

Date: 1999 07 20
Docket: CV07666/CV07797/CV07832

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN: (CV 07666)
HARRY SEETON Applicant
-and-

COMMERCIAL UNION ASSURANCE COMPANY OF CANADA
Respondent

AND BETWEEN: (CV 07797)
ROBERT KOSTA Applicant
-and-

WESTERN UNION ASSURANCE COMPANY
Respondent

AND BETWEEN: (CV 07832)
EDMUND SAVAGE Applicant
-and-

ELITE INSURANCE COMPANY
Respondent

MEMORANDUM OF JUDGMENT

[1] The issue is the recovery of travel expenses by non-resident counsel as costs.

[2] All three counsel representing the three successful respondents reside outside of the jurisdiction. One resides in Edmonton; one in Calgary; and, the third in Vancouver. They seek to recover, as taxable disbursements, the cost of travel to Yellowknife for the cross-examinations of the applicants and for the hearing. The costs range from \$2,000.00 to \$3,000.00 for each counsel.

[3] Rule 648(4) of the Rules of Court provides the current guidelines:

(4) The proper travelling and living expenses of a solicitor who does not reside in the Territories are recoverable under subrule (3) only where, in the opinion of the Court,

(a) the expertise required to perform the particular service was not available from those solicitors resident in the territories; or

(b) conflicts of interest prevented solicitors resident in the Territories from acting in the matter.

[4] The issue in the litigation was a relatively complex question of insurance law. It required some expertise but certainly not to an extraordinary degree. Expertise, however, was not the particular concern. The claim for recovery of these costs was placed primarily on the lack of local counsel available due to conflicts of interest. This litigation is related tangentially to other litigation involving the three applicants and a veritable host of other parties. I think it is fair to say, though, that the respondent companies wanted these particular counsel to represent them in this litigation. I heard about the difficulties these counsel had in obtaining local agents but nothing about whether the clients attempted to obtain local representation initially.

[5] Rule 648(4) makes reference to subrule (3). That subrule speaks specifically of travel expenses for counsel for attendance at pre-trial examinations. Notwithstanding that specific reference, the criteria set forth in subrule (4) above have been the generally recognized ones for all types of proceedings (including motions, trials, and appeals). It is based on the accepted principle that some special circumstance must justify the retention of non-resident counsel if recovery for the additional costs (such as travel) incurred thereby is sought from the other side. Reference can be made to *Dennis v. The Commissioner of the Northwest Territories*, [1990] N.W.T.R. 97 (S.C.), and *Shearing et al v. Fullowka et al* (N.W.T.C.A. No. 00736; October 20, 1998).

[6] The approach adopted in this jurisdiction attempts to achieve a balance between (a) the reality that, while the resident bar has grown in size and expertise, there may be times when the necessary legal service is not locally available, and (b) the traditional rule in most jurisdictions that the client is responsible for putting its counsel at the place of trial at its own expense (see, for example, *Westmount Transfer Limited v. Mill-Jay Enterprises Ltd.* (1977), 18 N.S.R. (2d) 94).

[7] Considering the number of lawyers now resident in the jurisdiction, and the experience level of many of them, I am not totally convinced that the respondents could not have retained local counsel. Even if I was satisfied that the criteria in subrule (4) were satisfied, there is further cause to exercise my discretion in favour of the applicants.

[8] The respondent companies chose to do business in this jurisdiction. They collected premiums from the applicants. The controversy in this litigation raised a genuine and serious issue about the extent of the policy coverage for which those premiums were paid. It seems to me that if the respondents choose

to do business here for the economic benefits then the fact that they incur some additional expense by choosing to retain outside counsel is part of the cost of doing business (as it also may be for non-resident counsel who choose to do business in the jurisdiction).

[9] Accordingly, the respondents are not entitled to recover as costs the travel expenses incurred by counsel.

[10] There will be no costs of this particular application.

J.Z. Vertes
J.S.C.

Counsel for the Applicants: Austin F. Marshall
Counsel for the Respondent (Commercial Union): Eric R. Holden
Counsel for the Respondent (Western Union) Daniel W. Hagg, Q.C.
Counsel for the Respondent (Elite Insurance) Timothy J. Delaney
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