

Date: 20080616

Docket: T-2208-05

Citation: 2008 FC 753

BETWEEN:

COASTAL CULTURE INC.

APPLICANT

AND

WOOD WHEELER INC.

RESPONDENT

ASSESSMENT OF COSTS- REASONS

W. DOYLE
Assessment Officer

[1] The Applicant (Coastal Culture Inc.) sought judicial review in the Federal Court in respect of a decision of the Registrar of Trade-marks dated October 5, 2005, rejecting the Applicant's opposition to the registration of DIRT SHIRT (TMA 1,144,955) as a trade-mark.

[2] The judicial review was set for hearing before the Federal Court in Charlottetown on November 23, 2006. However, on November 20, 2006 the Applicant wrote a letter to the Court advising:

"... In preparing for this hearing, both Mr. Brenton and I have reviewed the materials and have indicated to each other that each party is prepared to stand on the written submissions which have been previously filed with the Court..."

[3] On November 22, 2006 in light of this November 20, 2006 letter from the Applicant written on behalf of both parties, Oral directions were received from the Court stating:

The Honourable Mr. Justice O'Keefe directing that the Court has considered the letter from Mr. Connolly of November 20th and wishes to advise both parties that he concurs that an oral hearing is not necessary and the parties need not appear before him tomorrow.

[4] On May 2, 2007 Reasons for Judgment and Judgment were rendered by the Honourable Mr. Justice O'Keefe:

"...THIS COURT ADJUDGES that: 1. The appeal of Coastal is allowed and the decision of the registrar is reversed. 2. The registrar is directed to refuse Wheeler's application. 3. Coastal shall have its costs of the appeal."

[5] On April 2, 2008 the Applicant (Coastal Culture Inc.) filed a Bill of Costs with the Federal Court in Fredericton. I then issued a timetable for submission, reply and rebuttal materials to be served and filed. The Applicant served and filed an affidavit of Joyce Keenan in support of the amounts of disbursements claimed in the Bill of Costs. The Respondent served and filed written submissions, and no rebuttal material was received.

[6] I reviewed all of the documents filed with the Court as well as the chronological list of all of the documentation on the Court file within the Proceedings Management System database. I am now prepared to assess the Bill of Costs.

[7] The Applicant is seeking fifty-two units of assessable services equaling \$6,240.00 attracting GST at 5% and PST at 10% for a sub-total of \$7,207.20 plus disbursements in the amount of \$685.00 for a total Bill of Costs tendered at \$7,892.20.

[8] For clarity, given the number of assessable service items sought, I have reproduced the list within this paragraph. Listed here are the item numbers, the stated Assessable Services requested and the units sought in the Applicant's filed Bill of Costs;

Item 1 –preparation and filing of an appeal and application records; preparation of pre-trial conference memorandum - seven units,

Item 3 – Preparation of supplementary affidavits and supplementary pre-trial conference memorandum; receipt of same from Respondent - six units,

Item 5- Preparation and filing of application and supporting documentation attendance at planning conference; preparation for motion - seven units,

Item 6 – Attendance with Federal Court re motion - one unit,

Item 8 – Preparation of affidavits; review of Respondent's affidavits - five units,

Item 13 – Preparation for hearing; correspondence with client; interview of witnesses; issuance of documents - five units,

Item 14 – Counsel fees - three units,

Item 15 – Legal research; Preparation of factum - seven units,

Item 23 – Correspondence / email with Respondent and Federal Court - two units,

Item 25 – Service of documents - one unit,

Item 26 – Assessment of costs; preparation of order for costs - six units,

Item 27 – Settlement negotiations; receipt and review of decision - two units.

I will begin with a review and commentary on those items that, in my opinion, do not appear to fall within the guidelines of allowable assessable services in relation to matters in this particular file.

[9] Item 3 – Preparation of supplementary affidavits and supplementary pre-trial conference memorandum; receipt of same from Respondent – six units. Here, as correctly noted by the respondent, this item is reserved for “***Amendment of documents, where the amendment is necessitated by a new or amended originating document, pleading, notice or affidavit of another party.***” A database search did not reveal any reference to such items; these units claimed are consequently not allowed.

[10] Item 5 - Preparation and filing of application and supporting documentation; attendance at planning conference; preparation for motion – seven units. Upon review of the file, I note that there were two motions - both in writing without personal appearance; the Applicant’s March 15, 2006 motion was concluded by the Court (The Honourable Madam Justice Tremblay-Lamer) dismissing the Applicant’s motion with costs (to the Respondent). In relation to the second motion on the file, brought April 28, 2006 by the Respondent , the Court (Madam Prothonotary Tabib) ordered that the motion be granted to the respondent and was silent as to costs. Based on the foregoing, the seven units claimed for this item are therefore not allowed.

[11] Item 6 – Attendance with Federal Court re motion – one unit. ***Federal Court Rules***, Tariff A 6. states “***Appearance on a motion, per hour.***” In referring to paragraph [10] and upon review of the file it appears there was no personal attendance on either motion, therefore the one unit claimed is not allowed.

[12] Item 8 – Preparation of affidavits; review of Respondent’s affidavits - five units. As the respondent noted, this assessable item is reserved for discovery and examinations. **Federal Court Rules**, Tariff A 8. states; **“Preparation for an examination, including examinations for discovery, on affidavits, and in aid of execution.”** Again, after review of the file it does not appear that there was discovery; there is no evidence of transcript or proof of examination therefore the five units claimed are not allowed.

[13] Item 14 – Counsel fees - three units. **Federal Court Rules**, Tariff A 14. states; **“Counsel fee: (a) to first counsel, per hour in Court; and (b) to second counsel, where Court directs, 50% of the amount calculated under paragraph (a).”** A review of the file reveals no personal appearances in Court whatsoever; the matter was adjudicated entirely based on written submissions. The three units claimed for this item are not allowed.

[14] Item 15 – Legal research; Preparation of factum – seven units. **Federal Court Rules**, Tariff A 15. states; **“Preparation and filing of written argument, where requested or permitted by the Court.”** A review of the file revealed no such request on behalf of the Court. In regard to legal research and preparation of factum since these items are contemplated under item 1 they may not be indemnified a second time. The seven units claimed for this item are not allowed.

[15] Item 23 – Correspondence / email with Respondent and Federal Court – two units.

Federal Court Rules, Tariff A 23, states; “***Attendance on a reference, an accounting or other like procedure not other wise provided for is this Tariff, per hour.***” This item contemplates references under ***Federal Courts rules 153***. This matter did not involve a reference therefore the two units claimed for this item are not allowed.

[16] Item 27 – Settlement negotiations; receipt and review of decision - two units.

Federal Court Rules, Tariff A 23, states; “***Such other services as may be allowed by the assessment officer or ordered by the Court.***” This item has an allowable range of one to four - however, respectfully, I believe item 27 is meant to indemnify counsel for extraordinary items not covered elsewhere in the Tariff, therefore the two units claimed are not allowed.

[17] I will now continue with the remaining items claimed under Assessable services.

Item 1 - preparation and filing of appeal and application records; preparation of pre-trial conference memorandum. The allowable range for item 1 is four to seven units. In sum, this matter was characterized by the solicitor for the Respondent as “uncomplicated and ... resolved expeditiously, the issues before the Court were narrowly defined and addressed via affidavit evidence without the need for trial or discovery...” I agree.

Subsequently, the seven units claimed are reduced to an allowed four units for this item.

[18] Item 13 – Preparation for hearing; correspondence with client; interview of witnesses; issuance of documents – five units. The range for this item is two – five, with five at the high end of the scale. I do recognize significant time was spent with both parties attempting to regulate this file without Court intervention, however, respectfully, in my opinion, this matter was not extremely complicated and was in fact finally concluded without any personal appearance – the five units claimed are hereby reduced to an allowed three units for this item.

[19] Item 25 – Service of documents – one unit. The allowable number of units for item 25 is one unit; item 25 was claimed at one unit and will be allowed as claimed.

[20] Item 26 – Assessment of costs; preparation of order for costs – six units. In my opinion, the matter of the assessment was straightforward also without the personal appearance of the parties. The six units sought are hereby reduced to an allowed two units for this item.

[21] I will now review the claimed disbursements – again entirely listed here for clarity; tabs, binding materials - \$70.00, Courier/delivery, postage, process server - \$134.00, Photocopies - \$425.00, Long distance telephone/facsimile charges \$56.00 = Total disbursements of \$685.00.

[22] Disbursements as established in the affidavit of Joyce Keenan are allowed as claimed in the amount of \$685.00. Although I would prefer to have documentation in the form of exhibits attached to the affidavit of disbursements, I do see the reasoning for the disbursements as claimed.

[23] By way of example, in the affidavit of Joyce Keenan, duly sworn to at Charlottetown Prince Edward Island on April 18 2008, the Applicant is claiming an amount of \$425.00 for photocopies. I note the Applicant's record on the Court file contains 471 pages and in calculating copies necessary under *Federal Courts Rules 309* some 1,884 plus pages of photocopies (along with associated tabs and binding materials) were required. Typically the Court allows .25 cents per page for photocopies therefore, in my opinion, in this case and based on the material seen to be filed with the Court, the claim for photocopies at \$425.00 is reasonable. Additionally, with reference to "courier/delivery, postage, process server..." upon review of the Applicant's affidavits of service on the Court file, I note that the materials were either couriered or process servers were employed for the serving of documentation.

[24] The Bill of Costs presented at \$7,892.20 is accordingly assessed and allowed in the amount of \$ 2,071.00. A certificate is now issued in the Federal Court proceeding for \$2, 071.00.

" Willa Doyle"
Assessment Officer

Fredericton, New Brunswick
June 16, 2008

FEDERAL COURT
NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-2208-05

STYLE OF CAUSE: COASTAL CULTURE INC. –and–
WOOD WHEELER INC.

ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF
THE PARTIES

ASSESSMENT OF COSTS -
REASONS BY: Willa Doyle, Assessment Officer

DATED: June 16, 2008

WRITTEN REPRESENTATIONS BY:

Geoffrey D. Connolly FOR THE APPLICANT

Michael D. Brenton FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stewart McKelvey FOR THE APPLICANT
Charlottetown, PE

Barry Spalding FOR THE RESPONDENT
Saint John, NB