

Date: 20081204

Docket: A-421-06

Citation: 2008 FCA 385

Vancouver, British Columbia, December 4, 2008

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

AIDAN BUTTERFIELD

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, pursuant to Rule 414 of the *Federal Courts Rules*, SOR/98-106, seeks a review of the award of costs made by an Assessment Officer of this Court (*Butterfield v. Attorney General of Canada*, 2008 FCA 315 – referred to as the Assessment of Costs). For the reasons that follow, I conclude that there is no reviewable error and that the decision should stand.

I. Background

[2] The court proceedings that gave rise to the Assessment of Costs consisted of three separately-filed but related judicial review applications, filed in 2004 and 2005, of a Transportation Appeal Tribunal of Canada hearing and decision to suspend the Applicant's pilot licence.

[3] By an order dated May 25, 2005, the matters were consolidated for the purpose of hearing. Various procedural motions were brought by the Applicant or, where brought by the Respondent, were unnecessarily opposed.

[4] Justice Heneghan dismissed the judicial review on July 18, 2006, awarding costs to the Respondent "to be assessed on the basis of Column III, Tariff B, one counsel fee".

[5] The Applicant appealed and the appeal was dismissed on September 17, 2007, with costs to the Respondent.

II. Assessment of Costs

[6] On August 22, 2006, the Respondent submitted a claim for \$6,512.84 (\$4,197.60 for counsel fees and \$2,315.24 for disbursements) in respect of the matters at trial. On November 6, 2007, the Respondent submitted a claim for \$3,476.57 (\$2,416.80 for legal fees and \$1,059.77 for disbursements) in respect of the appeal. The Applicant made extensive submissions.

[7] The Respondent's claimed amounts were assessed by the Assessment Officer on October 21, 2008. The Assessment Officer:

- Reduced the Respondent's bill of costs for the lower court matters from \$6,512.84 to \$5,111.00;
- Reduced the Respondent's bill of costs for the appeal matter from \$3,476.57 to \$2,305.00;
- Awarded units which fell within the range of units under Column III, Tariff B; and
- Reduced the disbursement amounts claimed by the Respondent due to lack of proof with respect to some of the claimed disbursements.

III. Analysis

[8] The jurisprudence is well-settled that the Court should only intervene in the decision of an assessment officer where: (a) there has been an error in principle; or, (b) the amount awarded is so unreasonable so as to suggest an error in principle (see, for example, *Merck & Co. v. Apotex Inc.*, 2002 FCT 1037, 224 F.T.R. 278 at para.6; *Bellemare v. Canada (Attorney General)*, 2004 FCA 231, 327 N.R. 179 at para. 3).

[9] Although it is not entirely clear from his submissions, it appears that the Applicant is asserting that the Assessment Officer made an error in principle by awarding costs without requiring the Respondent to provide evidence of the expenses incurred – both as to the counsel fees and the disbursements. Only then, he submits, can the principle of “indemnification” be respected.

[10] As I understand his argument, the Applicant is, in effect, questioning the award of costs set out in the decisions of the application judge and the Court of Appeal. The Applicant relies on the decision of the British Columbia Court of Appeal of *Gyles v. British Columbia (Superintendent of Motor Vehicles)*, 2004 BCCA 541, as authority for the proposition that costs are not warranted where there is a challenge to the decision of a government agency. Whether that case is one that should be followed in the Federal Court may be arguable. However, what is obvious is that the case has no applicability to the decision of the Assessment Officer. The time to address the award – as opposed to the amount – of costs is at the time of the judicial review or the appeal, as appropriate (and as was done in *Gyles*, above). Having failed to do so, the Applicant cannot now raise his objections to the award of costs. Once costs were awarded, the Assessment Officer was obliged to assess the amount of those costs; in this case, he had no choice but to apply column III of Tariff B of the *Federal Courts Rules*.

[11] Moving beyond the award of costs to the assessment itself, the Applicant's issue then appears to be whether the Assessment Officer required evidence beyond the two bills of costs and supporting affidavit submitted by the Respondent. In his written submissions, the Applicant asserted that the Respondent "adduced no evidence of indemnification or of reasonableness, necessity or relevance". As explained by the Applicant in oral argument, the argument seems to be that the Assessment Officer required some evidence that the Attorney General, who was representing the Minister of Transport, actually invoiced his client, the Minister of Transport, for any fees or disbursements. The Applicant submits that, without such evidence, the Assessment Officer had no basis upon which to conclude that any counsel fees or disbursements were incurred.

[12] The same argument was made to and rejected by Justice von Finkenstein in *Trevor Nicholas Construction Co. v. Canada (Minister for Public Works)*, 2006 FC 42. Justice von Finkenstein addressed the argument, at paragraphs 6 to 7, as follows:

There are several things wrong with this argument. First Rule 407 of the *Federal Courts Rules* provides that, unless otherwise ordered, costs shall be awarded in accordance with column III of the table to Tariff B. Secondly, Rule 400(2) provides that costs may be awarded [to or] against the Crown. Third there is no evidence that the Crown will profit from an award of \$110 per unit. Finally, s. 28(2) of the *Crown Liability and Proceedings Act* provides:

28(2) Costs awarded to the Crown shall not be disallowed or reduced on taxation by reason only that the solicitor or counsel who earned the costs, or in respect of whose services the cost or charge, was a salaried officer of the Crown performing those services in the discharge of the officers duties and was remunerated therefore by a salary, or for that or any other reason was not entitled to recover any costs from the Crown in respect of services so rendered."

. . . Clearly awards can be made to the Crown on the basis of column III of the table to Tariff B. There is no requirement for the Defendant to disclose the fee it pays to its solicitors in order to demonstrate that the award does not exceed compensation. [Emphasis added.]

[13] I concur with Justice von Finkenstein's reasoning.

[14] The Applicant argues that the decision in *Trevor Nicholas*, above, is distinguishable because that case involved an action and not a judicial review. In my view, there is no difference in the application of the principles stated by Justice von Finkenstein. Whether the costs are being assessed in respect of an action, a judicial review, a motion or otherwise is irrelevant. In all cases where the Court has directed that costs be awarded in accordance with Tariff B, there is no requirement that

the Attorney General demonstrate that he invoiced and was or was not paid by the agency or department client for his legal services.

[15] Accordingly, I conclude that there was no error in principle. Further, I am also satisfied that the amount awarded is not so unreasonable so as to suggest an error in principle. As reflected in the reasons of the Assessment Officer in the Assessment of Costs, the Assessment Officer carefully and properly considered the reasonableness of the number of units for each of the items in the Bills of Costs, reducing where he felt it appropriate to do so. A similarly detailed assessment of disbursements was carried out.

[16] In conclusion, there is no reviewable error and the motion for review of the Assessment of Costs will be dismissed. In my discretion, I award costs to the Respondent for this review, fixed in the amount of \$400.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The motion for review of the Assessment of Costs is dismissed; and
2. Costs, fixed in the amount of \$400, are awarded to the Respondent.

“Judith A. Snider”

Judge

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-421-06

STYLE OF CAUSE: AIDAN BUTTERFIELD v. AGC

PLACE OF HEARING: Vancouver, BC

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REASONS FOR JUDGMENT AND JUDGMENT: SNIDER J.

DATED: December 4, 2008

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