Competition Tribunal Tribunal de la Concurrence

Reference: *B-Filer Inc. et al. v. The Bank of Nova Scotia*, 2007 Comp. Trib. 26
File No.: CT-2005-006
Registry Document No.: 0188

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

AND IN THE MATTER OF an application by B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc. for an order pursuant to section 75 of the *Competition Act.*

B E T W E E N :

B-Filer Inc.,
B-Filer Inc. doing business as
GPAY GuaranteedPayment and
Npay Inc.
(applicants)

and

The Bank of Nova Scotia
(respondent)

Decided on the basis of the written record
Before: Dawson J. (presiding), Mr. L. Bolton and Dr. L. Csorgo
Date of Reasons and Order: August 24, 2007
Order and Reasons signed by: Madam Justice E. Dawson, Mr. L. Bolton and Dr. L. Csorgo

PRELIMINARY REASONS FOR ORDER AND ORDER REGARDING COSTS

[1] By confidential reasons for order dated December 20, 2006, the Competition Tribunal dismissed this application. At the request of the parties, the issue of costs was reserved on terms that if costs could not be agreed, the Tribunal would receive written submissions as to costs.

[2] Despite requesting and receiving a number of extensions of time for the purpose of agreeing on costs, the parties were not able to reach agreement as to costs. Written submissions were filed by the respondent, The Bank of Nova Scotia ("Bank" or "Scotiabank"), on April 23, 2007, responsive submissions were filed by the applicants ("B-Filer") on June 8, 2007 (after an extension of time was granted on consent) and reply submissions were filed by the Bank on June 25, 2007.

[3] These are the Tribunal's reasons in respect of those submissions. The Tribunal finds in these reasons that a lump sum should be awarded to the Bank. This lump sum shall be guided by the top end of Column IV of Tariff B of the Federal Courts for two counsel throughout the preparatory phase of the hearing and 2 ½ counsel during the actual hearing. Given the Bank's offer to settle of July 31, 2006, the Tribunal finds that the lump sum award shall be based upon 150% of the top end of Column IV of Tariff B for services rendered after July 31, 2006. The Bank shall prepare a draft bill of costs in accordance with these reasons.

SUMMARY OF THE POSITION OF THE BANK

[4] The Bank relies upon a written offer to settle it made to the applicants on July 31, 2006 to argue that it should have its costs fixed by the Tribunal on a lump sum basis in the amount of $1,994,000.00. This is said to reflect costs on a party-and-party basis to the date of the written offer, with solicitor-and-client costs thereafter. The Bank also asserts that it is entitled to increased costs because: (i) it was wholly successful in this application, (ii) the issues were important and complex, (iii) the amount of work involved in this application was extraordinary, (iv) the conduct of the applicants' witnesses unnecessarily lengthened the duration of the hearing, and (v) the applicants failed to admit during the pre-hearing process that they were operating a Money Services Business. For comparative purposes only, the Bank prepared what are said to be the bills of costs in accordance with Columns III and V of Tariff B of the Federal Courts ("Tariff"). Those bills total, respectively, $867,960.51 and $1, 332,791.70.

SUMMARY OF THE POSITION OF B-FILER

[5] B-Filer argues that costs should be assessed on the basis of Column III of the Tariff and that the Bank has submitted cost calculations for both its lump sum claim and its claim under the Tariff that are highly inflated. In particular, B-Filer asserts that:

(i) Column III is the norm for costs awarded in both the Federal Court and the Tribunal and it would be inconsistent with the Tribunal's cost award in *Commissioner of Competition v. Canada Pipe*, 2005 Comp. Trib. 17 to award costs above Column III of the Tariff.

(ii) The Bank's offer to settle was made just four weeks before the hearing. More importantly, the Bank "did not beat or even meet its offer to settle". Thus, it is argued that there is no basis upon which to award increased costs based on the offer to settle.

(iii) The Bank's lump sum claim is defective because no docket or invoice or other document is provided to particularize or support any of the fees or disbursements that are claimed.

(iv) The Bank's Tariff B Column III calculations are grossly inflated in four ways:

(a) First, Scotiabank has claimed its costs of the application for leave. The leave application was a separate proceeding. B-Filer, not Scotiabank, was successful. If costs of the leave proceeding are awarded, they should be to B-Filer. However, no award of costs was made. Thus, Scotiabank cannot recover its costs of the leave application in this proceeding.

(b) Second, Scotiabank has claimed costs of the motion for interim relief. Although Scotiabank was successful in opposing this motion, the Tribunal made no award as to costs. When the issues in a motion are discrete and do not relate to the merits of the action, costs are awarded separate from and in advance of trial. As affirmed by the Federal Court, where "there will be no need to revisit the determinations made by this Court on the interim injunction decision…it is appropriate to award costs on this motion separate from and in advance of trial." As costs were not awarded by the Tribunal on this motion, it is inappropriate for Scotiabank to claim for costs of this discrete interim motion.

(c) Third, Scotiabank has improperly divided assessable services into smaller discrete tasks and claimed for each task. Scotiabank is only entitled to claim for the assessable service as a whole.

(d) Fourth, Scotiabank has listed as many as four lawyers, with each claiming the maximum amount under the Tariff for each task. Scotiabank is only entitled to claim once in respect of each assessable service, unless specified under the Tariff. Units are not awarded to more than one lawyer except for counsel fees during the hearing. Even then, this is not an automatic award but only occurs when the Tribunal so directs. Scotiabank is thus not entitled to multiply its claim by the number of lawyers that worked on the assessable services.

[6] B-Filer seeks an order that:

(a) Scotiabank is entitled to costs assessed in accordance with Tariff B, Column III, without increase on account of its offer to settle.

(b) Scotiabank shall prepare a fresh Tariff B, Column III calculation upon which its costs shall be assessed if the parties are unable to reach an agreement.

(c) B-Filer is entitled to set off $3,270 in costs in respect of

(i) the contested motion to file an amended Notice of Application in the amount of $1,920

(ii) the contested motion to declare the affidavit of Stanley Sadinsky inadmissible in the amount of $840

(iii) related disbursements in the amount of $510

from costs owing to Scotiabank.

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

(i) Should costs be assessed on the basis of Column III of the Tariff, or on a lump sum basis?

[8] Section 8.1 of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.) confers jurisdiction on the Tribunal to award costs. Such costs are to be awarded in accordance with the provisions governing costs in the *Federal Courts Rules*, SOR/98-106. Pursuant to Rule 400 of the *Federal Courts Rules*, the Tribunal is to have "full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid". Rule 400(3) provides a list of factors the Tribunal may consider in the exercise of its discretion. Rule 400 is attached as a schedule to these reasons.

[9] While costs are wholly discretionary, in the absence of any order otherwise, Rule 407 directs that party-and-party costs are to be assessed in accordance with Column III of the Tariff.

[10] The Tribunal has followed the jurisprudence of the Federal Court to the effect that there must be sound reasons to depart from Rule 407. For example, in *Rona Inc. v. Commissioner of Competition*, 2005 Comp. Trib. 26, the Tribunal wrote at paragraphs 11 and 12:

> [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" (paragraph 11). RONA made various arguments in support of its request for increased costs, which we will now consider.

> [12] The first point the Tribunal may consider under paragraph 400(3)(*a*) of the Rules is the result of the proceeding. Rona was successful. That in itself does not justify an increase but RONA argued that, at the very least, RONA should be awarded costs in accordance with the usual practice. The Commissioner does not contest this fact. The dispute concerning costs turns on the increased assessment.

[11] We reject, however, B-Filer's argument that it would be inconsistent with the "precedent set in *Canada Pipe* for the Tribunal to award Scotiabank costs on a scale that is much higher than the scale applied in *Canada Pipe*, when this case was shorter and simpler". We reject this submission because the Tribunal in *Canada Pipe* itself applied the discretionary factors set out in Rule 400. Section 8.1 of the *Competition Tribunal Act* requires the Tribunal to consider the exercise of discretion in each case and not to simply perform a comparative analysis based upon the *Canada Pipe* decision. Further, the length of the hearing is simply one matter that may be considered. To illustrate, in *Geza v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1401 (T.D.), affirmed [2006] F.C.J. No. 477 (C.A.), an award of costs based on Column V of the Tariff was awarded in respect of the three-day application for judicial review.

[12] Turning to the principles that govern the exercise of discretion, in *Consorzio del Prosciutto di Parma v. Maple Leaf Meats Inc.*, 2002 FCA 417, Mr. Justice Rothstein, then of the Federal Court of Appeal, noted as follows:

> [8] An award of party-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-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-party compensation.
>
> [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. Rule 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.

> [10] The Court, therefore, does have discretion to depart from the Tariff, especially where it considers an award of costs according to the Tariff to be unsatisfactory. Further, the amount of solicitor-client costs, while not determinative of an appropriate party-party contribution, may be taken into account when the Court considers it appropriate to do so. Discretion should be prudently exercised. However, it must be borne in mind that the award of costs is a matter of judgment as to what is appropriate and not an accounting exercise.
>
> [11] I think this approach is consistent in today's context with the observations of Nadon J. (as he then was) in Hamilton Marine and Engineering Ltd. v. CSC Group Inc. (1995), 99 F.T.R. 285 at paragraph 22:
>
> > I indicated to counsel during the hearing that there was no doubt that, in most cases, the fees provided in Tariff B were not sufficient to fully compensate a successful party. I also indicated to counsel during the hearing that, in my view, the Tariff necessarily had to remain the rule and that an increase of tariff fee was the exception. By that I mean that the discretion given to the Court to increase the tariff amounts pursuant to rule 344(1) and (6) of the Federal Court Rules was not to be exercised lightly. Put another way, the fact that the successful party's legal costs were far superior to the amounts to which that party was entitled under the Tariff, was not in itself a factor for allowing an increase in those fees.

