



Reference: *The Commissioner of Competition v. Premier Career Management Group Corp. et al.*, 2009 Comp. Trib. 05
File No.: CT-2007-006
Registry Document No.: 0169

IN THE MATTER of the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER of an inquiry pursuant to subparagraph 10(1)(b)(ii) of the *Competition Act* relating to certain marketing practices of Premier Career Management Group Corp. and Minto Roy;

AND IN THE MATTER of an application by the Commissioner of Competition for an order under section 74.1 of the *Competition Act*.

B E T W E E N:

The Commissioner of Competition
(applicant)

and

**Premier Career Management Group Corp. and
Minto Roy**
(respondents)



Based on the written record
Presiding Judicial Member: Simpson J. (Chairperson)
Date of Reasons and Order: June 5, 2009
Reasons and Order signed by: Madam Justice Sandra J. Simpson

REASONS FOR ORDER AND ORDER REGARDING COSTS

I. INTRODUCTION

[1] On July 15, 2008, the Competition Tribunal dismissed the Application filed by the Commissioner of Competition (the “Commissioner”) pursuant to section 74.1 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the “Act”). At paragraph 225 of its reasons for order, the Tribunal indicated that the issue of costs remained under reserve in the hope that a settlement can be achieved.

[2] The parties did not reach a settlement and have therefore filed submissions. On December 10, 2008, the Respondents filed a Cost Brief and on March 4, 2009 the Respondents filed a Revised Bill of Costs (“Revised Bill of Costs”) and a Revised Comparative Bill of Costs (“Revised Comparative Bill of Costs”). The Commissioner filed a Response on March 13, 2009 and the Respondents filed their Reply on March 31, 2009.

II. SUMMARY OF THE PARTIES’ POSITIONS

(a) The Respondents

[3] The Respondents are seeking a lump sum award of costs in the amount of \$66,664.02, including disbursements. This is the total described as a partial indemnity on the Revised Bill of Costs. The lump sum is calculated by taking 60% of the legal fees incurred by Mr. Roy and includes 50 hours of Mr. Roy’s time valued at \$360.00 per hour. For comparative purposes only, the Respondents prepared a calculation based entirely on Column III, Tariff B of the *Federal Courts Rules*, SOR/98-106 (the “Rules”). The total amount claimed under Tariff B, including disbursements is \$41,704.24. The Respondents submit that Tariff B does not provide adequate compensation for their costs.

[4] The Respondents argue that an award of costs should represent a compromise between compensating a successful party and not unduly burdening an unsuccessful party and submit that the Commissioner’s position with respect to costs is not a compromise.

(b) The Commissioner

[5] The Commissioner submits that the costs sought by the Respondents are excessive. The Commissioner says that the Respondents should be awarded costs in the amount of \$2,520 in accordance with Column II of Tariff B of the Rules, plus \$1,246.56 in disbursements. The Commissioner submits that the award of costs should be based on Column II of Tariff B rather than Column III because (i) it was successful in establishing all of the elements of the reviewable conduct save one, (ii) the issues were relatively non-complex, (iii) there was public interest in having the matter litigated, (iv) the Respondents’ conduct unnecessarily lengthened the proceeding and (v) the Tribunal found that the Respondents’ key witnesses were not credible.

[6] The Commissioner also submits that the Respondents' Revised Comparative Bill of Costs contains claims which are invalid or inflated. They are as follows:

- (a) First, the Respondents have claimed for the preparation and filing of their memorandum of argument responding to the Commissioner's default judgement motion. To allow the Respondents to recover costs for this item would be to, in effect, reward the Respondents failure to observe the *Competition Tribunal Rules*, SOR/2008-141.
- (b) Second, the Respondents have claimed costs associated with the Commissioner's examination of the Respondent, Mr. Roy, pursuant to paragraph 11(1)(a) of the Act. That examination took place before the Commissioner filed her application in the present matter. The Tribunal's jurisdiction to award costs is limited to the costs of proceedings before the Tribunal.
- (c) Third, the Respondents have claimed \$18,000 for the time that the Respondent, Mr. Roy, as a self-represented litigant, attended the hearing in this matter. The Tribunal should decline to award Mr. Roy any amount in respect of his attendance at the hearing. As the sole director and shareholder of Premier Career Management Group Corp. ("PCMG"), even if he had been represented by counsel, Mr. Roy would have attended the proceeding. In the alternative, if an amount is to be awarded it should be based on 25 hours as Mr. Roy would have attended at least ½ of the hearing. And, \$60.00 per hour would be an appropriate hourly rate.
- (d) Fourth, the Respondents seek to recover costs associated with two counsel attending case management conferences with the Tribunal on November 19, 2007 and December 4, 2007. The conferences were held to address procedural and relatively non-complex matters and as such should be limited to participation by a single counsel.

[7] I now turn to the consideration of each of these submissions.

III. ANALYSIS

[8] Section 8.1 of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.) gives jurisdiction to the Tribunal to award costs of proceedings before it in accordance with the provisions governing costs in the Rules. Accordingly, pursuant to Rule 400(1) of the Rules the Tribunal has "full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid." Factors which may be considered by the Tribunal in the exercise of its discretion are found under Rule 400(3) of the Rules.

(a) *Federal Court Tariff or Lump Sum*

[9] In *B-Filer Inc. et al. v. The Bank of Nova Scotia*, 2007 Comp. Trib. 26, the Tribunal

outlined its position with respect to the award of costs on a lump sum basis. It stated at paragraph 13:

In our view, the Tribunal should favour lump sum awards over formal taxation of bills of costs because such practice is in accordance with the direction to the Tribunal found in subsection 9(2) of the *Competition Tribunal Act* that all proceedings before it “shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.”

[10] In *B-Filer*, the Tribunal also indicated that “when setting costs on a lump sum basis, the Tribunal is not to take a shot in the dark” and that “costs must be determined on a principled basis.” I agree with the Tribunal’s reasoning in *B-Filer* and will therefore award costs on a lump sum basis. I now turn to the question of how the lump sum is to be calculated.

[11] In *B-Filer*, the Tribunal stated that it had followed the jurisprudence of the Federal Court to the effect that there must be sound reasons to depart from Rule 407 of the Rules which directs that party-and-party costs are to be assessed in accordance with Column III of Tariff B. In *Rona Inc. v. Commissioner of Competition*, 2005 Comp. Trib. 26, when considering what costs should be awarded in light of the factors found in Rule 400(3), the Tribunal wrote at paragraph 11:

The starting point for this analysis is that the Tribunal must, in the words of Décary J.A. in *Wihksne*, have “valid reasons to derogate from Rule 407 which states the general principle that costs are to be awarded in accordance with column III of the table to Tariff B”.

[12] The Tribunal, in *B-Filer*, also determined that it was appropriate, when fixing lump sum fees to be guided by Tariff B of the Rules.

[13] Both parties submit that the Tribunal should depart from Rule 407. In their Revised Bill of Costs, the Respondents claim \$66,664.02 based on partial indemnity. This amount exceeds their entitlement to costs in accordance with Column III of Tariff B which they have calculated to be \$41,704.24. The Respondents did not provide the Tribunal with any arguments supporting their submission that the cost award should not be premised on Tariff B other than stating that Tariff B does not provide adequate compensation for costs and that the overriding principle is that a costs award, whether based on a lump sum amount or derived from Tariff B, must be a reasonable compromise between compensation and burden. Accordingly, I find that the Respondents have failed to establish that there are sound reasons to depart from the principle that costs are to be assessed in accordance with Tariff B. The Respondents’ Revised Bill of Costs based on a partial indemnity will therefore be disregarded.

[14] I turn now to the Commissioner’s submission that, for the reasons outlined above, the calculation for the lump sum award should be based on Column II of Tariff B rather than on Column III. These arguments are based on the list of factors which the Tribunal may consider in exercising its discretion in the award of costs under Rule 400(3) of the Rules.

[15] I cannot agree with the Commissioner’s submission that Column II should govern because she was largely successful, the matter was not complex, it was of public interest, PCMG

representatives were not credible, and Mr. Roy unnecessarily lengthened the hearing. In short, I have concluded that the Commissioner failed to prove all elements of the case and Mr. Roy did a respectable job representing himself. Finally, I am not persuaded that negative credibility findings alone should justify a departure from the use of Column III and I do not read *B-Filer* as having made this suggestion. For this reason, the lump sum award should be premised on Tariff B, Column III. There is no reason to depart from this norm.

[16] The lump sum calculation will therefore be based on the mid-range of Column III, Tariff B.

(c) Costs for Preparation of Material in Response to the Default Motion

[17] The Commissioner filed her notice of application on May 8, 2007. The Respondents failed to respond within the time period set out in the *Competition Tribunal Rules* and, on July 23, 2007, the Commissioner moved for an *ex parte* order in default of response. The Tribunal ordered the Commissioner to prepare a revised motion record and ordered that the revised motion record be served. The Respondents were given 20 days to respond failing which the motion would proceed without further notice. One day before the expiry of the 20-day period, newly retained counsel for the Respondents sought an extension of time to serve a responding motion record. The request was granted and after some discussion, the Commissioner agreed to abandon her motion for an order in default of response.

[18] The Respondents claim costs for the preparation and filing of their memorandum of argument responding to the Commissioner's default judgement motion.

[19] In its order relating to matters considered at the case management conferences of November 19, and December 4, 2007, the Tribunal ordered that "[t]here shall be no costs in respect of the Commissioner's Motion for an Order in Default of Response." Costs in relation to the default proceedings will thus not be awarded.

[20] Further, I accept the Commissioner's argument that the Respondents are not entitled to costs in connection with the default proceedings that they caused by failing to file a timely response. I note that this is consistent with the principle cited in Orkin's, *The Law of Costs*, at s. 408.7 (looseleaf (Aurora: Canada Law Book Inc., 2000)) that "[o]n a successful motion to set aside a default judgment regularly signed, the defendant will usually be charged with the costs of the motion together with all costs thrown away by reason of his default."

(d) Costs Associated with Examination Pursuant to Paragraph 11(1)(a) of the Act

[21] I also accept the Commissioner's submission that the Respondents are not entitled to costs for preparation and attendance at the examination of the Respondent, Mr. Roy, pursuant to paragraph 11(1)(a) of the Act. The notice of application in the present matter was filed on May 8, 2007 and the examination of Mr. Roy took place on February 27, 2007. Subsection 8.1(1) of the *Competition Tribunal Act* reads as follows:

The Tribunal may award costs of proceedings Le Tribunal, saisi d'une demande prévue aux

before it in respect of reviewable matters under Parts VII.1 and VIII of the *Competition Act* on a final or interim basis, in accordance with the provisions governing costs in the *Federal Court Rules, 1998*.

parties VII.1 ou VIII de la *Loi sur la concurrence*, peut, à son appréciation, déterminer, en conformité avec les *Règles de la Cour fédérale (1998)* applicables à la détermination des frais, les frais – même provisionnels – relatifs aux procédures dont il est saisi.

[my emphasis]

[22] The Tribunal's jurisdiction regarding costs is therefore limited to proceedings before the Tribunal in respect of reviewable matters under Parts VII.1 and VIII of the Act and, it does not extend to events which occur prior to the commencement of a proceeding.

(e) Costs for Self-Represented Litigants

[23] On February 14, 2008, the solicitors for the Respondents, Harper Grey LLP, moved to be removed as solicitors of record for non-payment of fees. Since the Respondents' witness statements were due on February 25, 2008, Respondents' counsel was ordered to stay on the record until the statements were prepared. Seven days before the commencement of the hearing, Mr. Michael Osborne of Affleck, Greene, McMurtry advised the Tribunal that he had been asked to represent the Respondents at the hearing and sought an adjournment as he was not available on the dates the hearing was scheduled to take place. The Tribunal denied the request based on the fact that the Respondent, Mr. Roy, had known the hearing dates for many months.

[24] The Respondents did not retain counsel who could attend the hearing, Mr. Roy was therefore self-represented and PCMG was unrepresented. Mr. Osborne reviewed the transcripts and assisted Mr. Roy with the preparation of his initial final argument. Mr. Osborne then acted for both Respondents when he prepared supplementary arguments and submissions regarding costs.

[25] The question that must be addressed is whether or not Mr. Roy, as a self-represented litigant, is entitled to be reimbursed on the basis that the time he spent in hearing and in preparation therefore meant that he forfeited income from employment he otherwise would have earned.

[26] Based on the objective of costs, case law has established that it may be appropriate to award some form of compensation to self-represented litigants based on the following principles:

- (a) The litigant must demonstrate that he devoted time and effort to do work ordinarily done by a lawyer in the conduct of the litigation and that he incurred an opportunity cost by foregoing remunerative activity.
- (b) Costs should not be awarded on the same basis as those of a litigant represented by counsel.
- (c) Nor should they be awarded for the time or service that any litigant would have expended on the case.

(d) Costs for preparation and presentation of the case should be reasonable and moderate. (see *Thibodeau v. Air Canada*, 2007 FCA 115 (F.C.A), *Fong v. Chan* (1999), 46 O.R. (3d) 330 (Ont. C.A.), *Lee v. Bank of Nova Scotia*, [2004] O.J. No. 3506 (Ont. Sup. Ct.) (QL))

[27] In their Revised Bill of Costs the Respondents have claimed \$18,000 for Mr. Roy's attendance at the hearing which lasted 50 hours. Costs for preparation for the hearing are not sought.

[28] I am of the view that Mr. Roy is entitled to reasonable reimbursement for his attendance at the hearing as a self-represented litigant. However, I also accept the Commissioner's argument that should Mr. Roy be entitled to compensation, such compensation should be based on 25 hours rather than 50 hours of hearing time. I am of the opinion that, as sole shareholder and director of PCMG, Mr. Roy would have been in attendance for at least half of the hearing even if he had retained counsel.

[29] With regard to the hourly rate, in light of case law which suggests a modest reimbursement, I am of the view that \$360 per hour is too high and that \$150 per hour is a reasonable reimbursement. Mr. Roy is therefore entitled to \$3,750.

(f) Number of Counsel in Attendance for Case Conferences

[30] The question is whether one or two of the Respondents' counsel should be entitled to costs for the two prehearing case conferences which took place on November 19, 2007 and December 4, 2007. I accept the Commissioner's argument that the conferences were uncomplicated and conclude that the Respondents are only entitled to costs for the participation of a single counsel.

(g) Disbursements

[31] The Commissioner agrees that the Respondents are entitled to recover their costs in respect of the transcripts they purchased. With respect to the balance of the disbursements claimed, the Commissioner submits that absent proof that disbursements have been paid, those amounts should be struck from the Respondents' claim.

[32] In their Reply, the Respondents submit that whether Mr. Roy has actually paid his legal bill is irrelevant and that costs are payable for allowable expenses and services incurred.

[33] I agree with the Respondents' argument and find that the disbursements claimed by the Respondents are reasonable. I will however deduct from the disbursements claimed, disbursements relating to Mr. Roy's examination pursuant to paragraph 11(1)(a) of the Act.

(h) Other Matters

[34] Other assessable services found in the Respondents' Revised Comparative Bill of Costs were not disputed by the Commissioner other than the fact that they should be based on Column

II of Tariff B and not Column III. I have already dismissed this argument. Consequently, I will assess costs for these services in accordance with Column III of Tariff B.

[35] Based on these conclusions and working generally within the confines of Column III of Tariff B, I hereby award the Respondents costs in the amount of \$10,500.00. The calculation is attached as Schedule "A" hereto.

FOR THESE REASONS, THE TRIBUNAL ORDERS that

[36] The Commissioner shall pay to the Respondents costs fixed in the amount of \$10,500.00 all inclusive.

DATED at Ottawa, this 5th day of June 2009.

SIGNED on behalf of the Tribunal by the Chairperson

(s) Sandra J. Simpson

SCHEDULE A

Item	Assessable Service	Col. III Unit Range	Number of Units upon which calculation by Tribunal is based	Total
A2	Preparation and filing of response and surreply	4-7	5	\$ 600.00
A3	Preparation and filing of response	2-6	4	\$ 480.00
D10	Preparation for Case Management Conference of November 19, 2007	3-6	4	\$ 480.00
D11	Attending Case Management Conference of November 19, 2007	1-3/hour	2 units for 1 hour	\$ 240.00
D11	Attending Case Management Conference of December 4, 2007	1-3/hour	2 units for 1 hour	\$ 240.00
D13a	Preparation for hearing – Michael Osborne	2-5	4	\$ 480.00
E15	Preparation and filing of written argument	3-7	5	\$ 600.00
G26	Preparation of Bill of Costs	2-6	4	\$ 480.00
Total Fees				\$ 3,600.00
Other				
Taxable Disbursements				\$ 2,775.67
Non-Taxable Disbursements				\$ 60.00
GST on Fees (6%)				\$ 122.40
GST on Fees (5%)				\$ 78.00
GST on Disbursements				\$ 138.78
Minto Roy as Self-Represented Litigant				\$ 3,750.00
Grand Total				\$10,524.85

COUNSEL:

For the applicant:

The Commissioner of Competition

John Syme

For the respondents:

Premier Career Management Group Corp. and Minto Roy

Michael Osborne

Sonny Ingram