Federal Court  Cour fédérale

Date: 20120517

Docket: A-479-08

Citation: 2012 FC 604

Ottawa, Ontario, May 17, 2012

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

NEIL MCFADYEN

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER
(REVIEW OF COSTS ASSESSMENT)

[1] In the face of it, Mr. McFadyen unilaterally discontinued an appeal to the Federal Court of Appeal from a decision of the Tax Court of Canada just days before the scheduled hearing. The Attorney General of Canada sought an assessment of his costs. They were fixed by Mr. Bruce Preston, assessment officer, in the amount of $1,338. This is a review of his certificate of assessment. Rule 414 of the *Federal Courts Rules* provides that if, as in this case, the assessment officer is not a judge, the motion in reassessment is to be heard by a judge of the Federal Court, not the Federal Court of Appeal.

[2] When the request for assessment was made, the key document before Mr. Preston was a notice of discontinuance which said nothing about costs, and which was not countersigned by the respondent. Rule 402 provides:

Unless otherwise ordered by the Court or agreed by the parties, a party against whom an action, application or appeal has been discontinued or against whom a motion has been abandoned is entitled to costs forthwith, which may be assessed and the payment of which may be enforced as if judgment for the amount of the costs had been given in favour of that party.	Sauf ordonnance contraire de la Cour ou entente entre les parties, lorsqu'une action, une demande ou un appel fait l'objet d'un désistement ou qu'une requête est abandonnée, la partie contre laquelle l'action, la demande ou l'appel a été engagé ou la requête présentée a droit aux dépens sans délai. Les dépens peuvent être taxés et le paiement peut en être poursuivi par exécution forcée comme s'ils avaient été adjugés par jugement rendu en faveur de la partie.

[3] Mr. McFadyen's position then, and now, is that the parties had agreed that his appeal be discontinued, each party paying its own costs. If that is so, the agreement was not vitiated by the fact that the notice of discontinuance is silent on costs, and is not countersigned by solicitors for the respondent.

[4] Mr. McFadyen's position before the assessment officer, and now, is that since in his responding material on the assessment he provided *prima face* evidence that there had been a settlement, Mr. Preston was without jurisdiction to assess costs. The burden was on the other party, the Attorney General of Canada, to move for a declaration that the notice of discontinuance had not been filed in pursuance of a settlement agreement which included a waiver of costs.

[5] In his reasons, Mr. Preston said that he was without jurisdiction to make a determination as to the validity of the alleged agreement. He said "…its validity must be judicially determined." I agree. However, he went on to say that he did not think that he was therefore barred from assessing the Attorney General of Canada's costs, as his jurisdiction derived from rule 402. Since the issue of a settlement agreement was not raised until Mr. McFadyen's cost submissions were filed, given the provisions of that article, and based on the court record at the time of the discontinuance, he concluded that "…I may proceed with the assessment of costs."

[6] In setting the matter down for a hearing, or as in this case by written submissions only, I find that the assessment officer had some discretion. He could have suspended his assessment for a brief period to allow a party, in my opinion, Mr. McFadyen, to move the court, presumably the Federal Court of Appeal, for a declaration that there had been a settlement. However, in my opinion, he also had the discretion to proceed with the assessment. To this day, neither party has sought a declaration from any court as to whether or not the appeal was discontinued on the basis that each party would bear its own costs.

[7] Since I am sitting in review of that assessment, since in my opinion it was open to Mr. Preston to make that assessment, and since the reasonableness of the quantum has never been contested, I shall dismiss Mr. McFadyen's motion. However, in the hope of giving some guidance to the parties, I have the following comments.

[8] In May 2009, Mr. McFadyen had four proceedings against the Attorney General of Canada. His wife, Ms. Gardner, had one. The Attorney General was represented in two of Mr. McFadyen's proceedings by one counsel at the Department of Justice, and in each of the other two by other counsel at the Department of Justice. On 11 May 2009, all three wrote to Mr. McFadyen's counsel, and to his wife's counsel, referring to all five proceedings. The offer there made, which was open until13 May 2009 at 4:30 p.m., was that the respondent or defendant, as the case may be, would agree to a dismissal of the action or appeal, as the case may be, on a without cost basis. However, the letter also provided: "This offer is not subject to partial acceptance."

[9] It is common ground that Mr. McFadyen's spouse did not accept. On that basis there was no settlement. This was and is the Attorney General's position.

[10] However, on 12 May 2009, there was a letter from one of the Department of Justice's counsel, Elizabeth Kikuchi, with copy to the other two counsel at the Department of Justice, addressed only to Mr. McFadyen's counsel, Mr. Riddell, and which only referred to his four proceedings. The letter says: "This letter is further to our recent telephone conversation. Please find attached our proposed settlement agreement and release for the proceedings relating to Mr. McFadyen." The attached document was entitled "Settlement Agreement and Full and Final Release". Neither the letter nor the attached document made any reference whatsoever to the proceedings instituted by Mr. McFadyen's spouse. According to Mr. McFadyen's counsel, Mr. Riddell, who in essence was testifying rather than making submissions, he had informed Ms. Kikuchi that Mr. McFadyen's spouse would not go along with the proposal. He counter-offered that Mr. McFadyen's spouse be dropped from the equation and that Mr. McFadyen would be prepared

to accept. Therefore, he took the letter of 12 May 2009, with attachment, as acceptance of the counteroffer.

[11] On 13 May 2009, he wrote to Ms. Kikuchi with copy to the other two counsel. He referred to the letter dated 12 May 2009 and confirmed that Mr. McFadyen had accepted the proposed settlement. He wrote by facsimile. He enclosed an executed copy of the settlement agreement in full and final release and said he would take charge of effecting the various discontinuances.

[12] That same day, two of the Attorney General's counsel, Brian Harvey and Andrew Miller, wrote to Mr. Riddell, with copy to Ms. Kikuchi, saying there had been no settlement as Mr. McFadyen's spouse had not accepted the offer, and the offer had, therefore, expired by lapse of time. Ms. Kikuchi did not write a letter at that time.

[13] The discontinuance in this, and in the other proceedings, was only filed subsequently to the receipt of the letters from Mr. Harvey and Mr. Miller.

[14] As I stated during oral argument, there is a *prima face* case that there was no settlement and there is a *prima face* case that there was a settlement. If either party were moving for summary judgment, even if I had jurisdiction, I would not grant same. What is crucial is the content of the discussion on 12 May 2009 between Mr. Riddell and Ms. Kikuchi. At the very least, there would have to be affidavits from both, and an opportunity to cross-examine before a court with jurisdiction could decide one way or the other.

[15] It seems to me that the burden is on the party invoking the agreement, Mr. McFadyen.

[16] Mr. McFadyen submits that the Federal Court of Appeal would have jurisdiction, while Mr. Miller, on behalf of the Attorney General, submits that it is the Ontario Superior Court of Justice which should decide. The issue is not whether the Ontario courts have jurisdiction. The issue is whether the Federal Court, or the Federal Court of Appeal, has jurisdiction.

[17] While it may be that once upon a time one might argue that this was simply a matter of contract at large, and the federal courts did not have jurisdiction, it seems to me that that day has long passed. Pursuant to section 22 of the *Federal Courts Act*, rules 324 and following of the *Federal Courts Rules* and the *Commercial Arbitration Act*, it is incongruous that the Federal Court has jurisdiction to determine whether or not parties who were not before the Court at the time validly entered into an arbitration agreement, and yet not be able to determine whether negotiations between counsel, as officers of this Court, representing parties who were before this Court, resulted in an offer and acceptance. Furthermore, if that were the case, then rules 419 and following of the *Federal Courts Rules*, which deal with the cost consequences of offers to settle, would be meaningless if one party could take the position there had been no such offer and this Court could not decide the point.

[18] In addition, if it is determined that the discontinuance was filed as a result of a genuine mistake, only the Federal Court of Appeal is in position to allow Mr. McFadyen to withdraw the discontinuance and continue his appeal.

[19] In summary, I find that Mr. Preston was entitled to proceed as he did and my review concludes that the quantum of his assessment was reasonable. Neither he, nor I in review, have jurisdiction to determine whether or not an agreement had been reached so that the appeal could be discontinued on a without-cost basis.

[20] The motion shall be dismissed without costs. The parties agree that the assessment officer was without jurisdiction to determine the validity of the alleged settlement, and yet squabble incessantly as to who has the burden of proof and which court has jurisdiction to decide the point.

[21] To use the words of Mr. Justice Evans in *Apotex Inc v Merck & Co Inc*, 2008 FCA 371, 382 NR 374, at paragraph 16, this motion "…has done little to advance the public interest in the due administration of justice."

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The motion in reassessment of the certificate of costs issued by the assessment officer is dismissed.

2. The whole without costs.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	A-479-08
STYLE OF CAUSE:	MCFADYEN v AGC
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MAY 15, 2012
REASONS FOR ORDER AND ORDER (REVIEW OF COSTS ASSESSMENT):	HARRINGTON J.
DATED:	MAY 17, 2012

APPEARANCES:

Alan Riddell	FOR THE APPELLANT
Andrew Miller	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Soloway Wright LLP Barristers & Solicitors Ottawa, Ontario	FOR THE APPELLANT
Myles J. Kirvan, Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT