COSTS - EMPLOYEE
SC CIV 74 007 166

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF AN APPLICATION BY CHIEF FRANCOIS PAULETTE ET AL TO LODGE A CERTAIN CAVEAT WITH THE REGISTRAR OF TITLES OF THE LAND TITLES OFFICE FOR THE NORTHWEST TERRITORIES.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE W. G. MORROW (NO. 3)

The present matter came on before me as an appeal from a taxation which took place before Marvin Bruce, Clerk of the Court. Judgment was reserved to this date. The present taxation arises from the Court having ordered the Government of Canada to pay costs to the proposed caveators herein to be taxed on one and one-half Column 5 of the Supreme Court Rules; viz. 1973 6 W.W.R. 97 at page 148; (1974) 39 D.L.R. (3) 45; 42 D.L.R. (3) 8. Appeals have been taken from the judgments cited above and on December 17, 1974, this Court granted a stay of execution in respect to costs until the appeals have been heard. These are understood to have been scheduled for hearing in June 1975.

On arguing the appeal before me, in addition to questioning certain portions of the taxation made by the Clerk, counsel for the Crown took the position that the caveators were not entitled to costs in any event because

they were by arrangement protected from the expenses of the litigation in any event. For convenience the items of taxation complained of will be examined first and the main issue will be discussed secondly.

I TAXATION DISPUTED

(a) These items totalling $1,344.30 and representing travel, meal and accomodation expenses of two counsel, who appeared and took part in arguments, are opposed as not properly representing disbursements but being rather expenses incurred by two counsel employed additional to the two who were shown on the record and for whom provision was made in the judgment.

There is no doubt in my mind that these two gentlemen did make a very substantial contribution in the very telling submissions they made in each case. I would like to be able to provide for the payment of their expenses but under the existing rules I can see no basis. Accordingly the three items totalling the sum shown above are disallowed.

(b) The sum of $1,041.06 representing the expenses incurred in bringing Dr. June Helm and Mrs. Beryl Gillespie, anthropologists, to Yellowknife for dis-

cussions preliminary to the actual hearings. Again the expert testimony given by these witnesses later at the trial made a material contribution to the case but I agree with counsel for the Crown that their preliminary briefing could have been made by counsel travelling to their university, thus cutting the costs considerably. This item will be reduced to $520.53.

(c) During 1973 some nine special applications were made to this Court to exempt the effect of the proposed caveat pending the final judgment dated 6th September 1973. Counsel for the Crown takes the position that since the Crown did not oppose these applications there should not be costs. The problem here, however, is that while the Crown did not oppose them, in fact did not appear on some of them, nonetheless these applications were made necessary because of the Crown's initial and continuing opposition to the caveat proceedings. Accordingly, to the extent that this Court was silent as to costs on these special applications the caveators may tax for same. The total permitted to be taxed here shall be limited to four, namely the applications of May 8, June 12, July 3, and August 7, 1973, and taxation should be as

exparte under item 11(e) of Schedule C, making a total of $480.00 rather than $1,890.00 as claimed.

II THE RIGHTS TO COSTS

For the purpose of the appeal before me counsel agreed on the following statement of facts:

> " That the only undertaking by the Caveators to reimburse the Indian Brotherhood is in the event of recovery against the Crown. All expenses including counsel have been paid by the brotherhood. It is also agreed that Mr. Sutton who was solicitor on the record is and was a salaried employee of the brotherhood and his appearance as counsel was as part of his position as employee. That there is no firm agreement whereby the brotherhood must pay the costs but it is understood that they are expected to."

The question here was posed as two-fold but the same argument was used in respect to each aspect.

(a) Whether a counsel fee can be taxed for Mr. Sutton's services?

(b) Whether all other costs including disbursements could be claimed for taxation?

Costs as between parties are governed by Supreme Court Rules 600 to 612. For the purpose of construing these Rules the definition of "costs" found in Rule 600 (a) governs:

"600. In Rules 601 to 612

(a) "costs" includes all the reasonable and proper expenses which any party has paid or become liable to pay for the purpose of carrying on or appearing as party to any proceeding, including, without restricting the generality of the foregoing,

(i) the charges of barristers and solicitors,

(ii) the charges of accountants, engineers, medical practitioners or other experts for attendance to give evidence and, if the Court so directs, the charges made by such persons for investigations and inquiries or assisting in the conduct of the trial,

(iii) the charges of legal agents,

(iv) expenses for the preparation of plans, models, or copies of documents,

(v) the fees payable to officers of the court, and

(vi) witness fees or conduct money for witnesses, together with the expenses of obtaining the attendances of witnesses at trial, and upon any examination;"

Counsel for the Crown argues that, based on the agreed facts, the Caveators have neither "paid or become liable to pay" the expenses claimed.

In this respect heavy reliance was placed on such decision as *Carson v. Pickersgill & Sons*, (1885) L.R. 14 Q.B.D. 859, and *Richardson v. Richardson*, L.R. 1895 P.D. 346. The court in the *Carson Case* was concerned with what costs if any a sucessful plaintiff in an action in forma pauperis should be entitled to tax. In essence after reviewing the history of pauper cases the Court concludes "that the costs are to be taxed upon the same principle as costs are taxed in other cases, and that the pauper is not to be allowed costs which he was never obliged to pay," Bowen, L.J. at page 872. In the *Richardson Case* it was decided that rule laid down in *Carson v. Pickersgill* should be followed with respect to forms pauperis divorce proceedings.

For a general review of the common law practice reference should be made to *Ryan v. McGregor* 1926 1 D.L.R. 476 where at page 477, Middleton, J.A. quotes with approval

from *Harold v. Smith* (1860), S. H. & N. 381, at page 385, what he describes as a "particularly clear statement of the principle", viz:

> "Costs as between party and party are given by the law as an indemnity to the person entitled to them: they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the damnification can be found out, the extent to which costs ought to be allowed is also ascertained."

It is clear here that costs awarded are the costs of the party and not awarded to the solicitor: *Ponton v. Winnipeg* (1909) 41 S.C.R. 366.

Where the solicitor retained in the litigation is employed on a salary then recovery is not normally made in respect to his services: *Hamberg - American Packet Co. v. The King*, (1908) 38 S.C.R. 621.

It is further clear that if the form of the retainer is such that a party is not liable to pay the costs then he cannot tax costs against the opposite party: *Meriden Britannia Co. v. Braden et al*, (1896) 17 O.P.R. 77; *Miller et al v. McCarthy*, (1876) 27 U.C.C.P. 147. The same applies where a statute gives the same effect: *Esquimalt and Nanaimo Railway Co. v. Hoggan*, (1908) 14 B.C.R. 49.

The fact that as in insurance cases the insurer may be obliged to pay the solicitor's costs does not disentitle the successful party from taxing costs unless there is a clearly binding agreement between he and the solicitors that he is not liable for their costs: *Armand v. Wilcox* 1927 S.C.R. 348. See also *Adams v. London Improved Motor Coach Builders Ltd.*, 1921 1 K.B. 495.

With the above recognized principles in mind let us examine the agreed facts. There can be no doubt that Mr. Sutton as a salaried lawyer for the Indian Brotherhood will not in any way look to the caveators for payment for his services rendered. But what of Mr. Graham Price who appeared as well, and what of the disbursements, the witness expenses and so on? It is correct that the "only undertaking by the Caveators to reimburse" is if there is a recovery against the Crown. It is equally correct that there is "no firm agreement whereby the brotherhood must pay the costs". Actually it is an understanding that they will. But is there any firm undertaking or agreement that under no circumstances the caveators may not have to pay all or any part of these charges or any fees Mr. Price may have earned. It seems to me that except for Mr. Sutton's services, the caveators may on these facts still have the prime responsibility to pay the remaining

expenses and the fees of Mr. Price. They have become "liable" within the meaning of Rule 600 (a). True they have strong reason to hope they will not be called upon to do so, but as I read the above cases if the agreement removing liability is not a clear cut one then the party may tax his costs.

Accordingly it is hereby ordered:

(a) A counsel fee for Mr. Sutton's services may not be taxed.

(b) All other costs including Mr. Price's counsel fee and all disbursements except where already covered under heading I, herein, may be taxed.

As there has been a divided success on the present appeal there will be no costs to either party.

W. G. Morrow

31 December 1974
Yellowknife, N.W.T.

Counsel:

I.G. Whitehall, Esq., for the Crown
J.R. Slaven, Esq., for the Government of the N.W.T.
C.G. Sutton, Esq., for the Caveators