Federal Court of Appeal  Cour d'appel fédérale

Date: 20140213

Docket: A-350-00

Citation: 2014 FCA 44

Present: **JOHANNE PARENT, Assessment Officer**

BETWEEN:

CHARLES GAGNÉ

Applicant

and

HER MAJESTY THE QUEEN
(Revenue Canada – Tax)

and

THE ATTORNEY GENERAL OF CANADA

Respondents

Assessment of costs without personal appearance of parties.

Certificate of costs delivered at Toronto, Ontario, on February 13, 2014.

REASONS FOR ASSESSMENT: JOHANNE PARENT, Assessment Officer

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REASONS FOR ASSESSMENT

JOHANNE PARENT, Assessment Officer

[1] On October 17, 2001, the Court allowed the application for judicial review, with costs in the Federal Court of Appeal and the Tax Court of Canada. On December 14, 2001, the Court dismissed that applicant's motion for directions to the assessment officer, holding that costs would be assessed in the usual manner, in accordance with Column III of Tariff B. On

July 8, 2013, the applicant entered in the Court record its bill of costs prepared in accordance with Column III. At the request of counsel for the applicant, it was decided that the assessment would proceed on written representations, and to this end, directions were issued informing the parties of that decision and of the limitation periods for filing representations. Written representations in response to the bill of costs were served and received on September 9, 2013. On September 25, 2013, counsel for the applicant sent the Court Registry a letter containing its written representations in reply, along with an amended bill of costs prepared in accordance with Column III of Tariff B and confirming use of the unit value in force at the time of the proceedings before the Court. In that letter, counsel for the applicant also reported that he was waiting to hear from opposing counsel regarding the need for a hearing. After receiving the letter, I had numerous telephone conversations regarding this matter, and it was not until early January 2014 that counsel for the applicant announced that negotiations with the opposing party were over and asked that the bill of costs be assessed on the basis of the representations in the record. Now that the parties have entered in the Court record their written submissions on costs and in reply, I will proceed with the assessment.

[2] First of all, counsel for the respondents alleges in her written representations in response that costs were awarded 11 years ago. She then makes representations regarding the six-year limitation period provided under section 32 of the *Crown Liability and Proceedings Act* [CLPA]. In the alternative, should it be decided that the applicant is entitled to costs, she presents an argument regarding what amount would be reasonable in the circumstances.

Is the assessment of bills of costs as provided in the *Federal Courts Rules* subject to the prescription period in section 32 of the CLPA?

[3] Counsel for the respondents submits that section 32 [TRANSLATION] "states that except as otherwise provided by legislation, the prescription periods apply to proceedings by or against the Crown":

> **32.** Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.
>
> **32.** Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent lors des poursuites auxquelles l'État est partie pour tout fait générateur survenu dans la province. Lorsque ce dernier survient ailleurs que dans une province, la procédure se prescrit par six ans.

Referring to *Markevich v Canada*, 2003 SCC 9, para. 39 [*Markevich*], counsel for the respondent alleges that since the federal government is not located in any particular province, the "cause of action" therefore arose "otherwise than in a province". Since the prescription period begins running the day costs are awarded to one party, the prescription period for recovery would have expired six years after the award of costs was made. Consequently, it is argued that the costs are no longer recoverable.

[4] In reply, counsel for the applicant submits that the request for assessment is not prescribed and asks that the bill of costs be assessed. On this point, he argues as follows:

> [TRANSLATION]
> 10. Section 32 does not apply in the present case. The true cause of action is the judgment of the Federal Court of Appeal awarding costs in both courts.
>
> 11. For administrative reasons, and in the light of how the Tax Court of Canada and the Federal Court of Appeal are organized, the Tax Court of Canada located in

> Ottawa had jurisdiction, and the appeal of the taxpayer, domiciled in Quebec, was fileable in the Federal Court of Appeal located in Ottawa.

Considering that *Markevich* pertained to the collection of a tax debt, counsel for the applicant argues that its does not apply here. The present case concerns the recovery of a judgement debt, and if prescription applied, it would have been interrupted by the request for directions made to the Court. In support of his representations, counsel for the applicant refers, without elaborating, to *Rhéaume v Canada*, 2012 FCA 138 and *Urbandale Realty Corp. v Canada*, 2008 FCA 167 [*Urbandale*].

[5] I do not think that the costs due upon allocation by the Court pursuant to subsection 400(1) of the *Federal Courts Rules* are subject to the prescription period in section 32 of the CLPA.

[6] In *Markevich*, as counsel for the respondents states, the Supreme Court notes that section 32 provides, except as otherwise provided by legislation, that the prescription periods apply to proceedings by or against the Crown. The Court adds at paragraph 9 that

> . . . [t]he section applies to the statutory collection procedures if two criteria are met. First, the *ITA* must not otherwise provide for limitation periods with respect to the collection of tax debts. Second, the statutory collection procedures must qualify under s. 32 as "proceedings . . . in respect of a cause of action".

[7] If we apply the reasoning of the Supreme Court to the case at hand, the question to be answered as regards the first test would be this: Does the *Federal Courts Act* provide for prescription periods applicable to the recovery of assessed costs? There is no prescription period in the *Federal Courts Act* or the *Federal Courts Rules* regarding the assessment of bills of costs. However, section 39 of the *Federal Courts Act* [FCA] does provide as follows:

39. (1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.	**39.** (1) Sauf disposition contraire d'une autre loi, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance devant la Cour d'appel fédérale ou la Cour fédérale dont le fait générateur est survenu dans cette province.
(2) A proceeding in the Federal Court of Appeal or the Federal Court in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.	(2) Le délai de prescription est de six ans à compter du fait générateur lorsque celui-ci n'est pas survenu dans une province.

[8] Then there is the second test: Under section 32 of the CLPA, is the recovery of costs a proceeding by or against the Crown in respect of any cause of action? I note that, like section 32 of the CLPA, section 39 of the FCA uses the term "cause of action" to describe the proceeding or action. In *Markevich*, the Court notes at paragraph 27 that "a 'cause of action' is only a set of facts that provides the basis for an action in court". On the basis of this definition, I, like my colleague in *Urbandale*, do not think that an award of costs by the Court is a cause of action within the meaning of *Markevich*. In *Urbandale*, the assessment officer remarked:

> **22** I venture some obiter commentary on the Respondent's *CLPA*, s. 32, position. Without the benefit of *Markevich*, *Doer* and the *Ontario Rules*, I likely would have addressed the issue of a statutory bar as follows. John Burke, *Jowitt's Dictionary of English Law*, 2d ed. (London: Sweet & Maxwell Limited, 1997) vol. 1, s.v. "cause of action" defines it as "the fact or combination of facts which give rise to a right to sue" and asserted that it "consists of two things, the wrongful act and the consequent damage." In a rough sense, the Appellant's position would assert the reassessment of taxes as the wrongful act and the associated payment of more taxes as the consequent damage. The judgment, which could include as here an award of costs, disposing of said cause of action renders it *res judicata*. As the matter of costs is subsumed in the judgment and I presume that an award of costs is an explicit final disposition of entitlement to costs within the meaning of Rule 400(1), providing that the "Court shall have full discretionary power over the amount and allocation of costs and the determination

> of by whom they are to be paid", the matter of entitlement to costs is *res judicata* and cannot be the subject of an independent proceeding or action for further adjudication other than by statutorily sanctioned process such as a formal appeal of the judgment for costs.
>
> **23** I think that the definition in *Jowitt's* of "cause of action" contemplates an action or appeal but not the interlocutory process within each. The process of quantification of the award of costs in a judgment is incidental to the judgment and is therefore interlocutory. I simply do not think that the *CLPA*, s. 32 addresses such interlocutory process and therefore the Respondent can only raise delay in the context of arguing for reduced costs on assessment further to Rule 400(3) factors. I note that if the Respondent was a non-Crown litigant and therefore subject to execution, unlike the Crown not subject to execution further to the *CLPA*, s. 29, the Appellant might encounter difficulty in executing for assessed costs in the face of Rule 434(1)(*a*) requiring leave of the Court for issuance of a writ of execution if six or more years have elapsed since the date of judgment.

[9] Given that an award of costs is not a "cause of action" within the meaning of the CLPA or the FCA, but a process that is incidental to the judgment of the Court, I conclude that the prescription period provided in section 32 of the CLPA and section 39 of the FCA does not apply to an assessment of costs. Therefore, I will now assess the applicant's costs in view of the parties' arguments as submitted in their written representations.

[10] In response to the applicant's bill of costs, counsel for the respondents alleges that the bill of costs prepared in accordance with Column III of Tariff B and totalling approximately $2,000.00 should be reduced pursuant to section 409 and paragraphs 400(3)(*i*) and (*o*) of the Rules to a maximum lump sum of $1,000.00, and that the respondents should be awarded the costs of the assessment in accordance with subsection 408(3) of Rules. She raises the following grounds in support of this argument: several years have passed after the six-year prescription period, during which time nothing was done to recover the costs; and the applicant allegedly did not file a suitable bill of costs. In reply, counsel for the applicant included with his representations an amended bill of

costs, alleging that the respondents suffered no harm, in that the claimed unit value is from 2001, not 2013.

[11] Section 409 and paragraph 400(3)(*i*) of the Rules allow an assessment officer to consider any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding. In the present case, no representations were made to justify the time that elapsed between the decision of the Court dated December 14, 2001, and the filing of the bill of costs. Despite this, I would not apply paragraph 400(3)(*i*) to all the proceedings claimed in this case, since it was lengthened only in respect of the assessment of costs. In the light of the preceding, the improper delay in filing the bill of costs, and subsection 408(3) of the Rules, the units claimed by the applicant for the assessment of the bill of costs will not be allowed.

[12] As regards the other services claimed in the bill of costs, upon reading the respondents' representations, I have trouble understanding how they suffered any harm owing to the passage of time when no concrete grounds were raised in this regard. As for the deficiencies in the first bill of costs, the applicant filed an amended document more in keeping with the rules. Absent any other relevant evidence or information regarding the alleged harm caused by the delay, I will assess the amended bill of costs in the light of the decisions of the Court in this case and of the *Federal Courts Rules*.

[13] Given the lack of any specific challenge regarding the services and disbursements claimed in the applicant's bill of costs, I have reviewed all the elements while making sure that the services claimed match what is provided in the decisions of the Court in this case and in Tariff B of the *Federal Courts Rules*. The costs requested under Item 17 (preparation, filing and service of notice

of appeal), Item 18 (preparation of appeal book), Item 19 (preparation of memorandum of fact and law), Item 20 (requisition for hearing), Item 21 (representations on motion to strike) and Item 22 (counsel fee on hearing of appeal) are uncontested and are allowed as requested.

[14] Counsel for the applicant is again claiming two units under Item 21(a) for a motion and for the service of written representations. Subsection 400(1) of the *Federal Courts Rules* establishes the discretion of the Court in determining costs. As stated by the Court of Appeal at paragraph 7 of *Pelletier v Canada*, [2006] F.C.J. No. 1884, "the duty of an assessment officer is to assess costs, not award them". From my reading of the record, apart from the order dated August 10, 2000, for which costs have already been awarded, the Court does not explicitly or even implicitly state in its decisions dated March 30, 2001, and December 14, 2001, any award of costs to either party, except where it notes in its December 14 decision that there would be no costs in that motion. Accordingly, the units claimed under Item 21(a) will not be allowed.

[15] The claim under Item 24 for travel by counsel to attend a hearing cannot be allowed. Item 24 clearly specifies that this item is "at the discretion of the Court". This discretion does not extend to the assessment officer if the Court has not already issued any specific directions in this regard (see: *Fournier Pharma Inc. v Canada* 2008 FC 929). Absent a clear direction from the Court, the assessment officer has no jurisdiction to allow costs under Item 24 of Tariff B.

[16] Counsel for the applicant is claiming provincial sales tax (QST) for the services claimed in the bill of costs. The definition of "taxable service" appearing in subsection 1(1) of the *Retail Sales Tax Act*, R.S.O. 1990, c. R.31, made no mention of "legal services" in 2000–2001. As the assessment of costs should cover only those costs that have actually been incurred, the amount

claimed for provincial sales tax will not be allowed. As for the amounts claimed for the Goods and Services Tax (GST), they will be allowed, but at the rate applicable in 2001.

[17] The justification for the disbursements claimed is set out in the affidavit of Jean J. Laflamme. Said disbursements are uncontested and are considered to be expenses necessary for the conduct of this case. The amounts are justified and will therefore be allowed as requested. However, the calculation of the total amount claimed was adjusted to counter the double payment of taxes already claimed on invoices and to reflect the revised calculations of the amounts set out in the amended bill of costs.

[18] The applicant's bill of costs is assessed and allowed in the amount of $1,908.27. A certificate of assessment will be issued for this amount.

"Johanne Parent"

Assessment Officer

Certified true translation
François Brunet, Revisor

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-350-00
STYLE OF CAUSE:	CHARLES GAGNÉ v HER MAJESTY THE QUEEN (Revenue Canada – Tax) and THE ATTORNEY GENERAL OF CANADA

ASSESSMENT OF COSTS WITHOUT APPEARANCE OF THE PARTIES

REASONS FOR ASSESSMENT BY:	JOHANNE PARENT, ASSESSMENT OFFICER
DATED:	February 13, 2014

REPRESENTATIONS:

Jean Laflamme	FOR THE APPLICANT
Jade Boucher	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Laflamme et Associés Gatineau, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENTS