Federal Court of Appeal  Cour d'appel fédérale

**Date: 20120525**

**Docket: A-450-10**

**Citation: 2012 FCA 153**

**PRESENT: Bruce Preston, Assessment Officer**

**BETWEEN:**

**RACHEL EXETER**

**Appellant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Dealt with in writing without appearance of parties

Certificate delivered at Toronto, Ontario, on May 25, 2012.

REASONS FOR ASSESSMENT OF COSTS BY: BRUCE PRESTON, Assessment Officer

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## REASONS FOR ASSESSMENT OF COSTS

BRUCE PRESTON, Assessment Officer

[1] By way of Judgment dated September 16, 2011, the Court dismissed the Appeal, with costs.

[2] On November 30, 2011, the Respondent filed its Bill of Costs claiming fees and disbursements of $3,363.93. Further to the directions of December 16, 2011 and February 17, 2012, the parties have filed materials concerning the assessment of costs. On January 16, 2012, the Respondent filed the Affidavit of Johanne Gagnon sworn January 9, 2012. Attached to the affidavit

was a Draft Bill of Costs claiming fees and disbursements of $3,595.93. The Appellant having had an opportunity to make submissions concerning the Draft Bill of Costs filed January 16, 2012, I will utilize it to conduct the assessment of costs.

[3] In the Appellant's Response to the Respondents Bill of Costs (Appellant's Response), the Appellant requests an adjournment of the assessment of costs pending her appeal to the Supreme Court of Canada. In her submissions, the Appellant contends that the delay in filing her appeal was caused by her ill health, which has been ongoing since September 2011. The Appellant submits that her treatments will be finished and her appeal to the Supreme Court of Canada should be filed by mid April, 2012.

[4] In reply to the Appellant's request for an adjournment, the Respondent contends that the Appellant had sixty days to file an application for leave to appeal to the Supreme Court of Canada, that six months have lapsed since the decision of the Federal Court of Appeal and that the Appellant has still not filed an application for leave. The Respondent further argues that the appellant's ill health cannot be taken as justification for the delay as the Appellant has pursued another appeal in docket A-84-11 and filed two additional motions in the Federal Court of Appeal (12-A-12 and 12-A-13).

[5] Having reviewed the recorded entries for docket A-84-11, it is apparent that the Appellant appeared at the hearing of her appeal on March 21, 2012. This brings into question why the Appellant's health prevented her from being able to file an application for leave to appeal to the Supreme Court of Canada when she was able to proceed with her appeal in the Federal Court of Appeal. Further, the Appellant has presented no evidence from a physician indicating that she was

being treated for an ailment between September 2011 and April 2012. Also, in *Latham v Canada*, 2007 FCA 179 (paragraph 8), it was held that the existence of outstanding appeals does not prevent a party from proceeding with an assessment of costs. In the present assessment there is no evidence that the Appellant has filed an application for leave to appeal to the Supreme Court of Canada, even though the Appellant has submitted that leave should be filed by April of this year. Further, in keeping with *Latham*, even if the Appellant had filed an application for leave with the Supreme Court, this assessment could proceed. Therefore, given that I have been presented with no evidence that the Appellant's health justifies the delay, and in keeping with *Latham*, the Appellant's request for an adjournment of the assessment is denied.

[6] In her response, the Appellant also submits that the evidence of the Respondent is perjured. In reply, the Respondent submits that the Appellant's contention that the Respondent has relied on perjured evidence is inaccurate, vexatious and frivolous.

[7] I find that the Appellant's accusation is unfounded. I have been provided with no evidence to support her assertion that the Respondent's evidence is perjured. Further, having reviewed the evidence of the Respondent, I find the evidence to be consistent with the conduct of the proceeding.

[8] The Appellant also argues that the claims should have been submitted under column I and that the claims are excessive. In reply, the Respondent submits that Rule 407 of the *Federal Courts Rules* stipulates that costs be assessed in accordance with column III of the table to Tariff B.

[9] As indicated by the Respondent, Rule 407 states that unless the Court orders otherwise, costs shall be assessed in accordance with column III of the table to Tariff B. In the present case the Court did not order or direct that a column other than column III be utilized in the assessment of

costs. Given this, I am bound by the provisions of Rule 407. Therefore the Respondent's costs will be assessed in accordance with column III of the table to Tariff B.

[10] Concerning the specific claims for assessable fees and disbursements, the Appellant argues that the claim for process servers should not be allowed as the she picked up packages from the post office. The Appellant also submits that the claim for photocopying should be reduced as the Appellant did not receive the documents claimed under invoice 17848 and invoice 200911920 is dated after the hearing had concluded and the decision had been rendered. Also, the Appellant argues that the claim for Quicklaw was unnecessary as the case was not complex and litigation is the Respondent's specialization. Further, the Appellant contends that Item 5 should not be allowed as she did not receive the Respondent's material concerning the constitutional question until after the hearing. The Appellant also argues that the motion to strike the constitutional question lasted only 20 minutes. It is further argued that Item 19 should not be allowed as the Respondent's Memorandum of Fact and Law was substantially the same as that used in the lower Court. After concluding that the costs allowed should be nil the Appellant submits:

> In all the circumstances, I conclude that the amount claimed for costs is unfair and unreasonable.
>
> Referring to the *Rules of Civil Procedure,* in fixing the costs the Assessment Officer is required to consider the factors set out in rule 57.01. The costs award must be fair and reasonable and must take into account the reasonable expectations of the parties: *Boucher v Public Accountants Council for the Province of Ontario* (2003), 71 O.R. (3d) 291, [2004] O.J. No. 2634 (C.A.). At the end of the exercise, taking those factors into account, you are required to stand back and make an award that is just in the circumstances. The same context applies to the *Federal Courts Rules*, rule 400.
>
> I regard the following factors as particularly important in this case:
>
> -the motion was not complex, given the issues of jurisdiction;
> - the time spent and the rates claimed are unreasonable in light of the consequence of the motion;

> - amounts claimed and the amounts recovered are factors to be considered; and
> - Respondent exaggerates the amount of work.

Moreover, I live below the poverty line not by design but caused by Statistics Canada. I was bullied, harassed and mobbed everyday for four years ….until I was fired.

> -I do not have the ability to pay any amount.
> -I went to the Courts to right a wrong committed against me but the Courts misconstrued the evidence presented. I do not consider the decision of the FCA final for there is the SCC.

[11] In reply to the Appellant's submissions, the Respondent argues that the process server was used to serve the Appellant with relevant materials and that invoices have been submitted. Concerning the claims for Items 19 and 5, the Respondent argues that the Memorandum of Fact and Law and the motion to strike the constitutional question were prepared and served on the Appellant. Having regard to photocopying, the Respondent contends that although invoice # 200911920 was dated after the hearing, the service rendered was provided on September 13, 2011, prior to the hearing. Finally the Respondent contends that the Quicklaw research was needed to respond to the appeal and that the appeal, including the motion to strike the constitutional question lasted 1 hour and 20 minutes.

Assessment

[12] Concerning the Appellant's contention that she is not able to pay any amount to the Respondent, it has been decided that ability to pay is not a factor which may be considered in an assessment of costs (see: *Solosky v Canada*, [1977] 1 F.C. 663; *Moodie v Canada (Minister of National Defence*, 2009 FC 608; *Seesahai v Via Rail Canada Inc.*, 2011 FCA 248; *Murray v*

*Canada (Attorney General)*, 2009 FCA 52). Therefore, in keeping with the above decisions, this factor will not be considered in assessing the costs of the Respondent.

[13] Having regard to the standard of proof to be used in an assessment of costs, the Appellant is correct in contending that an assessment of costs must be fair and reasonable. 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)

Having acknowledged the Appellant's submissions, and in keeping with this decision, I will only allow such fees to which the Respondent is entitled and which comply with the range of units under Column III to the table in Tariff B of the *Federal Courts Rules*. Further, I will only allow such disbursements which I find to be reasonable and necessary.

[14] Concerning the Appellant's contention that Item 5 should not be allowed as she did not receive the motion to strike the constitutional question until after the hearing, I have reviewed paragraph 20 of the Reasons for Judgment of the Court and the court file and it is clear that the Appellant was served with the Respondent's Motion and filed a Motion Record in response to the motion to strike. However, notwithstanding this, I have reviewed the Order granting the Respondent's motion to strike and, it is noted, that the Court did not award the Respondent costs for the motion. It has been held that absent an exercise of discretion by the Court, an assessment officer, who is not a member of the Court, has no jurisdiction to allow costs of a motion (see: *Canada v*

*Uzoni* 2006 FCA 344). Therefore, the Respondent's claim under Item 5 is disallowed. In keeping with this, the Respondent's disbursements for photocopying ($74.85) and service ($77.97) of the Respondent's motion record by process server are not allowed.

[15] Concerning Item 19, as the preparation of a Memorandum of Fact and Law requires work, I am not inclined to disallow the Respondent's claim. However, I find that the Respondent's Memorandum related to the appeal of an order dismissing a motion for an extension of time. Further, having reviewed the Memorandum, the issues addressed were not complex and the Memorandum was just over 11 pages long. Under these circumstances, I find the Respondent's claim of 7 units excessive. Therefore, recognizing that an award of zero units, as suggested by the Appellant, would be unjust, I allow Item 19 at the minimum of 4 units.

[16] Concerning the Appellant's contention that the duration of the hearing was no more than 20 minutes, having reviewed the Abstract of Hearing in the Court Record Management System, I have confirmed that the hearing of the appeal and motion had duration of 1 hour and 20 minutes. However, as the Court did not award the Respondent costs of the motion to strike, the time required to argue that motion must be removed from the Respondent's claim under Item 22. Given that the Respondent has not provided evidence concerning the duration of the motion, I will accept the Appellant's submission that the motion lasted 20 minutes. Therefore, Item 22 is allowed at 3 units per hour for duration of 1 hour.

[17] As the Appellant submitted no objection to the other assessable services claimed, they are allowed as presented in the Respondent's Bill of Costs.

[18] Concerning the disbursement claimed for Quicklaw, although I have no hesitation to allow legal research, I find a claim of $200.00 for a proceeding of this type excessive. In the circumstances of an appeal from a motion for an extension of time, and not having been provided with adequate evidence to justify the amount claimed, and considering that the Respondent's Book of Authorities contained only ten decisions, I allow Quicklaw in the amount of $75.00 in recognition that some on-line legal research would have been necessary.

[19] The final two disbursements claimed are photocopying and service of the Respondent's Record. Although there is no requirement for a Record on an appeal from a decision in the Federal Court, the dates for service and filing of the Record appear to correspond with the service and filing of the Respondent's Book of Authorities. Accepting that the disbursements relate to the Respondent's Book of Authorities and noting that the service and filing of a Book of Authorities is a necessary step in the appeal process, I find the disbursements incurred to be reasonable, necessary and justified by the Affidavit of Johanne Gagnon. Therefore, I allow photocopying in the amount of $88.23 and process server in the amount of $138.88.

[20] For the above reasons, the Respondent's Bill of Costs, presented at $3,595.93, is assessed and allowed at $1,862.11. A Certificate of Assessment will be issued.

"Bruce Preston"

Assessment Officer

**FEDERAL COURT OF APPEAL**

**SOLICITORS OF RECORD**

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| **DOCKET:** | A-450-10 |
| **STYLE OF CAUSE:** | RACHEL EXETER v. ATTORNEY GENERAL OF CANADA |

**ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES**

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| **PLACE OF ASSESSMENT:** | TORONTO, ONTARIO |
| **REASONS FOR ASSESSMENT OF COSTS:** | BRUCE PRESTON |
| **DATED:** | MAY 25, 2012 |

**WRITTEN REPRESENTATIONS:**

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|---|---|
| Rachel Exeter | FOR THE APPELLANT (ON HER OWN BEHALF) |
| Adrian Bieniasiewicz | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| N/A | FOR THE APPELLANT (ON HER OWN BEHALF) |
| Myles J. Kirvan<br>Deputy Attorney General of Canada | FOR THE RESPONDENT |