Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

Date: 19980624

Docket: T-1154-89

BETWEEN:

JACK SEBASTIAN CHIEF COUNCILLOR, GORDON SEBASTIAN, MARVIN GEORGE and DOUGLAS TAIT, BAND COUNCILLORS ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHER MEMBERS OF THE HAGWILGET BAND COUNCIL,

Plaintiffs,

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by the MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT and THE CATHOLIC PUBLIC SCHOOLS OF THE DIOCESE OF PRINCE GEORGE,

Defendants.

ASSESSMENT OF COSTS - REASONS

Charles E. Stinson
Assessment Officer

[1] The Plaintiffs sought declaratory relief and damages relative to certain Indian trust funds and to certain lands and premises. Applications brought on behalf of the Defendants, the Roman Catholic Episcopal Corporation of Prince Rupert and the Catholic Public Schools of the Diocese of Prince George (hereafter, the non-Crown

Defendants), and on behalf of the Defendant, Her Majesty the Queen, resulted in two Orders dated June 24, 1996, by the Prothonotary, John A. Hargrave, dismissing the action for want of prosecution with costs to the Defendants. The Plaintiffs appealed. Coincidentally, the non-Crown Defendants moved for a stay of proceedings pursuant to the *Federal Court Act*, s. 50(1). On August 26, 1996, the Honourable Mr. Justice Teitelbaum ordered both applications adjourned "*sine die* for possible settlement conference and/or continuation of the present hearing". Costs were not mentioned. On December 19, 1996, his Lordship convened the settlement conference. It was not successful. By Reasons for Order and Order of even date, his Lordship dismissed the Plaintiffs' appeal without costs and awarded costs of the settlement conference to both the Plaintiffs and the Defendant, Her Majesty the Queen, payable forthwith on a solicitor-client basis by the non-Crown Defendants.

[2] On April 30, 1997, the Plaintiffs filed this bill of Costs against the non-Crown Defendants for their December 19, 1996, appearance:

Solicitor-Client Costs

For preparation and appearance at the settlement conference by Peter Grant	$ 1,833.50	
For preparation for settlement conference by Cynthia M. Joseph (articling student)	$ 805.00	
For services after judgment	$ 190.00	
For taxing costs	$ 260.00	
SUB-TOTAL, COSTS		$ 3,088.50

Disbursements

Costs incurred for photocopying of case law and authorities (900 copies @ $0.45)		$ 405.00	
SUB-TOTAL, DISBURSEMENTS			$ 405.00

Witnesses

Witness fees		$ 40.00	
Costs incurred for travel by witnesses to Vancouver:			
- airfare:	$ 1,107.18		
- taxi's, buses, parking, mileage	$ 97.83		
TOTAL TRAVEL COST:		$ 1,199.01	
- accommodation	$ 352.05		
- meals	$ 381.60		
TOTAL ACCOMMODATION		$ 733.65	
SUB-TOTAL, WITNESSES			$ 1932.66
SUB-TOTAL , COSTS, DISBURSEMENTS AND WITNESSES			**$ 5,466.16**

[3] On June 12, 1997, the non-Crown Defendants filed this Bill of Costs against the Plaintiffs further to the June 24, 1996, Order:

ITEM	DESCRIPTION	UNITS
2	Preparation of Defence	7
5	Preparation and filing of Contested Motion	7
7	Discovery of Documents	5

14	Counsel Fee: (per hour on Court) 24 June, 1996	
	1000 - 1200 (2 hours) 2 x 2	4
	1400 - 1530 (1.5 hours) 1.5 x 2	3
24	Travel by Counsel Prince George - Vancouver; 24 June 1996	5
26	Taxation of Costs	1

In addition, reasonable travelling and subsistence expenses shall be allowed as a disbursement.

TOTAL UNITS

	CLAIMED	**ALLOWED**
Total number of units:	32	
Multiply by Unit value:	x $100.00	x $3,200.00
TOTAL FEES	**$ 3,200.00**	
DISBURSEMENTS:		
Postage	$ 30.10	
Photocopying	345.30	
Long Distance Charges	74.21	
BC Courthouse Library	158.50	
Fax Charges	17.00	
Loomis Courier	12.00	
Travel Expenses	1,211.02	
TOTAL DISBURSEMENTS	**$ 1,848.13**	

TOTAL FEES:	$ 3,200.00
TOTAL DISBURSEMENTS:	$ 1,848.13
TOTAL BILL:	**$ 5,048.13**

[4] On January 9, 1998, the Plaintiffs filed this Bill of Costs against the Defendant, Her Majesty the Queen, further to the Order of the Honourable Mr. Justice Collier dated August 22, 1990, substantially dismissing the latter's motion to strike certain paragraphs of the Statement of Claim with costs in any event of the cause:

Item 5		No. of units
Preparation and filing of a contested motion, including materials and responses thereto		5 units
Item 6		
Appearance on a motion or application	2.5 hours @ 2 units =	5 units
Item 26		
Taxation of costs		2 units
TOTAL		12 units @ $100
		$1,200

[5] On March 23, 1998, the Defendant, Her Majesty the Queen, filed this bill of Costs against the Plaintiffs further to the June 24, 1996, Order:

Item	Taxable Service	Number of Units
	A. *Originating Documents and Pleadings*	
2.	Preparation and filing of all defences, replies, counterclaims or respondents's records and material	7
	B. *Interlocutory Motions and Applications*	

5.	Preparation and filing of a contested motion, including all materials: - Motion to dismiss	7
6.	Appearance on a motion or application, per hour: June 17, 1996 (3 x 4 hours)	12
	C. *Discovery and Examinations*	
7.	Discovery of documents including listing, affidavit and inspection	5
8.	Preparation for an examination whether on discovery, affidavit, in aid of execution after judgment or otherwise: - Penner - Friesen (2 times) - Sebastian	 5 10 5
9.	Attending on examinations, per hour: - Penner - August 22, 1990 (3 x 4 hours) - Penner - August 23, 1990 (3 x 5 hours) - Friesen - January 23, 1991 (3 x 4.5 hours) - Friesen - January 24, 1991 (3 x 6 hours) - Friesen - March 27, 1991 (3 x 4.5 hours) - Friesen - March 28, 1991 (3 x 5.5 hours) - Friesen - May 23, 1991 (3 x 5.5 hours) - Friesen - May 24, 1991 (3 x 3 hours) - Sebastian - July 8, 1991 (3 x 4 hours) - Sebastian - July 10, 1991 (3 x 4.5 hours)	 12 15 13.5 18 13.5 16.5 16.5 9 12 13.5
26.	Taxation of Costs	6

Total number of units:		196.5		
Multiply by unit value:	$	100.00		
Subtotal:	$	19,650.00		
GST:		1,375.50		
PST:		1,375.50		
Total Fees:	$	22,401.00	$	22,401.00

DISBURSEMENTS

Non-Taxable			
B.C. On Line - Title Searches		$ 14.00	$ 14.00
Taxable			
Long Distance Calls		$ 126.85	
Photocopies at 25¢		751.25	
Postage		71.78	
Agent's Fees		44.00	
Courier		209.59	
Faxes		108.90	
Peter Grant's Account - Photocopies		80.00	
Court Reporters' Accounts:			
- Aug. 22/90 Penner	($116.80)		
- Aug. 23/90 Penner	($191.20)		
- Jan. 23/91 Friesen	($119.00)		
- Jan. 24/91 Friesen	($222.50)		
- Mar. 27/91 Friesen	($221.00)		
- Mar. 28/91 Friesen	($218.00)		
- May 23/91 Friesen	($201.50)		
- May 24/91 Friesen	($114.50)		
- July 8/91 Sebastian	($345.00)		
- July 10/91 Sebastian	($437.00)	2,186.50	
Quicklaw		165.18	
Total Taxable Disbursements:		$ 3,744.05	
7% GST on Taxable Disbursements:		262.08	$ 4,006.13
Total Fees, Disbursements and Taxes:			$ 26,421.13

and this Bill of Costs against the non-Crown Defendants for the December 19, 1996, appearance:

SOLICITOR-CLIENT COSTS

Preparation for settlement conference, including brief and attendance at settlement conference - December 19, 1996	$	2,150.00
GST:		150.50
PST:		150.50
Total Fees:	$	2,451.00

DISBURSEMENTS

Non-Taxable			
B.C. Online (title searches)			$ 14.00
Taxable			
Long Distance Calls	$	12.57	
Photocopies (280 copies x 25¢)		70.00	
Postage		16.39	
Total Taxable Disbursements:	$	98.96	
7% GST on Taxable Disbursements:		6.93	$ 105.89
Total Fees, Disbursements and Taxes:			$ 2,570.89

NOTE: The Crown's Bill of Costs for $26,421.13 appears to have removed certain items from an earlier version addressed in paragraphs 6-10 of the Plaintiff's written submissions filed January 9, 1998.

Timetables were set for the filing and service of materials for disposition in writing of these five Bills of Costs.

Submissions on Behalf of the Plaintiffs

[6] the non-Crown Defendant's Bill of Costs against the Plaintiffs

October 14, 1997

The maximum claimed for fee items is not the norm and was not justified here. Reduce the claim by forty percent per *Olson v. Canada* [1991] 2 F.C. 61 (T.O.) at 66. As the Order dated June 24, 1996, did not grant costs in the principal action, item Nos. 2 and 7 for a Defence and Discovery of Documents respectively were not authorized. *D & N Sports Enterprises Ltd. v. Cooper Canada Ltd.* [1989] QL F.C.J. No. 1135 (T.D.) and *Knight Maintenance Ltd. v. Canada (Public Works)* [1989] QL F.C.J. No. 1053 (T.D.)

confirm this Court's practice of distinguishing costs attendant upon motions for want of prosecution from those in the principal action. Furthermore, since the Plaintiffs exercised their right to appeal the Prothonotary's Order, the latter's decision was not final with respect to principal action: see *Navijet S.A. v. The Lendoudis Evangelos II* [1993] QL F.C.J. No. 929 (T.O.) at paragraph 3. Rather, Teitelbaum J.'s Order was the final disposition. It upheld the Prothonotary's decision but without costs to either side except for those relating to the settlement conference of the same date. Item No. 6 should replace item No. 14 because the latter addresses trial in the principal action and not appearance on a motion. Item No. 6 is consistent with the item No. 5 properly presented here for preparation for a motion as opposed to preparation for trial under item No. 13. Remove item No. 24 because neither Teitelbaum J. nor Hargrave P. exercised "the discretion of the Court" by way of Order. The Plaintiffs concede the 1 unit for item No. 26. To summarize, allow only item No. 26 at 1 unit and item Nos. 5 and 6 at 60% of the maximum equal to 4.2 and 1.8 units respectively.

[7] Photocopies cannot be indemnified in the absence here of proof of necessity, quantity and rate: see *United Terminals Ltd. v. Canada (Minister of National Revenue)* [1991] QL F.C.J. No. 705 (T.O.) applying *Diversified Products Corporation et al. v. Tye-Sil Corporation Ltd.*, T-1565-85 on November 22, 1990 (T.D.). Remove the disbursement of $158.50 for the BC Courthouse Library because it is unexplained and unclear on its face. If it addressed photocopies, disallow it consistent with the principles asserted above. Consistent with *United Terminals Ltd. supra,* the affidavit of Mia Frumau sworn October

14, 1997, establishes that $1,078.74 represents an economy fare and a reasonable rate of accommodation in close proximity to the Federal Court premises as opposed to the travel expenses of $1,211.02 presented. Therefore, the total allowable for this Bill of Costs is $1,883.34 inclusive of fees and disbursements.

[8] January 9, 1998

The Plaintiffs never asserted that the non-Crown Defendants were not entitled to costs but rather that the latter were entitled only to costs pursuant to Rule 344 and therefore should identify the award by this Court upon which they base their claim for costs. Contrary to their assertion that Plaintiffs could have discontinued without costs in response to the motion to dismiss for want of prosecution, the Rules clearly provide that a plaintiff who discontinues is responsible for the defendant's costs of the action.

[9] Plaintiffs' solicitor-client Bill of Costs against the non-Crown Defendants October 14, 1997

The Plaintiffs assert that the underlying purpose of costs "between solicitor and client" is to provide complete indemnification for all fees and disbursements: see *Scott Paper Co. v. Minnesota Mining and Manufacturing Co.* (1982) 70 C.P.R. (2d) 68 (F.C.T.D.) at 79. Given that all submissions addressing the two applications had been made by August 26, 1996, most of the work up to December 19, 1996 by counsel therefore could only have addressed preparation in good faith for the settlement conference at which a representative of the non-Crown Defendants failed to attend

contrary to the commitment made by their counsel. Teitelbaum J. concluded that these Defendants never had the intention to effect a negotiated settlement and therefore should pay solicitor-client costs. See *TNT Canada Inc. v. T.N.T. Motor Lines Ltd.* [1990] QL F.C.J. No. 358 (T.O.) for authority to recover the costs of an articled student docketed separately to the client as part of the service provided by the lawyer. The disbursement for photocopies was essential to resolution of this complex dispute.

[10] January 9, 1998

The allegations as to the veracity of the affidavit of Peter R. Grant sworn April 23, 1997, concerning the number of photocopies are unbecoming an officer of the Court. The Plaintiffs' amended Bill of Costs claimed 100 photocopies at $0.25 per page. The Frumau affidavit confirms that more than 100 photocopies were necessary for a settlement conference of sufficient complexity to warrant an estimated duration by counsel of two days. Unfortunately, as indicated by Teitelbaum J.'s negative view of the conduct of these non-Crown Defendants, this preparation was in vain. The sum of $1,932.66 for transportation, food and lodging for three days' travel by the two representatives of the Plaintiffs between Vancouver and Hazelton compares favourably to the $1,711.02 (fees of $500.00 plus disbursements of $1,211.02) claimed by the non-Crown Defendants for attendance of their counsel at the settlement conference. Finally, the record clearly demonstrates that argument on the merits of the appeal concluded on August 26, 1996. Therefore, the only work remaining of sufficient complexity to warrant use of an articling student addressed the settlement conference estimated at two days.

[11] The Crown's Bill of Costs against the Plaintiffs

January 9, 1998

The submissions above addressing the claim for maximum units by the non-Crown Defendants apply. As above, reduce the maximum units by 40 percent. Remove item Nos. 2, 7, 8 and 9 for pleadings and discoveries because the Court did not specifically award costs in the principal action. The submissions above for the non-Crown Defendants apply. The Notice of Motion for dismissal itself did not ask for costs. Reduce item Nos. 5 and 6 by 40 percent for a total of 13.2 units. The disbursements claimed flow from the principal action and therefore cannot be allowed. The total allowable for this Bill of Costs is 13.2 units times $100.00 per unit = $1,320.00.

[12] April 15, 1998

As above, costs do not follow the event unless the Court exercises its discretion to award them. Here, the Crown cannot claim costs for the principal action in the absence of an Order specifically awarding them. Given that the relationship between the Crown and an Indian Band is fiduciary in nature, the Crown bears the burden of justifying any derogation from the rule against costs for trustees: see *Guerin v. The Queen* (1984) 13 D.L.R. (4th) 321 (S.C.C.); *R. v. Sparrow* (1990) 70 D.L.R. (4th) 385 (S.C.C.) and *In re Sullivan Estate* (1954) 12 W.W.R. (N.S.) 461 (B.C.S.C.). The Defendant Crown's non-fiduciary conduct in defending the action bars recovery for costs. A trustee who adopts an adversarial position to protect itself and abandons its role of assisting the Court as servitor in the cause of justice is not entitled to costs: see *Mackey Estate v. Mackey*

(1986) 24 E.T.R. 174 (Ont. H.C.J.) at 189-90. Here, the Crown vigorously resisted the Plaintiffs' claim including denial of her fiduciary relationship with them, ie. paragraph No. 12 of the Statement of Defence filed March 22, 1990, in contradiction to the clear statement of law in *Guerin v. the Queen* and *R. v. Sparrow, supra.* Even on a successful application to dismiss for want of prosecution, the defendants will not be entitled to costs if they have allowed years to pass without giving Plaintiffs notice either to proceed or face a motion to dismiss: see *Collins v. Canada et al.* (1994) 87 F.T.R. 82 (Proth.) at 88. They will not be entitled to full costs on a successful application for dismissal for want of prosecution if they allow years to pass without trying to force the action on for trial: see *Patex Snowmobiles Ltd. v. Bombardier Ltd.* (1991), 48 F.T.R. 221 (T.D.) at 224. Here, the Crown failed to shorten the duration of this action by not moving for dismissal until five years had elapsed from the last step in the proceedings.

[13] The fact that a point is complex does not warrant higher than usual costs and the complexity of the point of law at issue does not affect the costs awarded if the majority of the proceedings addresses issues of fact: see *Crane Canada Ltd. v. McBeth Plumbing and Heating Ltd. et al.* (1965-1967) D.R.S. ¶ 53-142 (B.C.S.C.). By the Crown's own admissions (paragraph Nos. 3, 4 and 5 of the Submissions filed March 23, 1998), the majority of these proceedings consisted of the examination of documents as well as oral and written discoveries none of which established complexity sufficient for maximum units. Finally, without prejudice to our position that the Crown is not entitled to costs in the principal action, the Crown has not proved the necessity for, nor reasonableness of,

the disbursements. A simple listing of expenditures does not discharge the onus of leading evidence to justify importance, relevance, prudence, quantity and rate: see *F-C Research Institute Ltd. v. Canada* [1995] QL F.C.J. No. 1251 (T.O.) reported at 95 D.T.C. 5583. Given that the Goods and Services Tax only came into effect on January 1, 1991, it was improperly charged against disbursements for 1990, ie. at least one title search, numerous courier charges and two accounts for court reporters.

Submissions on Behalf of the non-Crown Defendants

[14] the non-Crown Defendants' Bill of Costs against the Plaintiffs

December 9, 1997

The record confirms the complexity of the motion to strike. All parties of record submitted extensive briefs containing both argument and case authorities. The factual underpinnings of proceedings in the Supreme Court of British Columbia had to be cross-referenced to this case thereby complicating this application to strike. Given that the Order dated June 24, 1996, clearly awarded costs to the Defendants upon dismissal of the action, the Plaintiffs' denial of the non-Crown Defendants' right to costs typifies the conduct of the Plaintiffs throughout. The Reasons of Hargrave P. dated June 24, 1996, clearly disclose that Plaintiffs were given ample notice of the intention of the non-Crown Defendants to move for dismissal for want of prosecution. The Plaintiffs could have precluded these additional costs by discontinuing without costs but they did nothing.

[15] The Plaintiffs' solicitor-client Bill of Costs against the non-Crown Defendants

December 9, 1997

No materials were provided at the settlement conference other than an Appraisal Report which was returned to the Plaintiffs' counsel. The Grant affidavit, in asserting that 900 photocopies were made at a cost of $405.00 for preparation for the settlement conference, "is at best, demonstrably reckless and at worse [*sic*] totally false". This affidavit must be discounted in the face of 15 pages only (six of which were new) of written material actually placed before Teitelbaum J. The $713.65 for accommodation and meals, not properly claimable even as between solicitor and own client, is unusually high for an appearance of approximately 2½ hours. Further, it represented three full days of expenses for December 18-20, 1996. No invoices at all for hotels and meals were presented. The Frumau affidavit discloses that the Plaintiffs submitted these not inconsiderable expenses to their own Band Council also apparently without supporting documentation. Witness fees of $40.00 were inappropriate given that no witnesses were called at the settlement conference.

[16] The method of calculation of the fees of $1,833.50 and $805.00 for Mr. Grant and the articled student respectively was not provided. There is no evidence of direct or indirect participation at the settlement conference by the articled student. Exhibit No. 1 to the Frumau affidavit discloses that, of the approximately ten hours billed in December 1996 by Mr. Grant to the file, less than six hours could easily be attributed to the settlement conference. On its face, none of the time for the articled student could be attributed to the settlement conference. Clearly, all of the hours prior to December 19,

1996, and leading up to the appeal from Hargrave P. cannot be attributed to the settlement conference. The brevity of the written material placed before his Lordship indicates very little "new" work was necessary to prepare for the settlement conference. There was no Judgment after the settlement conference to warrant the claim for $190.00. The Plaintiffs did not respond to our repeated inquiries for explanation and relevant documentation.

Submissions on Behalf of the Defendant, Her Majesty the Queen

[17] The Crown's Bill of Costs against the Plaintiffs

March 23, 1998

The issues herein of breach of trust and of fiduciary responsibility were complex and of major significance to the parties. Some issues, such as the term "Indian monies" as defined by the *Indian Act* and the nature of the relationship between the Crown and the non-Crown Defendants with regard to the administration of schools constructed to serve the needs of both Indian and non-Indian children, were novel. The listing of documents and the discoveries were extensive and extended back some fifty years.

[18] April 17, 1998

The Order of Hargrave P. dated June 24, 1996, provided for costs to the Defendant upon dismissal of the action. The Rules and the *Federal Court Act* confirm that he had the jurisdiction to make a final disposition of the action, which he did. The Assessment Officer in *Navijet S.A., supra,* confirmed that such Orders have the effect of a

final judgment. As well, the Band was not the Plaintiff in this litigation. Rather, the Band Councillors on their own behalf and on behalf of others were the Plaintiffs. Every relationship between the Crown and an Indian Band is not necessarily fiduciary in nature. Their circumstances must therefore be considered to determine whether they are or not. The Plaintiffs' action against the Crown was based on a contractual relationship entered into between the Minister of Indian Affairs and Northern Development and the Defendant, the Roman Catholic Episcopal Corporation of Prince Rupert. The cases cited by the Plaintiffs are not relevant here particularly given that the Court has awarded costs. The *In re Sullivan Estate* case *supra* is not relevant because the Crown is not charging for a professional service but rather is recovering costs incurred in defending an action. The *Mackey Estate* case *supra* discloses that the trustee was found not to be entitled to costs because it had defended its position and lost. The proper interpretation of the *Collins* case *supra* is not that costs are precluded when there is a delay in bringing a motion for dismissal for want of prosecution but rather that the Prothonotary exercised his discretion given the facts before him and found that there was insufficient reason to award costs. Contrary to the Plaintiffs' submissions that complexity is not a factor, the Rules specifically identify importance, complexity and volume as factors. The Plaintiffs' own Memorandum of Fact and Law, on appeal from the Prothonotary, stated in paragraph No. 3 that the "issues in this case are complex and have not been addressed by any Court". Contrary to the circumstances of the *F-C Research Institute Ltd.* case *supra*, the Crown has produced invoices here for the majority of the disbursements. Most of the disbursements relate to transcripts of examinations for discovery conducted by the

Plaintiffs and, in the circumstances, it would seem absurd for the Plaintiffs to argue that such disbursements were not reasonable or necessary. Finally, remove $24.75 from the Bill of Costs to reflect that GST did not apply in 1990.

[19] The Crown's solicitor-client Bill of Costs against the non-Crown Defendants March 23, 1998

The affidavit of J. Raymond Pollard sworn March 20, 1998, to address disbursements was filed.

DISPOSITION BY WAY OF ASSESSMENT

[20] The Plaintiffs' solicitor-client Bill of Costs against the non-Crown Defendants

To clarify, the Plaintiffs had characterized the Court's award of solicitor-client costs as "between solicitor and client". They were strictly solicitor-client costs: see the Reasons dated June 3, 1996, in A-333-94: *Byers Transport Limited v. Dorothy Kosanovich et al.* (A.O.). I agree that the activity after August 26, 1996, would have substantially addressed the settlement conference. However, Teitelbaum J. had only adjourned the appeal and counsel, acting prudently, would surely have remained current on its still outstanding issues. The docket dated December 31, 1996, shows 10.05 hours and 31.20 hours respectively for Peter Grant and Cynthia Joseph (his articling student). The Bill of Costs presented 9.65 hours and 33.49 hours respectively. The slight increase in hours for Ms. Joseph may originate with an unproduced docket. I allow the 9.65 hours for Mr. Grant equating to $1,833.50. This was reasonable and prudent. The time of the articled student included entries such as this one of 0.40 hours for December 11, 1996: "Review

Discovery Transcripts; Memos to David Schulze Re: Outstanding Discovery Questions". While the review of discovery transcript could be severed and stretched to relate to the settlement conference, ie. to ensure complete understanding of issues surrounding the evaluation of proposals, the latter portion of this entry, in the absence of clearer evidence or plausible explanation, could more readily be attributed to case preparation activities in the ordinary course of litigation and therefore would both be caught by the partial indemnity limitation of the Tariff and be outside the parameters of the Court's exercise of discretion for costs in this particular instance. That is, the Plaintiffs did not receive costs for this latter activity and not likely for the review activity as well in this entry. It was difficult to pick out others which might or might not have been relevant. I allow 21 hours times $24.04 per hour = $504.84. I remove the $190.00 for services after Judgment. I have no doubt that its event occurred but the Plaintiffs received only solicitor-client costs for the settlement conference but not for the action as a whole. However, I allow the $260.00 as presented for the assessment of costs. This assessment is integral to translation of the Court's award of costs to an exact amount and is therefore bound up in said award: see *Byers Transport Limited, supra.*

[21] I have followed precepts in *Carlile v. The Queen*, 97 D.T.C. 5284. One of the cases referred to therein, my Reasons dated July 3, 1991, in T-705-89: *United Terminals Limited v. The Minister of National Revenue et al.* (A.O.) distinguished certain cases on photocopies. I allow 100 photocopies at $0.25 per page = $25.00 as necessary for the settlement conference. This entry indicates that they were for case law and authorities.

On their face, they would appear closely associated with the appeal, for which the Plaintiffs did not receive costs, as opposed to the settlement conference. I remove the $40.00 for witness fees. The clients did not attend in that capacity but rather to hear and evaluate propositions. Their personal time cannot be compensated: see my Reasons dated March 31, 1998, in A-539-93: *Youssef Hannah Dableh v. Ontario Hydro* at paragraph [66] (A.O.). Economy airfares, and not discount faresavers, presently are the standard in litigation given that schedules do change. For example, counsel estimated two days for this conference. It took 2½ hours. The clients could have checked out earlier assuming the availability of airline seats thereby reducing hotels and meals. It may have suited their schedule to stay for non-litigation purposes. Even if they had stayed for litigation purposes on December 20-21, 1996, the associated expenses would have fallen outside the restrictions of this particular solicitor-client award. There was no evidence on these points. I allow the airfare and ground transportation as presented. However, I reduce the accommodation and meals by one-third to $488.61. The Plaintiffs' solicitor-client bill against the non-Crown Defendants is allowed at $4,316.96.

NOTE: There was an addition error in the bill as presented of $6.00 for the subtotal of airfare and ground transportation which I have taken into account.

[22] The non-Crown Defendant's Bill of Costs against the Plaintiffs

The Rules stipulate payment of costs of the action upon discontinuance but not upon dismissal for want of prosecution. A Judge or Prothonotary would not ordinarily be involved in a discontinuance. The Rules reflect that absence. The situation for

dismissal is different in that there is no automatic entitlement to costs by reason of this step taken by a party under the Rules. Rather, the discretion to award or deny costs remains solely with the Court and is not automatic. The Reasons of Hargrave P. *supra* at pages 7-8 discuss the direct and indirect costs associated with the litigation. Those Reasons do not indicate whether the award of costs includes costs of the action or is restricted to those costs of the interlocutory application. The Order does not elaborate. However, its effect was disposition of the substance of the action and the award of costs can be read narrowly so as to restrict it to the application or broadly so as to recognize the costs which the Defendants incurred to date in the action. I think that the practical interpretation is that these Defendants can assess their costs of the action including the event of June 24, 1996, but not including the appeal since Teitelbaum J. made no award of costs.

[23] The subject of this litigation was sensitive. I allow 6, 4 and 4 units respectively for item Nos. 2, 5 and 7. The Court records disclose that the appearance was on June 17, 1996, and not on June 24. The Prothonotary reserved his decision on June 17 and released it on June 24. The hours of 10:00 a.m. to 12:00 noon only in the Bill of Costs are consistent with the Abstract of Hearing for June 17. The hours as a whole in the Bill of Costs are consistent with the Abstract of Hearing for August 26, 1996, but these Defendants did not receive costs for that day. Item No. 14 does not apply to an application to dismiss for want of prosecution. Item No. 6 applies and I allow it at 2 units for 2 hours for a total of 4 units. There is no authority to allow anything for item

No. 24: see *Dableh, supra*, at paragraph [15] confirming that an Assessment Officer must have a prior direction from the Court. Item No. 26 as presented at 1 unit is beyond my discretion. In the absence of prior directions from the Court, I must apply the range of 2-6 in Column III. I allow 2 units. The evidence for photocopies is less than absolute. I allow $180.00. I have similar concerns about the $158.50 for the B.C. Courthouse Library. I allow $75.00. I allow the travel expenses at $1,211.02 as presented. I compared this amount to that of $1,199.01 in paragraph No. 3 of the Grant affidavit. The latter did not include the meals and accommodation for the Plaintiffs' representatives shown in the Plaintiffs' solicitor-client Bill of Costs. The non-Crown Defendant's Bill of Costs against the Plaintiffs is allowed at $3,599.33.

[24] Plaintiffs' Bill of Costs against the Crown

I allow item Nos. 5 and 26 at 5 and 2 units respectively as presented. I allow item No. 6 at 2 units for a total of 6 units to avoid fractions of units and to reflect that the Abstract of Hearing discloses an appearance on both August 21 and 22, 1990. The Plaintiffs' Bill of Costs against the Defendant, Her Majesty the Queen, is allowed at $1,300.00.

[25] The Crown's Bill of Costs against the Plaintiffs

Consistent with *Byers Transport Limited, supra,* at page 39, the Crown correctly asserted that the Assessment Officer does not award costs. The Court has exercised its discretion and my function is to translate that discretion to a dollar amount. The

Plaintiffs' argument concerning the fiduciary relationship should have been made before Hargrave P. I allow item Nos. 2, 5, 7, and 26 at 6,4,4, and 2 units respectively. For item No. 6, I allow 2 units applied to two hours for a total of 4 units. For item Nos. 8 and 9, the materials do not disclose what sort of examinations occurred. For example, there was an interval of two months for an individual named Friesen. Preparation is claimed twice for Friesen perhaps because of the passage of time or because the examinations were entirely different in nature. I will allow only one item No. 8 for Friesen at 4 units. Item No. 8 is allowed at 4 units for each of three individuals for a total of 12 units. The hours for item No. 9 total 46.5 hours. To preclude fractions of units, I allow 2 units for 47 hours yielding a total of 94 units. The proof is less than absolute for photocopies. I allow $250.00 and remove $35.09 GST. I also removed the $24.75 noted above for GST in 1990. Otherwise, the disbursements are allowed as presented. The Crown's Bill of Costs against the Plaintiffs is allowed at $17,823.04.

[26] The Crown's solicitor-client Bill of Costs against the non-Crown Defendants is allowed at $2,570.89 as presented.

Assessment Officer

Dated at Vancouver, B.C. this 24th day of June, 1998

NAMES OF COUNSEL AND SOLICITORS OF RECORD

STYLE OF CAUSE: JACK SEBASTIAN
CHIEF COUNCILLOR et al.

- and -

HER MAJESTY THE QUEEN
IN RIGHT OF CANADA et al.

COURT NO.: T-1154-89

ASSESSMENT IN WRITING WITHOUT PERSONAL APPEARANCE OF PARTIES

ASSESSMENT OF COSTS - REASONS BY: CHARLES E. STINSON
ASSESSMENT OFFICER

DATE OF REASONS: June 24, 1998

SOLICITORS OF RECORD:

Hutchins, Soroka & Grant Vancouver, B.C.	for Plaintiffs
Hope, Heinrich Prince George, B.C.	for Defendants - The Roman Catholic Episcopal Corporation of Prince Rupert and The Catholic Public Schools of the Diocese of Prince George
Mr. George Thomson Deputy Attorney General of Canada Agent Richards, Buell, Sutton Vancouver, B.C.	for Defendant Her Majesty the Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development