

Federal Court
of Appeal



CANADA

Cour d'appel
fédérale

Date: 20100318

Docket: A-196-09

Citation: 2010 FCA 78

BETWEEN:

SIMPSON STRONG-TIE COMPANY, INC.

Appellant

and

PEAK INNOVATIONS INC.

Respondent

ASSESSMENT OF COSTS - REASONS

Charles E. Stinson
Assessment Officer

[1] The Court dismissed with costs this appeal of an order of the Federal Court upholding an order of the case management prothonotary dismissing the Appellant's application for production of documents and for answers to questions refused in the cross-examination on an affidavit relating to an appeal of a decision of the Registrar of Trade-marks. I issued a timetable for written disposition of the Respondent's bill of costs.

Counsel Fees: item 18 (preparation appeal book claimed at 1 unit / available range = 1 unit; hereafter, the numbers following the description of the fee item represent the available range of units in the Tariff); item 19 (memorandum of fact and law claimed at 7 units / 4-7 units); item 24 (travel by counsel from Vancouver to Toronto / 1-5 units) and item 26 (assessment of costs / 2-6 units)

Disbursements: Online searches (\$3.60); Photocopies at \$0.35 per page (\$180); Courier (\$70); Long Distance Telephone (\$37.26); Binding (\$26.22); Toronto Hotel (\$418); Toronto Taxis (\$76.14); Airfare Vancouver-Toronto (\$494.92) and Toronto Meals (\$71.63)

I. The Appellant's Position

[2] The Appellant argued that nothing should be allowed for fee item 18 because it was the Appellant who prepared the appeal book. Only 4 units should be allowed for fee item 19 as there was no evidence that this was anything but a simple appeal. An assessment officer has no jurisdiction to allow fee item 24 in the absence of a specific direction of the Court.

[3] The Appellant conceded the claimed airfare to Toronto (hearing venue) given the receipt in evidence, but argued generally that the absence of receipts and business logs for the other claimed disbursements such as online searches, couriers, long distance and binding should preclude their allowance. Although some assessment officers have exercised discretion in such circumstances to allow real expenditures deemed necessary to advance litigation, the absence here of any effort to produce supporting evidence should preclude that result. As the Respondent will achieve some success on this assessment of costs by its nature, the claimed 3 units for fee item 26 should be reduced or disallowed given the inadequacy of the evidence.

[4] The Appellant argued that in addition to the absence of evidence for photocopies, the claimed rate of \$0.35 per page is well above that of commercial outlets and the amount claimed may be some sort of estimate as it is not evenly divisible by \$0.35. On their face, the charges

of \$418 and \$71.63 respectively for accommodation and meals for one night in Toronto seem excessive. The absence of receipts prevented the Appellant from gauging reasonableness and ensuring that inappropriate items such as alcohol and movies were not included. An adverse inference should be drawn given the Respondent did not discharge its onus to produce supporting evidence.

II. The Respondent's Position

[5] The Respondent argued that the real work necessary to review the contents of the appeal book for completeness justifies fee item 18: see paragraph 11 of *Actra Fraternal Benefit Society v. Canada*, [2000] D.T.C. 6491, [2000] F.C.J. No. 1214 (A.O.). The maximum for fee item 19 is justified because the memorandum of fact and law is the most important part of an appeal. The Respondent argued that the claimed disbursements were obviously incurred to support this litigation and were reasonable in the circumstances.

III. Assessment

[6] I have not summarized the respective submissions of the parties concerning fee item 22(a) (appearance at the hearing claimed at 2 units per hour for 2 hours / 2-3 units per hour) because, although the Court did not call upon counsel for the Respondent, he still had to prepare for and attend the full hearing without any expectation of not having to speak. The Respondent is entitled to fee item 22(a) claimed here in any event at the minimum 2 units per hour. I agree with the Respondent on the responsibility to review the contents of the appeal book and allow fee item 18 as presented. I allow only the minimum 2 units for fee item 26 in these circumstances of the proof.

[7] My findings in *Halford v. Seed Hawk Inc.* (2009), 69 C.P.R. (4th) 1, [2006] F.C.J. No. 629 (A.O.), *Biovail Corp. v. Canada (Minister of National Health and Welfare)* (2007), 61 C.P.R. (4th) 33, [2007] F.C.J. No. 1018 (A.O.), aff'd (2008), 64 C.P.R. (4th) 475, [2008] F.C.J. No. 342 (F.C.) and *Abbott Laboratories v. Canada (Minister of Health)* (2008), 66 C.P.R. (4th) 301, [2008] F.C.J. No. 870 (A.O.) [*Abbott*] (under appeal) set out my views on the threshold of proof for categories of costs and approach to their assessment. Paragraphs 68 to 72 inclusive of *Abbott* above summarize the subjective elements and the notion of rough justice in assessments of costs. In paragraphs 38 to 40 of *Aventis Pharma Inc. v. Apotex Inc.*, [2009] F.C.J. No. 56 (A.O.) [*Aventis 2009*], I reinforced my view that an assessment of costs should reflect the reality of the demands of litigation. Paragraph 14 of *Merck & Co. v. Apotex Inc.* (2009), 73 C.P.R. (4th) 423, [2008] F.C.J. No. 1656 (F.C.A.) held that “in view of the limited material available to assessment officers, determining what expenses are “reasonable” is often likely to do no more than rough justice between the parties and inevitably involves the exercise of a substantial degree of discretion on the part of assessment officers.”

[8] I concluded in paragraph 7 of *Starlight v. Canada*, [2001] F.C.J. No. 1376 (A.O.) that the same point in the ranges throughout the Tariff need not be used as each fee item for the services of counsel is discrete and must be considered in its own circumstances. As well, broad distinctions may be required between an upper versus lower allowance from available ranges. This was not the simplest or the most difficult of appeals. I allow 6 units for fee item 19.

[9] Further to my comments in paragraph 3 of *Abbott* above, I disallow the fee item 24 claim (travel time of counsel) as there must be a visible direction by the Court to the assessment officer specifically authorizing fees for the time of counsel in transit. Such a direction is not, however, necessary to assess essential and associated travel disbursements, which might include those for second counsel where relevant.

[10] I allow the online charges, couriers, long distance tolls, binding and airfare as presented. Paragraph 65 of *Abbott* above summarized my practice for photocopies including the need “to strike the appropriate balance between the right of a successful litigant to be indemnified for its reasonably necessary costs and the right of an unsuccessful litigant to be shielded from excessive or unnecessary costs.” The proof here was less than absolute. I allow 500 pages at \$0.25 per page for a total of \$125.

[11] Counsel for the Respondent travelled from Vancouver to Toronto on Saturday for a Monday hearing and returned home Monday evening after the hearing. I find that reasonable in the circumstances of having to acclimate oneself to a different time zone, yet minimize expenses by not avoiding an evening flight home. Thus, \$418 for two nights of accommodation in Toronto is generally in order, but yielding slightly to the Appellant’s concern for the lack of details of that charge, I reduce it to \$370. I allow the taxis and meals as presented.

[12] On occasion, it is difficult as here to discern from the format of a bill of costs how PST and GST were applied. Here, the claimed subtotal of \$1,377.77 for disbursements was presented

under a subheading indicating it was inclusive of PST without detailing which items were affected. GST (\$96.44) on disbursements was a separate entry in the bill of costs, but without details of its calculation. That is, GST of five percent would have to be applied to \$1,928.80 and not \$1,377.77 to give \$96.44. The record does not assist in clarifying this. I am not inclined to attempt a GST exclusion calculation: see *Abbott* above, *Aventis 2009* (paras. 73-73) above and *Aventis Pharma Inc. v. Apotex Inc.*, [2008] F.C.J. No. 1238 (A.O.) (para. 31). GST is not taken on PST. My assessed subtotal for disbursements is \$1,274.77 inclusive of any PST. As in paragraph 73 of *Aventis 2009*, I make a conservative estimate and allow only \$50 for GST.

[13] The Respondent's bill of costs, presented at \$4,531.81, is assessed and allowed at \$3,217.57.

“Charles E. Stinson”
Assessment Officer

Vancouver, BC
March 18, 2010

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-196-09

STYLE OF CAUSE: SIMPSON STRONG-TIE COMPANY, INC.
v.
PEAK INNOVATIONS INC.

ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES

REASONS FOR ASSESSMENT OF COSTS: CHARLES E. STINSON

DATED: March 18, 2010

WRITTEN REPRESENTATIONS:

Kenneth D. McKay FOR THE APPELLANT

Paul Smith FOR THE RESPONDENT

SOLICITORS OF RECORD:

Sim, Lowman, Ashton & McKay LLP FOR THE APPELLANT
Toronto, ON

Smiths IP FOR THE RESPONDENT
Vancouver, BC