Federal Court of Appeal  Cour d'appel fédérale

Date: 20130108

Dockets: A-237-11
A-244-11

Citation: 2013 FCA 1

Present: **Bruce Preston, Assessment Officer**

BETWEEN:

VLASTA STUBICAR

Appellant

and

DEPUTY PRIME MINISTER AND MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

ASSESSMENT OF COSTS - REASONS

Bruce Preston - Assessment Officer

[1] These Reasons will be filed in Court file A-237-11 and in Court file A-244-11. Separate Certificates of Assessment will be issued for each file.

[2] The Federal Court of Appeal heard the appeal in A-237-11 together with file A-244-11. By way of Judgments dated February 15, 2012, the Court dismissed both appeals "with costs limited to one set for the hearing on appeal".

[3] On August 15, 2012 the Respondents filed two Bills of Costs, one on each file. Further to the Direction issued August 29, 2012, the parties have filed their Written Representations as to Costs.

[4] As a preliminary issue, I find it necessary to determine the proper interpretation of the awards of costs in the Judgments dated February 15, 2012. At paragraph 5 of their Written Representations, the Respondents submit:

> …the two cases were heard consecutively on February 15, 2012, and it is obvious that the Federal Court of Appeal, in such circumstances, would limit the costs **for the hearing** of both cases to only one set of costs. (emphasis is the Respondents')

Then at paragraph 6, the Respondents contend that they are entitled to all of their costs, incurred on both files, pursuant to Tariff B, as submitted in their Bills of Costs. The Respondents conclude by submitting that if the Court had intended to omit all items except Item 22(a) it would have done so, therefore, costs should be allowed as per the order of the Federal Court of Appeal.

[5] In response, at paragraph 9 of her Written Representations, the Appellant submits that by not being set off from the rest of the sentence by commas or parentheses, the words "limited to one set for the hearing on appeal" are properly considered essential to the main idea of the sentence as a whole. In support of this, at Tab 10 of the Appellant's Written Representations, the Appellant refers to *Webster's Third New International Dictionary of the English Language* at page 49a section 4.1.2.1 and 4.1.2.2. The Appellant further contends that the words "limited to one set for the hearing on appeal" are properly interpreted as being akin to the words "limited to $500".

[6] The Appellant continues by setting out a comparison of the wording in the Court's Reasons for Judgment in this file with the wording in other decisions of the Court. The following examples are referred to: "The two appeals will be dismissed with costs limited to one set for the hearing on appeal", *Stubicar v Canada* 2012 FCA 52, at paragraph 6; "I would dismiss the appeal with costs, but would limit the hearing costs to one set", *Gagliano v Canada* 2011 FCA 217, at paragraph 50; "For the forgoing reasons, I would dismiss each appeal with costs to the respondent, limited in relation to the hearing before us to one set of costs, as the appeals were heard together", *Canadian Association of Broadcasters v Canada* 2008 FCA 157, at paragraph 100; "…we have concluded that these appeals must be dismissed with costs (limited to one set for the hearing)", *Wicks v Canada* 2008 FCA 96, at paragraph 3 and "I would therefore dismiss the appeals with costs provided, however, that only one set of costs be awarded for the hearing", *Canadian Pacific Ltd v Matsqui Indian Band* [1999] FCJ 1057, at paragraph 32.

[7] At paragraph 15 of her Written Representations, the Appellant submits that the Respondents' interpretation of the award of costs, that costs are awarded throughout but only one set of costs is awarded for the hearing, is the same as that conveyed in the decisions in *Canadian Association of Broadcasters* (*supra*) and *Canadian Pacific* (*supra*). The Appellant further submits that the visible difference in the construction of those awards, when compared with the award in these files, suggests that the award in the present files hold a different meaning than that suggested by the Respondents. The Appellant concludes by suggesting that, in light of the forgoing considerations, it is reasonable to give effect to the construction which the Court has used in these cases, by limiting the costs payable to "one set for the hearing on appeal".

