

Date: 20080718

Docket: T-715-03

Citation: 2008 FC 890

**BETWEEN:**

**CHRISTOPHER K.J. POLCHIES, CALESTA POLCHIES,  
and CRYSTAL POLCHIES**

**PLAINTIFFS**

**AND**

**HER MAJESTY THE QUEEN**

**DEFENDANT**

**AND**

**CYNTHIA POLCHIES, EMMANUEL POLCHIES, and the  
OROMOCTO INDIAN BAND**

**THIRD PARTIES**

**ASSESSMENT OF COSTS- REASONS**

**W. DOYLE  
Assessment Officer**

[1] This simplified action proceeded to trial in Fredericton before Madam Prothonotary Tabib on October 23, 24 and 25, 2006. May 4, 2007, Madam Prothonotary Tabib dismissed the Plaintiff's action and the third party claim stating that if the parties cannot come to an agreement as to costs, parties should serve and file written representations. July 26, 2007, Madam Prothonotary Tabib ordered:

**"The costs of the Defendant and of the Third Party Oromocto Indian Band in this action shall be paid by the Plaintiffs"**

[2] The Defendant filed a Bill of Costs and an affidavit of Prudence Kennedy in support with the Federal Court in Fredericton on February 22, 2008, asking that the assessment be done by way of written submissions. I issued a timetable for reply and rebuttal materials to be served and filed. The Plaintiff sought, and was granted, an extension of time in relation to the date for serving and filing their reply. The Plaintiff then filed their memorandum on costs to which the Defendant filed their written representations. I am now prepared to assess the bill of costs.

[3] A review of the events in this simplified action reveal; May 6, 2003, the Plaintiffs (Christopher K.J. Polchies, Calesta Polchies and Crystal Polchies) each filed statements of claim in the Federal Court in regard to the payment of monies paid to members of the Oromocto Indian band ("Band") as a result of a 1983 land claim settlement. The Plaintiffs submitted, among other claims, that there had been a breach of trust owed to them and a breach of fiduciary duty pursuant s. 52 of the *Indian Act*, R.S.C.1970, 1-6.

[4] July 4 2003, the Defendant filed a notice of motion requesting the three files be consolidated, the consolidated proceedings be conducted as a simplified action, an extension of time for serving and filing the Defence, costs and further relief as the Court may permit. August 8, 2003 the Court (Madam Prothonotary Tabib) ordered:

**"1.The proceedings in files T-715-03, T-714-03 and T-715-03 shall be consolidated and heard together. 2. The resulting action shall be conducted as a simplified action. 3. the Plaintiff's shall no later than 30 days from the date of this order, serve and file an amended statement of claim consolidating the actions of the three Plaintiffs. All further proceedings shall be filed in T-715-03 only. 4. The time within which the Defendant is to serve and file its statement of defence to the consolidated action shall run from the time of filing the Plaintiff's amended statement of claim. 5. The costs of a single motion shall go to the Defendant...."**

[5] August 14 2003, the Plaintiffs filed a consolidated claim and on October 12, 2004 the Plaintiffs filed a motion to amend this statement of claim. The motion, held by way of video conference, was granted and the Court (Madam Prothonotary Aronovitch) ordered:

**“...The motion is granted as requested...Each party shall bear its own costs of the motion...The pre-trial conference shall take place on August 22, 2005 commencing at 10:00 a.m. (EST) by teleconference.”**

[6] August 22, 2005 and December 2, 2005, pre-trial teleconferences were held resulting in counsels' agreement that the trial of this simplified action be set down for hearing in Fredericton at the earliest available opportunity. February 22, 2006, Chief Justice Lutfy directed that the matter be set down for hearing in Fredericton to begin on October 23, 2006.

[7] I reviewed the documentation on file and will begin this assessment of costs – reasons with the claimed assessable services portion of the Defendant's Bill of Costs.

[8] Item 1 - For preparation and filing of Third Party Statement of Claim – six units are claimed by the Defendants - the allowable range is four to seven. This Third Party Claim is considered to be an originating document as required in item 1 in Tariff A, **Federal Courts Rules** since a non-party was added, the document was filed and served and the filing fee was paid. In my opinion, having regard to the basis of the matter before the Court, I consider four units reasonable; four units are allowed for this item.

[9] Item 2 – For preparation and filing of Statement of Defence – six units are claimed by the Defendants – the allowable range is four to seven. I consider four units are reasonable for this item; four units are allowed for this item.

[10] Item 3 – For preparation and filing of Amended Statement of Defence – four units are claimed by the Defendants – the allowable range is two to six. Three units are allowed.

[11] Item 5 - For preparation and filing of Defendant's contested Motion including all material and Replies regarding Application Simplifying the Action – Order dated August 8, 2003 – five units are claimed – the allowable range is three to seven. As noted in paragraph [4] the Order states “...**The costs of a single motion shall go to the Defendant...**” The five units as claimed are allowed.

[12] Item 5 - For preparation and filing of Defendant's contested Motion including all material and our objection regarding the Plaintiff's motion to amend their Statement of Claim – March 30, 2005 – five units are claimed – the allowable range is three to seven. However, as noted in paragraph [5] the Order relevant to this motion states: “...**The motion is granted as requested...Each party shall bear its own costs of the motion...**”, therefore zero units are allowed for this item.

[13] Item 6 – Appearance via Videoconference regarding Plaintiff's Motion to amend their Statement of Claim – March 30, 2005 – two units claimed – the allowable range is one to three. However, the Order relevant to this motion states: “...**The motion is granted as requested...Each party shall bear its own costs of the motion...**”, therefore zero units are allowed for this item.

[14] Item 7 – Examination of Documents, including listings, affidavits and inspections – four units are claimed. In view of the documentation on file, four units are allowed.

[15] Item 8 – For preparation and review of written examinations – four units are claimed – the allowable range is two to five. In my opinion, particularly in view of the fact that this file followed the simplified action rules, two units are reasonable and allowed.

[16] Item 10 – For Preparation for Pre-trial conference including memorandum – November 26, 2004 - five units are claimed – the allowable range is three to six. Given the documentation on file for the August and December pre-trial conferences, three are reasonable and allowed.

[17] Item 11 – Attendance at teleconference, per 1\*3 units per hour – two units are claimed – the allowable range is one to three. The two units are allowed.

[18] Item 12 – For preparation, response and review of Agreed Statement of Facts and Requests' to Admit – two units are claimed – the allowable range is one to three. The two units, as requested, are allowed.

[19] Item 13(a) - Preparation for trial, including correspondence, preparation of witnesses including travel – five units are requested – the allowable range is two to five units. I am mindful of the fact that this action proceeded, as requested, before the Federal Court as a simplified action. In my opinion, for three units are reasonable and are allowed for this item.

[20] Item 13(b) - Preparation for trial per 2<sup>nd</sup> and 3<sup>rd</sup> days in Court after the first day: October 24, 2006 – 3.50\*2units per hour = \$840.00 October 24, 2006 – 1.50\*2 units per hour = \$360.00. The allowable range for this item is two to three. The ten hours at two units as claimed are allowed.

[21] Item 14 (a) - Attendance of lead Counsel in Court: October 23, 2006 - 4.0 hours x 2 units per hour = \$960.00; October 24, 2006 - 6.5 hours x 2 units per hour = \$1,560.00; October 25, 2006 - 6.0 hours x 2 units per hour = \$1,440.00 - are claimed by the Defendant – the allowable range per hour for this item is two to three. My review of the summary of recorded entries retrieved from the Federal Court Proceedings Management System database reveal the hours recorded as follows; October 23, 2006, 9:40 to 12:10 (2.5hours), October 24, 2006, 9:30 to 3:30 (6 hours) and October 25, 2006, 10:00 to 4:05 (6 hours). This provides a total of 14.5 hours in Court, 14.5 hours at two units per hour are allowed.

[22] Item 14(b) - Counsel Fee to second counsel, 50% of the amount calculated under paragraph (a). The defendant is claiming 16.5 hours at two units X 50% at the applicable tariff rate of \$120. Per unit. This item, found in Tariff B of the **Federal Courts Rules** reads “ **to second counsel, where Court directs, ...**” My review of the file and documentation did not reveal a direction of the Court granting costs to second counsel therefore, this item may not be allowed. These units are reduced to zero.

[23] Item 15 - For preparation and filing of Canada’s Memorandum of Law – five units are claimed – the allowable range is three to seven. This item, found in Tariff B of the **Federal Courts**

**Rules** reads; “*Preparation and filing of written argument, where requested or permitted by the Court*”. My review of the file and documentation did not reveal a direction or request of the Court in this regard, therefore, this item may not be allowed. The claim for this item is reduced to zero.

[24] Item 24 - Travel by counsel to attend trial – three units are claimed, the allowable range is one to five. However, this item found in Tariff B of the ***Federal Courts Rules*** - reads “... ***at the discretion of the Court.***” As an assessment officer, I can not allow costs for travel under item 24 when the Court is silent in this regard. No units are allowed for this item.

[25] Item 25 – Services after judgment – one unit is claimed – this is the allowable number of units for this item and it is allowed.

[26] Item 26 – Assessment of costs – the defendant claimed three units - the allowable range is two to six. However, as sworn in the affidavit of Prudence Kennedy, Ms. Kennedy, as paralegal, states it was she who prepared the Defendant’s Bill of Costs. I have therefore I reduced the amount allowed under item 26 by one-half in accordance with item 28 of the Tariff – one and one-half units are therefore allowable and allowed for this item.

[27] Item 27 - Such other services as may be allowed by the assessment officer or ordered by the Court:  
- three units are claimed – the allowable range is one to three. In my respectful opinion, this item is meant to indemnify counsel for extraordinary matters not covered elsewhere in the Tariffs. Zero units are allowed for this item.

[28] Item28 – For Services of a paralegal (Prudence Kennedy) 50% of the amount that would be calculated for a solicitor. The defendant appears to be claiming thirty-three units x 50% at the tariff value of \$120. per unit giving rise to the defendants' claim of \$1,980.00. In the sworn affidavit of Prudence Kennedy (paralegal), Ms. Kennedy states her role in this file was to conduct research and collect information regarding the Plaintiffs' claims to assist with the preparation of this matter for trial as well as the fact that she prepared the Defendant's Bill of Costs. It would not be proper to indemnify the Defendant with regard to services of his paralegal for items that, in my opinion, in relation to this file no units could be awarded. Accordingly, based on the allowed units for assessable service taken into account, the numbers of units for item 28 are reduced from what appears to be 50 % of thirty three units to an assessed and allowed 50% of nineteen units.

[29] Consequently, the total assessable service amount is reduced from the requested \$16,920.00 to a total assessable service allowed amount of \$9,720.00.



[30] It should be noted the Plaintiff's did serve and file a brief Memorandum on Costs. However, the Plaintiffs choose not to challenge any specifics in either the assessable services section nor in the claimed disbursement section of the Bill of Costs. The Plaintiff's brief submissions made reference to ***Federal Courts Rules*** Rule 409 of (factors in assessing costs) and also made reference to the significant amount of work by the defendant by stating: "Even though this was a Simplified Action, the Crown's approach to the matter was that of a tobacco company facing a billion dollar class action suit. ..." The Plaintiff's submission did not contain any case law directly challenging any of the fifteen individual authorities fully provided by the Defendant in support of the Defendant's Bill of Costs. With no specific relevant submissions in opposition to the Defendant's Bill of Costs, I am without guidance in identifying issues of particular concern to the Plaintiff's in regard to the Bill of Costs. The role of the assessment officer is not to advocate for counsel when they choose not to contradict nor challenge items claimed. It is the role of the assessment officer to fix the amount of costs in light of criteria established in Part 11 – Costs of the ***Federal Courts Rules***.

[31] In regard to disbursements, the evidence in the affidavit of Prudence Kennedy provides substantial documentation, however I do have some concerns. In my opinion, it is not clear whether each and every photocopy expenditure (totaling \$5,749.90) was absolutely necessary for the reasonable conduct of the trial in this simplified action. I have therefore reduced the photocopy expenditure, \$4,887.42 is now allowed for photocopies.

[32] In relation to the disbursement claimed for Quick law (On-line research) at \$1,081.12, I express the same concern. \$973.00 is now allowed for research.

[33] I find the travel expense for lead counsel for interviewing and preparing witnesses for trial (all of whom did appear as witnesses at trial) reasonable and have allowed it. However, less clear to me is the reasonable necessity for second counsel to attend at these same interviews and also the reasonable necessity for second counsel to attend at the trial. (I note from the court record second counsel did not address the Court at any time during the trial). However, on the basis of the material before me and in view of the fact that Plaintiff's counsel did not raise an objection on this disbursement, I will not vary the disbursements sought. Travel disbursements at \$4,504.99 are allowed as claimed.

[34] The Bill of Costs presented at \$29,793.17 is accordingly assessed and allowed in the amount of \$ 21,623.50. A certificate is issued in the Federal Court proceeding for \$21,623.50.

"Willa Doyle"  
Assessment Officer

Fredericton, New Brunswick  
July 18, 2008

FEDERAL COURT  
NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-715-03

STYLE OF CAUSE: CHRISTOPHER K.J. POLCHIES, CALESTA POLCHIES, and CRYSTAL POLCHIES –AND- HER MAJESTY THE QUEEN and CYNTHIA POLCHIES, EMMANUEL POLCHIES, and the OROMOCTO INDIAN BAND

ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES

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

DATED: July 18, 2008

WRITTEN REPRESENTATIONS BY:

Joseph J. Wilby FOR THE PLAINTIFFS

Jonathan D. N. Tarlton FOR THE DEFENDANTS

SOLICITORS OF RECORD:

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