Date: 20071220

Docket: T-1302-05

Citation: 2007 FC 1353

BETWEEN:

RICHARD CHIU

Applicant

and

NATIONAL PAROLE BOARD

Respondent

ASSESSMENT OF COSTS - REASONS

Charles E. Stinson
Assessment Officer

[1] These reasons, filed in this court file (the T-1302-05 file) with a copy also filed in Federal Court file T-1972-05 (the T-1972-05 file), apply in each matter (having the identical style of cause) accordingly. In July 2005, a clerk with the Appeal Division of the National Parole Board wrote a letter to the Applicant's solicitor providing an update on the status of his pending appeal concerning revocation of his parole. The Respondent brought a summary motion for dismissal of the T-1302-05 file, an application for judicial review of said letter, on the ground that said letter was not a decision subject to judicial review. In November 2005, the Court, in finding that said application for judicial review was bereft of any possibility of success, agreed and dismissed it with costs throughout to the Respondent. The T-1972-05 file, an application for judicial review of a decision of the Appeal Division of the Respondent upholding the decision to revoke the Applicant's full parole, was

discontinued in March 2006. The Respondent presented a bill of costs in each matter for assessment (Rule 402 providing for costs forthwith being the relevant authority for the T-1972-05 file). I issued a timetable for written disposition of their assessment.

[2] The record indicates that, in February 2006, counsel for the Respondent sent to opposing counsel a bill of costs for the T-1302-05 file in the amount of $2,785.36 (consisting of $1,800.00 for counsel fees + $985.36 for disbursements) and requested either consent thereto or suggested adjustments, failing which an assessment of costs would be scheduled. In April 2006, counsel for the Applicant suggested that it would be prudent to address costs for the T-1972-05 file at the same time and asked for their details. Two days later counsel for the Respondent in the T-1972-05 file provided the relevant bill of costs (marked "draft for discussion only") in the amount of $1,580.50 + $620.50 for disbursements) and asserted that if consent was forthcoming, proposals for adjustments would be considered and the item 26 fee (assessment of costs) would be withdrawn. There was no further correspondence on costs between counsel until the Respondent, in February 2007, filed for assessment thereof a bill of costs for the T-1302-05 file in the amount of $3,025.36 (consisting of $2,040.00 for counsel fees + $985.36 for disbursements) and a bill of costs for the T-1972-05 file in the amount of $2,420.50 (consisting of $1,800 for counsel fees + $620.50 for disbursements).

[3] The reply materials filed by counsel for the Applicant asserted that her client had advised her that he intended to take over the matter of costs. However, as he had not yet filed the requisite notice to remove her from the record, she filed them to assist her client and as a friend to the Court. Said reply materials set out her summary of events; asserted that the T-1972-05 file was

discontinued after a Supreme Court of Canada decision held that superior courts of the provinces had jurisdiction to hear *habeas corpus* applications; asserted that the British Columbia Court of Appeal subsequently, further to a *habeas corpus* application, released the Applicant on full parole and found that the Respondent's miscalculation of dates had interfered with his rights; asserted that the respective arguments for the British Columbia Court of Appeal matter and the two Federal Court matters were essentially identical and that no costs were awarded in the former matter because it was a criminal proceeding; argued further to *Re Ange* [1970] 5 C.C.C. 371 (Ont. Ct. Appeal) that costs should not be awarded here because matters involving deprivation of liberty, as here, are criminal in nature; asserted that financial reasons precluded an appeal of the award of costs in the T-1302-05 file and requested that no costs be awarded because the Respondent was aware of the difficulties for the incarcerated Applicant in getting instructions to his solicitor, as well as proceeding to an assessment of costs without notice despite an awareness of the Applicant's willingness to negotiate costs and intent to represent himself.

[4] In rebuttal for both matters, counsel for the Respondent added to the record the correspondence between opposing counsel subsequent to the filing for assessment of the bills of costs in February 2007. That correspondence indicated that the Respondent would consider adjustments and that the Applicant had instructed his solicitor that he did not dispute the disbursements. It indicated that the Respondent, in response to the Applicant's request that some counsel fee items be reduced because of the similarity of the two matters, reduced some items and then requested consent to the adjusted amounts. It indicated that counsel for the Applicant subsequently requested that costs be forgiven because of the illegal actions of the Respondent, for

which the Applicant may sue for damages including recovery of the costs in issue here, and asserted that the Applicant, recently released from custody, was arranging for payment of the costs. It indicated that counsel for the Respondent advised opposing counsel that she would ascertain whether her client might forego collection of costs; that it is appropriate to proceed to a formal assessment of costs in the absence of a specific settlement offer regardless of an expressed intent to pay; that there is no apparent jurisprudence addressing costs relative to relief outside the Federal Court's jurisdiction, i.e. *habeas corpus*; that if there is jurisprudence precluding the Federal Court from awarding costs in matters of *certiorari* and *mandamus* relating to prisoners, it is curious that the trial judge awarded costs in the T-1302-05 file and that there exists a statutory bar to actions in negligence against members of the Respondent in the exercise of their duties.

[5] Counsel for the Respondent asserted that the Applicant's reply materials do not dispute counsel fees or disbursements and instead indirectly operate as an appeal of the award of costs in the T-1302-05 file and a request that there be no assessment or collection of costs. As such, they are irrelevant for an assessment of costs: see *Astrazeneca AB v. Novopharm*, [2004] F.C.J. No. 1196 (A.O.) addressing Rules 2 and 405 relative to an assessment officer's jurisdiction, As well, the *Federal Courts Act*, s. 27(1), vests jurisdiction for such appeals in the Federal Court of Appeal only. That the Applicant did not appeal the award of costs is irrelevant for this assessment of costs. The reference to *Re Ange* above is misplaced in an assessment of costs as it should have been raised before the trial judge, before final judgment, in connection with issues of entitlement to costs. An assessment officer has no jurisdiction to interfere with the Court's finding here on entitlement further to Rule 400(1). In any event, *Re Ange* addressed issues of *habeas corpus*, which were absent

here. A similar rationale applies to the T-1972-05 file, for which Rules 402 and 412 establish the Respondent's entitlement to costs further to discontinuance. In particular, the jurisdiction attributed to superior courts of the provinces is irrelevant for assessment of costs further to said Rules.

[6] Counsel for the Respondent argued that the record confirms ample notice of its desire for resolution of costs by consent, adjustments or assessment. The rebuttal materials present an amended bill of costs for the T-1302-05 file in the amount of $2,545.36 (consisting of $1,560.00 for counsel fees + $985.36 for disbursements) and an amended bill of costs for the T-1972-05 file in the amount of $1,920.50 (consisting of $1,320.00 + $620.50 for disbursements). Any issues of collection of costs are independent of issues of assessment of costs and are irrelevant for and cannot preclude the latter from proceeding to completion.

Assessment

[7] The Respondent is correct: I do not have jurisdiction to sit in appeal of or otherwise interfere with the Court's finding on costs. As well, I do not have the authority to make the order contemplated under Rule 402 to vary or vacate the Respondent's entitlement to costs further to discontinuance in the T-1972-05 file. My role is to establish a dollar figure for an award of costs as a function of reasonable necessity, which sometimes requires that I rule on issues of law flowing from assessments. Those issues include matters of entitlement, i.e. orders silent on costs, but that does not permit me to refuse to assess costs in the face of materials asserting that the Court incorrectly awarded costs in the first instance. The Respondent is also correct that financial hardship

and issues of collection of costs are irrelevant: see *Latham v. Canada*, [2007] F.C.J. No. 650 (A.O.) at para. [8].

[8] The record refers to the challenges for a recently released inmate to get his life in order. I can understand that resolution of these costs might be of secondary importance both now, and while still incarcerated when gaining his freedom would likely have been paramount. On the other hand, I find that he had ample notice (over one year) that the Respondent would seek costs and of the extent of the potential amounts for each matter. His inaction, i.e. not filing a notice of intent to represent himself, put his solicitor of record in an awkward position. She filed a notice of motion in each matter - for which the Respondent took no position - for an order to remove herself from the record. Her supporting affidavits and written representations indicated that her client had informed her office that he would take control of these matters; that she had forwarded the Respondent's materials to him with a suggestion that he contact the Registry; that she had prepared a reply affidavit and submissions for costs for his use further to his assertion to her that he intended to reply further to my timetable; that he had called her on April 17, 2007, to say that he would be delayed, was aware of the April 18, 2007 deadline for his reply materials and would meet it; that he did not come to her office on April 17, 2007; that she had attempted unsuccessfully several ways on April 18, 2007, to contact him and out of an abundance of caution had filed the reply materials for costs on his behalf; that she forwarded a copy of said materials to him on April 25, 2007, and that he had not contacted her office since April 17, 2007, despite her ongoing attempts to contact him. The Court issued an order in both matters removing her from the record.

[9] Generally, the authority of solicitors to act by filing materials and appearing in Court flows from and is restricted to instructions from their clients. That principle is tempered by certain professional obligations to the Court itself flowing from the *Federal Courts Act*, s. 11(3), making them officers of the Court. As such, I think that the Applicant's former solicitor of record discharged her s. 11(3) obligation properly by leading the reply materials after notification from her client that he intended to represent himself. Notwithstanding that the record confirms that they were prepared in consultation with the Applicant, I could not be certain that they indeed accurately represented his current position. Those reply materials resulted in reasonable efforts by the Respondent to accommodate to the extent that there is very little room left to further reduce counsel fees. If I permitted the Applicant to adduce further or replacement materials possibly abdicating the position represented by the reply materials currently in place, that would put the Respondent to further expense in circumstances by which further reductions might be minimal. As well the concessions by the Respondent to date were not, in my view, an admission of wrong or excessive claims but simply a reasonable attempt at efficient resolution of issues of costs which would, among other things, preclude possible further costs for an appeal. If I did permit the Applicant to reopen the process by adducing further materials, that would penalize the Respondent by way of costs for a possibly fruitless exercise, and I therefore would permit the Respondent to further amend the bills of costs by reverting to higher counsel fee claims as it sees fit as well as adding the disbursements, not presently in the amended bills of costs, for preparation and service of the costs materials all to the detriment of the reductions achieved to date on behalf of the Applicant by his former solicitor of record.

[10] My view, expressed further to my approach in *Carlile v. Canada (M.N.R.)* (1997), 97 D.T.C. 5284 (T.O.) and the sentiment of Lord Justice Russell in *Re Eastwood (deceased)* (1974), 3 All. E.R. 603 at 608, that assessment of costs is "rough justice, in the sense of being compounded of much sensible approximation", is that discretion may be applied to sort out a reasonable result for costs equitable for both sides. I think that my view is reinforced by the editorial comments (see The Honourable James J. Carthy, W.A. Derry Millar & Jeffrey G. Gowan, *Ontario Annual Practice 2005-2006* (Aurora, Ont.: Canada Law Book, 2005)) for Rules 57 and 58 to the effect that an assessment of costs is more of an art form than an application of rules and principles as a function of the general weight and feel of the file and issues, and of the judgment and experience of the assessment officer faced with the difficult task of balancing the effect of what could be several subjective and objective factors.

[11] I think that the most that the Applicant might have achieved by getting my permission to adduce further reply materials would have been to challenge the Respondent's item 5 fee claim for 3 units ($120 per unit) to oppose the Applicant's motion in the T-1972-05 file to extend time for filing of the record plus the associated disbursements of $249.14 and $47.62 for preparation and service respectively of the motion record. In fact, the T-1972-05 file was discontinued before the Court could rule on the motion and therefore there was no interlocutory exercise of the Court's discretion under Rule 400(1) permitting motion costs. The Respondent did not, but could reasonably have done so, argue that the filing of the discontinuance shortly after the filing of the Applicant's motion to extend time constituted an abandonment of a motion contemplated by Rule 402 in turn creating an entitlement by the responding party to its associated and real interlocutory costs. In my

opinion, it would be difficult for a lay litigant to overcome that position. Considering all these circumstances, I thought it inevitable that waiting for the Applicant to come forward on his own - and he had not made a single overture to the Registry from April 17, 2007 to the date of removal of his solicitor of record - to reopen the process for submissions and then permitting him to adduce further materials which might abandon his current position on the record would result in higher, and not lower, costs payable by him.

[12] However, given repeated indications in the record of his intent to actively address these matters of costs, I issued directions giving notice to him that he had had sufficient time (several months) to consider his respective positions on the assessments of costs and to arrange, if necessary, for new counsel and that he would have one month to file any additional reply materials. I noted for him that an Assessment Officer does not have jurisdiction to sit in appeal of or otherwise interfere with the Court's exercise of discretion under Rule 400(1) concerning entitlement to costs as used in the T-1302-05 file to award costs to the Respondent, nor to make the order contemplated under Rule 402 to vary or vacate the Respondent's entitlement to costs further to the discontinuance in the T-1972-05 file. The Respondent did not file additional materials.

[13] The amended bills of costs of the Respondent are assessed and allowed as presented at $2,545.36 and $1,920.50 for the T-1302-05 file and the T-1972-05 file respectively.

"Charles E. Stinson"

Assessment Officer

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1302-05
STYLE OF CAUSE:	RICHARD CHIU v. NPB

ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES

REASONS FOR ASSESSMENT OF COSTS:	CHARLES E. STINSON
DATED:	December 20, 2007

WRITTEN REPRESENTATIONS BY:

Ms. Donna M. Turko	FOR THE APPLICANT
Ms. Esta Resnick	FOR THE RESPONDENT

SOLICITORS OF RECORD:

n/a	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT