

Federal Court



Cour fédérale

Date: 20191119

Docket: T-2190-18

Citation: 2019 FC 1445

Ottawa, Ontario, November 19, 2019

PRESENT: The Honourable Madam Justice Fuhrer

BETWEEN:

AAREN JAGADEESH

Applicant

and

**CANADIAN IMPERIAL BANK OF
COMMERCE (CIBC)**

Respondent

ORDER AND REASONS

[1] In the Judgment and Reasons issued on September 24, 2019 in respect of this proceeding having neutral citation 2019 FC 1224 [Judgment and Reasons], I awarded costs in favour of the successful Applicant. The parties were provided 30 days to come to an agreement regarding the amount of costs or failing agreement, to make costs submissions in writing. As the parties were unable to reach agreement, both filed submissions which have been considered carefully.

[2] As noted in para 67 of the Judgment and Reasons, the parties made brief costs submissions at the oral hearing. Mr. Jagadeesh sought, minimally, costs of \$438.10 to cover his direct disbursements, while CIBC sought partial indemnity costs estimated to be \$5,000.00. The parties remain divergent, with Mr. Jagadeesh now seeking fixed costs (essentially, a lump sum) in the amount \$6,646.57, while CIBC submits that costs should be awarded to Mr. Jagadeesh in the amount of \$500.00.

[3] The starting point for any award of costs by this Court is Rule 400 of the *Federal Courts Rules*, SOR/98-106 [FCR]. FCR Rule 400(1) provides that the Court has “full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.” Further, the Court “may award a lump sum in lieu of, or in addition to, any assessed costs”: FCR Rule 400(4). Pursuant to FCR Rule 400(3) possible relevant factors applicable to this proceeding include: the result of the proceedings; the importance and complexity of the issues; the amount of work; any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding; whether any step in the proceeding was improper, vexatious or unnecessary, or taken through negligence, mistake or excessive caution; or any other matter the Court considers relevant.

[4] As noted by the Federal Court of Appeal: “Lump sum awards have found increasing favour with courts”: *Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 [Nova Chemicals] at para 11. As further noted in *Nova Chemicals*:

[17] A review of the case law indicates that increased costs in the form of lump sum awards tend to range between 25% and 50% of actual fees. However, there may be cases where a higher or lower percentage is warranted.

[18] When a party seeks a lump sum award based on a percentage of actual legal fees above the amounts provided for in the Tariff, as a matter of good practice the party should provide both a Bill of Costs and evidence demonstrating the fees actually incurred. As well, a sufficient description of the services provided in exchange for the fees should be given to establish that it is appropriate that the party be compensated for those services. What is required is sufficient evidence of the nature and extent of the services provided so that a party can make an informed decision whether to settle the fees or contest and that the Court can be satisfied that the actual fees incurred and the percentage awarded are reasonable in the context of the litigation.

[5] Though Mr. Jagadeesh has not provided evidence to support his costs as claimed, I believe this Court needs to be somewhat flexible in the case of a self-represented litigant:

Herrington v Canada (National Revenue), 2016 FC 953 at para 2.

[6] In his submissions, Mr. Jagadeesh cited the Ontario Superior Court decision in *Blustein v Kronby*, 2010 ONSC 1718 [*Kronby*]. In my view, following costs principles described in *Kronby* at paras 4-5 are relevant here:

[4] In practice, and in accordance with both the Rules and the decisions of the Court of Appeal, the usual costs award is partial indemnity. One of the principles underlying the litigation system in this province is that litigation is not cost-free and the winning party will normally only recover a portion of its actual legal costs from the losing party – generally somewhere between one-third and one-half. The next costs level, substantial indemnity, is only awarded in three situations: where this is specified by contractual agreement; where there are settlement offers that trigger Rule 49; or if conduct of the losing party was “reprehensible” or “outrageous” and thus deserving of sanction

[5] Provided that one litigates within the Rules, albeit aggressively and relentlessly and in a manner that may well upset the other side, this by itself will not amount to “reprehensible” behaviour. Courts generally require evidence of abuse of process or malice or some form of conduct that is otherwise “egregious.”

Substantial indemnity may then be awarded as a form of chastisement and sanction.

[7] Notwithstanding Mr. Jagadeesh's assertions to the contrary, I am not convinced that CIBC's counsel exhibited conduct that in any way triggered substantial indemnity. Both parties vigorously and respectfully advanced their positions at the oral hearing and in their written submissions. Furthermore, as noted in *Galati v Harper*, 2016 FCA 39, at para 22: "A self-represented litigant, by definition, has no counsel and therefore no out-of-pocket expenses for which full indemnity is appropriate."

[8] Self-represented litigants are eligible for a moderate allowance above the costs of their direct disbursements to reflect the time and effort they devoted to preparing and presenting their case, and insofar as they forewent other remunerative activities: *Sherman v Canada (Minister of National Revenue)*, 2003 FCA 202 at paras 46-52; *Yu v Canada (Attorney General)*, 2011 FCA 42 at para 37. These costs should not exceed those for which counsel otherwise would have been eligible under the applicable Tariff, had they been appointed: *Air Canada v Thibodeau*, 2007 FCA 115 at para 24.

Accordingly, at most Mr. Jagadeesh is entitled to partial indemnity which, exercising my discretion, I set at 50% of the amount of \$6,646.57 which he now seeks, for a total award of \$3,332.30 (rounded up) all inclusive. Such an award falls approximately within the mid to high end of Column IV of FCR Tariff B and, though a departure from FCR Rule 407, nonetheless is within my discretion to award.

ORDER in T-2190-18

THIS COURT'S ORDER is that:

1. Costs awarded to the Applicant are fixed in the amount of \$3,332.30, payable forthwith by the Respondent.

“Janet M. Fuhrer”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-2190-18

STYLE OF CAUSE: AAREN JAGADEESH v CANADIAN IMPERIAL BANK
OF COMMERCE (CIBC)

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 18, 2019

ORDER AND REASONS: FUHRER J.

DATED: NOVEMBER 19, 2019

APPEARANCES:

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FOR THE APPLICANT
(ON HIS OWN BEHALF)

Elisha Jamieson-Davies

FOR THE RESPONDENT

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