Federal Court of Appeal | Cour d'appel fédérale

Date: 20110317

Docket: A-272-08

Citation: 2011 FCA 105

BETWEEN:

GARRET MADELL

Appellant

and

HER MAJESTY THE QUEEN

Respondent

ASSESSMENT OF COSTS – REASONS

Charles E. Stinson
Assessment Officer

I. Introduction

[1] The Court dismissed with costs this appeal of a decision of the Tax Court of Canada addressing tax shelter arrangements and loyalty card programs. I issued a timetable for written disposition of the assessment of the Respondent's bill of costs.

II. The Respondent's Position

[2] The Respondent's bill of costs claimed at or near the maximum value in the available ranges for counsel fees, except for fee item 26 (assessment of costs) claimed at the mid-range value.

The Respondent argued further to Rules 409 and 400(3)(a) (result), (g) (amount of work), (i) (conduct tending to shorten or unnecessarily delay a proceeding) and (k) (improper, vexatious or unnecessary steps) that the claim of $4,084.80 for costs ($2,502.50 for counsel fees, $1,062.30 for disbursements and additional counsel fees of $520 for the assessment of costs) is within Tariff limits and is reasonable in these circumstances.

III. The Appellant's Position

[3] The Appellant noted as background information (not before me in affidavit form, but generally available in the court file) that his role as a representative litigant for about 460 taxpayers resulted in significantly lower costs for the Respondent in this Court and below. Although the efforts of all the taxpayers, including the Appellant, contributed to an orderly formulation of their respective appeals below, the amount of time taken required those individuals not selected as representative litigants to apply in the Tax Court of Canada for extensions of their respective appeal periods. The supervising judge there directed that these motions be held in abeyance pending the outcome of the representative cases.

[4] The Appellant asserted that it was the understanding throughout that the representative cases would be determinative of the balance of the appeals. The co-operation and sacrifice of resources of the representative taxpayers benefited the Respondent relative to the cost of addressing several hundred taxpayers, but the representative taxpayers received no recompense from this entire process. The Tax Court of Canada dismissed the test case on May 2, 2008. The various taxpayers filed a notice of discontinuance of the applications to extend time to file notices of appeal on

November 13, 2009, on a without costs basis as consented to by the Crown. This completely disposed of all matters between the parties, including costs in both courts.

[5] The Appellant noted the comment in *Western Canada Shopping Centres Inc v Dutton*, [2001] 2 SCR 534 that the absence of comprehensive legislation on class action practice means that the courts must use their inherent power to settle the rules of practice and procedure for disputes brought before them. The Appellant argued generally that the Respondent's bill of costs is inappropriate given the representative circumstances of the Appellant and their associated economy of scale.

[6] The Appellant noted that Rule 400 grants the Court broad discretionary power over the payment of costs of any party. The Court may relative to Rule 400(3)(a) consider result, i.e. this appeal was dismissed and a notice of discontinuance was filed. Relative to Rule 400(3)(b) (amounts claimed and amounts recovered), the taxpayers are now obligated to pay significant amounts of interest and penalties largely further to this prolonged process. As well, the representative taxpayer will not receive costs. Relative to Rule 400(3)(c) (importance and complexity), the Court should support the efforts of taxpayers as here significantly alleviating burden on the legal system. Relative to Rule 400(3)(d) (apportionment of liability), the Court should compensate the Appellant further to his sacrifice of time and resources for the benefit of all the taxpayers, none of whom have indemnified him for his costs. Relative to Rule 400(3)(i), the Court should consider the extra time and cost associated with the rejection of the initial proposed representative candidate by counsel for the Respondent on the basis of perceived potential risk to his

client. The Appellant argued accordingly that the Court should exercise its general discretion to strike the Respondent's bill of costs.

IV. Assessment

[7] I found the affidavit of Ashley Utri sworn August 5, 2008, in support of the Appellant's motion for an extension of time to settle the contents of the appeal book, useful for clarification of the Appellant's position. It asserted that the parties agreed before the Tax Court of Canada that adjudication of the representative cases of four taxpayers would bind the adjudication of the balance of the cases, that approximately 151 of the original group of approximately 370 taxpayers submitted the appropriate undertaking to the Tax Court of Canada, that the May 8, 2008 decision addressed the four test cases and that Garret Madell was selected as the representative appellant here for the purpose of this appeal from the May 8, 2008 decision. Generally, I did not find anything in the record indicating a special agreement between the parties concerning liability for costs, including any specific consideration in favour of Mr. Madell as the ultimate representative taxpayer.

[8] Pages 14-16 of the trial transcript disclose the Appellant's counsel discussing the relationship of the four representative taxpayers to the rest of the appellants, but without reference to any special considerations for costs (pp. 497-99 of the Appeal Book). The presiding judge then dealt with preliminary matters up to page 37 of the transcript, following which the Appellant's counsel made his opening statement in which he referred to the test case format, but said nothing about special considerations for costs (pp. 37-45, pp. 520-28 of the Appeal Book). The opening statement by the Respondent's counsel did not mention costs (pp. 45-49, pp. 528-32 of the Appeal

Book). The trial transcript of the oral evidence does not disclose references to or discussion of litigation costs (pp. 49-668, pp. 532-1151 of the Appeal Book).

[9] Page 438 discloses the Appellant's counsel introducing certain documents, referring to the representative nature of the test cases and then using the term "member of a class" (p. 921 of the Appeal Book; p. 441, p. 924 of the Appeal Book). The trial judge immediately asserted that this was not a class action. The Appellant's counsel agreed. The trial judge then noted that the four test cases were "somewhat similar to a class action perhaps" (pp. 441-43, pp. 924-26 of the Appeal Book). There ensued a discussion about the composition of the representative taxpayers and the balance of the taxpayers, but there was no mention of litigation costs as an issue for resolution by the trial judge.