[8] By way of response, in their Rebuttal Written Representations, the Respondents submit:

> 1. At paragraphs 3 to 26 of her written representations, through an unproductive close semantic parsing of the Court's reasons in several cases, the Appellant submits unreasonable interpretation of the reasons rendered by the Federal Court of Appeal in the instance.
>
> 2. Common sense should prevail, and the Applicant's [*sic*] interpretation of the Court's reasons should be rejected. By limiting the costs to only one set for the hearing (common hearing), the Federal Court of Appeal was simply ensuring that the Respondent did not claim twice for its sole presence in Court on the two cases that were heard consecutively.
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> 3. Rule 407 of the *Federal Courts Rules* provides that unless the Court orders otherwise, party-and-party costs shall be assessed in accordance with Column III of Tariff B.
>
> 4. Respondent reiterates that had the Court wished to exclude costs for all the other items other than 22 a), it would have clearly stated so.

[9] Before proceeding further, I must determine whether the Respondents are entitled to one set of costs for the combined hearing of the appeals only, or whether the Respondents are entitled to their costs of the proceeding on each file, but for the combined hearing of the appeals, they are only entitled to one set.

[10] The Respondents have submitted that they are entitled to their costs throughout and that common sense would suggest that the Court of Appeal was simply ensuring that the Respondents did not present two claims for one appearance in Court. However, if the clear meaning of the Courts' award of costs suggests otherwise, the Respondents' "common sense" argument must fail.

[11] The Respondents have suggested that the Appellant's submissions on this point amount to unproductive close semantic parsing of the Court's Reasons. On the contrary, I find that the crux of

the decision concerning the breadth of the costs award may be found in the grammatical construction of the award. When the award of costs in this file is compared to the awards in the other decisions submitted by the Appellant, the difference is found in the use of restrictive and non-restrictive elements of a sentence.

[12] As submitted by the Appellant, the *Webster's Third New International Dictionary of the English Language* suggests that:

> When inserted or appended words, phrases or clauses are restrictive or essential to the main idea of a statement, they are spoken without the pause or other significant intonation that would indicate a matter of minor importance. In writing commas are likewise unnecessary. (Emphasis added)

On page 120 at section 7.14 in *The Canadian Style* (Dundurn Press Limited in co-operation with Public Works and Government Services Canada Translation Bureau, 1997) it states:

> Most difficulties with the use of the comma hinge on the distinction between restrictive and non-restrictive sentence elements. A restrictive word, phrase or clause adds to the words it modifies a "restrictive" or defining element that is essential to the meaning of the whole; it should therefore not be separated by a comma or other mark of punctuation. A non-restrictive element provides incidental or supplementary information which does not affect the essential meaning; it should be set off by a comma or commas. (Emphasis added)

From these excerpts, it is clear that the only difference between a restrictive and a non-restrictive clause is a comma or other mark of punctuation.

[13] When these grammatical elements are applied to an award of costs, the difference between "with costs limited to one set for the hearing of the appeal" (a restrictive phrase) and "with costs, limited to one set for the hearing of the appeal" (a non-restrictive phrase) becomes clear. In the phrasing of the Judgment in this file, the modifying words "limited to one set for the hearing on

appeal" add to the word "costs" a restrictive or defining element that is essential to the meaning of the whole. In other words, I find that the costs of this matter are limited to one set for the hearing on appeal. I will now proceed with the assessment of costs.

A-237-11

Assessable Services

[14] In keeping with the above reasons, Items 18 and 19 are not allowed as they are not fees related to the hearing on appeal. Concerning Item 22(a), at paragraph 38 of her Written Representations the Appellant submits:

> The minutes of hearing in this case are evidence at first sight that counsel for the Respondent's only intervention was five minutes before the end of hearing, when, in answer to the question from the Bench, counsel confirmed that he was relying on his factum. This is a relevant consideration in assessing the reasonableness of the maximum 3 units claimed.

[15] At paragraph 17 of their Rebuttal Written Representations the Respondents submit:

> The Appellant objects to the maximum 3 units claimed by the Respondents on the basis that Respondents' intervention was limited to answer a question asked by the Court. As mentioned in *Simpson Strong-Tie Company Inc v Peak Innovations Inc*, 2010 FCA 78, at para. 6, "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".

[16] Rule 409 of the *Federal Courts Rules* states that, in assessing costs, an assessment officer may consider the factors referred to in subsection 400(3). Of the factors listed under Rule 400(3), I find (c), the importance and complexity of the issues and (g), the amount of work, to be the most relevant in the assessment of Item 22(a) on this matter. In submitting that the Respondents only had to answer a question posed by the Court, it appears that the Appellant's submissions relate to subsection 400(3)(g), amount of work. In keeping with the decision in *Simpson Strong-Tie* (*supra*),

I find that although he was only asked a question by the Court, counsel for the Respondents had no forewarning that he would not be called upon to present submissions and therefore had an obligation to attend and remain attentive to the submissions of the Appellant. On the other hand, pursuant to subsection 400(3)(c), I am able to consider the complexity of the issues in assessing costs. Having reviewed the decision of the Court and the materials filed by the parties, I find that this was an appeal concerning a motion to strike an affidavit, that the issues involved in this appeal were not complex and that the Court's Reasons consisted of slightly more than two pages. Considering this, I find that a claim of 3 units under Item 22(a) is not reasonable and allow Item 22(a) at 2 units per hour. As the Appellant has not disputed the duration of the hearing, and the duration claimed being consistent with the duration found on the Abstract of Hearing, Item 22(a) is allowed for a total duration of 1.5 hours.

[17] Having regard to Item 26, in her Written Representations the Appellant contends that the Respondents' Affidavit and Written Representations are relevant considerations in determining whether the Respondents expended sufficient effort to warrant the maximum under Item 26. Finally, the Appellant submits that under Rule 408(3), an assessment officer may assess and allow, or refuse to allow, the costs of an assessment to either party.

[18] By way of rebuttal, counsel for the Respondents submits that the assessment "was not the most complicated" and that 3 units should be, in the circumstances, a minimum allowed.

[19] The Respondents have claimed 6 units under Item 26. As submitted by the Appellant, Rule 408(3) of the *Federal Courts Rules* provides Assessment Officers with jurisdiction to assess and

allow, or refuse to allow, the costs of an assessment to either party. Therefore, I find that I am able to allow Item 26 despite the limitation imposed by the Court's Judgments. Considering the submissions of counsel for the Respondents and the jurisdiction conferred by Rule 408(3), Item 26 is allowed at 3 units.

Disbursements

[20] The Respondents have claimed disbursements for the photocopying of the Supplementary Appeal Book, Respondents' Memorandum of Fact and Law and the Respondents' Book of Authorities. They have also claimed disbursements for the service of the Respondents' Memorandum of Fact and Law and the Respondents' Book of Authorities. Having found that the costs awarded are limited to one set for the hearing on appeal, I find that I am not able to allow any of the disbursements claimed as they do not relate specifically to attendance at the hearing on appeal.

A-244-11

[21] In keeping with my reasons above, Items 18 and 19 are not allowed.

[22] Concerning disbursements, the Respondents have claimed for the same disbursements as were claimed in file A-237-11. In keeping with my reasons above, I am not able to allow any of the disbursements claimed as they do not relate specifically to attendance at the hearing on appeal.

[23] Concerning Item 26, and in keeping with my reasons above, I allow 3 units as the Respondents argued costs on both files even though, ultimately, costs were only allowed on file A-237-11.

[24] Finally, as the amounts for the hearing on appeals are already allowed at the low end of Column III of the Table in Tariff B, I find that there is no requirement to review the Appellant's representations concerning a reduction of costs due to public interest.

[25] For the above reasons, the Respondents' Bill of Costs on file A-237-11 is assessed and allowed at $780.00 and the Respondents' Bill of Costs on file A-244-11 is assessed and allowed at $390.00. Separate Certificates of Assessment will be issued for each file.

"Bruce Preston"
Assessment Officer

Toronto, Ontario
January 8, 2013

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKETS:	A-237-11 and A-244-11
STYLE OF CAUSE:	VLASTA STUBICAR v. DEPUTY PRIME MINISTER AND MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES

PLACE OF ASSESSMENT:	TORONTO, ONTARIO
REASONS FOR ASSESSMENT OF COSTS:	BRUCE PRESTON
DATED:	JANUARY 8, 2013

WRITTEN REPRESENTATIONS:

Vlasta Stubicar	FOR THE APPELLANT (SELF-REPRESENTED)
Jacques Mimar	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

N/A	FOR THE APPELLANT (SELF-REPRESENTED)
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENTS