Federal Court of Appeal | Cour d'appel fédérale

Date: 20130719
Docket: A-84-12

Citation: 2013 FCA 185

PRESENT: JOHANNE PARENT, Assessment Officer

BETWEEN:

NATIONAL GALLERY OF CANADA

Applicant

and

CANADIAN ARTISTS' REPRESENTATION/ FRONT DES ARTISTES CANADIENS AND REGROUPEMENT DES ARTISTES EN ARTS VISUELS DU QUÉBEC

Respondents

and

SOCIETY FOR REPRODUCTION RIGHTS OF AUTHORS, COMPOSERS AND PUBLISHERS IN CANADA

Intervener

Assessment of costs without appearance of the parties.

Certificate of costs delivered at Toronto, Ontario, on July 19, 2013.

REASONS FOR ASSESSMENT BY: JOHANNE PARENT, Assessment Officer

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REASONS FOR ASSESSMENT

JOHANNE PARENT, Assessment Officer

[1] On March 4, 2013, the Court allowed the application for judicial review and set aside the decision of the Canadian Artists and Producers Professional Relations Tribunal issued on February 16, 2012, with costs. On June 20, 2013, the applicant submitted its bill of costs to the

Court. On June 28, 2013, a notice of appointment scheduling the hearing to assess the bill of costs for July 8, 2013, was issued. The assessment hearing was held in both official languages. Since most of the arguments were made in French, the reasons for this decision are being written in French.

[2] In light of the Court's order dated May 15, 2012, granting the Society for Reproduction Rights of Authors, Composers and Publishers in Canada the right to intervene and stating that the Society would not be entitled to costs and that none would be awarded against it, the intervener, in a letter dated July 8, stated its intention not to participate in the assessment hearing.

[3] In accordance with Tariff B of the *Federal Courts Rules*, the applicant is seeking 27 units for various services under item 1: preparation and filing of the application for judicial review (7 units), affidavit of Serge Thériault (7 units), applicant's record (7 units) and preparation of the memorandum of fact and law (6 units). According to the applicant, this number of units is warranted given the legal importance and complexity of this matter and the amount of work required. In support of this claim, the applicant indicated that the affidavit of Mr. Thériault totalled 11 pages and included 87 exhibits, and that the applicant's record consisted of 22 volumes and had required considerable work for the compilation of information. Regarding the memorandum of fact and law, it is suggested that the maximum number of units should be allowed given the very great complexity of this matter due in part to the arguments of the opposing party, the new law invoked and the various cases referred to, and considering that all the work done led to a split decision of this Court and — given the legal significance of this case — to an application for leave to appeal to the Supreme Court of Canada. Referring to *Kassam v Canada* 2005 FCA 169, in which a distinct number of units was allowed under item 2

for each bill of costs, the applicant argues that, contrary to item 2 of Tariff B, which is applied in the form of a global award for all the services mentioned there, item 1 may be allowed more than once (*International Taekwon-Do Federation v Choi* 2008 FC 1103).

[4] At the hearing, counsel for the respondents agreed to the awarding of seven units under item 1 given the complexity of the case and the Court's split decision. Counsel also argued that this number of units could be allowed only once for all the services claimed under item 1, as is the case for item 2.

[5] Item 1 of Tariff B reads as follows:

Preparation and filing of originating documents, other than a notice of appeal to the Federal Court of Appeal, and application records.	Préparation et dépôt des actes introductifs d'instance, autres que les avis d'appel, et des dossiers de demande.

[6] For applications filed under Part 5 of the *Federal Courts Rules*, item 1 therefore covers the preparation and filing of the notice of application (rule 301) and the preparation and filing of the applicant's record, including, among other things, according to rule 309, affidavits and documentary exhibits and the memorandum of fact and law. As I mentioned in paragraph 5 of *Montréal (Ville) c Administration portuaire de Montréal*, 2012 CF 221,

> [TRANSLATION]
> . . . current case law (*Dell Inc v 9153-3141 Québec Inc*, 2007 FC 1070; *Stanfield v Canada*, 2007 FC 542; *Novopharm Ltd v AstraZeneca AB*, 2006 FC 678; and *Kassam v R*, 2005 FCA 169) generally recognizes that, barring exceptional circumstances, item 1 of Tariff B is allowed only once for the preparing and filing of the originating document as well as the affidavits and the application record . . .

I note that the manner in which item 1 was applied in *International Taekwon-Do Federation* (above) was an exception. There, item 1 was indeed allowed more than once. However, that case clearly involved the assessment of an unchallenged bill of costs and the assessment officer, who could not argue on behalf of an absent party, noted that the result could have been different if there had been an objection. Consequently, in accordance with an established line of authority, and being fully aware of the amount of work this case may have required of the parties, I will allow the maximum number of units under item 1 for the notice of application for judicial review and for the applicant's record, including the affidavit and the memorandum of fact and law.

[7] The applicant is claiming five units for preparing and filing a motion for a stay (item 5) and five further units, also under item 5, for the written representations filed with respect to that same motion in reply to the opposing party's representations. In support of its claim, the applicant alleges that costs were awarded implicitly by the Court in its order dated May 16, 2012, when it adjourned the said motion until the end of the hearing. The applicant thus infers that, in its May 16 order, the Court referred the decision regarding costs to the judges who would be hearing the case on the merits, which judges, in allowing the application for judicial review with costs, in the judgment dated March 4, 2013, incidentally allowed the costs of the motion for a stay.

[8] In reply, counsel for the respondents submits that the assessment officer is without jurisdiction and that no units should be allowed. The Court did not make a decision on the merits of the motion for a stay, any more than it did on costs and, as can be seen in the decision of the Court, this motion was adjourned by mutual consent of the parties, who had [TRANSLATION] "agreed to continue their negotiations and to temporarily set aside the issue of copyright until the

application had been heard on its merits". The following case law was submitted in support of this reasoning: *Aird v Country Park Village Properties (Mainland) Ltd*, 2005 FC 1170, para. 10; *Estensen Estate v Canada*, 2009 FC 152, paras. 8-11; and *Exeter v Canada*, 2013 FCA 134.

[9] As I read the record, the Court did not, in its decision dated May 16, 2012, explicitly or even implicitly refer the issue of costs to the judges who would hear the matter on the merits. In its order dated May 16, 2012, the Court did not mention costs and, contrary to what the applicant seems to be suggesting, did not allow costs in the cause. The above-cited case law referred to by counsel for the respondents is clear and still applies. The Court's decision dated March 4, 2013, does not authorize the assessment of costs with respect to the interlocutory decision dated May 16, 2012 which was silent on such costs. On the basis of the principle established in the case law, including the decisions submitted by the respondents, that a judge's decision to allow the costs of a motion or not cannot be disregarded by the judge ruling on the merits of the case, and considering that the Court, in the order on the motion for a stay, did not mention costs, the units claimed under item 5 and the disbursements for the printing of documents in relation to that motion will not be allowed.

[10] The applicant is claiming units for the presence of second counsel in court at the hearing on September 5, 2012 (item 14(*b*)). At the assessment hearing, the applicant submitted that second counsel became necessary because of the high hourly rate of first counsel in the case. In reply, counsel for the respondents submits that item 14(*b*) of Tariff B specifies that units may be allowed for second counsel, where the Court directs, at 50% of the amount calculated under paragraph (*a*). Since the record contains no directions of the Court in this regard, these units

should not be allowed in light of *Merck & Co v Canada*, 2007 FC 312, and *Novopharm Ltd v AstraZeneca AB*, 2006 FC 678.

[11] In accordance with the respondents' position and in light of the fact that costs for the presence of second counsel are not mentioned at all in any of the various decisions in the Court record, the units claimed under item 14(*b*) will not be allowed.

[12] At the hearing, it was argued that the units claimed under item 15 of Tariff B were related to the documents filed with the Court at the hearing on September 5, 2012. In that regard, the applicant referred to the summary of the hearing of September 5, which states that [TRANSLATION] "three documents were received from counsel for the applicant: 1. an outline of submissions; 2. a consolidated book of authorities; 3. a consolidated book of exhibits". Counsel for the respondents argues that these documents are not before us, that they are probably a compendium-style summary of the arguments, and that the Court had not given any directions asking or allowing the applicant to file these documents.

[13] Item 15 of Tariff B reads as follows:

Preparation and filing of written argument, where requested or permitted by the Court.	Préparation et dépôt d'un plaidoyer écrit, à la demande ou avec la permission de la Cour.

[14] The case law is clear on this point and, absent any specific indication of a request by or permission from the Court, item 15 will not be allowed (*League for Human Rights of B'nai Brith Canada v Canada*, 2012 FC 234, para. 21). At the hearing, the applicant was unable to show permission from the Court to prepare and file a written argument, other than the fact that the

documents mentioned at paragraph 12 of these reasons were received at the hearing. The claim under item 15 will therefore not be allowed.

[15] The units claimed under items 13(*a*) (preparation for hearing), 14(*a*) (counsel fee for presence of first counsel in Court), and 25 (services after judgment) are not contested and will be allowed as sought.

[16] The maximum number of units is claimed under item 26 of Tariff B for the assessment of costs. Furthermore, at the assessment hearing, the applicant explained that the claims under item 27 (such other services as may be allowed) and item 28 (services by law clerks) were related to the steps taken and the documents filed in connection with the assessment of costs. In support of item 26, the applicant alleges that the bill of costs was submitted to the opposing party for discussion and an attempt at settlement on three occasions before it was filed and before it became necessary to file an affidavit and to hold an assessment hearing. The applicant also suggests that the assessment of the bill of costs was made particularly complex by the opposing party's various challenges. The applicant is apparently claiming item 27 to cover services related to the request for an assessment hearing, while the claim under item 28 covers the steps taken by the law clerk with regard to the preparation of three bills of costs, communications with the assessment officer in order to schedule a hearing, and case law research. Counsel for the respondents submits that the units sought for these services should be reduced to nothing. Because of the obvious shortcomings of the bill of costs, no units should be allowed for any of the services related to the assessment of costs; instead, three units should be allowed to counsel for the respondents for counsel's presence at the assessment hearing.

[17] Subsection 408(3) of the *Federal Courts Rules* grants assessment officers the discretion to "assess and allow, or refuse to allow, the costs of an assessment to either party". However, I doubt that, in the present case, this provision permits me to allow assessment costs to both parties, thus leaving them to assume their own costs. The applicant is claiming the maximum amount in column III under item 26 as well as units under items 27 and 28 for the assessment of costs. It is trite law that, save certain exceptions, a given service that is already provided under Tariff B can be assessed only once, and I do not believe that I am authorized to assess additional items or units for a service that has already been claimed (under item 26). The services provided in relation to the assessment and claimed under items 27 and 28 will therefore not be allowed. I recognize that the applicant saw to the preparation, serving and filing of the bill of costs, as well as the affidavit of disbursements and supporting documentation, in addition to making representations at the hearing. However, and despite what was alleged by the applicant, the bill of costs was not particularly complex: the documents filed in support amply demonstrate this. The respondents were entitled to challenge it, and their legitimate challenge of the bill of costs should not be a factor in deciding how many units to allow. Indeed, the present reasons emphasize more than once the difficulties raised by the applicant's position in this assessment. However, I do not believe that the assessment was entirely futile and consequently do not feel that there are sufficient grounds for allowing the claim made under item 26 by counsel for the respondents for being present at the hearing. In light of the above, I will, however, reduce the amount claimed by the applicant under item 26 to four units.

Disbursements

[18] At the hearing, counsel for the respondents indicated that the disbursements claimed for the costs of filing the application, the costs of printing the application, the affidavit and the

applicant's record, and costs of serving the applicant's record on the respondents were not being challenged. These disbursements are justified and reasonable, and will be allowed as sought.

[19] An amount of $59.22 is claimed as an assessable disbursement for having a bailiff serve the applicant's record on counsel for the interveners. While the respondents object to this disbursement, the applicant submits that the applicant's record had to be sent to all parties, including the intervener.

[20] Rule 407 of the *Federal Courts Rules* provides:

407. Unless the Court orders otherwise, party-and-party costs shall be assessed in accordance with column III of the table to Tariff B.	**407.** Sauf ordonnance contraire de la Cour, les dépens partie-partie sont taxés en conformité avec la colonne III du tableau du tarif B.

[21] The assessment of party-and-party costs does not entitle the successful party to full recovery of the expenses it incurred with respect to a proceeding, but rather to partial compensation for the reasonable costs incurred in a proceeding between two opposing parties. Even if it appears from the Court record and the affidavit and documentation in support of the bill of costs that the applicant's record was indeed served on the intervener, I consider that the present assessment relates to the applicant and the respondents and that the costs relating to the intervener are not addressed in the Court's final decision. The respondents cannot be responsible for all the disbursements incurred, as the legitimacy of these does not make them all reasonable. The costs of service in the amount of $59.22 are therefore not allowed.

[22] The bill of costs contains a claim with respect to expenses for travel between Montréal and Ottawa in a personal vehicle and for accommodation at the Westin Ottawa for both counsel who took part in the hearing. Relying on paragraph 51 in *Abbott Laboratories Ltd v Canada*, 2009 FC 399 [*Abbott*], and paragraphs 26 to 28 in *Merck & Co v Canada*, 2007 FC 312 [*Merck*], the applicant submits that costs may be awarded for the travelling expenses of the two counsel despite an explicit direction of the Court in that regard under item 24 of Tariff B. The applicant argues that the presence of both counsel at the hearing of this matter had been essential and that it is reasonable to claim their expenses for travel to and accommodation in Ottawa.

[23] In reply, counsel for the respondents submits that, in accordance with item 24 of Tariff B, the travelling expenses for second counsel should not be allowed any more than should those for both counsel given that, in order to expedite matters, the place of hearing proposed by the parties had been chosen by mutual consent and, consequently, travelling expenses should not be claimed at this stage. Should expenses be allowed in this regard, counsel for the respondents submits that the amounts claimed for hotel accommodation ($366 a night) and return trips by car for each counsel are unreasonable.

[24] From the parties' arguments I understand that the parties had agreed to the hearing on the merits being held in Montréal or Ottawa. Consequently, I find it reasonable, in light of the Court order scheduling the hearing in Ottawa, that the party that had to travel in order to attend the hearing be reimbursed the necessary travel expenses. Also, as reflected in my decision in *Abbott* (cited above), I agree with the proposition discussed in *Merck* (cited above) and find that the travelling expenses may be assessed despite the fact that item 24 of Tariff B was not allowed. I note from the invoices submitted as exhibits to the affidavit of Patricia Baram that counsel stayed

at the Westin Ottawa on September 4, 2012, and that the hearing began at 9:30 a.m. on September 5. Clearly, counsel could hardly travel on the morning of the hearing and appear before the Court ready to argue their client's position. On the other hand, as pointed out at the hearing by counsel for the respondents, the costs claimed for both counsel's stay at the Westin seem relatively high. However, counsel for the respondents did not provide any basis of comparison that could have assisted me in establishing a reasonable amount for comparable stays in Ottawa in September 2012. In the absence of any other arguments and with no evidence before me other than the invoices submitted as exhibits to the affidavit of Patricia Baram, which reflect the actual disbursements, the hotel costs will be allowed as sought. Regarding the transportation expenses, it would certainly have been more economical for the two counsel to travel in the same vehicle, but as one cannot oblige people to follow the same schedule, it seems to me entirely reasonable, given the means of transportation used in the circumstances, to allow the transportation expenses as claimed.

[25] The applicant's bill of costs is allowed in the amount of $17,019.42.

"Johanne Parent"
Assessment Officer

Certified true translation
Erich Klein

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-84-12
STYLE OF CAUSE:	NATIONAL GALLERY OF CANADA v CANADIAN ARTISTS' REPRESENTATION/FRONT DES ARTISTES CANADIENS and REGROUPEMENT DES ARTISTES EN ARTS VISUELS DU QUÉBEC v SOCIETY FOR REPRODUCTION RIGHTS OF AUTHORS, COMPOSERS AND PUBLISHERS IN CANADA

ASSESSMENT OF COSTS WITHOUT APPEARANCE OF THE PARTIES

REASONS FOR ASSESSMENT BY:	JOHANNE PARENT, ASSESSMENT OFFICER
DATED:	July 19, 2013

REPRESENTATIONS:

Patricia Baram	FOR THE APPLICANT
Wassim Garzouzi	FOR THE RESPONDENTS
N/A	FOR THE INTERVENER

SOLICITORS OF RECORD:

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Matteau Poirier avocats inc. Montréal, Quebec	FOR THE INTERVENER