[10] Pages 668-84 of the trial transcript disclose that, at the conclusion of the oral evidence, counsel suggested an adjournment to permit them to obtain transcripts, submit written argument and then schedule any needed oral argument (pp. 1151-1167 of the Appeal Book). There were general references to the four test cases relative to the larger group of taxpayers. The Appeal Book does not disclose any written argument after the Tax Court of Canada hearing. The trial judge did convene two subsequent teleconferences with counsel. His decision did not refer to the four test cases in the context of the larger group of taxpayers and therefore there were no special directions on costs in that area as an issue within the appeal to this Court.

[11] Paragraph 2 of the Appellant's Memorandum of Fact and Law here referred to his representative status. Paragraph 58 referred to the negative impact on the Appellant and the other

taxpayers, but did not mention costs. Paragraph 61 asked for the Appellant's costs of the appeal, but not for a broader direction on costs relative to the Appellant's representative status. Paragraph 8 of the Respondent's Memorandum of Fact and Law referred to the representative status of the Appellant and the three other taxpayers, but did not mention costs there or elsewhere relative to special considerations for the Appellant's representative status. The decision of the Federal Court of Appeal did not refer to the Appellant's representative status either in the context of this appeal or in that of the trial below, and it did not give special directions further to said representative status.

[12] The Notice of Discontinuance dated November 13, 2009 in the Tax Court of Canada did not contain language binding on costs considerations in the Federal Court of Appeal. As well, it restricted itself to the motions to extend time. Its body referred to an attached table listing the relevant taxpayers for whom it applied: the Appellant's name appeared on page 4. I find this document irrelevant for the assessment of costs in this Court. As well, I find that, further to the materials available to me, special consideration of the Appellant's costs relative to his representative status was not an issue below for the trial judge or in the appeal here.

[13] The Appellant's position, in urging me to effectively strike an award of costs, essentially misconceived the role of an assessment officer: see para 3 of *Marshall v Canada*, [2006] FCJ No 1282 (AO) [*Marshall*]. I do not have the jurisdiction to vacate or vary a judgment as I am not the "Court" as that term is used in the *Federal Courts Rules*: see *Marshall* above and *Sander Holdings Ltd v Canada (Minister of Agriculture)*, [2009] FCJ No 720 (AO) [*Sander Holdings*]. With respect, the Federal Court of Appeal having rendered its judgment for costs, I doubt that the relief contemplated by the Appellant's materials before me is available via interlocutory process.

[14] The Appellant's materials, focused as they were on striking the costs as a whole, did not analyse individual counsel fee or disbursement items. However, I perceive them as general opposition to the bill of costs. Effectively, these circumstances are as if the Appellant had advanced no materials given the absence of any relevant representations which could have assisted me in identifying the respective issues for individual items of costs and making a decision. My view, often expressed in comparable circumstances, is that the *Federal Courts Rules* do not contemplate a litigant benefiting by having an assessment officer step away from a neutral position 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. I examined each item claimed in the bill of costs and the supporting materials within those parameters.

[15] My findings in *Halford v Seed Hawk Inc* (2009), 69 CPR (4th) 1, [2006] FCJ No 629 (AO), *Biovail Corp v Canada (Minister of National Health and Welfare)* (2007), 61 CPR (4th) 33, [2007] FCJ No 1018 (AO), aff'd (2008), 64 CPR (4th) 475, [2008] FCJ No 342 (FC) and *Abbott Laboratories v Canada (Minister of Health)* (2008), 66 CPR (4th) 301, [2008] FCJ No 870 (AO) [*Abbott*] set out my views on the threshold of proof for categories of costs and my 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] FCJ No. 56 (AO), I reinforced my view that an assessment of costs should reflect the reality of the demands of litigation. I endorse the practical approach in paragraph 69 of *Merck & Co v Canada (Minister of Health)*, [2007] FCJ No 428 (AO) aff'd on its point and others, but varied on others [2007] FCJ No 1337 (FC). Paragraph 14 of *Merck & Co v Apotex Inc* (2009),

73 CPR (4th) 423, [2008] FCJ No 1656 (FCA) 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." This practice of rough justice does not, however, require an assessment officer to approve any and all claimed items of costs without question. Disallowances or reductions often occur. I have generally held that a paucity of evidence may result in conservative allowances.

[16] I concluded in paragraph 7 of *Starlight v Canada* [2001] FCJ No 1376 (AO) 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.

[17] The total amount claimed in the bill of costs is generally arguable as reasonable within the limits of the award of costs and in the circumstances of this litigation and is allowed as presented, except for one counsel fee item which requires my intervention. Further to my conclusions in paragraph 15 of *Sander Holdings* above, I disallow the claim for second counsel under fee item 22(b).

[18] My allowance above of the balance of the bill of costs included $1,033.80 for photocopies, although the proof was less than absolute. 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 Respondent's bill of costs is assessed and allowed at the reduced amount of $3,597.30.

"Charles E. Stinson"
Assessment Officer

Vancouver, British Columbia
March 17, 2011

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-272-08
STYLE OF CAUSE:	GARRET MADELL v. HER MAJESTY THE QUEEN

ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES

REASONS FOR ASSESSMENT OF COSTS:	CHARLES E. STINSON
DATED:	March 17, 2011

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