Federal Court of Appeal | Cour d'appel fédérale

Date: 20150430

Docket: A-144-12

Citation: 2015 FCA 113

Present: **Bruce Preston, Assessment Officer**

BETWEEN:

VLASTA STUBICAR

Appellant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

Heard in writing without personal appearance of the parties

Reasons for Assessment of Costs delivered at Toronto, Ontario, on April 30, 2015.

REASONS FOR ASSESSMENT OF COSTS BY: BRUCE PRESTON.

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REASONS FOR ASSESSMENT OF COSTS

Bruce Preston – Assessment Officer

[1] By way of Judgment dated November 13, 2012, the Court allowed the Appeal, set aside the Order of May 7, 2012 and dismissed the Motion of the Respondent appealing the Order of October 13, 2011, with costs to the Appellant throughout.

[2] Further to the filing of the Appellant's Bill of Costs on February 2, 2015, Directions dated February 6, 2015 and February 25, 2015 were issued setting a schedule for the exchange of submissions. On March 3, 2015, the Appellant filed an Amended Bill of Costs. As the parties

[3] have now filed their submissions, I will proceed with the assessment of the Appellant's Amended Bill of Costs.

[4] By letter dated March 12, 2015, counsel for the Respondent submits:

> I have reviewed the Appellant's Bill of Costs and find it to be reasonable. I will consent to the amount requested on the condition that it is offset against the costs owing to the Crown in A-531-12 and T-2102-10 which are currently under consideration by Mr. Preston.

[5] Further to the Respondent's letter, a teleconference was proposed to allow the Appellant to make submissions concerning the set-off. By letter dated April 9, 2015, the Appellant objected to the teleconference as it would allow the Respondent a second chance for sur-reply for which there is no authority under the Federal Courts Rules. By letter dated April 13, 2015, the Respondent submits that if the set-off of costs creates a challenge, counsel would set-off the amount owed to the Appellant against the amount the Appellant owes to the Crown. Then, by way of rebuttal, the Appellant submits that the Respondent's position concerning set-off is not supported by the authority. The Appellant refers to *Canada (Attorney General) v Pelletier*, 2008 FCA 251, at paragraph 4, in support of the argument that "set-off can only be done in the same file". The Appellant concedes that in *Wilson v Canada*, [2000] FCJ 506 at paragraph 40, it was held that set-off of separate awards of costs in different files is allowable but suggests that the Respondent has "not even attempted to suggest any prejudice anticipated in the event of a separate assessment process", leaving the Appellant's Bill of Costs virtually unopposed. Then, referring to *Reginald R. Dahl v HMQ*, 2007 FC 192, at paragraph 2, the Appellant submits that unless an item falls outside the authority of the judgment or Tariff an Assessment Officer should not intercede on behalf of a party. Finally, the Appellant contends:

> In light of the above representations, the amended Bill of Costs, the evidence and the representations filed March 3, 2015 and consisting of 54 pages, to which the Respondent replied by simple letter faxed on March 13, 2015, the Assessment Officer has grounds for allowing the amounts claimed by the Appellant in file A-144-12 as moderate, justifies and consistent with the costs awarded by the Federal Court of Appeal.

Before proceeding with the assessment of the Appellant's costs I will address the issue of set-off.

Rule 408(2) states:

(2) Where parties are liable to pay costs to each other, an assessment officer may adjust those costs by way of set-off.	(2) Lorsque des parties sont tenues de payer des dépens les unes aux autres, l'officier taxateur peut en faire le rajustement par compensation.

[6] As was held in *Pelletier* (supra), subsection 408(2) of the Federal Courts Rules is normally applicable to costs awarded on the same file. However, *Wilson* (supra) held that when there is a basis for "concern about prejudice because of an apparent lack of any realistic means of recovery within the jurisdiction" costs awarded on more than one file may be set-off against each other. However, as submitted by the Appellant, the Respondent has not argued this and has provided no evidence that there is an apprehension that recovery of the costs assessed is of concern. Further, given the position taken by the Respondent, that counsel would set-off costs after assessment, I find that there is no justification to set-off the costs of this file with the costs of A-531-12 and T-2102-10.Therefore, for the above reasons, there will be no set-off of costs.

I. Assessment

[7] Upon a review of the Appellant's Amended Bill of Costs, it is noted that claims under Item 17, Item 18, Item 19, Item 20, Item 26 and Item 27 have been included. At paragraph 3 of the Supplementary Affidavit of Vlasta Stubicar sworn March 2, 2015, the Appellant submits that she is a "self-represented Appellant in the within file". Then at paragraph 22 the Appellant submits that the time spent "doing the lawyers work made necessary by my appeal from the Federal Court Order … is time that I would have otherwise devoted to earning income as a bilingual lawyer". In the Appellant's Written Representations, the Appellant submits that in awarding "costs to the Appellant throughout", the Federal Court of Appeal "is reasonably held to have taken into account the time, effort and skills deployed by the Appellant in defending the Prothonotary's Order". Further, the Appellant refers to *Professional Institute of Public Service of Canada v Bremsak*, 2013 FCA 214, *London Scottish Benefit Society v Chorley,* (1884) 12 Q.B.D. 452, affirmed at (1884) 13 Q.B.D. 872 and *Malloch v Aberdeen Corporation (No 2),* [1973] 1 All ER 304, in support of the contention that self-represented litigants are entitled to costs for the time and effort required to litigate.

[8] The Appellant has argued that she is entitled to costs for assessable services for time she "would have otherwise devoted to earning income as a bilingual lawyer". This is not the test to be used in assessing costs. In *W. H. Brady Co. v Letraset Canada Ltd.*, [1991] 2 F.C. 226, it was held:

> The general proposition that, to be entitled to recover costs, a litigant must be liable to pay them to his solicitors is based on the principle that party and party costs are given as an indemnity, as a compensation for the expense to which a successful litigant has been put by reason of the litigation. The payment of costs to a party is not to be a gift. It would be unacceptable to let a party collect costs -- which, for the most part, relate to professional services -- if the solicitor who has rendered the services is not legally in a position to claim them from him. The liability required to satisfy the principle involved is easy to define: it is the legal

> obligation to pay for the services rendered to him which a litigant assumes towards his solicitor and which can be enforced by the solicitor at any time.

[9] In the present matter the Appellant is not liable to pay her solicitor. Further, the jurisprudence presented by the Appellant consists of matters decided by the Court, not Assessment Officers. Pursuant to subsection 400(1) of the Federal Courts Rules, the Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid. Under subsection 400(1) the Court has sole jurisdiction to award assessable services to self-represented litigants. In Urbandale Realty Corp v. Canada 2008 FCA 167, at paragraph 20, it was held:

> … The Federal Courts Act s. 5(1) defines the constitution of the Federal Court of Appeal as the Chief Justice and 12 other judges. Rule 2 provides that "Court" means, as the circumstances require, the Federal Court of Appeal. Rule 2 also provides that an "assessment officer" means "an officer of the Registry designated by an order of the Court, a judge or a prothonotary, and includes, in respect of a reference, the referee presiding in the reference." I fall within the first option, i.e. an officer of the Registry designated by an order of the Court. An assessment officer is not part of the constitution of the Federal Court of Appeal defined in the Federal Courts Act, s. 5(1). It follows that the term "Court" defined in Rule 2 does not include me. I am not aware of jurisdiction for an assessment officer alternative to that for the Court in Rules 400(1) and 407 permitting me to effectively vary the Court's award…

[10] In other words, as Assessment Officers are not members of the Court, my jurisdiction is limited as I am not permitted to vary an award of the Court. Therefore, in situations when the Court exercises its jurisdiction and awards assessable services to a self-represented litigant, an Assessment Officer may allow claims for services (See: Carr v Canada, 2009 FC 1196). On the other hand, if the Court does not exercise its jurisdiction to award assessable services to a self-represented litigant, Assessment Officers lacks the jurisdiction to allow services on an

assessment of costs. This was the situation in *Dewar v Canada,* [1985] F.C.J. No. 538, where the Assessment Officer held:

> A lay litigant is restricted to taxing disbursements and may not tax fees calculated to be an equivalency, in terms of his time or out-of-pocket loss, to solicitor's fees or otherwise.

[11] I have reviewed the award of costs and although it awards costs in both the Federal Court of Appeal and the Federal Court, there is no indication that the Court has exercised its jurisdiction to award assessable services to the Appellant. In *Dahl* (supra), at paragraph 2, the assessment officer held:

> …the Federal Courts Rules do not contemplate a litigant benefiting by an assessment officer stepping away from a position of neutrality to act as the litigant's advocate in challenging given items in a bill of costs. However, the assessment officer cannot certify unlawful items, i.e. those outside the authority of the judgment and the Tariff. (Emphasis added)

[12] Therefore, I find that I do not have the jurisdiction to allow assessable services. On the other hand, counsel for the Respondent has indicated that the Respondent will consent to the costs claimed by the Appellant. Ordinarily, under the circumstances of consent, an Assessment Officer would allow the costs as presented. However, in *Cornwall (Township) v Ottawa and New York Railway Co*., [1916] S.C.J. No. 4, the Supreme Court of Canada held;

> …Consent can give jurisdiction when it consists only in waiver of a condition which the law permits to be waived, otherwise it cannot. Where want of jurisdiction touches the subject matter of the controversy or where the proceeding is of a kind which by law or custom has been appropriated to another tribunal then mere consent of the parties is inoperative. No consent, for example, could give the Supreme Court of Ontario jurisdiction to hear a petition for determining the right to a seat in Parliament…. (Emphasis added)

[13] Subsection 400(1) grants the Court full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid. In other words, the authority to award assessable services to a self-represented litigant has been appropriated to the Court. Therefore, the consent of the Respondent, agreeing to the amount claimed for assessable services claimed by the Appellant, a self-represented litigant, is inoperative. For the above reasons, I find that I lack the jurisdiction to allow the Appellant's claim for assessable services. Therefore, the Appellants claims under Item 17, Item 18, Item 19, Item 20, Item 26 and Item 27 are not allowed.

[14] Concerning disbursements, further to the Court's award of costs, I have jurisdiction to assess any disbursements claimed. As the Respondent has consented to the disbursements claimed, I find that they may be allowed as presented. Therefore, the disbursements claimed by the Appellant are allowed at $372.78.

[15] For the above reasons, the Appellant's Amended Bill of Costs is assessed and allowed at $372.78. A Certificate of Assessment will be issued.

"Bruce Preston"

Assessment Officer

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-144-12
ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES	
STYLE OF CAUSE:	VLASTA STUBICAR v. HER MAJESTY THE QUEEN
PLACE OF ASSESSMENT:	TORONTO, ONTARIO
REASONS FOR ASSESSMENT OF COSTS	BRUCE PRESTON
DATED:	APRIL 30, 2015

APPEARANCES:

Vlasta Stubicar	FOR THE APPELLANT (ON HER OWN BEHALF)
Max Binnie	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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