Date: 20081110

Docket: T-2278-06

Citation: 2008 FC 1249

BETWEEN:

PHARMACOMMUNICATIONS HOLDINGS INC.

Applicant

and

AVENCIA INTERNATIONAL INC., JASON LEWIS, DONALD LAJOIE AND GREGORY KOCHUK

Respondents

ASSESSMENT OF COSTS - REASONS

Johanne Parent
Assessment Officer

[1] On July 2, 2008, the Court (Mr. Justice Frenette) dismissed with costs the application for various types of relief pursuant to section 53.2 of the *Trade Marks Act.* Counsel for both parties filed their submissions on costs and agreed on the written disposition of the assessment of the respondents' bill of costs.

[2] In consideration of the factors under rule 400(3) of the *Federal Courts Rules*, the respondents requested in their submissions on costs, an award of costs in accordance with Column

VII of Tariff B of the *Federal Courts Rules* and further sought in their reply submissions, solicitor and client scale costs. Rule 407 of the *Federal Courts Rules* stipulates that: "Unless the Court orders otherwise, party-and-party costs shall be assessed in accordance with column III of the table to Tariff B". The order of Mr. Justice Frenette simply states that, "the application is dismissed with costs against the applicant". Costs must, therefore, be assessed in accordance with Column III.

[3] In light of Column III of the Tariff, the respondents seek the maximum number of units for all assessable services claimed in their bill of costs. The respondents were entirely successful in responding to this application. In his decision, Mr. Justice Frenette indicates that:

> …there is no mention of actual or potential damage in the applicant's notice of application. Nor is there any mention of actual or potential damage in the applicant's memorandum of fact and law. The applicant has not established two of the conditions required in passing-off and because of the absence of evidence with regard to potential or actual damage on the respondents, (he) could not conclude that the respondents were involved in passing-off under subsection 7(b) of the *Trade Marks Act.*

One cannot conclude in referring to this excerpt of the Court's decision that this application was frivolous and vexatious. Nowhere is it indicated in Mr. Justice Frenette's decision that the application brought by the applicant was, pursuant to Rule 400(3)(k) improper, vexatious, and unnecessary or taken through negligence, mistake or excessive caution.

[4] The applicant in its submissions on costs alleged that the respondents accused the applicant of improper conduct and further mentions that these allegations were not supported by any specific evidence. Accordingly, it was submitted that any costs award should be reduced to punish the respondents for making such allegations. Mr. Justice Frenette had the opportunity to hear counsel on

all matters pertaining to this file. Upon making his final decision, he did not make any findings based on these allegations nor did he comment on them or use this issue as a basis for making any special costs order. The above, will, therefore, not be a consideration in the amount of costs to be awarded.

[5] Taking into account the relative complexity of this case, the apparent amount of work and actual time in Court, six units will be allocated to Item 2 for the preparation and filing of the respondents' record. Four units will be allocated to Item 13 a) for counsel's preparation for hearing and one unit for Item 25.

[6] Counsel claimed three units times four hours for their appearance at the hearing on June 9, 2008 under Item 13 b). Three units for each hour where counsel appeared in Court will be allocated under Item 14 a). However, in view of my reading of the Court's Abstract of hearing for that day, the number of hours will be reduced to two hours and fifteen minutes.

[7] The respondents claimed five units for the preparation for cross-examination on affidavits of both Jason Lewis and Ronald Maheu (Item 8). I will allow three units for the preparation for the cross-examination of Mr. Lewis held on July 4, 2007. With regard to Mr. Maheu's cross-examination, it appears from the Court's record that the cross-examination related to his affidavit sworn on January 25, 2008 was filed in support of the applicant's motion for leave to file additional affidavit material. The Court's record does not indicate that Prothonotary Aalto in dealing with this

motion allowed costs to any parties on this motion. Therefore, no units will be allocated under Item 8 for the cross-examination of Mr. Maheu.

[8] Seven units are claimed by the respondents for a memorandum of fact and law under item 19. This assessable service can be located in Tariff B of the *Federal Court Rules* under sub-heading F which pertains to appeals to the Federal Court of Appeal. This proceeding does not constitute an appeal as contemplated by Rule 335 of the *Federal Court Rules*. Furthermore, the respondents have already been compensated under Item 2 for the preparation and filing of all records or materials.

[9] As concluded by the Assessment Officer in *Marshall v. Canada*, [2006] F.C.J. No. 1282 at par. 6 “The *Federal Courts Act* sections 4 and 5.1(1) defining the Federal Court, and Rule 2 of the *Federal Courts Rules* defining an assessment officer, mean that the terms "Court" (as used in item 24 of Column III of Tariff B for the time of counsel to travel to a venue) and "assessment officer" refer to separate and distinct entities.” Here, the Court did not provide any direction for the travel fees of counsel to attend the hearing or cross-examinations and, therefore, I do not have the jurisdiction to allow anything for item 24**.**

[10] Item 26 for the assessment of costs is reduced to four units considering the documentation on file and the relative complexity of the bill of costs.

[11] Photocopies and mileage/meals are the only amounts claimed for disbursements contested by the applicant. In looking closely at the exhibit attached to the affidavit of Daniel J. MacKeigan

sworn on July 14, 2008, it seems that some portions of the amount claimed for photocopies pertain to the filing of the respondents' motion for which no costs were allowed by the Court. I reduce the amount claimed for photocopies to $450.00. The exhibit attached to the affidavit in support of the disbursements claimed is not specific about the trips claimed under mileage and meals. Considering the elements found in the Court file to explain those trips along with counsel's location, the amount claimed will be reduced to $200.00. All other disbursements claimed are substantiated, not contested by the applicant and are all charges considered necessary to the conduct of this matter. The amounts are reasonable and are, therefore, allowed.

[12] The bill of costs is allowed at $ 4584.24 plus GST ($229.21) for a total amount of $4813.45.

"Johanne Parent"
Assessment Officer

Toronto, Ontario
November 10, 2008

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-2278-06

STYLE OF CAUSE: *PHARMACOMMUNICATIONS HOLDINGS INC. v. AVENCIA INTERNATIONAL INC., JASON LEWIS, DONALD LAJOIE AND GREGORY KOCHUK*

ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES

REASONS FOR ASSESSMENT OF COSTS: JOHANNE PARENT

DATED: NOVEMBER 10, 2008

WRITTEN REPRESENTATIONS:

Paul Bigoni	FOR THE APPLICANT
David J. MacKeigan	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

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