Federal Court  Cour fédérale

Date: 20120216

Docket: T-833-10

Citation: 2012 FC 221

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

BETWEEN:

CITY OF MONTRÉAL

Applicant

and

MONTREAL PORT AUTHORITY

Respondent

REASONS FOR ASSESSMENT

JOHANNE PARENT, Assessment Officer

[1] On September 13, 2011, upon the applicant's motion for reconsideration, the Court ordered that the applications for judicial review in dockets T-833-10 and T-936-10 be allowed with costs. On October 27, 2011, the applicant filed its bill of costs with this Court. A Notice of Appointment was issued on November 1, 2011, scheduling the hearing for the assessment of the bill of costs for November 24, 2011. At the hearing on November 24, the parties agreed to serve and file written submissions concerning the disbursements claimed. Having received these submissions, I will now proceed with the assessment of the applicant's bill of costs.

[2] Pursuant to Tariff B of the *Federal Courts Rules*, seven units are requested for the preparation and filing of the application for judicial review (item 1), as well as seven units for the preparation of the full application record (item 1). According to the applicant, the maximum number of units is justified, given the total amount of work required; the importance and complexity of the new legal issues, which counsel for the applicant called [TRANSLATION] "historic and complicated"; and the considerable sums of money at stake in this case. To determine the point on the scale under Column III of Tariff B that applies to the services claimed, the applicant relies on the decision of the Honourable Justice Tremblay-Lamer in *M.K. Plastics Corp. v Plasticair Inc.* 2007 FC 1029 [*M.K. Plastics*].

[3] In reply, the respondent submits that item 1 does not apply in this case because this item excludes records for applications governed by Part 5 of the *Federal Courts Rules*. Counsel for the respondent further submits that the number of units claimed for services related to the bill of costs is too high and that the mid-point on the scale of units under Column III of Tariff B should be adopted for all the services claimed in the bill of costs. Counsel explains his argument in his written submissions:

> [TRANSLATION]
> It would appear that the importance and complexity of the issues in this case cannot be regarded as being anything but the consequence of the previous case dealing with the principal amount of the PILTs for the silos and the business tax.
> This previous dispute was heard by the Federal Court (T-795-04 – judgment dated July 5, 2007), the Federal Court of Appeal (A-413-07 – judgment dated September 19, 2008) and the Supreme Court of Canada (32881 – judgment dated April 15, 2010). At trial, the parties agreed not seek costs from each other. On appeal, the victorious MPA waived the right to seek costs. In the Supreme Court, the City of Montréal was not entitled to costs against the MPA.

> Once the outcome was known (the Supreme Court favouring the position of the City of Montréal), the question remained as to whether a late payment supplement should be added to the principal of the PILTs.
> The only difficulty in this case was in performing the calculation permitted under the *Payments in Lieu of Taxes Act* (PILTA) by reference to the provisions of the *Financial Administration Act* to establish the applicable interest rate. This calculation was performed by the City of Montréal's own finance department and verified by the Montreal Port Authority's own real property management officers. The quantum was not in dispute.
>
> All that remained to be determined was whether at law a late payment supplement was owed (a) in whole; (b) in part; or (c) not at all.
> The exercise of the MPA's discretion in this regard, according to the City of Montréal's arguments, was fettered by the decision of the Supreme Court of Canada. Until the Supreme Court of Canada delivered its judgment, it was the Federal Court of Appeal's judgment that prevailed, and that judgment fully agreed with the position of the Montreal Port Authority. In the present case, the amount in dispute (whose quantum is, once again, common ground) depended on the principal amount of those PILTs that the Supreme Court of Canada finally recognized.
> This is why the MPA submits that it would be reasonable to apply the mid-point of scale under Column III.

[4] Regarding the respondent's first argument, namely, that item 1 of Tariff B of the *Federal Courts Rules* does not apply to records for applications governed by Part 5 of the *Federal Courts Rules*, item 1 of Tariff B states as follows:

1. Preparation and filing of originating documents, other than a notice of appeal to the Federal Court of Appeal, and application records. (my emphasis)	a. Préparation et dépôt des actes introductifs d'instance, autres que les avis d'appel, et des dossiers de demande. (je souligne)

It seems to me that item 1 expressly covers application records without making any distinction between Part 5 and any other part of the Rules. What is more, I reviewed a vast number of decisions made by assessment officers of this Court and cannot help but note that they do indeed apply this

item to records for applications governed by Part 5 of the *Federal Courts Rules*. In light of the foregoing, and absent a more substantial argument by the respondent on this point, I do not see how item 1 of Tariff B of the *Federal Courts Rules* could not apply to records for applications under Part 5.

[5] Furthermore, recent case law, such as *Dell Inc. v 9153-3141 Québec Inc.* 2007 FC 1070, *Stanfield v Canada* 2007 FC 542, *Novopharm Ltd v AstraZeneca AB* 2006 FC 678 and *Kassam v R.* 2005 FCA 169, generally recognizes that, barring exceptional circumstances, item 1 of Tariff B is allowed only once for the preparation and filing of originating documents, affidavits and application records. As I am not aware of any exceptional circumstances that would warrant allowing units for the application and for the application record, I will therefore assess the number of units requested for the preparation of the application record, including the originating document, in light of the arguments made by the parties.

[6] Rule 409 of the *Federal Courts Rules* authorizes the assessment officer to consider the factors referred to in subsection 400(3) when assessing costs. In the present case, I have been specifically asked to assess costs on the basis of the amounts in dispute, the importance and complexity of the issues raised, and the workload. Upon reading paragraph 4 of the decision of the Honourable Justice Martineau dated July 27, 2011, I note that the dispute focused exclusively on the respondent's refusal to pay the applicant late payment supplements (LPS) or interest under the Act and the *Crown Corporation Payments Regulations*. The principal amounts owing had been dealt with in previous cases. There can be no doubt that the amounts in issue in this case were considerable, but I find that this justification alone is insufficient to allow the maximum number of

units, particularly since the payments in principal had already been dealt with in previous cases and it remained to be seen at that point whether a late payment supplement was owed. Regarding the importance and complexity of the matter, if I confine myself to paragraph 26 of *M.K. Plastics*, above, I note that "it is the legal significance of the case, not the economic and business significance to the parties that must be considered". The dispute concerns decisions by the respondent not to pay LPS to the applicant, so essentially, the Court should consider whether this discretion was exercised reasonably. I find that this was a very important case for the parties but was not, however, a case of major legal significance. Regarding the workload required to deal with this application for judicial review, I note that the applicant's record contains a very well substantiated notice of application, a single nine-page affidavit with two attached exhibits, and a memorandum of fact and law citing various statutes and authorities. However, I do not think that the required workload, while significant, could be characterized as being much, much heavier than the norm in an application for judicial review. In light of the preceding, I will allow six units under item 1 of Tariff B for the preparation of the application record (including the application).

[7] At this point, in response to the respondent's argument that the mid-point on the scale of units should be adopted for all the services claimed, I would add that, in light of paragraph 8 of *Starlight v Canada*, 2001 FCT 999, "each item is assessable in its own circumstances and it is not necessary to use the same point throughout in the range for items as they occur in the litigation".

[8] The applicant claims seven units for the preparation and filing of a contested motion to reconsider in accordance with subsection 397(1) of the *Federal Courts Rules* (item 5). In reply, the respondent submits that the Court, in its decision dated September 13, 2011, did not make an award of costs. The claim for services rendered in connection with the motion to reconsider cannot be

allowed. A review of the Court's order dated September 13, 2011, shows that no costs were awarded to either party. As is stated in Rule 400(1) of the *Federal Courts Rules*, only the Court "shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid". Section 2 of the *Federal Courts Rules* defines the "Court" as "the Federal Court, including a prothonotary", while subsection 5.1(1) states that the Court consists of "a chief justice called the Chief Justice of the Federal Court, who is the president of the Federal Court, and 32 other judges". Nowhere in the Act or the *Federal Courts Rules* is it stated that an assessments officer is considered to be a member of the Court. Accordingly, an assessment officer does not have the necessary jurisdiction to award costs when the Court, in rendering its decision, has not expressly done so.

[9] Eleven times five units are claimed in the original bill of costs for discovery of documents (affidavit, letters (5), draft schedule, record, request for hearing, supplemental book of authorities and exhibits) under item 7 of Tariff B. Four times five units were added to the bill of costs, through the applicant's written submissions, for discovery of four other documents: the notice of appointment, the MPA's record, additional documents from the MPA and a letter from the MPA. The applicant submits that item 7 of the Tariff applies to the discovery of each document (sent or received) and that the principle that each of the discoveries should be treated discretely was established in *Early Recovered Resources Inc v Gulf Log Salvage Co-operative Assn.*, 2001 FCT 1212. The respondent, on the other hand, submits that it is trite law [TRANSLATION] "that the provisions of item 7 for discovery of documents refer to rules 222 to 232 in respect of Actions, that is, Part 4 of the Rules. Item 7 does not apply to proceedings instituted through an application for judicial review in accordance with Part 5 of the Rules" (*Turcotte v Canada*, 2011 FC 1090, *Omary v*

Canada, 2010 FC 813, *Wax v Canada*, 2007 FC 424, *Lavigne v Canada Post Corporation*, 2004 FC 350). The units claimed under item 7 of Tariff B will not be allowed. As the respondent notes, the case law long ago established that this service refers to rules 222 to 232 of the *Federal Courts Rules* – Discovery and Inspection, which come under Part 4 – Actions in the Rules. With respect for the contrary opinion, the decision cited by the applicant refers to a case instituted by way of an action and therefore does not apply here. Absent any other argument justifying such a request in the present application for judicial review, I do not see how such a claim is appropriate.

[10] For item 13(a) of Tariff B, the respondent challenges only the number of units claimed, which is at the top of the scale under Column III. The summary of the hearing in this case tells us that, in practice, the hearing went on for three days. In light of my argument set out in paragraph 6 of these reasons in my assessment of the factors under Rule 400(3), I allow four units for the preparation for the first day of the hearing, given that the preparation for the trial, although relatively complex, did not require preparing any witnesses. For the same reasons, two units will be allowed for each of the subsequent two days of preparation.

[11] The units claimed in the bill of costs under item 14(a) for first counsel's presence in Court were amended at the hearing to reflect the exact time in Court. The number of hours claimed was not challenged by the respondent, and I find the number of units claimed to be reasonable. Item 14(a) will therefore be allowed as requested.

[12] Regarding the applicant's claim under item 14(b) of the Tariff, which covers the presence of second counsel at the hearing, the parties agreed at the assessment hearing to withdraw this amount. In any event, the 23 units claimed under this item could not be awarded. As was mentioned at the

assessment hearing, item 14(b) provides for counsel fees for second counsel at the hearing, "where [the] Court directs" (emphasis added). At the assessment hearing, counsel confirmed that no representations on this point were made before the Court and that, accordingly, no order or direction was issued.

[13] Ten units are claimed under item 24 for travel by two counsel to attend the hearing. Item 24 of Tariff B leaves this item entirely up to the discretion of the Court, and absent a clear direction of the Court, the assessment officer has no jurisdiction to allow the requested fees. Accordingly, given the absence of an order or direction of the Court, the units claimed will not be allowed.

[14] The claim under item 25 (services after judgment) is allowed. There is no doubt in my mind that the applicant, following the Court's judgment, had to contact its clients, if only to explain the scope and impact of the judgment and see to the next steps.

[15] In reference to the claim for the maximum number of units under item 26 of Tariff B for the assessment of costs, counsel for the respondent argues that the number of units should be reduced to the mid-point on the scale for this service. I recognize that the applicant saw to the preparation, serving and filing of the bill of costs and supporting documentation, as well as the representations made at the hearing and in the written submissions. In consideration of the work performed, but taking into account the complexity of this assessment, four units will be allowed under item 26.

I. Disbursements

[16] In the written submissions filed by the parties regarding the claims for taxes on counsel fees, bailiff fees, taxi fares and court costs, it is stated that the disbursements claimed for court costs and taxi fares are not in dispute. These disbursements are justified and reasonable, and will be allowed as sought.

[17] Relying on the table of disbursements incurred in this case, which was submitted as an exhibit in the applicant's submissions, an amount of $237.15 is claimed as assessable disbursements for bailiff fees. The respondent, on the other hand, submits that the bailiff fees total only $112.67. I had an opportunity to review the parties' calculations, and it seems clear at first glance that the respondent did not include the fees incurred in April 2011 to serve the authorities. Another point on which the parties disagree seems to be the reimbursement of fees for the urgent service of certain documents. It appears from the Court's record and from the invoices submitted in support of the bill of costs that the authorities were indeed served and filed. In light of the foregoing and the fact that no submissions were made to explain why the bailiff fees related to the filing and service of these authorities should not be reimbursed, I will include in my calculations the amounts submitted for the month of April. Regarding the amounts incorporated into the invoicing for the filing and urgent service of certain documents, no arguments were offered to substantiate the use of this service to serve the application, the reply and the authorities on an urgent basis, and I was unable to find any grounds that would justify using this service and obliging the opposing party to reimburse it. I have therefore revised the calculations for this disbursement accordingly, and bailiff fees will be allowed in the amount of $164.98 (taxes included).

[18] A total of $11,837.09 is claimed in the bill of costs for counsel fees under paragraph 1(3)(*b*) of Tariff B. The applicant states in support of its claim that

> [TRANSLATION]
> . . . the purpose of this section is to reimburse the party that had to pay the taxes described in it, despite having won in Court, particularly those paid "on counsel fees" (GST and QST), as well as those paid on "disbursements allowed under this Tariff".

In support of its claim, the applicant refers to the decision of Assessment Officer Stinson in *Englander v Telus Communications Inc.*, 2004 FC 276 [*Englander*], in which it was allegedly determined that paragraph 1(3)(*b*) of the Tariff creates an entitlement to the [TRANSLATION] "reimbursement of taxes on counsel fees as well as on disbursements". The applicant argues that only disbursements are affected by the "allowed under this Tariff" limitation. Counsel for the applicant further argues that the assessment officer in *Englander*, above, [TRANSLATION] "does not have jurisdiction to refuse to allow the taxes on counsel fees, given the imperative rule of his own Court (paragraph 1(3)(*b*) of the Tariff), which is expressed in very general terms, regardless of whether or not the assessment officer thinks that the party could receive a windfall in this regard". In response, the respondent submits that disbursements are not the only component affected by the "allowed under this Tariff" limitation in paragraph 1(3)(*b*) of the Tariff. Counsel fees and disbursements must be considered in accordance with the Tariff. In the French version of this provision of the Tariff, the use of the conjunction "et" is associative, not alternative. Counsel for the respondent also refers to an excerpt from *Perry v Heywood et al* (1997), 159 Nfld & P.E.I.R. 183, cited in *Englander*, which explains, among other things, the three types of costs that may be awarded by a trial judge: party and party, lump sum, or solicitor and own client. On the subject of solicitor and own client costs and lump sums for costs awarded by the Court, counsel for the respondent states in his submissions that,

> [TRANSLATION]
> . . . in both cases, it is the judge who decides, failing which the assessment officer must follow Tariff B with regard to counsel fees

> and disbursements that may be allowed for the purposes of assessing costs, which means that taxes are excluded.
> Accordingly, no taxes may be added to the counsel fees in this case because the fees allowed were not established on a solicitor and own client basis or on a lump sum basis, and because the Court gave no express direction to the contrary.

[19] Unlike the decision in *Perry*, the *Federal Courts Rules* do cover, with regard to the assessment of party and party costs, in paragraph 1(3)(*b*) of the Tariff, any service or sales tax payable on counsel fees or disbursements allowed under the Tariff.

See subsection 1(3) of Tariff B:

(3) Disbursements – A bill of costs shall include disbursements including:	(3) Débours – Le mémoire de frais comprend les débours notamment :
(*a*) payments to witnesses under Tariff A; and	a) les sommes versées aux témoins selon le Tarif A;
(*b*) any service, sales, use or consumption taxes paid or payable on counsel fees or disbursements allowed under this Tariff.	b) les taxes sur les services, les taxes de vente, les taxes d'utilisation ou de consommation payées ou à payer sur les honoraires d'avocats et sur les débours acceptés selon le présent tarif.

[20] As counsel for the applicant ably explains in his interpretation of *Englander*, the assessment officer does not have the power to refuse to allow taxes as provided under paragraph 1(3)(*b*) of the Tariff. The ambit of the assessment officer's discretion in this regard is dealt with in countless decisions of the Federal Court and the Federal Court of Appeal. By my reading of paragraph 1(3)(*b*) and the case law, including *Englander* (paragraph 18), and later *Mercury Launch & Tug Ltd. v Texada Quarrying Ltd.*, 2009 FC 331 [*Mercury Launch*], at paragraph 11, I cannot conclude that the taxes referred to in paragraph 1(3)(*b*) are for the counsel fees payable by the party without taking

into account Tariff B. In my view, paragraph 1(3)(*b*) clearly stipulates that both the counsel fees and the disbursements must be allowed under the Tariff before the application of any taxes can be considered. The French version, which uses the conjunction "et", does not lend itself to any other application, and the English version seems to confirm this application. Like the assessment officers in *Englander* and *Mercury Launch*, I am therefore of the opinion that the taxes covered by paragraph 1(3)(*b*) include counsel fees allowed under the Tariff. This application is also confirmed in numerous decisions rendered by assessment officers, including the two decisions mentioned in this paragraph, where the assessment officer allowed GST on costs assessed for the services of counsel and on the disbursements assessed. Accordingly, the taxes on counsel fees as claimed under the disbursements assessed will not be allowed. Since the taxes on the other disbursements are already included in the amounts assessed, only the GST as claimed by the applicant in the bill of costs under assessable services will be allowed.

[21] The applicant's bill of costs is allowed in the amount of $10,731.48.

"Johanne Parent"
Assessment Officer

Toronto, Ontario
February 16, 2012

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-833-10
STYLE OF CAUSE:	*CITY OF MONTRÉAL v MONTREAL PORT AUTHORITY*

ASSESSMENT OF COSTS WITH APPEARANCE OF THE PARTIES

REASONS FOR ASSESSMENT BY:	JOHANNE PARENT, ASSESSMENT OFFICER
DATED:	February 16, 2012

SUBMISSIONS:

Vincent Jacob	FOR THE APPLICANT
Gilles Fafard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Brunet, Lamarre Montréal, Quebec	FOR THE APPLICANT
De Grandpré Chait Montréal, Quebec	FOR THE RESPONDENT