Federal Court of Appeal  Cour d'appel fédérale

Date: 20150416

Docket: A-316-14

Citation: 2015 FCA 97

CORAM: **NADON J.A.**
WEBB J.A.
BOIVIN J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

RAPISCAN SYSTEMS, INC.

Respondent

Heard at Toronto, Ontario, on January 29, 2015.

Judgment delivered at Ottawa, Ontario, on April 16, 2015.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: NADON J.A.
WEBB J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

[1] The Attorney General of Canada (the appellant) appeals a June 12, 2014 order of Mr. Justice Annis of the Federal Court (the judge) awarding costs to Rapiscan Systems, Inc. (the respondent).

[2] In his order, the judge awarded costs to the respondent in the following manner:

1) A $67,500 lump sum, based on 30% of costs assessed at the high end of Column IV of Tariff B of the *Federal Courts Rules*, SOR/98-106 (*Rules*);

2) If the parties cannot agree on disbursements, the assessment of same;

3) HST shall apply to the award of costs; and

4) The costs award shall bear uncompounded post-judgment interest as of January 21, 2014 (the date of the original judgment) at the rate provided for in s. 127 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[3] From the outset, the judge rejected the respondent's claim to solicitor-client costs given the lack of scandalous or improper conduct on the part of the appellant. On the face of the record, I agree with the judge that there was no basis for such costs.

[4] In reaching this award, the judge noted that he was afforded discretionary powers to fashion the award pursuant to Rule 400(1) and that Rule 407 provides that the default assessment is in accordance with the mid-point of Column III of Tariff B. His review of the jurisprudence, the Rules and the parties' written submissions persuaded him that the appellant's decision namely not to file affidavit evidence or to reach a settlement did not justify increased costs.

[5] The judge then proceeded to determine a lump sum costs award, having regard to the principles of fairness, reasonableness and proportionality.

[6] As such, he considered the Federal Court decision on costs in *Dimplex North America Limited v. CFM Corporation*, 2006 FC 1403, 55 C.P.R. (4th) 202 [*Dimplex*]. In that case, the Federal Court canvassed the issues of the Court's ability to award increased costs within or outside of Tariff B, how that related to the Court's discretionary powers pursuant to Rule 400(1) and what factors must be considered under Rule 400(3). Relying on the principles stated by this

Court in both *Consorzio del Prosciutto di Parma v. Maple Leaf Meats Inc.*, 2002 FCA 417, [2003] 2 F.C.R. 451 at paras. 8-10, and *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 157, 325 N.R. 134 at paras. 14-15, it was determined in *Dimplex* that the appropriate award was 20% of actual costs assessed at the high end of Column V, with post-judgment interest.

[7] In comparing *Dimplex* to the present case, the judge determined that a costs award "at the high end of Column IV may be justified" and found those costs to be "in the order of $225,000" (judge's reasons at para. 23). He therefore awarded the respondent 30% of actual costs assessed at the high end of Column IV, for a lump sum totalling $67,500 exclusive of disbursements and taxes, with uncompounded post-judgment interest as of the date of his decision on the merits (judge's reasons at paras. 24, 26).

[8] The appellant argues that the judge ought to have assessed costs under Column III of Tariff B, as is the normal approach, which would have resulted in an award of $10,080. The appellant also submits that the judge erred in making reference to some factors that are not established principles of costs and taking into account some procedural motions, the costs of which were assessed separately from those of the main application.

[9] For its part, the respondent essentially relies on the discretionary nature of costs awards and the high threshold for appellate intervention to argue that the award should stand and asserts that the final award was indeed fair, reasonable, and proportionate and should not be disturbed.

[10] It is trite law that costs are a discretionary matter and an appellate review of such an award must consider whether the costs award was plainly wrong or rested on an error in principle: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303 at para. 27; *Philip Morris Products S.A. v. Marlboro Canada Limited*, 2015 FCA 9 at para. 3.

[11] In my view, the appellant has failed to demonstrate that the judge committed an error.

[12] The judge considered all relevant factors as well as the submissions of the parties and their conduct throughout the case. He balanced factors that would tend to weigh in the interests of each party, considered the jurisprudence, and assessed his lump sum award bearing in mind the "principles of fairness, reasonableness and proportionality" (judge's reasons at para. 16). Although I agree with the appellant that the judge's reference to "the significant value that likely underlies an outcome that sets aside the procurement process" does not seem to refer to an established principle of costs (judge's reasons at para. 17), the fact of the matter is that the award does not rest on this notion.

[13] For the reasons above, I would dismiss the appeal with costs.

"Richard Boivin"

J.A.

"I agree
M. Nadon J.A."

"I agree
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-316-14
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. RAPISCAN SYSTEMS, INC.
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REASONS FOR JUDGMENT BY:	BOIVIN J.A.
CONCURRED IN BY:	NADON J.A. WEBB J.A.
DATED:	APRIL 16, 2015

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