

CANADA / JUDGMENT

Trevor Nicholas Construction Co. v. Canada (Minister for Public Works)

2006 FC 42

COURT

Federal Court

DECIDED

17 January 2006

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Trevor Nicholas Construction Co. v. Canada (Minister for Public Works) Court (s) Database
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Decision Content Date: 20060117 Docket: T-2034-91 Citation: 2006 FC 42 Toronto, Ontario, January
17, 2006 Present: THE HONOURABLE MR. JUSTICE VON FINCKENSTEIN BETWEEN: TREVOR
NICHOLAS CONSTRUCTION CO. LIMITED Plaintiff (Moving Party) and HER MAJESTY THE
QUEEN AS REPRESENTED BY THE MINISTER FOR PUBLIC WORKS CANADA Defendant
(Responding Party) REASONS FOR ORDER AND ORDER

- [1] This is an appeal from the decision of Assessment Officer Preston dated December 10, 2005 wherein the Defendant was awarded fees in the amount of \$6,930.00 and disbursements of \$2,904.97 for a total award of \$9,834.97 instead of the total of \$26,461.60 asked for by the Defendant.
- [2] Plaintiff is appealing this assessment arguing:
- a) Defendant should have disclosed the amount paid to its solicitor rather than relying on the tariff rate of \$110 per unit;
 - b) the Assessment Officer erred in relying on the affidavit of one Karen Hodges in establishing evidence of reasonableness and necessity given that it was not served on the Plaintiff;
 - c) Defendant failed to supply evidence of reasonableness and necessity regarding the disbursements claimed; and
 - d) the various units claimed for fees were not reasonable.
- [3] It is well established that the Assessment Officer=s discretion in allowing specific items ought not be changed unless the amounts are so inappropriate or his decision so unreasonable as to suggest that an error in principle was the cause. The Court=s function on review is to determine whether the Assessment Officer applied the correct principles. If an item does not involve a question of principle, but merely a question of amount awarded, the Assessment Officer will not be interfered with unless the amount can be shown to be so

unreasonable as to suggest that an error in principle must have been the cause. See *IMB Canada Limited v. Xerox Canada Limited*, [1977] 1 F.C. 181 (F.C.A.) at para. 7 and 9;

- [4] In respect of point a) the Plaintiff cites *W.H. Brady Co. v. Letraset Canada Ltd.*, [1991] 2 F.C. 226, particularly the following quote of Marceau J.A.:
- [9] The general proposition that, to be entitled to recover costs, a litigant must be liable to pay them to his solicitors is based on the principle that party and party costs are given as an indemnity, as a compensation for the expense to which a successful litigant has been put by reason of the litigation. The payment of costs to a party is not to be a gift. It would be unacceptable to let a party collect costs -- which, for the most part, relate to professional services -- if the solicitor who has rendered the services is not legally in a position to claim them from him. The liability required to satisfy the principle involved is easy to define: it is the legal obligation to pay for the services rendered to him which a litigant assumes towards his solicitor and which can be enforced by the solicitor at any time.
- [5] According to the Plaintiff, only if the Crown discloses what it actually pays its solicitors can the Assessment Officer be assured the Defendant is compensated rather making a profit on the award of costs on the basis of \$110.00 per unit.
- [6] There are several things wrong with this argument. First Rule 407 of the Federal Courts Rules provides that, unless otherwise ordered, costs shall be awarded in accordance with column III of the table to Tariff B. Secondly, Rule 400(2) provides that costs may be awarded against the Crown. Third there is no evidence that the Crown will profit from an award of \$110 per unit. Finally, s.28(2) of the Crown Liability and Proceedings Act provides: A28(2) Costs awarded to the Crown shall not be disallowed or reduced on taxation by reason only that the solicitor or counsel who earned the costs, or in respect of whose services the cost or charge, was a salaried officer of the Crown performing those services in the discharge of the officers duties and was remunerated therefore by a salary, or for that or any other reason was not entitled to recover any costs from the Crown in respect of services so rendered.@"
- [7] Thus the quote referred to from *W.H. Brady supra* must be read in context of the Rules and the provisions of the Crown Liability and Proceedings Act. Clearly awards can be made to the Crown on the basis of column III of the table to Tariff B. There is no requirement for the Defendant to disclose the fee it pays to its solicitors in order to demonstrate that the award does not exceed compensation.
- [8] With respect to point b) the Assessment Officer states in his reasons:
- [3] At the commencement of the Assessment on April 14, 2005, Mr. Susin, representing the Plaintiff, indicated that he did not receive the Affidavit of Disbursements of Karen Hodges. The assessment was adjourned for 45 minutes to give Mr. Susin an opportunity to review the Affidavit of Disbursements.

- [4] Upon resumption Mr. Susin objected that he did not have all his records with him. At that point it was determined that we would proceed, however, should Mr. Susin find that he was missing documentation, the Court file would be made available to him. Should this not suffice, an adjournment would be entertained.
- [9] Thus the Assessment Officer took all steps to ensure that the Plaintiff was not prejudiced in light of the allegation of non-service (notwithstanding an affidavit of service to the contrary). Since the Plaintiff agreed with this procedure and never asked for an adjournment. I fail to see how the Plaintiff can now successfully object with respect to the manner in which the Assessment Officer proceeded or that he relied on the affidavit of Karen Hodges.
- [10] With respect to point c) it is the affidavit of Karen Hodges that provides the evidence both in terms of reasonableness and necessity. The Plaintiff never challenged any fact alleged nor cross-examined on it. Furthermore, the Assessment Officer probed each item and deleted some items as not being necessary. Thus, I fail to see any merit in the Plaintiff=s allegation that there was no evidence of reasonableness or necessity.
- [11] With respect to point d) the Plaintiff=s allegation essentially amount to saying the Assessment Officer failed to exercise his discretion properly. The Assessment Officer carefully explained his award and I can find no fault with his reasoning. It is not the function of this Court to substitute its discretion for that of the Assessment Officer, rather it will only interfere if the amounts are so inappropriate or so unreasonable as to suggest an error in principle. This was not the case in the decision of Assessment Officer Preston.
- [12] Accordingly, none of the Plaintiff=s argument succeed. ORDER THIS COURT ORDERS that this appeal be dismissed. In order to avoid further litigation there will be no order as to costs in this appeal. AK. von Finckenstein@ Judge FEDERAL COURT NAMES OF COUNSEL AND SOLICITORS OF RECORD DOCKET: T-2034-91 STYLE OF CAUSE: TREVOR NICHOLAS CONSTRUCTION CO. LIMITED Plaintiff (Moving Party) and HER MAJESTY THE QUEEN AS REPRESENTED BY THE MINISTER FOR PUBLIC WORKS CANADA Defendant (Responding Party) PLACE OF HEARING: TORONTO, ONTARIO DATE OF HEARING: JANUARY 16, 2006 REASONS FOR ORDER AND ORDER BY: von FINCKENSTEIN J. DATED: JANUARY 17, 2006 APPEARANCES: John Susin FOR THE PLAINTIFF Christopher Parke FOR THE DEFENDANT SOLICITORS OF RECORD: John Susin Toronto, Ontario FOR THE PLAINTIFF John H. Sims, Q.C. Deputy Attorney General of Canada FOR THE DEFENDANT

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