Federal Court  Cour fédérale

Date: 20151030

Docket: T-2057-13

Citation: 2015 FC 1238

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

BETWEEN:

MÉLANIE ALIX

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ASSESSMENT

JOHANNE PARENT, Assessment Officer

[1] On November 6, 2014, the Court dismissed the application for judicial review with costs. On September 1, 2015, the respondent served and filed his bill of costs, and directions were issued on September 10, 2015, informing the parties that the assessment would proceed on the basis of written submissions and setting out the prescribed timeline for the filing of submissions. In addition to the affidavit of Angela Mastrogiacomo, which was solemnly affirmed on

May 26, 2015, the respondent filed representations in reply to the submissions made by the applicant in response to the bill of costs.

[2] Alleging that the respondent is unjustifiably claiming the maximum number of units for all of the items claimed under Tariff B of the Rules, counsel for the applicant points out the complexity of the issues factor and the amount of work factor in subsection 400(3) of the *Federal Courts Rules* (Rules). Also, referring to paragraph 11 of *Stevens v AGC*, 2007 FC 847, counsel for the applicant argues that this matter was not frivolous, that the proceedings were not unduly lengthy, and raises "the common law principle . . . that costs cannot be made a source of profit to a successful party, . . . that the approach to costs can be viewed as being animated by the broad concern to ensure that the justice system works fairly and efficiently". Regarding the seven units claimed under item 2 of Tariff B, the applicant alleges that the parties' arguments in their memoranda of fact and law were very brief since only one issue was raised, that is, an error in law. In her written submissions, the applicant contends that the matter raised [TRANSLATION] "no preliminary issue, no witnesses were heard, no out-of-court examinations took place and no constitutional questions were raised". In light of the foregoing, the [TRANSLATION] "straightforward nature of the sole issue" and the fact that the respondent did not file an affidavit, the applicant requests that four units be allowed under item 2 of Tariff B. Regarding the five units claimed under item 13 of Tariff B, counsel for the applicant alleges that three units should be allowed considering the brevity of the memorandum of fact and law and the fact that no witnesses were heard, no examinations took place, no subpoenas were issued and no experts were necessary. Because of the brevity of the hearing, the applicant alleges that the allocation of two units under item 14 of Tariff B reflects the work done in Court. Regarding item 26 (assessment of costs), counsel for the applicant maintains that this matter is not complex enough

to be granted the maximum number of units as [TRANSLATION] "the parties tried unsuccessfully to find some common ground".

[3] Regarding the disbursements claimed by the respondent, counsel for the applicant maintains that they are reasonable except for the fees claimed for the transcript. Arguing that those fees are unjustified, it is submitted that rules 309 and 310 [TRANSLATION] "are unequivocal, the parties must file the necessary transcripts in their records". Requesting that this disbursement be denied, the applicant contends that the allegations in the respondent's affidavit are without merit and that the affidavit with the necessary transcript was filed within the deadline and with the consent of the respondent.

[4] In reply, counsel for the respondent points out, contrary to the applicant's claims, that three issues were raised in this matter; the first two points were addressed in seven pages of the applicant's memorandum and contained some seventy-nine references to the evidence and the authorities. Regarding the absence of an affidavit in the respondent's record, counsel for the respondent adds that [TRANSLATION] "the only relevant evidence is the evidence which was before the decision-maker" and that as a result, there was no need for the respondent or the applicant to submit an affidavit. Regardless, counsel for the respondent alleges that he had to analyze the evidence and the transcript of a hearing that was three days long, in addition to analyzing the applicable case law and preparing the submissions. With respect to the claim under item 14, it is argued that a fee of $280 should be allowed to reflect the length of the hearing. Regarding the claim for the assessment of costs, it is alleged that the units claimed are justified when there is consideration of the preparation and filing of the bill of costs, the settlement discussions and the written submissions. Regarding the cost of the transcript, it is alleged that the

cost is justified because the transcript was necessary and would have been filed by the respondent if the applicant had not done so. With the aim of minimizing costs, counsel for the respondent states that he inquired into the filing of the transcript with counsel for the applicant. According to the evidence in the affidavit in support of the bill of costs, counsel for the applicant apparently [TRANSLATION] "failed to respond in a timely manner to requests from the Attorney General of Canada, who had to incur the cost of the transcript". Referring to paragraphs 10 to 15 of the Court's decision, counsel for the respondent notes that that evidence was necessary for the application for judicial review and, therefore, his client's rights had to be protected. Given the date on which counsel for the applicant contacted counsel for the respondent to inform him that he would take care of the transcript, it is submitted that work on the transcript ordered by the respondent had already been started and the cost already incurred. In reply to the applicant's arguments on the obligation to file a transcript, it is alleged that there was no obligation if the applicant did not consider it necessary for her record. In this regard, counsel for the respondent states that he considered the transcript necessary for his record and thus, the expense was entirely justified. It is also alleged that, considering the delay in counsel for the applicant's response concerning the transcript, the cost of the transcript claimed reflects only the work that was performed before the stenographer was contacted by counsel for the respondent and asked to stop the work. Finally, it is argued that the bill of costs [TRANSLATION] "does not constitute a profit" for the respondent and, given the fact that the applicant did not request any particular order for costs, they are assessable.

[5] On October 5, 2015, counsel for the applicant filed additional submissions with respect to the number of issues in this matter, the relevance of the affidavit including the transcript in the applicant's record and the allegation that counsel for the applicant had failed to act in respect of

the transcripts. Despite the fact that none of the provisions in the directions issued on September 10, 2015, covered the filing of a sur-reply, the applicant's document was received, and the opportunity to respond to it was provided to the opposing party.

[6] The maximum number of units is claimed for the preparation and filing of the respondent's record (item 2 of the table to Tariff B). In response to the argument by counsel for the applicant that the number of units should be reduced because the respondent did not file an affidavit in his record, I note that rule 307 and subsection 310(2) of the Rules cover the service and filing of a respondent's affidavit. I also note, as the Court proposed in the following decisions, that it is not always necessary for the respondent to file an affidavit: William v Canada, 1997 2 FC 646, *Wang v Canada*, 1999 FCJ 248 and *Awwad v Canada*, 1999 FCJ 103. That fact thus has no bearing on the number of units allowed except concerning the amount of work. Also, the two parties place a great deal of emphasis on the number of issues raised in this case. In this regard, I reviewed the records filed by the parties and the issued raised by each of them. In his memorandum of fact and law, the respondent reduces to one single issue the three points raised by the applicant, which were then reduced to two issues by the Court. Those issues and the parties' arguments in the memoranda of fact and law do not lead me to find that this was a matter of great complexity. Further to my reading of the Court's decision and my review of the memoranda of fact and law of both parties and in light of paragraphs 400(3)(*c*) and (*g*) of the Rules, nothing leads me to conclude that this matter was very complex or that it could have required a very significant amount of work; five units will thus be allowed.

[7] The maximum number of units is again claimed for the preparation for the hearing (item 13(*a*)) and for the attendance in Court (item 14(*a*)). It is understood that no witnesses were

heard, no examinations took place and no subpoenas were issued, and in consideration of the arguments in the previous paragraph, three units will be allowed under item 13 and two units multiplied by the length of the hearing on August 12, 2014, will be allowed under item 14.

[8] Regarding the six units claimed under item 26 of Tariff B (assessment of costs), I recognize that the respondent prepared, served and filed the bill of costs, an affidavit and supporting documentation as well as written submissions. Considering the work done for this straightforward assessment, four units will be allowed under item 26.

[9] With respect to disbursements, counsel for the applicant challenges the stenographic costs in the amount of $122.45. Subsections 309(2) and 310(2) of the Rules state that the records of the applicant and the respondent shall contain "the portions of any transcript of oral evidence before a tribunal that are to be used by the[m] . . . at the hearing" (emphasis added). My reading of those paragraphs leads me to conclude that only the portions of a transcript deemed necessary by the parties and that they intend to use should form part of the record. The parties were therefore not required to file the transcript that was made during the hearing before the independent chairperson. Also, as decided in *Carlile v Canada*, 1997 FCJ No 885, at paragraph 5 and *Dableh v Ontario Hydro*, 1994 FCJ No 1810, at paragraph 15, assessing the disbursements cannot be done in hindsight, but rather as the gauge of the effort required at the time for prudent representation of the client. Given the deadline for the service and filing of the records (subsections 309(1) and 310(1) of the Rules) and the evidence in the affidavit of Angela Mastrogiaconi regarding the delay in counsel for the applicant's response concerning the transcript, I am of the opinion that it was prudent and reasonable for the respondent to have had the transcript prepared as he did so that his record could be created within the prescribed

timeframe in the Rules. The costs incurred for the transcript will be allowed as requested because they reflect only the work that was completed before the two counsel were in contact. The other disbursements claimed by the respondent are not in dispute, are considered necessary, and the amounts are reasonable. They will be allowed as requested.

[10] The respondent's bill of costs is assessed and allowed in the amount of $2,273.86. A certificate of assessment will be issued for that amount.

"Johanne Parent"
Assessment Officer

Toronto, Ontario
October 30, 2015

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2057-13
STYLE OF CAUSE:	MÉLANIE ALIX v ATTORNEY GENERAL OF CANADA

ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES

REASONS FOR ASSESSMENT:	JOHANNE PARENT, ASSESSMENT OFFICER
DATED:	OCTOBER 30, 2015

WRITTEN SUBMISSIONS:

Maxime Hébert Lafontaine	FOR THE APPLICANT
Dominique Guimond	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT