Federal Court  Cour fédérale

Date: 20190121

Docket: T-745-04

Citation: 2019 FC 82

Ottawa, Ontario, January 21, 2019

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

PEMBINA COUNTY WATER RESOURCE DISTRICT, NORTH DAKOTA, CITY OF PEMBINA, NORTH DAKOTA, TOWNSHIP OF PEMBINA, NORTH DAKOTA, TOWNSHIP OF WALHALLA, NORTH DAKOTA, CITY OF NECHE, NORTH DAKOTA, TOWNSHIP OF NECHE, NORTH DAKOTA, TOWNSHIP OF FELSON, NORTH DAKOTA, TOWNSHIP OF ST. JOSEPH, NORTH DAKOTA, RICHARD MARGERUM AND VERLINDA MARGERUM

Plaintiffs

and

GOVERNMENT OF MANITOBA, AND RURAL MUNICIPALITY OF RHINELAND

Defendants

ORDER AS TO COSTS AND REASONS

I. Background

[1] The general background to this dispute is found in my Judgment and Reasons of June 2, 2016 in which I struck the Plaintiffs' claim for want of jurisdiction of the Federal Court.

[2] The Statement of Claim was filed on April 8, 2004 and, given the obvious complexities and importance of this case for both sides, the trial did not begin until April 4, 2016.

[3] The jurisdiction issue that was the sole ground for my dismissing the claim was not raised until the first day of trial.

[4] It was during opening statements that counsel for the Defendants raised whether the Federal Court had jurisdiction to deal with the dispute. No motion to strike was brought at that time. However, the Court and the parties discussed how best to deal with the jurisdiction issue.

[5] It was my view that the decisive issue of jurisdiction (which could be decided upon the pleadings alone) should be addressed as quickly as possible by way of motion to strike. However, I was also made aware by Plaintiffs' counsel that a delay in dealing with the merits of this action could work a significant injustice in that the Plaintiffs' key expert witness was somewhat advanced in years, and that instructing U.S. counsel was very ill. Given the amount of time it could take the Court, and appellate Courts, to deal with the jurisdiction issue, the Plaintiffs could well lose a significant portion of their case even if they were successful in

defending the anticipated strike motion. For this reason, I suggested that the Plaintiffs should be allowed to put in their case before we dealt with the strike motion and, with the agreement of Defendants' counsel, this option was offered to the Plaintiffs. The Plaintiffs opted to proceed in this way and, over a three-week period they put in substantially their whole case.

[6] At completion of the Plaintiffs' case, the Defendants brought their motion to strike for want of jurisdiction, and both sides filed comprehensive materials on this issue.

[7] Having considered the matter, which involved the statutory interpretation of s 4(1) of the *International Boundary Waters Treaty Act*, RSC, 1985, c I-17 [IBWTA] and which, based upon the facts pleaded, did not require me to assess and review the Plaintiffs' trial evidence, I determined on June 2, 2016 that the Federal Court did not have the jurisdiction to deal with the dispute and struck the claim accordingly.

[8] As anticipated, the Plaintiffs appealed my decision to the Federal Court of Appeal who, by judgment rendered May 3, 2017, dismissed the appeal. The Plaintiffs then sought leave to appeal to the Supreme Court of Canada and the leave application was dismissed on December 21, 2017.

[9] Notwithstanding that the Plaintiffs' claim has been struck in its entirety, they now seek to convince the Court to deny the Defendants' claim for costs and to award them their costs that were wasted by the Defendants' failure to move to strike their claim for want of jurisdiction early on in the proceedings. The Defendants take the position that the usual principle that costs should

follow the event should apply and that, indeed, based upon an Offer to Settle made two months before the trial, some of their costs should be awarded by way of double indemnity.

[10] Needless to say, after some 12 years of pre-trial litigation the costs on both sides of the dispute are significant. All in all, the two remaining Defendants – the Government of Manitoba and the Rural Municipality of Rhineland – are seeking C$692,279.37 in fees and disbursements, and the Plaintiffs are seeking C$594, 275.34 in fees and disbursements.

[11] Given the complexities of the issues raised over the allocation of costs, I asked for written submissions, which were provided in a thorough form by both sides. In addition, I allowed further oral submissions at a hearing in Winnipeg on December 14, 2018.

II. Arguments

[12] The Defendants say there is no reason for the Court to depart from the general principle that costs should follow the event and so should be awarded to the Defendants who were the successful parties in the action. They also say that, in accordance with Rule 400(3)(e) and Rule 420 of the *Federal Courts Rules*, SOR/98-106, they are entitled to party-and-party costs to February 8, 2016 (the date upon which their Offer to Settle was served) and costs calculated at double that rate for all aspects of the action from February 8, 2016 to the date of my judgment dismissing the claim for want of jurisdiction.

[13] The Plaintiffs say that the usual principle that costs should follow the event should not apply in this case. They point out that the claim was decided upon the jurisdictional issue alone and that the Defendants:

(a) Failed to plead want of jurisdiction as a defence in breach of Rule 183; and

(b) Failed to move to strike for want of jurisdiction in a timely manner as required by the jurisprudence of this Court.

[14] The Plaintiffs also say that the Defendants were not successful in all aspects of the action, but only on the jurisdiction issue, so that any claim they make for costs must either be reduced to reflect this result or the Court should decline to award costs to any of the parties.

[15] The Plaintiffs also say that the Offer to Settle made by the Defendants under Rule 420 was not triggered in this case because:

(a) The Offer to Settle was not unconditional;

(b) The requirements of Rule 420 were not met;

(c) There has been no resolution yet to the substantive aspects of the Plaintiffs' claim;

(d) The Offer to Settle expired upon the commencement of the trial and prior to the jurisdictional issue ever being raised by the Defendants. Hence, the Offer to Settle was made upon the grounds contained in the pleadings at the time it was made and cannot be related to the jurisdictional ground upon which the action was decided.

[16] The Plaintiffs go even further and say that they are entitled to "throw-away costs" because the Defendants, in waiting until the trial to raise a jurisdictional defence and move to

strike, allowed the matter to proceed for more than a decade of litigation over issues unrelated to jurisdiction. This means that the Defendants' conduct is deserving of the sanction of an award of throw-away costs to the Plaintiffs.

III. Basic Principles on Costs

[17] I see no disagreement between the parties as to the general principles that govern the award of costs in the Federal Court.

[18] In accordance with Rule 400 of the *Federal Courts Rules*, in proceedings such as the present, the Court has full discretionary power over the amount and allocation of costs and the determination of who should pay them.

[19] Notwithstanding this broad discretion, Rule 400(3) sets out a list of factors that the Court may consider, some of which are particularly important for present purposes. However, it has to be borne in mind that this list of factors is not exhaustive and, in accordance with Rule 400(3)(h), the Court may take into account any other matter that it considers relevant.

[20] This broad discretion is not, however, arbitrary. The jurisprudence on costs has produced some guidelines and objectives that the Court has consistently adhered to. One of them is the three-fold objective that, in awarding costs, the Court must keep in mind compensation, promotion of settlement, and deterring abusive behaviour. See *Thibodeau v Air Canada*, 2007 FCA 115. It is also well accepted that, absent sufficient justification to do otherwise, costs will

usually follow the event, and quantum, as directed by Rule 407, will be assessed in accordance with Column III of the table in Tariff B.

[21] As regards the allocation of costs between the parties in this case, the Defendants emphasize that they were successful in all respects (Rule 400(3)(b)), and that the Plaintiffs recovered nothing because their claim was struck out in its entirety for want of jurisdiction (Rule 400(3)(e)), and the award in their favour should be increased in accordance with Rule 400(3)(e) or otherwise because they made the Plaintiffs a written Offer to Settle in accordance with Rule 420 that was not accepted.

[22] The Plaintiffs say that exceptional circumstances arise in this case that require deviation from the norms relied upon by the Defendants and suggest that, even as the successful parties there should be no award of costs to the Defendants, and, indeed, that the Defendants' conduct justifies an award of costs to the Plaintiffs under Rule 400(b) and in accordance with the principles of "throw-away costs."

IV. Issues Raised in this Case

A. *Failure to Raise and Deal with Jurisdictional Issue in a Timely Manner*

[23] The Plaintiffs say that the Defendants' "inadequate and sloppy pleadings" failed to raise the jurisdictional defence, and their failure to raise the defence until the first day of trial gives rise to serious misconduct that needs to be reflected in any cost award.

[24] In their written submissions, the Plaintiffs offer the following observations for the Court's consideration:

> 29. The defendants' conduct unnecessarily lengthened the proceeding by more than a decade. In resolving the issue of costs, it is crucial for this Court to appreciate that not a single step taken after the pleadings were filed in 2004/2005 (with the exception of the motion itself) was necessary or relied upon to determine the jurisdictional issue.
>
> 30. The effect of the defendants' failure to bring their motions to strike until mid-trial was to render meaningless over a decade of litigation. The plaintiffs were put to extraordinary expense preparing for a trial on the merits which, in reality, never took place, including engaging experts to consider issues raised by the defendants (whether natural watercourses existed) and which had no bearing on how the matter was ultimately resolved.
>
> 31. It is without question that the jurisdictional issue could have been resolved on the basis of the pleadings alone. The motions to strike could have (and ought to have been) filed when the Statement of Claim was issued in 2004. Neither of the defendants raised the issue in their pleadings (in clear violation of Rule l83) or at any point during the 12 subsequent years of litigation leading up to trial.
>
> 32. When pressed as to why the issue had not been raised earlier in the proceeding, the only explanation offered by the defendants was the fact that neither of them had even given thought to the issue until they began preparing for trial. Rhineland admitted in its opening statement that the question of the Court's jurisdiction was a "pure issue of statutory interpretation" and could be determined on the basis of the pleadings alone without reference to any evidence.
>
> 33. The pleadings were filed in 2004/2005. The jurisdictional issue could have been brought before the Court at that time. Instead what followed was unnecessary litigation including examinations for discovery, documentary disclosure, contested motions, Case Management conferences and trial preparation. In addition, a substantial amount of judicial resources were needlessly consumed over this period of time.
>
> 34. The defendants, in moving to strike mid-trial and not when the pleadings were filed, are responsible for prolonging the litigation. It follows that it would be unjust to hold the plaintiffs

> responsible for costs arising out of the defendants' delay in moving to strike. The decision of Madam Justice Kane in *Alpha Marathon Technologies*, which resulted in no costs to the defendants, is similar in many respects to the case at bar including the fact that the defendants waited over a decade to raise a jurisdictional issue that ultimately resulted in the dismissal of the action.
>
> 35. To use the language of Justice Zinn in *Katz*, the defendants must be "taken to task" for their delay in moving to strike regardless of their success on the motions.
>
> 36. An order for no costs to the defendants in this case would sufficiently discourage future litigants from waiting until the commencement of a trial to move to strike a claim from the Federal Court for want of jurisdiction.
>
> 37. Accordingly, the inexcusable delay in moving to strike ought to factor heavily in the Court's determination on the issue of costs.

[25] The Defendants' general response to these remarks is best captured in Rhineland's Written Submissions in Reply:

> 12. As noted above, at the heart of the plaintiffs' submissions is the astounding claim that the <u>defendants' conduct</u> unnecessarily lengthened the proceeding by more than a decade. The defendants are accused of delay, prolonging the litigation, failing to act in a timely manner and waiting to raise the jurisdictional issue. Completely overlooked is the simple fact that the plaintiffs chose to bring their action in the Federal Court. <u>To the extent all or any portion of the litigation was rendered meaningless, it was due to the plaintiffs' failure to select the proper forum</u>. The defendants should not be held responsible for this mistake. The plaintiffs' position is tantamount to an argument that the defendants should be penalized for failing to save the plaintiffs from their own error.
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> [Emphasis in original.]

[26] Although the Defendants have offered no sworn explanation for their failure to raise the jurisdiction issue and to bring a motion to strike earlier than they did, legal counsel have

explained in open Court that they did not identify a jurisdictional problem with the claim until they were doing detailed preparation in the short period of time before the trial began. The Plaintiffs have not challenged this explanation, but they certainly feel it does not excuse the Defendants' failure to move to strike early in the proceedings when further facts and evidence were not required for what was, in effect, a matter of statutory interpretation based upon the pleadings.

[27] I don't think the Defendants take issue with the general proposition that "costs consequences may flow from tardiness in making [a motion to strike for want of jurisdiction]," (see *Verdicchio v Canada*, 2010 FC 117 at para 21 [*Verdicchio*]), but they do say that there is no justification to penalize them in costs for their conduct in the present case.

[28] In *Verdicchio*, where Justice Mainville referred to this principle, he cited no authority and articulated no principles that might help in the present case. The case involved a tax dispute and he granted the Crown's motion to strike a statement of claim but declined to award costs.

[29] In *Lebrasseur v Canada*, 2006 FC 852, Justice Mactavish again acknowledged the principle:

> [19] More importantly, however, the defendant's motion goes to the question of the Court's jurisdiction. It is self-evident that the Court either has jurisdiction or it does not, and any delay on the part of a defendant could not operate so as to confer jurisdiction where it does not otherwise exist. It is for this reason that Justice Hugessen observed in *Dene Tsaa First Nation v. Canada*, [2001] FCJ No. 1177, 2001 FCT 820, at ¶ 3-4, (varied, but not on this point by [2002] FCJ No. 427 (FCA)), that:
>
> > [W]here a motion to strike based upon [Rule 221]
> > a) ... the motion goes to the very heart of the action

> itself and it is appropriate that the Court should be able to deal with matters of that sort at any stage with perhaps only cost consequences flowing if the person making the motion does so on a late basis.

[30] While acknowledging the principle, Justice Mactavish did not provide any guidance as to when delay in bringing a motion to strike should, or should not, result in costs consequences and, on the facts of the case before her, she did award costs to the defendant who brought the motion.

[31] A little more guidance is provided in *Katz v Bank of Nova Scotia*, 2009 FC 328 [*Katz*] in which, *inter alia*, the plaintiffs had claimed against the bank and other defendants that they had released information contrary to the plaintiffs' instructions and this had resulted in a breach of confidentiality and a breach of privacy.

[32] The statement of claim in *Katz* was issued on August 11, 2008. The motion to strike was brought on March 18, 2009 which was successful. However, Justice Zinn then went on to deal with costs and the delay in bringing the motion to strike:

> [15] The defendants seek their costs. Ms. Katz, although she is not a practicing lawyer, is a lawyer and thus ought to be in a better position than most litigants to understand the niceties of jurisdictional issues. Further, defendants' counsel wrote to the plaintiffs on September 11, 2008, informing them that the defendants were of the view that this action had been commenced in the wrong Court. Ms. Katz responded by letter dated September 17, 2008, indicating that she did not share that view. Frankly, even a cursory understanding of the jurisdiction of the Federal Court and the Ontario Superior Court of Justice would have been sufficient to see that the defendants' counsel was correct in his assessment.
>
> [16] It is precisely because the lack of jurisdiction in this Court was clear, that the defendants must be taken to task for failing to immediately bring their motion to strike. Instead, they engaged in

> correspondence with the plaintiffs regarding particulars and ultimately brought a motion for particulars before they filed their motion to strike. Because of that delay and its resulting actions, needless costs were incurred by both parties relating to the motion for particulars and the corresponding default judgment motion brought by the plaintiffs.
>
> [17] Accordingly, it would be unjust that the plaintiffs be held responsible to the defendants for this unnecessary part of this litigation. As a result, there will be no order as to costs; each party shall bear its own costs.

[33] Although no general guidance is enunciated here, Justice Zinn makes two significant points:

(a) The defendants were taken to task on costs because "the lack of jurisdiction in this Court was clear…";

(b) The defendants engaged in wasteful activities even though they were aware of the jurisdictional issue and had written to the plaintiffs to say that it was their view the action had been commenced in the wrong Court so that the defendants were obviously fully aware of the jurisdiction issue long before they brought the motion to strike.

[34] The case most emphasized by the Plaintiffs on this issue is the recent decision of Justice Kane in *Alpha Marathon Technologies Inc v Dual Spiral Systems Inc*, 2017 FC 1119. On the issue of delay, Justice Kane provided the following guidance:

> [4] The Plaintiff's claim involves a dispute over the ownership of an invention that was patented by the Defendant, Castillo, in the United States. The Plaintiff claims to be a co-inventor of the invention due to the contractual relationship with the DSS and/or an employment relationship with Castillo. The Plaintiff also claims that its former principal, Alfredo Bentivoglio [Bentivoglio], "invented and/or discovered" the invention at issue, "together with" Castillo. In its Statement of Claim, the Plaintiff seeks

declaratory and injunctive relief with respect to the invention claimed in the US Patent Application.

…

[6] For the more detailed reasons that follow, I find that the Plaintiff has not established that this Court has jurisdiction to determine its action. The test established in *International Terminal Operators Ltd. v Miida Electronics*, [1986] 1 SCR 752, 28 DLR (4th) 741 [*ITO*, or the *ITO* test), and more recently explained and applied in *Windsor (City) v Canadian Transit Co*, 2016 SCC 54, [2016] 2 SCR 617 [*City of Windsor*], which first requires that there is a statutory grant of jurisdiction to the Federal Court, has not been met.

…

[9] The parties have been engaged in this litigation since 2005, although it appears that the Plaintiff's pursuit of its action has not been rigorous or consistent. Both parties acknowledge that they participated – off and on – in settlement discussions, without success. Regardless of the passage of time or their earlier apparent assumption that the Federal Court had the jurisdiction to determine the Plaintiff's cause of action, the parties cannot attorn to the jurisdiction of the Court where the jurisdiction does not exist. The Defendants' delay in bringing this motion is curious given that both parties were represented by Counsel for most of the relevant period of the litigation, albeit with changes in counsel at various times. Ironically, in the Plaintiff's Reply and Defence to the Defendants' Counterclaim, filed on September 2, 2005, the Plaintiff raised, among other issues, the jurisdiction of the Court to address the Defendants' claims that their Trade-mark and Copyright had been infringed. It appears that the Plaintiff did not turn its mind to the jurisdiction of the Court to adjudicate its own action and assumed, with confidence, that it did. Unfortunately, much time and effort has been spent without looking to the fundamental basis of the claim.

…

[108] In conclusion, the Defendants' motion pursuant to Rule 221 to strike the Plaintiff's Statement of Claim is granted as it is plain and obvious that this Court lacks jurisdiction to determine the Plaintiff's claims. The Defendants' alternative motion pursuant to Rule 118 to strike the Plaintiff's Statement of Claim due to its failure to notify the Defendants of a transmission of interest need

> not be determined. Nor does the Defendants' alternative motion pursuant to Rule 416 need to be determined.
>
> [109] I decline to make any Order with respect to Costs. Although the Plaintiff launched its Statement of Claim in 2005 and the Defendants responded with a Statement of Defence and Counterclaim, the litigation languished over the years for long periods. Both parties participated in mediation attempts – on and off – which were unsuccessful. *The parties apparently assumed that this Court had jurisdiction.* As noted above, the Plaintiff argued in its response to the Defendants' Counterclaim that the Court lacked jurisdiction to determine certain claims, but did not consider the Court's jurisdiction to determine its own claims. The Plaintiff bears the onus of establishing that the Court has jurisdiction. The Defendants' motion, which raises a fundamental issue of this Court's jurisdiction, was made very late in the day – after the trial date had been set and after time and effort had been spent by both parties. Although successful on the motion, I do not find that costs in favour of the Defendants are warranted. Nor do I find that the Plaintiff should be awarded costs based on the Defendants' allegations regarding the possible consequences of the Plaintiff's failure to provide notice of a transmission of interest, if such a notice were required. Although the allegations may be regarded by the Plaintiff as inflammatory, they are not irrelevant or baseless. There is some evidence to support the Defendants' motion pursuant to Rule 118, but it is not sufficient for the Court to make a finding, nor is such a finding necessary.
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> [Emphasis added.]

[35] Once again, apart from the fact that both parties "apparently assumed that the Court had jurisdiction" and so "carried on the litigation for years," and a general statement that "I do not find that costs in favour of the Defendants are warranted," it is difficult to arrive at a general conclusion as to when delay should result in a denial of costs.

[36] In the present case, I think the following factors are important for me to consider:

(a) The jurisdictional issue could have been identified in the statement of claim at the time it was first served;

(b) The parties did not need to go through some 12 years of proceedings in order to resolve the jurisdiction issue;

(c) Plaintiffs' counsel advises (and this is not challenged by the Defendants) that they did consider the jurisdictional issue at the outset of the proceedings, and even obtained outside advice on the issue, but concluded that the Court did have jurisdiction. This means that they proceeded with the litigation under the mistaken belief that s 4(1) of the IBWTA was not limited to waters flowing from Canada into the United States, which was the basis of my decision to later strike the claim;

(d) Unlike in *Katz*, the Defendants did not engage in wasteful activities in a way that shows they were aware of the jurisdictional issue or had formed the view that the Federal Court lacked jurisdiction until a short time before the trial began;

(e) Although I struck the claim under Rule 221 using the general "plain and obvious" test, it appears that the jurisdiction problem was not plain and obvious to either side in this dispute. The Plaintiffs actively considered the jurisdictional issue, and the Defendants proceeded on the assumption that there was no jurisdictional issue until they were engaged in trial preparation. Both sides got it wrong. I don't think the Plaintiffs can say that it was unreasonable for the Defendants to assume that jurisdiction was not an issue when the Plaintiffs considered the matter and reached a conclusion that supported the Defendants' assumptions on jurisdiction;

(f) Although the Defendants have explained that the jurisdictional issue did not occur to them until they engaged in trial preparation, they have provided no evidence or explanation as to why an issue based upon the pleadings alone was only identified some 12 years after the claim began. If the Defendants were able to identify a lack of

> jurisdiction defence on the eve of the trial, then there is nothing on the record before me to suggest they could not have identified it on the pleadings alone and brought a motion to strike that would have avoided the considerable expense that both sides of this dispute have incurred.

[37] This case was decided solely on the basis of lack of jurisdiction. The Plaintiffs lost. The Defendants won the case but have offered no explanation as to why the jurisdictional issue was apparent to them when they prepared for trial but was not apparent to them earlier, given that it was decided entirely upon the content of the pleadings. Jurisdiction and the issue of whether an action can proceed in a particular forum should be addressed as soon as reasonably possible in order to avoid unnecessary litigation costs. That being said, I think I have to conclude that the Defendants could have, and should have, brought their strike motion at the beginning of the process in order to avoid the unnecessary costs of this litigation and, for this reason, should not have their costs against the Plaintiffs. On the other hand, the Plaintiffs incorrectly concluded that the Federal Court had the jurisdiction to hear and decide this dispute and conducted the litigation based upon this mistaken assumption. The Defendants should not have to reimburse them for this mistake. The parties should bear their own costs.

B. *Offer to Settle*

[38] Based upon their written Offer to Settle served on February 8, 2016, the Defendants are seeking double costs in accordance with Rule 420(2).

[39] Having concluded that the parties should bear their own costs in this matter, I do not think that Rule 420(2) comes into play for several reasons.

[40] First of all, in accordance with Rule 420(2) itself, the Court has decided and will order otherwise for the reasons given above.

[41] Secondly, under Rule 420(2)(b), I have decided that the Defendants are not entitled to party-and-party costs to the date of service, so that no doubling can occur.

[42] Thirdly, I do not think that it would be appropriate to apply Rule 420 in this case. The Offer to Settle made by the Defendants, and not accepted by the Plaintiffs, was made on the basis of the pleadings as they existed on February 8, 2016, so that the Plaintiffs had no idea they would have to face the jurisdictional defence that was the basis of my decision to dismiss the claim. In effect, the Defendants made the offer based upon their view of the merits of the claim and before they had identified or raised want of jurisdiction with the Plaintiffs, and the Plaintiffs had to consider the offer before they knew they would have to face a dismissal of their whole claim on the sole ground of lack of jurisdiction. In these circumstances, it is not clear to me how either side viewed the status of the offer at the time when jurisdiction was raised at the trial and, in effect, they were confronted by an issue that was not in the pleadings.

C. *Throw-Away Costs*

[43] The Plaintiffs say that the principles applicable to throw-away costs (i.e. costs that are unsalvageable or wasted in view of the other party's conduct) should be applied to the present

situation. They say that, in waiting until the trial to raise a fundamental defence and moving to strike, the Defendants allowed the matter to proceed over a decade of litigation over other issues:

> 71. No portion of the plaintiffs' efforts over the 12 years of litigation is "salvageable" in the sense that it would be useful to any current or future proceeding. In particular:
>
> a) The proceeding in the Federal Court is at an end.
>
> b) The plaintiffs" primary instructing counsel from the United States has passed away.
>
> c) By reason of age, it is unlikely that the plaintiffs" hydrology expert could serve as an expert witness in future proceedings.
>
> d) If the plaintiffs were to file a claim in the Manitoba Court of Queen's Bench, new pleadings would have to be filed, further examinations for discovery would have to be conducted, and possibly a new expert in hydrology would have to be retained and trial preparations would be duplicated.

[44] As I discussed above, I regard the dismissal of the Plaintiffs' case for want of jurisdiction to be the result of mutual error. The Plaintiffs brought their case in the Federal Court based upon their view that s 4(1) of the IBWTA gave the Court jurisdiction to hear and decide the matter. For 12 years the Defendants' conduct was based upon the same mistaken conclusion. The Plaintiffs are attempting here to make the Defendants financially responsible for not identifying their own mistake on an issue where they say they took and accepted expert advice. The fact is that the Plaintiffs lost the case because they pursued relief in the Federal Court which does not have the jurisdiction to decide a claim based upon s 4(1) of the IBWTA. I have denied the Defendants' claim for costs because they could and should have moved to strike at an earlier date, but this does not mean that the Plaintiffs are entitled to their costs on a throw-away basis, and I can find no jurisprudence to support an award of throw-away costs that would suggest they are appropriate in a situation such as the present. The Plaintiffs lost their case and they conducted

12 years of litigation based upon a view of jurisdiction which they now say the Defendants should not have held. I don't think it would now be appropriate to award the Plaintiffs throw-away costs because the Defendants made the same mistake that the Plaintiffs made.

ORDER IN T-745-04

THIS COURT ORDERS that

1. There is no order for costs, and each party shall bear its own costs in this action.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-745-04
STYLE OF CAUSE:	PEMBINA COUNTY WATER RESOURCE DISTRICT ET AL v GOVERNMENT OF MANITOBA ET AL
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