Federal Court  Cour fédérale

Date: 20221123

Docket: T-538-19

Citation: 2022 FC 1606

Ottawa, Ontario, November 23, 2022

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

GCT CANADA LIMITED PARTNERSHIP

Applicant

and

VANCOUVER FRASER PORT AUTHORITY and ATTORNEY GENERAL OF CANADA

Respondents

SUPPLEMENTARY JUDGMENT AND REASONS

[1] On July 26, 2022, I dismissed an application for judicial review by GCT Canada Limited Partnership [GCT] of two decisions rendered by the Vancouver Fraser Port Authority [VFPA] in connection with GCT's planned expansion of its terminal at Roberts Bank (*GCT Canada Limited Partnership v Vancouver Fraser Port Authority*, 2022 FC 1109). In doing so, I awarded costs in favour of the VFPA and the Attorney General of Canada [Attorney General], but provided the

parties time to submit written submissions on the amount of such costs in the event that they could not come to an agreement. GCT and the Attorney General were able to come to an agreement, and those costs were settled; however, GCT and the VFPA were not able to come to terms, and they proceeded to file written submissions on the issue of costs in line with my instructions – each party filed initial written submissions, and the VFPA filed submissions in reply to those of GCT. This Supplementary Judgment and Reasons addresses the amount of costs to be paid to the VFPA on the basis of those written submissions.

[2] The VFPA seeks an award of costs in the amount of $144,892.88, as provided by column V of Tariff B, as set out in the draft bill of costs submitted as Appendix “A” of its written submissions. Alternatively, the port authority seeks costs in the amount of $115,504.08, as provided by column IV of Tariff B, as set out in the draft bill of costs submitted as Appendix “B” of its written submissions.

[3] In short, the VFPA submits that column III costs are meant to be the default level of costs for cases of average complexity or importance, but that this case was anything but average; the port authority submits that this case was a complex proceeding involving numerous counsel with unique issues that had not previously been adjudicated by the Federal Court regarding the mandate of port authorities under the *Canada Marine Act* and regarding whether the Crown could be compelled in a *mandamus*-like remedy to oversee port authorities’ statutory role in permitting. This was complex, lengthy and complicated litigation, and the VFPA argues that the Federal Court of Appeal has repeatedly recognized that in proceedings of this type, costs are appropriately awarded under column IV or V.

[4] In addition, the VFPA argues that it was the successful party after three years of (what I called “spirited”) litigation, and although I did find, as part of my reasons, that the VFPA breached its duty of procedural fairness towards GCT, that initial error was for all intents and purposes remedied by the VFPA when it reversed course a few months later; had GCT accepted to submit and move forward with its project proposal submission at that stage rather than pursuing an aggressive litigation strategy alleging serious misconduct on the part of the executive of the port authority – a strategy which ultimately failed – the breach, argues the VFPA, would have been of no consequence.

[5] For its part, GCT argues that this is a case of divided success; first, the entire dispute which underlay the proceedings from the outset related to the VFPA’s initial decision not to accept to review GCT’s preliminary project proposal for its planned expansion of its terminal at Roberts Bank – a decision which I found breached the port authority’s duty of procedural fairness – and then the port authority’s assertion, after reversing course a few months later, that it could rule on its own bias, something which, GCT asserts, two judges of this Court rejected. Second, GCT argues that it brought the present application to vindicate its rights to have its project application considered and to force the port authority to address its duties of procedural fairness and that, in the end, I should take guidance from the decision in *Canada (Minister of Health) v The Winning Combination Inc*., 2017 FCA 101, where the Federal Court of Appeal noted that the government department in that case had still breached its duty to perform a fair assessment and awarded solicitor-client costs against the company to promote public confidence in future decision-making. Accordingly, GCT submits that the VFPA should bear its own costs or be awarded nominal costs.

[6] Alternatively, argues GCT, the port authority's costs should be limited to the amount of $108,178.98, as provided by column III of Tariff B, as set out in the draft bill of costs submitted along with GCT's written submissions. GCT submits that the VFPA significantly delayed and drove up fees by bringing four unsuccessful motions, while it (GCT) brought motions that were meritorious, in whole or in part. It was the VFPA, argues GCT, which was found on the wrong end of a motion to remove its initial solicitors, and although that motion was hard fought, Justice Pentney observed that there were no special considerations that warranted departing from the usual scale pursuant to Rule 407, *to wit*, party-and-party costs in accordance with column III of Tariff B. Moreover, GCT argues that the complexity of this case does not justify a higher column and that assessing the allegations of the VFPA's bias is a far cry from the lengthy intellectual property trials involving extensive expert testimony cited by the VFPA. Finally, GCT underscores the Federal Court of Appeal's statement of principle in *Wihksne v Canada (Attorney General)*, 2002 FCA 356 at paragraph 11, *to wit*, that "an important principle underlying costs is that an award of costs represents a compromise between compensating a successful party and not unduly burdening an unsuccessful party" citing *Apotex Inc v Wellcome Foundation Ltd* (1998), 159 FTR 233).

[7] First of all, I should mention that I have already ordered costs in favour of the VFPA. Consequently, GCT's invitation that I order the port authority to bear its own costs is a non-starter. That said, on the whole, I agree with the VFPA that costs beyond column III are appropriate in this matter, and I award costs in line with column IV of Tariff B.

[8] Subsection 400(1) of the *Federal Courts Rules* [Rules] makes it clear that the first principle in the adjudication of costs is that the Court has full discretionary power in setting the amount of costs (*Consorzio del Prosciutto di Parma v Maple Leaf Meats Inc.*, 2002 FCA 417, [2003] 2 FC 451 at para 9 [*Consorzio*]). I have often found guidance in respect of the awarding of costs in the words of Rothstein J.A. (as he then was) in *Consorzio* at paragraphs 8 and 9:

> [8] An award of party-and-party costs is not an exercise in exact science. It is only an estimate of the amount the Court considers appropriate as a contribution towards the successful party's solicitor-client costs (or, in unusual circumstances, the unsuccessful party's solicitor-and-client costs). Under rule 407, where the parties do not seek increased costs, costs will be assessed in accordance with column III of the table to Tariff B. Even where increased costs are sought, the Court, in its discretion, may find that costs according to column III provide appropriate party-and-party compensation.
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> [9] However, the objective is to award an appropriate contribution towards solicitor-client costs, not rigid adherence to column III of the table to Tariff B which is, itself, arbitrary. Subsection 400(1) makes it clear that the first principle in the adjudication of costs is that the Court has "full discretionary power" as to the amount of costs. In exercising its discretion, the Court may fix the costs by reference to Tariff B or may depart from it. Column III of Tariff B is a default provision. It is only when the Court does not make a specific order otherwise that costs will be assessed in accordance with column III of Tariff B.
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> [Emphasis added.]

[9] In addition, it should be made clear that the VFPA seeks increased costs on a party-and-party basis, not solicitor-client cost. Costs awarded on a party-and-party basis do not indemnify the successful party for its solicitor-client costs and they are not intended to punish the

unsuccessful party for inappropriate conduct (*Consorzio* at para 7); the port authority only seeks costs based on Tariff B and argues that taking into account the factors relevant to this Court's discretion to award costs, as set out in subsection 400(3) of the Rules, an award of costs at the high end of column V – or alternatively IV – of Tariff B is unquestionably fair and justified in the circumstances of this litigation.

[10] Here, there is no doubt that the VFPA was the successful party (paragraph 400(3)(a) of the Rules). By far, the more significant aspect of the debate before me involved GCT's assertion that the port authority was a biased decision-maker, so much so that GCT required an order tantamount to an order of *mandamus* calling for an alternative vetting process involving the Minister of Transport, or his delegate, to be undertaken as regards GCT's planned expansion of its terminal at Roberts Bank – a vetting process without precedent and which the parties and the Court would have had to lay out if I accepted to issue such an order. Although the port authority was found to have breached the duty of procedural fairness owed to GCT, as I found, that breach was remedied and would have been inconsequential had GCT not taken the aggressive position that it did – and as I indicated, which was in its right to do – and simply accepted the VFPA's reversal of course and invitation to submit its proposal under the existing vetting procedures, given, in particular, the change of the legal landscape as regards the environmental assessment of such projects. With my decision, the chickens have come home to roost, and that strategic decision on the part of GCT now has consequences as regards costs.

[11] As to the importance and complexity of the case (paragraph 400(3)(c) of the Rules), I do not think that GCT can, on the one hand, concede that the recourse that it sought was novel, yet

on the other, assert that the complexity of this case does not justify a column higher than column III. Had GCT convinced me that the order it sought was appropriate and justified, a declaration of the nature it requested would have been a game-changer in the way port authorities, and statutory entities similar in nature, undertook large-scale project review and assessment. There is no reason to believe that GCT was fully conscious of what it was asking the Court to order in the event that it had succeeded in its arguments on bias. The port authority describes the matter as follows: "GCT challenged the Port Authority's right to act as a commercial operator and its ability to move forward with strategic infrastructure development. The remedies it sought would effectively sterilize the Port Authority's ability to carry out its long-term strategy for developing additional container capacity at Roberts Bank." I think that that fairly sums up what was at stake in this matter.

[12] As to the amount of work involved, as I mentioned in my decision, the proceedings were spirited. I would think that both parties played off the energy of the other; the result of course is that there were a number of preliminary motions, heated cross-examinations, and a number of motions to strike (not only as regards the evidence but also retained counsel). There is no doubt that that amount of work was significant, and for GCT to try to minimize the amount of such work by stating that this case was hardly of the nature, significance or complexity of intellectual property cases misses the point.

[13] It seems to me that GCT approached these proceedings as a significant commercial dispute, and although it was within its rights to do so, it must now face the consequences of its decisions; the outcome requires an award of costs in excess of column III. After over 30 years of

litigating before this Court, I am comfortable in suggesting, having canvassed the procedural history and the volume of the evidentiary record in this case, and given the level and experience of counsel who appeared and argued their case before me over four days, that even at column IV, the present award of costs is, in all probability, significantly less than the port authority's actual legal costs.

[14] Neither party made any submissions as to the terms or the amount of interest to run in relation to the cost award. Accordingly, I see no reason to depart from the legal rate of 5% per annum in line with section 3 of the *Interest Act*, RSC 1985, c I-15.

JUDGMENT in T-538-19

THIS COURT'S SUPPLEMENTAL JUDGMENT is that:

1. GCT Canada Limited Partnership shall pay to the Vancouver Fraser Port Authority costs of the present application, inclusive the costs in relation to the submissions on costs, in the amount of $115,504.08 inclusive of disbursements. Such amount shall bear interest at the rate of 5% per annum from the date of this Supplementary Judgment.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	GCT CANADA LIMITED PARTNERSHIP v VANCOUVER FRASER PORT AUTHORITY and ATTORNEY GENERAL OF CANADA
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