Date: 20090615

Docket: A-248-08

Citation: 2009 FCA 202

BETWEEN:

SIMPSON STRONG-TIE COMPANY, INC.

Appellant

and

PEAK INNOVATIONS INC.

Respondent

ASSESSMENT OF COSTS - REASONS

Bruce Preston
Assessment Officer

[1] Although this is a reasonably straightforward assessment of costs, there is one minor complication in that there are two awards of costs. One award is on this file and the second is on file A-249-08. On both files the assessment was triggered by a motion to strike the Notice of Appeal. By way of Order dated July 10, 2008, the Court granted the respondent's motion to strike the Notice of Appeal with costs to the respondent.

[2] On October 31, 2008 the respondent filed its Bill of Costs together with a letter requesting an assessment of their Bill of Costs in writing on both files.

[3] Upon reviewing the files, Senior Assessment Officer Charles E. Stinson determined that these assessments would be suitable for disposition by written submission. By way of direction dated February 26, 2009, a timetable was established for the filing of written submissions. The time limits set by the direction have now passed and materials have been filed by both parties.

[4] In support of this Bill of Costs the respondent filed an Affidavit of Paul Smith and Written Submissions. At paragraph 4 of the Smith affidavit it is submitted that the amounts in the Bill of Costs were calculated using the middle of Column III. At paragraph 5 of the Smith affidavit the affiant submits:

> The disbursements listed in Exhibit B were all incurred by the Respondent in relation to the motion and were necessary for the conduct of the motion. Some of the disbursements in the motion overlap with those for a separate motion in companion file no. A-249-08. Because of this, the amount of disbursements for the A-249-08 motion is lower.

[5] In its Reply to the Bill of Costs, the appellant submits that the submissions to quash the appeal were brief therefore Item 21 should be allowed at 2 units. The appellant also submits that Item 26 should be allowed at 2 units as it is a very simple assessment with no complicated issues. Concerning Item 27 the appellant submits: “Tariff Item 27 does not apply as there was no “Judgment” but rather an Order was rendered on a motion”.

[6] Further, concerning disbursements, the appellant submits: “Generally, as no disbursement log or invoices were attached to verify any of the disbursements, they should all be assessed at zero”. The appellant also submits that Quicklaw charges, facsimile and courier should be assessed at zero as part of normal office overhead. Specifically, concerning photocopies the appellant submits:

> The affidavit is equivocal as to whether $0.25/page was billed to the client or whether the photocopying was done externally is which case the costs would be significantly lower. Due to the equivocal evidence, the photocopy charges should be taxed at a lesser amount or zero.

[7] The appellant's final argument relates to the costs of the assessment. At paragraph 12 of its submission the appellant submits:

> As the Respondent is assured of the same degree of success on assessment by its very nature, the determining issue as to the award of costs is the degree to which the Respondent was successful in assessing its costs. If the amounts requested by the Respondent were not generally achieved, costs should be fixed and awarded to the Appellant and deducted from the total assessed amount plus PST and GST.

[8] By way of rebuttal to the appellants final point the respondent submits:

> With respect to the Appellant's request that costs of this assessment should be "…fixed and awarded to the Appellant and deducted from the total assessed…", there is no basis in the *Federal Courts Rules* for such an approach. An assessment officer does not have the authority to award costs.

Assessment

[9] I am faced with two assessments on two separate files each of which contain an order awarding costs to the respondent. As the two motions and the two orders emanating from the motions are for all intents and purposes identical, I am faced with the costs of a motion which overlap with those for a separate motion in companion file A-249-08. Under these circumstances, in assessing costs I must be cognisant of the award but at the same time be mindful of not allowing costs in a manner which would result in a doubling of costs.

[10] As supported by *9038-3746 Quebec Inc. v. Microsoft Corporation*, 2007 FCA 76, the respondent is correct that, as a general rule, motions are heard in writing in the Court of Appeal. As

this is the practice, the fact that the present motion was heard in writing, in and of itself, should not reduce the costs allowed.

[11] On the other hand, I am in agreement with the appellant that the materials filed in support of the motion were brief; therefore, I will award Item 21 at 2 units. Similarly, as mentioned earlier, this assessment was not complicated; therefore, I will allow Item 26 at 2 units.

[12] The respondent has claimed 1 unit under Item 27, services after judgment not otherwise specified, however, under Tariff B, Item 25 relates to services after judgment. As the respondent's reference to Item 27 appears to be in error, I will correct the Bill of Costs to reflect the correct Item number. The appellant submits that Item 25 should not be allowed as there was no judgment. The respondent submits: "the motion resulted in the striking of the Appellant's Notice of Appeal, effectively ending the appeal". Given that the result of the Court's decision was the ending of the appeal, I am of the opinion that this is a situation where costs may be allowed for services after judgement. Therefore, 1 unit is allowed for Item 25.

[13] The appellant submits that disbursements should be assessed at zero. While I recognize that the evidence presented was sparse, the disbursements claimed were not unreasonable. I will apply the decision of the Assessment Officer in *Métis National Council of Women v. The Attorney General of Canada* [2007] FC 961 at paragraph 21:

> The less that evidence is available, the more that the assessing party is bound up in the assessment officer's discretion, the exercise of which should be conservative, with a view to the sense of austerity which should pervade costs, to preclude

> prejudice to the payer of costs. However, real expenditures are needed to advance litigation: a result of zero dollars at assessment would be absurd.

[14] Although some disbursements may be seen as normal office overhead, I find that Quicklaw, facsimile and courier costs do not fall into this category as they may be attributed to a specific file. In its rebuttal the respondent submits that all of the photocopies, courier and facsimile charges were necessary for the motion. Having reviewed the file and the materials filed in support of the motion to strike the Notice of Appeal, and noting that counsel for the respondent practices in British Columbia while counsel for the appellant practices in Ontario, thus increasing facsimile and courier costs, I find the disbursements for Quicklaw, photocopies, facsimile and courier to be reasonable and necessary. Therefore, the respondent's disbursements are allowed as claimed.

[15] I cannot agree with the appellant's submission that, depending on the success of the respondent, the costs of the assessment should be fixed and awarded to the appellant and deducted from the total assessed amount. As submitted by the respondent, Assessment Officers lack the jurisdiction to award costs. In *Balisky v. Canada* [2004] F.C.J. No.536 at paragraph 6 the assessment officer states:

> Rule 400(1), which vests full discretionary power in the Court over awards of costs, means that orders and judgments must contain visible directions that costs have been awarded. Given the *Federal Courts Act* ss.3 and 5(1) defining the Court and Rule 2 of the *Federal Courts Rules, 1998* defining assessment officer, the absence of that exercise of prior discretion by the Court leaves me without jurisdiction under Rule 405 to assess costs.

[16] As Assessment Officers are not members of the Court, as defined by the *Federal Courts Act*, I am unable to award costs for the assessment to the appellant.

[17] Finally, pursuant to Division 6 of the *Social Services Tax Act*, [RSBC 1996] Chapter 431, in the province of British Columbia, legal services are subject to PST at a rate of 7%. As respondent's counsel is from Vancouver, and the respondent has requested both PST and GST on legal services, both are allowed.

[18] Further to these reasons, the Bill of Costs presented at $1,173.04 is allowed for a total amount of $769.84. A certificate of assessment will be issued.

"Bruce Preston"
Assessment Officer

Toronto, Ontario
June 15, 2009

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-248-08
STYLE OF CAUSE:	SIMPSON STRONG-TIE COMPANY, INC. v. PEAK INNOVATIONS INC.

ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES

PLACE OF ASSESSMENT:	TORONTO, ONTARIO
REASONS FOR ASSESSMENT OF COSTS:	BRUCE PRESTON
DATED:	JUNE 15, 2009

WRITTEN REPRESENTATIONS:

Kenneth D. McKay	FOR THE APPELLANT
Paul Smith and Lawrence Chan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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