Federal Court  Cour fédérale

Date: 20120221

Docket: T-1162-07

Citation: 2012 FC 234

BETWEEN:

LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH CANADA

Applicant

and

HER MAJESTY THE QUEEN, THE ATTORNEY GENERAL OF CANADA, WASYL ODYNSKY

Respondents

ASSESSMENT OF COSTS - REASONS

BRUCE PRESTON - ASSESSMENT OFFICER

[1] On June 19, 2009, the Court dismissed the application with costs payable to Mr. Odynsky by B'nai Brith (the Applicant) under Column III.

[2] The hearing of the assessment of costs was held on December 12, 2011 by way of teleconference. Counsel for the Crown did not participate in the assessment.

[3] During the teleconference, counsel for the Applicant requested an adjournment as counsel for Mr. Odynsky had submitted case law that morning. On the consent of both parties, the hearing of the assessment was adjourned for one hour.

[4] At the hearing of the Assessment of Costs, counsel for Mr. Odynsky submitted that the Applicant was seeking costs of $1.00.Counsel argued that the Court had awarded costs under Column III of Tariff B of the *Federal Courts Rules* and that, as a result, an assessment officer lacked the jurisdiction to allow costs of only $1.00. In support, counsel for Mr. Odynsky referred to *Madell v. the Queen*, 2011 FCA 105, at paragraph 13, which held:

> a. The Appellant's position, in urging me to effectively strike an award of costs, essentially misconceived the role of an assessment officer: see para 3 of *Marshall v. Canada*, [2006] F.C.J. No. 1282 (AO) [*Marshall*]. I do not have the jurisdiction to vacate or vary a judgment as I am not the "Court" as that term is used in the *Federal Courts Rules*: see *Marshall* above and *Sander Holdings Ltd v. Canada (Minister of Agriculture)*, [2009] F.C.J. No. 720 (AO) [*Sander Holdings*]. With respect, the Federal Court of Appeal having rendered its judgment for costs, I doubt that the relief contemplated by the Appellant's materials before me is available via interlocutory process.

[5] Counsel for Mr. Odynsky contended that the costs claimed in the Bill of Costs were completely reasonable and that the Applicant has made no written submissions concerning the individual Items claimed. Counsel referred to paragraph 14 of *Madell* (*supra*) in support of the argument that the *Federal Courts Rules* do not contemplate a litigant benefiting from having an assessment officer step away from a neutral position to act as the litigant's advocate in challenging given items in a bill of costs. Counsel also submitted that the only fees claimed were those associated with the preparation of the Memorandum of Fact and Law and the hearing of the Application.

[6] Referring to *Herbert v. AGC*, 2011 FC 365, counsel for the Applicant conceded that he was unable to argue for an award of $1.00 as the Court had specified costs under Column III. Counsel

argued that, as an assessment officer, the range of units under Column III was within my discretion and that the Items claimed should be allowed at the lowest end of the range.

[7] In his Written Submissions, counsel for the Applicant argues that the factors listed under Rule 400(3) of the Federal Court Rules should be taken into account in assessing costs at the low end of Column III of Tariff B. Beginning at paragraph 23, counsel submits:

> 23. In considering the result of the proceeding under Federal Courts rule 400(3)(a), the applicant submits that the Court should consider the results of the motions which the respondent Odynsky made in which the applicant succeeded. The Court should also consider that on the merits, the applicant succeeded on the issue of standing.
> 24. In considering the importance and complexity of the issues under Federal Court rule 400(3)(c), the Court should consider the need to prevent the Governor in Council from being immune from judicial review. Costs should not become a deterrent that would contribute to immunity.
> 25. In considering the apportionment of liability under rule 400(3)(d), this Court should take into account that success was divided. The respondent Odynsky succeeded on the issue of statutory interpretation but the applicant succeeded on the issue of standing.
> 26. In considering the amount of work under rule 400(3)(g), this Court should take into account that the effort the applicant made in opposing the motions in which the respondent failed and the position on standing on which the applicant succeeded was as substantial as the work involved on the issue of statutory interpretation and then some.
> 27. In considering whether the public interest in having the proceeding litigated justifies a particular award of costs under rule 400(3)(h), this Court should take into account these remarks of Mr. Justice Barnes at paragraph 12:
>
> > There is no question that B'nai Brith has raised a serious issue of statutory construction in this proceeding and the Attorney General did not strenuously argue otherwise. Justice Dawson also felt this was a serious issue worthy of further consideration, and I can find no basis for taking issue with her finding.
>
> and these remarks by the Federal Court of Appeal:
>
> > the point raised by the appellant concerning the interpretation of subsection 10(1) has never been put directly to this Court for decision.
>
> 28. In considering rule 400(3)(i), this Court should take into account that the motion to strike and the motion for a stay of the respondent Odynsky tended to unnecessarily lengthen the duration of the proceeding. The motion for a stay was consequent upon the motion to strike.
> 29. In considering rule 400(3)(i) and (k), this Court should take into account the fact that the respondent Odynsky failed to admit that the standing of the applicant was at least fairly arguable. The motion to strike and the motion for a stay were unnecessary. Any issue raised on the unsuccessful motion to strike could have been left to the main application.
> 30. In considering rule 400(3)(o), this Court should take into account that

> a) the applicant represents victims of the Holocaust in general and relatives of victims of the place where the respondent Odynsky was a concentration camp guard,
> b) revocation proceedings were commenced against the respondent Odynsky on the basis that the Minister of Citizenship and Immigration had concluded that the respondent Odynsky was a person with respect to whom there are substantiated allegations or evidence of direct involvement or complicity in war crimes or crimes against humanity,
> c) the Federal Court found that the respondent Odynsky obtained his citizenship by false representation or fraud or by knowingly concealing material circumstances.
>
> It would offend justice to order a representative of the relatives of the victims who died at the place where the respondent Odynsky was a concentration camp guard to be ordered to pay substantial sum of money by way of costs to a person such as the respondent Odynsky.

[8] At the hearing of the assessment, counsel for the Applicant also submitted that the public interest aspect of this proceeding related to the relatives of the victims of the concentration camp. Counsel conceded that there was not a broad public interest attached to this proceeding. Counsel argued that the Court granted the Applicant standing and that this is evidence of a public interest issue. Finally, counsel for the Applicant submitted that the issues contained in the application were larger than the Holocaust; the issues went to cabinet jurisdiction.

[9] In rebuttal, counsel for Mr. Odynsky submitted that the issue being addressed on the assessment was costs, not the standing of the Applicant. Concerning the issue of public interest, counsel referred to *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, 2002 FCA 515, at paragraph 10, which held:

> I think that the application of Rule 400(3) factors against the interest of successful litigants would require carefully considered discretion. Rule 409, being permissive, does not bind an assessment officer to exercise discretion exactly as the Court has done and does not automatically require that a public interest factor override all other factors so as to achieve minimum or maximum allowances. In Early Recovered Resources Inc., supra, I tempered the weight given to public interest because it was regional in nature. I doubt that, in these circumstances, I can ignore the Appellants' role in creating scrutiny of the process, but it is also uncontroverted that the Respondent had important responsibilities, including respect for the Appellants' right to proceed. The Respondent, having received the ordinary scale of

> party and party costs, is not bound by a public interest factor to permit the Appellants to escape completely the consequences of that costs award, ie. by minimum allowances when higher allowances might otherwise be warranted….

Counsel further contended that any issue of public interest was between the Applicant and the Attorney General of Canada. Counsel argued that Mr. Odynsky had been dragged into the application as the dispute between the Applicant and the Attorney General of Canada was his citizenship.

[10] I will commence with this last point. At paragraph 24 of *League for Human Rights of B'Nai Brith Canada v. Canada*, 2008 FC 732 (*League of Human Rights*), the Court held that a person is directly affected if the decision at issue directly affects the party's rights, imposes legal obligation on it, or prejudicially affects it directly. Although I would not characterize Mr. Odynsky's standing as being dragged in, it is clear that he is a person directly affected by the decision under judicial review.The question is whether this should have an impact on the issue of costs. I am of the opinion that it does. Neither the Crown nor Mr. Odynsky, both of whom possessed direct standing, sought a review of the decision. This challenge was initiated by a third party who was found not to have direct standing but who possessed public interest standing. When the Applicant applied for a judicial review of the Governor in Council's decision, Mr. Odynsky was faced with a challenge to the status of his citizenship by a third party. Faced with this challenge, Mr. Odynsky took steps to protect his rights and this should have a bearing on the assessment of costs.

[11] A second preliminary issue which must be addressed, is the impact of Mr. Odynsky's motions for orders striking the Application for Judicial Review and for a stay of the judicial review proceeding. Several times in its submissions on costs, the Applicant addresses Mr. Odynsky's

motions. Counsel for the Applicant argued that consideration should be given to the success of the Applicant and the effort the Applicant made in opposing these motions. Counsel contended that these motions unnecessarily lengthened the duration of the proceeding. As the Motion for a stay was in the Federal Court of Appeal and has no bearing on this assessment, I will focus on Mr. Odynsky's motion to strike.

[12] Ordinarily, motions for which costs have not been awarded would not have a significant impact on the costs of a proceeding. However, counsel for the Applicant raises Rules 400(3)(i) as a factor to be considered in this assessment. In reaching a decision as to whether the motion to strike, brought by Mr. Odynsky, unnecessarily lengthened the proceeding, I looked to the Courts' decisions regarding the motions. As the decision of the Prothonotary dated February 4, 2008 was reversed, I will focus on the decision on the appeal of that decision. At paragraph 2 of *League of Human Rights (supra),* the Honourable Madam Justice Dawson held:

> On this appeal from the prothonotary's order, I exercise my discretion *de novo*. I allow the appeal because I conclude that, in this case, the issue of public interest standing should not be decided on a preliminary or interlocutory basis. Instead, the issue should be left for the judge who hears the application for judicial review.

Further, I looked at the decision of the Federal Court of Appeal relating to Mr. Odynsky's appeal from the order of the Honourable Madam Justice Dawson. Commencing at paragraph 5 in *League for Human Rights of B'Nai Brith Canada v.Odynsky*, 2009 FCA 82, the Court held:

> **5** In the case of *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc. (C.A.)*, [1995] 1 F.C. 588, this Court ruled that motions to strike an application for judicial review should be resorted to only in the most exceptional circumstances, i.e. when the application is bereft of any possibility of success.

> **6** The rationale for this ruling was that judicial review proceedings are designed to proceed expeditiously and motions to strike have the potential to unduly and unnecessarily delay their determination. In other words, as per the *Bull* case, justice is better served by allowing the application judge to deal with all of the issues raised by the judicial review application.
> **7** This appeal illustrates the soundness and wisdom of the earlier ruling of this Court in the above-mentioned case.
> **8** We are asked today, Thursday, March 12, 2009, to decide an appeal on a dismissal of a motion to strike when the very merit of the application for judicial review is due to be heard in four days, a fact we were unaware of until we reached the stage of the submissions by counsel for the League.(emphasis added)

[13] In both of these decisions, the Court held that any decision on the motion to strike should be left to the judge hearing the judicial review application. It is clear that the Federal Court of Appeal found that Mr. Odynsky's motion to strike unduly and unnecessarily delayed this proceeding. Consequentially, Mr. Odynsky's conduct of the motion to strike and the subsequent appeal is a factor which should be considered in this assessment of costs.

[14] Another preliminary issue is public interest. When considering Rule 300(3)(h), I agree with the Applicant that the nature of this proceeding is such that for a portion of the population, public interest could be very high. However, as was held in *Bow Valley Naturalists Society (supra),* a public interest factor should not override all other factors so as to achieve minimum or maximum allowances and the weight given to public interest may be tempered due to a regional interest. Although the case before me does not have a regional limitation, I agree with counsel for the Applicant that the scope of public interest may not be overly broad and may be limited to those whom the Applicant represents. On the other hand, I agree with counsel for Mr. Odynsky that, in this particular proceeding, public interest is primarily an issue which is between the Applicant and the Respondents Her Majesty the Queen and the Attorney General of Canada. The judicial review

of the decision of the Governor in Council was launched by the Applicant and the decision is defended by the Crown. As was found at paragraph 10, above, Mr. Odynsky was faced with a challenge to his citizenship and took steps to protect his rights but the public interest aspect of the judicial review emanated from the Applicants challenge, not Mr. Odynsky's participation. In summary, although there is an obvious public interest, that interest is limited in nature and not related to steps Mr. Odynsky's took to protect his rights. Consequentially, I find that the impact of the public interest aspect of this proceeding should not have any impact on the assessment of Mr. Odynsky's costs.

[15] The final preliminary issue relates to the impact the Holocaust should have on the assessment of costs. When considering the Applicant's submissions concerning Rule 400(3)(o) (any other matter), it is noted that assessment officers occasionally conduct assessments involving parties facing challenging circumstances. However, notwithstanding the gravity of these situations, assessments must be conducted pursuant to the Rules and Tariff of the *Federal Courts Rules*. Therefore, I find the fact that the Applicant represents families of victims of the Holocaust is not a factor which I can consider in this assessment of costs.

[16] In the light of these competing factors, I will now address the individual Items and disbursements claimed.

[17] As mentioned above, the only argument concerning assessable services that was put forward by the Applicant was that the Items claimed should be allowed at the low end of Column III. In *Starlight v Canada*, 2001 FCT 999, it was held:

> **7** The structure of the Tariff embodies partial indemnity by a listing of discrete services of counsel in the course of litigation, not necessarily exhaustive. The

> Rules are designed to crystallize the pertinent issues and eliminate extraneous issues. For example, the pleading and discovery stages may involve a complex framing and synthesizing of issues leaving relatively straightforward issues for trial. Therefore, each item is assessable in its own circumstances and it is not necessary to use the same point throughout in the range for items as they occur in the litigation. If items are a function of a number of hours, the same unit value need not be allowed for each hour particularly if the characteristics of the hearing vary throughout its duration. In this bill of costs, the lower end of the range for item 5 and the upper end of the range for item 6 are possible results. Some items with limited ranges, such as item 14, required general distinctions between an upper and lower assignment in the range for the service rendered. (emphasis added)

In keeping with the findings in Starlight, I will assess each Item claimed based on the merits of the individual items.

[18] Counsel for Mr. Odynsky has claimed Item 2 (Preparation and filing of all defences, replies, counterclaims or respondents' records and materials) at 5 units. I consider this to be the mid range of Column III. Having reviewed the record of this proceeding and determined that counsel for Mr. Odynsky filed an Application Record; I find the amount claimed under Item 2 to be reasonable. Therefore, in keeping with my findings above, I allow Item 2 as claimed.

[19] Item 13(a) and (b) (preparation for trial or hearing) have been claimed at the high end of Column III. Given that Mr. Odynsky's appeal from the decision of the Honourable Madam Justice Dawson was heard just four days prior to the hearing of the judicial review, and given the findings of the Federal Court of Appeal as quoted at paragraph 12, above, I find that his claims for Items 13(a) and 13(b) are excessive. I allow Item 13 (a) at 2 units and Item 13(b) at 2 units per day for the second day of the hearing.

[20] Concerning Item 14 (a) (first counsel per hour in Court), Mr. Odynsky has claimed 3 units per hour for 10 hours. Having reviewed the Abstract of Hearing, it has been confirmed that the hearing of the judicial review lasted 10 hours over two days. Also, further to my findings at paragraph 10 above, I find that, because Mr. Odynsky was faced with a challenge to the status of his citizenship by a third party, he was paced in a unique position which warrants an allowance for counsels time in Court at a higher level. As Item 14 has a range of 2 – 3 units, I will allow it at 3 units for 10 hours as claimed.

[21] Counsel for Mr. Odynsky has claimed 7 units under Item 15 (preparation of written argument, where requested or permitted by the Court). Having reviewed the record, it appears that the claim under Item 15 relates to the service and filing of the Memorandum of Fact and Law. If this is the situation, the claim may not be allowed as claims for Memoranda of Fact and Law are allowed under Item 2 as part of the Respondent's Record. Further, although I was able to locate two directions of the Prothonotary requesting written argument, both of these directions relate to Mr. Odynsky's motion to strike for which no costs have been awarded by the Court. Although there is a third direction dated August 8, 2007, requesting a response to the Applicant's letter dated July 31, 2007, I do not consider this a request for written argument as contemplated by Item 15 of Tariff B. There are no other directions requesting written argument. I have decided on many occasions that, absent a direction or request from the Court, Item 15 may not be allowed. (see: *Moglica v. Canada (Attorney General)*, 2011 FC 466, *Laboucan v. Loonskin*, 2009 FC 194, *Bartkus v. Canada Post Corp.*, 2009 FC 404 and *Moodie v. Canada (Minister of National Defence)*, 2009 FC 608) Therefore, as there are no requests from the Court for written argument for which Mr. Odynsky is entitled to costs, the claim under Item 15 is not allowed.

[22] As the Applicant has not provided any submissions concerning the disbursements claimed, and having reviewed the claims for photocopying and delivery and service of document, I find the amounts claimed to be reasonable and necessary given the circumstances of this proceeding. Therefore, as Mr. Odynsky has provided justification for these disbursements, they are allowed as claimed for a total of $612.29.

[23] For the above reasons, the Bill of Costs of Mr. Odynsky is assessed and allowed at $6,341.39. A Certificate of Assessment will be issued in that amount.

"Bruce Preston"
Assessment Officer

Toronto, Ontario
February 21, 2012

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1162-07
STYLE OF CAUSE:	*LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH CANADA v. HER MAJESTY THE QUEEN, THE ATTORNEY GENERAL OF CANADA, WASYL ODYNSKY*

ASSESSMENT OF COSTS WITH PERSONAL APPEARANCE OF THE PARTIES

PLACE OF ASSESSMENT:	TORONTO, ONTARIO
REASONS FOR ASSESSMENT OF COSTS:	BRUCE PRESTON
DATED:	FEBRUARY 21, 2012

APPEARANCES:

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