Federal Court  Cour fédérale

Date: 20130307

Docket: T-1931-11

Citation: 2013 FC 238

Ottawa, Ontario, March 7, 2013

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

ULTIMA FOODS INC., DANONE INC. AND AGROPUR COOPERATIVE

Applicants

and

ATTORNEY GENERAL OF CANADA, MINISTER OF INTERNATIONAL TRADE, AGRO-FARMA CANADA, INC.

Respondents

REASONS FOR JUDGMENT – COSTS

[1] In my earlier decision on the merits (*Ultima Foods Inc. v Canada (Attorney General)*, 2012 FC 799), I dismissed the Applicants' application for judicial review (the Application) of a decision of the Minister of International Trade (the Minister) made on October 17, 2011 (the Decision). In the Decision the Minister issued supplemental import permits allowing the Respondent Agro-Farma Canada Inc. (Agro-Farma) to import specified quantities of its Chobani brand Greek-style yogurt for a limited period of time. I granted costs to all the Respondents but left open the possibility of further submissions on the scale and quantum of costs if a settlement could not be reached.

[2] Since the fees and disbursements payable to Agro-Farma were not settled, I heard further submissions from counsel for the Applicants and Agro-Farma on December 4, 2012. The principal issue is whether Agro-Farma is entitled to costs on a scale greater than that contemplated by Tariff B of the *Federal Court Rules*, SOR/98-106 (the Tariff).

[3] Agro-Farma provided the following information for the hearing:

- Actual fees $1,229,346.65 (full indemnity)
- Claimed fees $941,000.00 (later reduced to $876,457.50 – see para. 6 below)
- Column III fees $80,339.61
- Column V fees $138,306.35
- Disbursements $77,000.00 (later reduced to $74,929.56 – see para. 7 below)

[4] As noted above, Agro-Farma is seeking fees from the Applicants in the amount of $941,000.00 (the Claimed Fees). The Claimed Fees include two claims for full indemnity. The first is for fees of $121,000.00 attributable to Agro-Farma's response to the Applicants' motions for injunctive relief. Agro-Farma alleges that its work was wasted. The second claim is for fees in the amount of $222,000.00 incurred responding to evidence filed by the Applicants that Agro-Farma argues was unnecessary and outside the scope of the Application.

Deductions from the Claimed Fees

[5] Although I have not used the Claimed Fees as the basis for the costs award in this decision, I nevertheless think it appropriate to deal with the Applicants' arguments about the amounts claimed.

Agro-Farma asked for fees for the attendance of its two counsel as observers on a motion in Ottawa. I informed the parties during the hearing that these costs could not be recovered. It was agreed that these attendances represented roughly $15,000 in fees and disbursements. After the hearing, Agro-Farma informed the Court that the disbursements were $1,500. The balance of $13,500 will be considered as legal fees and will be deducted from Agro-Farma's Claimed Fees.

[6] Danone Inc. also refutes Agro-Farma's entitlement to fees for preliminary motions which did not result in costs awards. The law is clear that no costs are to be awarded if orders are silent on costs (*Abbott Laboratories v Canada (Minister of Health)*, 2008 FC 693 at para 73; *Estensen v Canada (Attorney General)*, 2009 FC 152 at para 9; *Corbett v Canada (Attorney General)*, 2008 FCA 343). I therefore accept Danone's argument with respect to the costs for uncontested motions claimed in Agro-Farma's bill of costs. Accordingly, a further $51,042.50 is hereby deducted from Agro-Farma's Claimed Fees. The deductions of $13,500 and $51,042.50 reduce the Claimed Fees to $876,457.50.

Deductions from Disbursements

[7] After the hearing, Agro-Farma filed an Affidavit made by Alison McLean. It showed that the disbursements had been overstated by $1,500.00 for the reasons set out above in paragraph 5 and noted other minor miscalculations. The net result is that the disbursements are now $74,929.56.

Recovery above Tariff B - The submissions:

[8] Agro-Farma urges the Court to exercise its discretionary power under Rule 400(1) of the *Federal Court Rules* to depart from Tariff B for the following reasons:

1. The Application was brought for strategic purposes in an effort to exclude Agro-Farma from the Canadian market;
2. The Applicants brought and then "abandoned" allegedly urgent motions for injunctive relief;
3. Much of the evidence filed by the Applicants was irrelevant, unnecessary and beyond the scope of the Application.
4. The Applicants did not have standing to bring the Application;
5. The subject matter was complex.

[9] Agro-Farma submits that the Court has departed from the Tariff in similar circumstances. In *Air Canada v Toronto Port Authority*, 2010 FC 1335, Mr. Justice Hughes held that a cost award outside Tariff B was warranted and awarded the Respondent 50% of its actual costs, plus disbursements. In reaching this decision Mr. Justice Hughes was influenced, *inter alia,* by the fact that the applicant knew that there was no decision which could be judicially reviewed and by the fact that the applicant made unsubstantiated allegations that the Respondent had engaged in anti-competitive activity.

[10] Agro-Farma also relies on Mr. Justice Hugessen's decision in *Jazz Air LP v Toronto Port Authority*, 2007 FC 976, in which he awarded costs against the Applicant on a solicitor-client basis after finding that the entire action was an abuse of process. The litigation was brought solely to prevent a smaller competitor from establishing itself in an important segment of the market.

[11] The Applicants, on the other hand, submit that there was nothing exceptional about this case or the way it was argued that would justify departing from Tariff B. They also say that the full indemnity costs sought by Agro-Farma are only appropriate in exceptional circumstances in which the conduct of a party can be characterized as reprehensible, scandalous or outrageous. The Applicants deny Agro-Farma's claim that their decision to proceed with an expedited hearing instead of an injunction application indicates that they had exaggerated the urgency of the situation. They stress that the plan to proceed to a hearing on the merits on an expedited basis was initially proposed by Counsel for the Minister. The Applicants also suggest that Agro-Farma should not be entitled to fees for two senior counsel.

[12] The Applicants rely on a number of cases which urge a cautious approach to the exercise of judicial discretion on costs issues. I will discuss them below. The Applicants also argue that the circumstances which led Mr. Justice Hughes and Mr. Justice Hugessen to depart from the Tariff in the cases noted above are not present in this case.

Discussion and Conclusions

[13] I am satisfied that this litigation was brought for the purpose of precluding Agro-Farma from sharing in the expanding market for yogurt sales in Canada. To achieve this objective the Applicants argued that the Ministers' Decision was *ultra vires* because he did not have the authority to issue import permits which harmed Supply Management. That argument failed because I was not persuaded that harm to Supply Management had been established.

[14] However, in my view, this conclusion does not lead to the recovery of any fees on a full indemnity basis because recovery at such a high level requires scandalous or abusive conduct. Litigating for strategic purposes without more, does not meet that test.

[15] I also agree with the Applicants that it cannot be said that the injunctions were "abandoned" by the Applicants when it was Counsel for the Minister who proposed that the matter proceed to an expedited hearing on the merits. It is my view that the proposal was reasonable in the circumstances and that the Applicants should not be penalized because they agreed with the Minister's counsel. Further, Agro-Farma has provided no evidence to demonstrate that any work it undertook was wasted. Accordingly, I am not persuaded that Agro-Farma is entitled to costs on a full indemnity basis under this heading.

[16] Agro-Farma submits that the Applicants filed irrelevant expert and other technical evidence regarding techniques used in the manufacture of Greek yogurt hoping that the Court would decide anew whether Chobani is made using a "new and unique process". This was one of the questions before the Minister and Agro-Farma says it was outside the scope of judicial review. The Evidence at issue is found in the affidavits sworn on behalf of Danone by Donald Snyder on February 11, 2012, and Luc Boulaine on February 13, 2012, and in the affidavit of Mario Proulx sworn on February 13, 2012 on Ultima's behalf. These deponents were all cross-examined by counsel for Agro-Farma.

[17] I accept Agro-Farma's assertion that by filing these affidavits the Applicants forced Agro-Farma to deal with this issue even though it was beyond the scope of the judicial review of the

Minister's Decision. While one affidavit on the issue might be viewed as reasonable industry background, three were unnecessary. In my view, this conduct should lead to an increased costs award even though it falls short of the scandalous or abusive behaviour which might justify full indemnity.

[18] Although the Applicants alleged prejudice and direct harm to justify standing under subsection 18.1(1) of the *Federal Court Act*, RSC 1985 c F-7, they offered no evidence to substantiate their claims. Danone also alleged that it was entitled to public interest standing but failed to meet the test. Accordingly, neither Applicant had standing. While not justifying a full indemnity award, this conclusion does justify increased costs.

[19] Regarding fees for two senior counsel, I am persuaded that staffing the file in this manner made sense given the pressure created by the Applicants' injunction applications and the Christmas holiday period.

[20] Against this background, and given that costs are usually awarded under Column III, the question becomes what constitutes increased costs? Is it costs under Column V or costs outside the Tariff? I am mindful of the cases cited by the Applicants and in particular the argument that fairness in the assessment of costs requires the predictability and certainty provided by the Tariff. The Applicants bring to my attention paragraph 57 of Mr. Justice Décary's reasons (dissenting in part) in *Consorzio del Prosciutto di Parma v Maple Leaf Meats Inc*., 2002 FCA 417, where he warned that cost awards which exceed the amounts permitted under the Tariff will lead to the undermining of the Tariff and will result in "unpredictability, arbitrariness and in the end unfairness in cost awards."

I also note that in *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 157 at paragraph 15, the Federal Court of Appeal cited the need for uniformity and foreseeability when it instructed judges to be guided as much as possible by Tariff B.

[21] The Applicants also rely on *Wihksne v Canada (Attorney General)*, 2002 FCA 356. In that case the Federal Court of Appeal held that absent special considerations outlined in Rule 400(3), the Court should be reluctant to depart from the Tariff. The Court in *Wihksne* relied on Mr. Justice Nadon's decision in *Hamilton Marine Engineering Ltd. v CSL Group Inc.* (1995), 99 FTR 285 (FCTD), which said that the Tariff must remain the rule and that a departure from the Tariff is an exception that the Court should not make lightly. However, I note that Mr. Justice Nadon, then of the Federal Court, did depart from the Tariff in that case, citing the volume of work required of counsel and the reasonable offers of settlement made by the successful party prior to and at the commencement of the trial. He ultimately awarded twice the Tariff amount under Column V.

[22] There is no doubt that uniformity and predictability are important objectives. However, there are other relevant factors that guide the exercise of judicial discretion in this realm. Although not referring to Tariff B, the Supreme Court of Canada stated in *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, that the fair and efficient functioning of the justice system, including the deterrence of frivolous actions and defences, is one of the policy objectives of the modern approach to costs. Other decisions have acknowledged that a cost award pursuant to Tariff B is not intended to fully indemnify the successful party but is meant to represent a compromise between awarding full compensation to a successful party and imposing a crushing burden on the

unsuccessful party (*Apotex Inc v Wellcome Foundation Ltd.* (1998), 159 FTR 233 at para 7 (FCTD); *Air Canada v Thibodeau*, 2007 FCA 115 at para 21).

[23] Taken together the cases show that although judges generally exercise their discretion within the Tariff, the Court may go beyond the Tariff when required to achieve a reasonable outcome. In *Consorzio del Prosciutto di Parma*, the Federal Court of Appeal awarded increased costs, representing roughly 30% of the actual fees plus disbursements. Mr. Justice Rothstein, then of the Federal Court of Appeal and writing for the majority, confirmed that Rule 400 permits judges to depart from the Tariff where an award of costs under the Tariff is deemed unsatisfactory. Although the Court instructed judges to exercise discretion prudently, it also offered the following reminder: "it must be borne in mind that the award of costs is a matter of judgement as to what is appropriate and not an accounting exercise" (at para 10). The reasons offered by Mr. Justice Rothstein for granting increased costs were the complexity of the matters and the amount of work required of counsel. The Court was also of the view that the actual amount of solicitor-client costs, although not determinative, may in some cases factor into determining an appropriate party-party cost contribution.

[24] This Court addressed a judge's discretion to award costs outside of the Tariff in *Dimplex North America Ltd. v CFM Corp*, 2006 FC 1403. Mr. Justice Mosley held that where increased costs are warranted the Court should first determine whether a reasonable award can be achieved within the Tariff. However, when it is not possible to achieve a reasonable or satisfactory result within Tariff B, the Court may consider awarding an amount in excess of the Tariff. The Court in

Dimplex awarded Column V costs to the successful party but added a premium which resulted in increased costs representing 20% of actual costs.

[25] Remaining mindful of the importance of predictability and certainty, and keeping in mind the cases cited above, I am of the view that in this case an award $138,306.35 under Column V of the Tariff leaves Agro-Farma to pay too heavily for its vindication. In my view, such an award would be unjust.

[26] I have therefore decided to depart from Tariff B and allow Agro-Farma to recover approximately one third of its actual costs i.e. $410,000 plus disbursements of $74,929.56.

ORDER

THIS COURT ORDERS that:

The costs in this matter are hereby granted to the Respondent Agro-Farma in the amount of $410,000 plus disbursements of $74,929.56. The Applicants are liable jointly and severally for this award.

"Sandra J. Simpson"

Judge

Federal Court  Cour fédérale

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET:	T-1931-11
STYLE OF CAUSE:	Ultima Foods Inc. et al v Attorney General of Canada et al
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	December 4, 2012
REASONS FOR JUDGMENT:	SIMPSON J.
DATED:	March 7, 2013

APPEARANCES:

Peter Kirby	FOR THE APPLICANT
Brenda Swick Andrew McCutcheon	FOR THE APPLICANT
Michelle Kellam	FOR THE RESPONDENT
Robert Armstrong Scott Kugler Paul Seaman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Fasken Martineau DuMoulin LLP Montreal, Quebec	FOR THE APPLICANT
McCarthy Tetrault Montreal, Quebec	FOR THE APPLICANT
Myles J. Kirvan Deputy-Attorney General of Canada	FOR THE RESPONDENT
Gowlings Toronto, Ontario	FOR THE RESPONDENT