[13] As for lump sum awards of costs, we endorse the view of Mr. Justice Hugessen in *Barzelex Inc. v. EBN Al Waleed*, [1999] F.C.J. No. 2002, where at paragraph 11 he wrote, "[i]n my view, as a matter of policy the Court should favour lump sum orders. It saves time and trouble for the parties and it is a more efficient method for them to know what their liability is for costs." 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".

[14] Having said that, when setting costs on a lump sum basis, the Tribunal is not to take a "shot in the dark". Rather, costs must be determined on a principled basis. See: *CCH Canadian Ltd. v. Law Society of Upper Canada*, (2004), 37 C.P.R. (4th) 323 (F.C.). We accept that when "fixing lump sum fees [it is appropriate] to be guided by Tariff B which operates on the principle of allowing a block of time within the range of hours set out in the various columns". See: *Donaghy v. Scotia Capital Inc.*, 2007 FC 598 at paragraph 7.

[15] Turning to the fixing of a lump sum award, we are satisfied that a number of factors warrant an award of increased costs. In our view, the lump sum should be guided by the top of Column IV of the Tariff for two counsel throughout the preparatory phase of the case and 2 ½ counsel during the actual hearing. The additional one half counsel fee for the hearing reflects the fact that all parties had at least three counsel present throughout the hearing, and we are satisfied that the volume and complexity of the material reasonably required that level of attendance. We deal later with the effect of the Bank's offer to settle.

[16] The factors that in our view warrant a lump sum award based upon the top end of Column IV of the Tariff for two counsel are as follows.

[17] First, the Bank was wholly successful in this application as B-Filer did not establish any of the required elements it needed in order to succeed on its application under section 75 of the *Competition Act*, R.S.C. 1985, c. C-34 ("Act"). Additionally, the evidence of all of the Bank's witnesses was accepted by the Tribunal.

[18] Second, there were numerous important and complex issues raised in the proceeding related to the regulatory regime within which chartered banks operate in Canada and the United States. The issues included determining compliance with the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 (PCMLTF Act) and its associated Regulations, SOR/2002-184; the Financial Transactions and Reports Analysis Centre interpretive guidelines as they related to the PCMLTF Act; the Office of the Superintendent of Financial Institutions guidelines; and Rule E2 of the Canadian Payments Association. The Tribunal received the evidence of four expert witnesses on these issues. This was also the first case in which the Tribunal was required to consider paragraph 75(1)(*e*) of the Act.

[19] Third, the work required was substantial, both in respect of the preparation for the hearing and the hearing itself. The case was actively case managed with a compressed schedule for all discoveries, the provision of expert reports and the like. To illustrate, 11 months elapsed from the date of the order granting leave to the date of final argument. As in *Fraser River Pile & Dredge Ltd. v. Empire Tug Boats Ltd.*, [1995] F.C.J. No. 740 (T. D.), we find that the extensive preparation required for such an efficient hearing would not be properly compensated by the existing tariff structure. By way of example, the top end of Column III of the Tariff would permit the Bank seven hours for the preparation of its defence at $120 per hour, for a fee of $840. Given the complexity of the matter and the compressed timeline to hearing, it was in our view necessary for both of the Bank's two lead counsel, Mr. Morrison and Ms. Constantine, to be actively involved in the preparation of the case. Double counsel fees at the top of Column IV to the Tariff permit 18 hours at $120 per hour for a fee of $2,160. This is far less than the 106.2 hours said to have been expended by a number of lawyers on the Bank's behalf, and far less than the sum of $37,884.33 claimed for the preparation of the defence ($37,884.33 being 66% of the solicitor client fees of $57,400.50).

[20] Finally, until its opening statement at the commencement of the hearing, B-Filer did not concede that it was operating a Money Services Business within the definition of the regulations enacted pursuant to the PCMLTF Act. Because of the impact of this admission upon the Bank's record keeping obligations, we accept that this failure to make a timely admission impacted significantly upon the Bank's preparation for hearing. This is a factor that goes to increase the costs.

[21] Conversely, while Mr. Grace was at times an evasive witness, we reject the Bank's submission that his conduct by itself unnecessarily lengthened the duration of the hearing so as to warrant an increase in costs on this ground.

[22] In summary, a lump sum award guided by double counsel fees at the top of Column IV for the preparation of the hearing, and an award of counsel fees for 2 ½ counsel during the hearing itself (again guided by the top of Column IV) strikes the appropriate balance. In our view, it bears a reasonable relationship to the actual cost of litigation (within the strictures of the Tariff) and compensates the successful party without unduly burdening the unsuccessful party. See: *AB Hassle v. Genpharm Inc.*, (2004) 34 C.P.R. (4th) 18 at paragraph 15.

(ii) The effect of the Bank's offer to settle

[23] By letter dated July 31, 2006 the Bank made the following offer of settlement:

> Scotiabank offers to settle the Competition matter and the outstanding Alberta Civil action, including the appeal from the Decision of Justice Lefsrud, and all other matters in dispute between the Applicants and Scotiabank on the following basis.
>
> Scotiabank will pay to the Applicants, collectively, the total sum of $250,000, inclusive of all damages, interest, and costs, in exchange for a full and final release in a form satisfactory to Scotiabank. The Applicants shall pay to Scotiabank the costs as assessed and fixed by Justice Lefsrud in the Alberta Civil Action.
>
> This offer shall remain open until one minute after the commencement of the hearing before the Competition Tribunal scheduled to begin on August 28, 2006 (or such other date that the matter begins, if the schedule is changed), following which it is revoked, unless revoked earlier, by written notice.
>
> Scotiabank considers this to be a formal offer and will rely on it in the event that it is awarded costs of the proceedings before the Competition Tribunal.

[24] The Bank seeks costs on a solicitor and client basis for services performed after the making of this offer.

[25] B-Filer responds that because the Alberta action continues, the Bank did not beat, or even meet, its offer to settle and that an offer to settle that goes beyond the claim in respect of which judgment has been given is of no advantage to the offering party (relying upon the authority of *Spencer v. Soanes*, [1994] B.C.J. No. 2290 (S.C.) at paragraph 6).

[26] Further, B-Filer argues that an offer to settle made late in the proceedings does not justify the imposition of solicitor-client or double costs.

[27] In response, the Bank argues that the *Spencer* decision is distinguishable because there the offer involved an additional proceeding against a third party. The Bank notes that in *Apotex Inc. v. Wellcome Foundation Ltd.*, [1998] F.C.J. No. 1736 (T.D.) affirmed [2001] F.C.J. No. 37 (C.A.) effect was given by the Federal Court to an offer that included related proceedings that were in both the Federal Court and the Ontario Court (General Division). In any event, because the Alberta action has been dormant for almost 2 years (B-Filer's appeal from the order refusing it an interim injunction having been dismissed for want of prosecution) the Bank says that it is "disingenuous for [B-Filer] to assert that the Alberta action continues".

[28] As to the timing of the offer, the Bank points out that it complied with the time limit in the applicable Federal Courts' Rule. Further, the Bank argues that the timing of the offer must be viewed in the context of the timeframe in which this matter proceeded, and that at the time the Bank made its offer, examinations for discovery had only just been completed, productions were still arriving from B-Filer, and expert reports and will-say statements were being delivered by the Bank.

[29] The starting point for consideration of the submissions regarding an offer to settle is *Federal Courts Rules* 420(2) and (3). They provide:

420(2) Unless otherwise ordered by the Court and subject to subsection (3), <u>where a defendant makes a written offer to settle,</u>	420(2) Sauf ordonnance contraire de la Cour et sous réserve du paragraphe (3), <u>si le défendeur fait au demandeur une offre écrite de règlement,</u> les dépens sont alloués de la façon suivante :
(*a*) if the plaintiff obtains a judgment less favourable than the terms of the offer to settle, the plaintiff is entitled to party-and-party costs to the date of service of the offer and the defendant shall be entitled to costs calculated at double that	*a*) si le demandeur obtient un jugement moins avantageux que les conditions de l'offre, il a droit aux dépens partie-partie jusqu'à la date de signification de l'offre et le défendeur a droit, par la suite et jusqu'à la date du jugement

rate, but not double disbursements, from that date to the date of judgment; or	au double de ces dépens mais non au double des débours;
(*b*) <u>if the plaintiff fails to obtain judgment, the defendant is entitled to party-and-party costs to the date of the service of the offer and to costs calculated at double that rate, but not double disbursements, from that date to the date of judgment.</u>	*b*) <u>si le demandeur n'a pas gain de cause lors du jugement, le défendeur a droit aux dépens partie-partie jusqu'à la date de signification de l'offre et, par la suite et jusqu'à la date du jugement, au double de ces dépens mais non au double des débours.</u>
<u>Conditions</u> (3) Subsections (1) and (2) do not apply unless the offer to settle (*a*) is made at least 14 days before the commencement of the hearing or trial; and (*b*) is not withdrawn and does not expire before the commencement of the hearing or trial. [underlining added]	<u>Conditions</u> (3) Les paragraphes (1) et (2) ne s'appliquent qu'à l'offre de règlement qui répond aux conditions suivantes : *a*) elle est faite au moins 14 jours avant le début de l'audience ou de l'instruction; *b*) elle n'est pas révoquée et n'expire pas avant le début de l'audience ou de l'instruction. [Non souligné dans l'original.]

[30] The Bank, in its reply submissions, correctly observes that the Federal Court has applied Rule 420 in cases where an offer to settle has extended to other proceedings. However, in *Apotex*, relied upon by the Bank, the successful party asserted that the claims advanced in the Ontario proceeding could no longer be asserted in the face of the Federal Court's judgment. In the present case, the Tribunal has previously held that "the issues before the Tribunal are not the same as the issues before the Alberta court" (see: *B-Filer Inc. v. Bank of Nova Scotia*, 2005 Comp. Trib. 31 at paragraph 13). It is therefore possible, though perhaps unlikely, that the Alberta proceeding could still be pursued. For that reason, plus the timing of the offer, we are not inclined to award the Bank double party-and-party costs under Rule 420. Nor is this a case where B-Filer's conduct would justify an award of solicitor-client costs.

[31] Nonetheless, a written offer to settle is a relevant matter that may be considered pursuant to Federal Courts Rule 400(3)(*e*). In our view, the Bank's offer to settle was more favourable than the result obtained by B-Filer, the offer contained a reasonable element of compromise, and the offer was made when the parties were still incurring fees in respect of the preparation for the hearing. We note parenthetically that the Tribunal's scheduling order following the June 15, 2006 case management conference required documents to be produced by B-Filer by June 22, 2006, the Bank was to file its expert reports on July 27, 2006 and discoveries were to have been completed by July 28, 2006. B-Filer was to file its reply expert reports and reply will-say statements before August 14, 2006. During the hearing there was discussion to the effect that the parties had extended at least some of these deadlines.

[32] In our opinion, these factors warrant additional costs such that the Bank should be entitled to a lump sum award that is based upon 150% of the top end of Column IV of the Tariff for services rendered after July 31, 2006. For certainty, this would apply to increase the award of the double counsel fee and the 2 ½ counsel fee at hearing by 150% after July 31, 2006.

(iii) The alleged failure of the Bank to particularize or support any of the claimed fees or disbursements

[33] B-Filer asserts that "[i]n a case such as this, where the costs claimed are significant, particulars are especially necessary to assess the reasonableness of the costs claimed". This statement is generally correct. However, the Bank's claim for costs must be seen in the context that the Tribunal hoped that the parties could reach an agreement on at least some of the issues related to costs. For that purpose, extensions of time were granted to the parties at their request. In that context, the Bank submits that:

- the bills of costs provided under the Tariff are submitted for guidance only, the Bank is seeking to have the Tribunal fix costs;

- B-Filer's counsel requested and received a copy of every invoice for expert services claimed by Scotiabank;

- the Bank provided B-Filer with information with respect to hourly rates and year of lawyer call. B-Filer never requested further detail, including dockets, in order to analyze the bills of costs the Bank prepared and submitted.

[34] Given the facts that the parties were to attempt to reach some agreement on costs, the Bank provided a bill of costs to B-Filer, and B-Filer sought and obtained the further supporting information it required, we give little weight to this complaint. We are supported, in this view, by the additional facts that our lump sum cost award will be guided by the Tariff (see *Donaghy*, above) and that the Bank's claim for fees and disbursements is supported by the affidavit of a senior law clerk. There was no cross-examination upon the Bank's affidavit.

(iv) The alleged inflation of the Bank's Tariff B Column III calculations

[35] The four respects in which the Bank's bill of costs is said to be inflated are set out above at paragraph 5 in subparagraph 4. Each will be considered in turn.

(a) The claim for costs in respect of the leave application

[36] The Bank has claimed costs for the leave application. B-Filer argues that the leave application was a separate proceeding in which it was successful. Therefore, any costs of that proceeding should be to B-Filer and not to the Bank. The Bank responds that: all the work that was done for the leave application by it was used later in the proceeding; success was divided on the leave application because B-Filer did not obtain leave under section 77 of the Act; and that because the order granting leave was silent on the issue of costs, by implication costs were left for the main hearing (reliance is placed upon *Merck & Co. v. Apotex Inc.*, [2002] F.C.J. No. 1637 at paragraph 23).

[37] The starting point for consideration of this issue is the order granting leave. It was open to the Tribunal to award costs on the leave application and indeed the Bank sought an order dismissing the leave application with costs.

[38] Turning to the order of the Tribunal, the order allowed the leave application under section 75 of the Act and dismissed the leave application under section 77 of the Act. The order was silent as to costs.

[39] Given the request made by the Bank to the Tribunal for costs, the Tribunal's jurisdiction to award costs, the divided success on the leave application, and the Tribunal's failure to award costs, it appears to us that the Tribunal intended each party to bear its own costs on the leave application. In any event, in the exercise of our own discretion taking into account the divided success, we too reach the same conclusion in respect of the leave application.

[40] Subject to one caveat, no costs will be awarded to any party in respect of the leave application. The one caveat is that if, for example, an affidavit was filed by the Bank in respect of the leave application and the affidavit was subsequently used and filed at the main hearing, a claim for costs may be advanced.

[41] We note in leaving this issue that such result is consistent with the principle cited in Orkin, *The Law of Costs*, at s. 105.7 (looseleaf (Aurora: Canada Law Book Inc., 2000)) that if a matter is disposed of on a motion, with no mention of costs "it is as though the judge disposing of the matter had said that he saw fit to make no order as to costs." See also *Kibale v. Canada (Secretary of State)*, [1991] 2 F.C. D-9. While a contrary conclusion was reached in the *Merck* case, relied upon by the Bank, there at paragraphs 22 and 23 Mr. Justice MacKay limited his comments to the context of proceedings for contempt.

(b) The costs of the motion for interim relief

[42] B-Filer argues that because the interim order in respect of its claim for relief was silent with respect to costs, it is inappropriate for the Bank to claim costs for the motion for interim relief. The Bank again responds that the costs of the motion were implicitly left for the Tribunal hearing the main application.

[43] This issue is easily dealt with because the Tribunal's order dismissing the application for interim relief expressly stated in the preamble "[a]nd upon observing that neither party has applied for costs". No costs were awarded by the Tribunal because no costs were sought. It is an error in law to award costs to a successful party where costs have not been requested. See: *Balogun v. Canada*, 2005 FCA 350 (F.C.A.).

[44] It follows, subject to the following comment, that no party is entitled to costs in respect to the motion for interim relief.

[45] The Bank asserts that it is justified in claiming time insofar as it related to the application for interim relief as some of the affidavits prepared were used as part of the main application. For example, the affidavit of Christopher Mathers, which was part of the Bank's affidavit material filed in response to the application for interim relief, was subsequently relied upon by the Bank at the hearing. Mr. Mathers testified as an expert witness at the main hearing.

[46] Fees and disbursement in respect of Mr. Mathers may be claimed by the Bank because he testified at the main hearing. The Bank may also claim costs associated with the preparation of affidavit material filed in response to the application for interim relief if those affidavits were used and filed at the main hearing.

(c) The Bank's alleged improper division of assessable services into smaller discrete tasks and
(d) The Bank's alleged practice of having multiple lawyers each claim the maximum amount under the Tariff

[47] With respect to these matters, it is sufficient for us to direct that the Bank prepare a bill of costs in accordance with the top of Column IV of the Tariff. Once this and B-Filer's responsive submissions are received, this information, together with the other bills of costs we have received, will form the basis of our award of a lump sum for costs.

(v) Other Matters Raised by B-Filer

[48] B-Filer gives examples of what it says are the Bank's excessive cost claims. Some have been dealt with above. Some have not. We give the following directions in respect of matters not dealt with above.

(a) Professor Sadinsky's affidavit

[49] B-Filer says that 13 units of assessment are claimed in respect of Professor Sadinsky's affidavit. No units should be claimed because the Tribunal refused to receive such evidence for the reasons given at paragraphs 250 through 262 of its confidential reasons for order. To the extent that such affidavit may have been used on the motion for interim relief, as noted above, no costs are to be awarded in respect of such motion.

(b) Alex Todd and David Stafford

[50] B-Filer says that because these witnesses were not called at the hearing, no claim for costs can be advanced in respect of these witnesses. We disagree in respect of Mr. Todd.

[51] Alex Todd was to testify as an expert witness. The affidavit in support of the Bank's claim for costs contains the following relevant evidence:

> 41. Alex Todd provided expert evidence in a number of affidavits all of which were served on the Applicants. Alex Todd was an expert in internet security. I am advised by Ms. Constantine, and verily believe, that is was necessary to retain Mr. Todd in view of the evidence provided by Mr. Iuso throughout his various affidavits with respect to the purported security associated with the UseMyBank service. The Applicants ultimately had an expert qualified to testify on issues of security, namely, Jack Bensimon. I am advised by Ms. Constantine, and verily believe, that, because Mr. Bensimon's evidence was so totally diminished on cross-examination, it was unnecessary to call Alex Todd to give evidence as part of the defence, thereby saving considerable hearing time.

[52] We accept this unchallenged evidence. We further accept that in order to prepare for the hearing it was necessary for the Bank to retain an expert on internet security. We note that B-Filer's expert Mr. Bensimon was effectively cross-examined (see our confidential reasons at paragraphs 166 through 168). It makes no sense for B-Filer to argue that reasonable fees and disbursements in respect of Mr. Todd could only be claimed if he was called as a witness after their own expert's evidence was so thoroughly diminished on cross-examination. Fees and disbursements in respect of Mr. Todd may be claimed by the Bank.

[53] With respect to Mr. Stafford, the Bank's evidence and submissions are silent on his evidence. There is, therefore, no basis upon which we can properly exercise our discretion in respect of fees and disbursements in respect of Mr. Stafford. No amount shall be claimed.

(c) Case conference

[54] B-Filer complains that it was successful on a case conference where the Bank unsuccessfully opposed its request to reschedule the hearing. In the result, B-Filer submits that 16 units of assessment should be deducted from the Bank's claim.

[55] Such submission ignores the fact that the Tribunal is not sitting as an assessment officer, but rather will make a lump sum award of costs. Generally, the successful party before the Tribunal will be entitled to costs in respect of attendances during the case management process, unless by its own unreasonable conduct the case management process was protracted. If so advised, the parties may address further submissions on this case conference.

(d) Stan Wilson

[56] Stan Wilson was another expert not called by the Bank at the hearing. B-Filer says no fees or disbursement should be recovered in respect of his proposed testimony. The expert fee charged by Mr. Wilson was $1,130.49.

[57] The Bank's unchallenged evidence is as follows:

> 42. There is a small invoice from Stan Wilson, an expert in internet security. I am advised by Lisa Constantine, and verily believe, that Mr. Wilson's advice was necessary to the defence of this matter, in that it was required and obtained on short notice in order to respond to an affidavit from Joseph Iuso. I am further advised by Ms. Constantine, and verily believe, that, while Mr. Wilson was not called to testify, the disbursement was nevertheless reasonable.

[58] We accept this evidence. Reasonable fees and disbursements in respect of Mr. Wilson ought to be recovered by the Bank.

(e) The costs of B-Filer's motion to amend

[59] The motion allowing B-Filer to amend its application was allowed and in such order B-Filer was awarded costs. B-Filer asks that those costs be assessed based upon Column III of the Tariff. Such costs should, in our view, be assessed on that basis because an order for costs issued without any variation of rule 407 is *res judicata* with respect to the scale of costs (See *Merck & Co. v. Apotex Inc.*, [2006] F.C.J. No. 1491 (F.C.A.)). B-Filer is entitled to set-off those costs.

(vi) Other Matters

[60] There are a number of matters that the parties either jointly or separately have not addressed. They include:

1. The Bank's claim for disbursements in respect of Ryan Woodrow.

2. The quantum of any costs thrown away as awarded in the Tribunal's order of December 1, 2005 relating to the *nunc pro tunc* filing of the Bank's evidence.

3. The reserved costs in respect of the Bank's motion to amend its response and B-Filer's motion to declare the affidavit of Mr. Sadinsky to be inadmissible.

[61] These issues may be dealt with in accordance with the following order.

THEREFORE, THE TRIBUNAL ORDERS THAT:

[62]

1. The issue of costs remains reserved.

2. The Bank shall prepare a further draft bill of costs in accordance with these reasons, such bill shall be served and filed within 14 days of the date of this order.

3. The Bank may accompany such bill with further written submissions, not to exceed 10 pages in length.

4. Thereafter, B-Filer may serve and file responsive submissions, not to exceed 10 pages in length, within 14 days after the service of the Bank's submissions.

5. The Bank may serve and file reply submissions, not to exceed five pages in length, within 7 days after the service of B-Filer's responsive submissions.

DATED at Ottawa, this 24th day of August, 2007.

SIGNED on behalf of the Tribunal by the panel members

(s) Eleanor R. Dawson

(s) Lorne R. Bolton

(s) Lilla Csorgo

SCHEDULE

[63] Rule 400 of the *Federal Courts Rules*:

400(1) 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.	400(1) La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.
Crown	La Couronne
(2) Costs may be awarded to or against the Crown.	(2) Les dépens peuvent être adjugés à la Couronne ou contre elle.
Factors in awarding costs	Facteurs à prendre en compte
(3) In exercising its discretion under subsection (1), the Court may consider	(3) Dans l'exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l'un ou l'autre des facteurs suivants :
(*a*) the result of the proceeding;	*a*) le résultat de l'instance;
(*b*) the amounts claimed and the amounts recovered;	*b*) les sommes réclamées et les sommes recouvrées;
(*c*) the importance and complexity of the issues;	*c*) l'importance et la complexité des questions en litige;
(*d*) the apportionment of liability;	*d*) le partage de la responsabilité;
(*e*) any written offer to settle;	*e*) toute offre écrite de règlement;
(*f*) any offer to contribute made under rule 421;	*f*) toute offre de contribution faite en vertu de la règle 421;
(*g*) the amount of work;	*g*) la charge de travail;
(*h*) whether the public interest in having the proceeding litigated justifies a particular award of costs;	*h*) le fait que l'intérêt public dans la résolution judiciaire de l'instance justifie une adjudication particulière des dépens;
(*i*) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;	*i*) la conduite d'une partie qui a eu pour effet d'abréger ou de prolonger inutilement la durée de l'instance;

(*j*) the failure by a party to admit anything that should have been admitted or to serve a request to admit;

(*k*) whether any step in the proceeding was

(i) improper, vexatious or unnecessary, or
(ii) taken through negligence, mistake or excessive caution;

(*l*) whether more than one set of costs should be allowed, where two or more parties were represented by different solicitors or were represented by the same solicitor but separated their defence unnecessarily;

(*m*) whether two or more parties, represented by the same solicitor, initiated separate proceedings unnecessarily;
(*n*) whether a party who was successful in an action exaggerated a claim, including a counterclaim or third party claim, to avoid the operation of rules 292 to 299; and

(*o*) any other matter that it considers relevant.

Tariff B

(4) The Court may fix all or part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, any assessed costs.

j) le défaut de la part d'une partie de signifier une demande visée à la règle 255 ou de reconnaître ce qui aurait dû être admis;
k) la question de savoir si une mesure prise au cours de l'instance, selon le cas :
(i) était inappropriée, vexatoire ou inutile,
(ii) a été entreprise de manière négligente, par erreur ou avec trop de circonspection;
l) la question de savoir si plus d'un mémoire de dépens devrait être accordé lorsque deux ou plusieurs parties sont représentées par différents avocats ou lorsque, étant représentées par le même avocat, elles ont scindé inutilement leur défense;
m) la question de savoir si deux ou plusieurs parties représentées par le même avocat ont engagé inutilement des instances distinctes;
n) la question de savoir si la partie qui a eu gain de cause dans une action a exagéré le montant de sa réclamation, notamment celle indiquée dans la demande reconventionnelle ou la mise en cause, pour éviter l'application des règles 292 à 299;
o) toute autre question qu'elle juge pertinente.

Tarif B

(4) La Cour peut fixer tout ou partie des dépens en se reportant au tarif B et adjuger une somme globale au lieu ou en sus des dépens taxés.

Directions re assessment

(5) Where the Court orders that costs be assessed in accordance with Tariff B, the Court may direct that the assessment be performed under a specific column or combination of columns of the table to that Tariff.

Directives de la Cour

(5) Dans le cas où la Cour ordonne que les dépens soient taxés conformément au tarif B, elle peut donner des directives prescrivant que la taxation soit faite selon une colonne déterminée ou une combinaison de colonnes du tableau de ce tarif.

Further discretion of Court

(6) Notwithstanding any other provision of these Rules, the Court may

(*a*) award or refuse costs in respect of a particular issue or step in a proceeding;

(*b*) award assessed costs or a percentage of assessed costs up to and including a specified step in a proceeding;

(*c*) award all or part of costs on a solicitor-and-client basis; or

(*d*) award costs against a successful party.

Autres pouvoirs discrétionnaires de la Cour

(6) Malgré toute autre disposition des présentes règles, la Cour peut :

a) adjuger ou refuser d'adjuger les dépens à l'égard d'une question litigieuse ou d'une procédure particulières;

b) adjuger l'ensemble ou un pourcentage des dépens taxés, jusqu'à une étape précise de l'instance;

c) adjuger tout ou partie des dépens sur une base avocat-client;

d) condamner aux dépens la partie qui obtient gain de cause.

Award and payment of costs

(7) Costs shall be awarded to the party who is entitled to receive the costs and not to the party's solicitor, but they may be paid to the party's solicitor in trust.

Adjudication et paiement des dépens

(7) Les dépens sont adjugés à la partie qui y a droit et non à son avocat, mais ils peuvent être payés en fiducie à celui-ci.

COUNSEL:

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Jennifer Cantwell

For the respondent:

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