respondent to serve and file its submissions within 10 days of the order. The Respondent duly complied.

[6] Finally, the Respondent submits that the Assessment Officer clearly has jurisdiction to determine the costs of the Applicant's abandoned motion. The Respondent argues that the Applicant cannot escape the operation of Rule 402, as it relates to the abandonment of a motion, by filing a Notice of Discontinuance after the Respondent has expended considerable resources preparing submissions.

[7] Rule 318 states:

318. (1) Within 20 days after service of a request under rule 317, the tribunal shall transmit	318. (1) Dans les 20 jours suivant la signification de la demande de transmission visée à la règle 317, l'office fédéral transmet
(a) a certified copy of the requested material to the Registry and to the party making the request; or	*a*) au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause;
(*b*) where the material cannot be reproduced, the original material to the Registry.	*b*) au greffe les documents qui ne se prêtent pas à la reproduction et les éléments matériels en cause.
(2) Where a tribunal or party objects to a request under rule 317, the tribunal or the party	(2) Si l'office fédéral ou une partie s'opposent à la demande de transmission, ils informent

shall inform all parties and the Administrator, in writing, of the reasons for the objection.	par écrit toutes les parties et l'administrateur des motifs de leur opposition.
(3) The Court may give directions to the parties and to a tribunal as to the procedure for making submissions with respect to an objection under subsection (2).	(3) La Cour peut donner aux parties et à l'office fédéral des directives sur la façon de procéder pour présenter des observations au sujet d'une opposition à la demande de transmission.
(4) The Court may, after hearing submissions with respect to an objection under subsection (2), order that a certified copy, or the original, of all or part of the material requested be forwarded to the Registry.	(4) La Cour peut, après avoir entendu les observations sur l'opposition, ordonner qu'une copie certifiée conforme ou l'original des documents ou que les éléments matériels soient transmis, en totalité ou en partie, au greffe.

[8] There is nothing in the provisions of Rule 318 which suggests a requirement that a Notice of Motion be filed for the determination of an objection under Rule 318 (2). Also, it is clear from the recorded entries for this particular file that the determination of the objection was proceeding pursuant to a Direction of the Court dated May 15, 2012. Further, Item 5 of the Table to Tariff B provides for assessable services related to the "preparation and filing of a contested motion, including materials and responses thereto". Given that there is no requirement for the filing of a Notice of Motion under Rule 318, that the Court did not require the filing of a motion and that no Notice of Motion was filed, I find that the circumstances necessary to justify a claim under Item 5 are not present.

[9] However, if I am incorrect and the determination of an objection under Rule 318 (2) should be considered a motion for the purposes of an assessment of costs, my decision remains the same. Rule 318 (3) states: "the Court may give directions to the parties and to the Tribunal as to the procedure for making submissions with respect to an objection under Subsection (2)", but there is no requirement for the parties to formally request such directions. Further, the Direction of the Court dated May 15, 2012 states:

> a. The Respondent shall, within 10 days of this direction, serve and file, in the form of a record written submissions setting out the grounds and arguments for its objection to production pursuant to Rule 318, including, as may be appropriate, any affidavit evidence that may be necessary for the Court to determine the objection.
>
> b. The Applicant shall, within 7 days of service of the Respondent's record, file a responding record, including any affidavit evidence that may be necessary for the Court to determine the objection.
>
> c. Written representations in reply may be served and filed by the Respondent no later than 4 days following service of the Applicant's record.
>
> d. Unless the Court directs otherwise, the objection shall be determined on the basis of the written record constituted in accordance with this direction.
>
> e. The Registry is to return to the Respondent the letter dated April 10, 2012.

[10] In providing the Respondent the opportunity to serve and file submissions first, I find that the Direction in effect considers the Respondent to be the moving party. This is supported by the fact that the Respondent is provided an opportunity to file reply to the Applicant's response. Therefore, if the determination of the objection should be considered a motion, it is the Respondent's objection under Rule 318 (2) which is the motion, not the Applicant's request for

directions. This being the situation, I find that the Respondent's motion cannot have been abandoned as a result of the Applicant's discontinuance of the Application. Under this circumstance and in keeping with *Halme* (*supra*), I find that there has been no determination of the Respondent's motion by the Court prior to the discontinuance of the Notice of Application, consequently the Court made no award of costs for the motion. As was held in *Uzoni* (*supra*), it is a well established principle that costs are at the discretion of the Court and where there is no order as to costs, Assessment Officers have no jurisdiction to allow the costs of a motion. Therefore, in any event, the Respondent's claim under Item 5 is not allowed.

[11] As the Respondent's claim under Item 25 is not contested by the Applicant, it is allowed as presented in the Bill of Costs.

[12] Concerning Item 26, in the Respondent's Submissions, it is argued that considering the vexatious nature of the application, the claim of 4 units is a reasonable compromise.

[13] In response, the Applicant contends that an Assessment Officer may award costs of an assessment to either party and that costs should be awarded to the party that made the most reasonable offer to settle the costs. The Applicant continues by suggesting that the Respondent offered to settle the costs for $1,250.00 and the Applicant counter offered $500.00. The Applicant contends that, pursuant to Rule 400 (3) (e) of the *Federal Courts Rules*, an Assessment Officer may consider offers made between the parties, even if they do not meet the criteria of Rule 420. Then, at paragraph 34 of the Applicant's Submissions, it is submitted that:

> The Assessment Officer may also consider under Rule 400 (3) (c), (i) and (k) the complexity of the issues, the conduct of a party, and whether any step in the proceeding was improper, vexatious or unnecessary. In this case, the Respondent raised many complex issues as they relate to the law governing costs in the Federal Courts. Further, the Respondent has essentially abused Rule 420 to intimidate an opposing party. The application, which had some merit, was discontinued at a very early stage. Pursuing substantial costs in such circumstances is improper and is contrary to the policy that the Court should encourage parties to discontinue matters at an early stage.

[14] By way of rebuttal, the Respondent contends that the Applicant is not entitled to costs after discontinuing his application and suggests the Applicant's plea is based on the incorrect assertion that the Assessment Officer lacks jurisdiction to allow costs in favour of the Respondent further to the Rule 317 motion. Finally, the Respondent submits that in view of the Respondent's offer to settle and the mischaracterizations in the Applicant's response, the Respondent's claim under Item 26 should be increased to 6 units.

[15] Although I find that it is open to an Assessment Officer to allow costs to a party responding to a Bill of Costs, I do not find this to be a situation where such action is warranted. The Respondent, although unsuccessful on some items, did not raise any claims which could be seen as patently unreasonable. On the other hand, I do not find this to be an assessment of costs which was overly complex. The application was discontinued early in the process which limited the costs which could be claimed. Concerning any offer to settle the costs, although mentioned by both parties, I can find no evidence concerning the nature or timing of any offer on the record or in the materials submitted. Therefore, I find that I am unable to factor any offer or counter offer into the assessment of Item 26. Having reached the above conclusions, I find that the Respondent's initial

claim of 4 units for the costs of the assessment is reasonable under the circumstances. Therefore, Item 26 is allowed at 4 units.

[16] Concerning the disbursements claimed by the Respondent, the Applicant has not contested any of the amounts claimed. Having reviewed the file I find that the disbursements claimed were necessary as they relate to either the Direction of May 15, 2012 or the assessment of costs. Further, in the circumstances of this file, I find the disbursements claimed to be reasonable. Therefore, the Respondents disbursements are allowed as presented in the Bill of Costs.

[17] At paragraph 20 of the Respondent's Rebuttal Submissions it is conceded that the doubling of costs under Rule 420 may not apply to costs incurred after the date of judgment and as such may not be available on Items 25 and 26. Further, I have reviewed Rule 419 and find that the doubling of costs does not apply to assessments of costs as they are not listed in the other proceeding to which Rules 420 and 421 apply. In view of the Respondent's concession and my review of Rule 419, and considering that Item 5 has not been allowed, I find that there is no requirement to address the issue of the doubling of costs as there are no costs to double.

[18] For the above reasons, the Respondent's Bill of Costs is assessed and allowed at $1,339.52. A Certificate of Assessment will be issued.

"Bruce Preston"
Assessment Officer

Toronto, Ontario
February 5, 2013

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-582-12
STYLE OF CAUSE:	AMIR ATTARAN v ATTORNEY GENERAL OF CANADA

ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES

PLACE OF ASSESSMENT:	TORONTO, ONTARIO
REASONS FOR ASSESSMENT OF COSTS:	BRUCE PRESTON
DATED:	February 5, 2013

WRITTEN REPRESENTATIONS:

Paul Champ	FOR THE APPLICANT
Brian Harvey	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Champ & Associates Ottawa, ON	FOR THE APPLICANT
William F Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT