COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: *Kilrich Industries Ltd. v. Halotier*
2008 YKCA 04

Date: 2008 02 29
Docket: YU 525
Registry: Whitehorse

Between:

Kilrich Industries Ltd.

Respondent
(Plaintiff)

And

Henri Halotier

Appellant
(Defendant)

And

Minister of Justice

Intervenor

Before: The Honourable Mr. Justice J.Z. Vertes

Appearances:

R. J.F. Lepage	Counsel for the Appellant
S.L. Dumont	Counsel for the Respondent
Z. Brown	Counsel for the Intervenor Minister of Justice
Place and Date of Hearing:	Whitehorse, Yukon 10 January 2008
Place and Date of Judgment:	Whitehorse, Yukon February 29, 2008

JUDGMENT ON COSTS

[1] On September 18, 2007, this court issued reasons for judgment in this case (see 2007 YKCA 12). The issues on the appeal concerned the scope of French language rights in the Yukon courts. The court, as part of the orders made, directed that the intervenor, the Minister of Justice for Yukon, pay the special costs of both the appellant and the respondent for the appeal and the trial below. The reasons for this

order are made clear in the earlier judgment. The Chief Justice has designated me to conduct the assessment of those costs.

[2] Special costs are provided by Rule 61 of the *Yukon Court of Appeal Rules* (2005):

61(1) The court or a justice may order that costs be assessed as special costs.

(2) If an order is made under subrule (1), the registrar must allow those fees that the registrar considers were proper or reasonably necessary to conduct the proceeding to which the fees related and, in exercising that discretion, the registrar must consider all of the circumstances, including:

(a) the complexity of the proceeding and the difficulty or novelty of the issues involved;
(b) the skill, specialized knowledge and responsibility required of the solicitor
(c) the amount involved in the proceeding;
(d) the time reasonably expended in conducting the proceeding;
(e) any party's conduct that tended to shorten or unnecessarily lengthen the duration of the proceeding;
(f) the importance of the proceeding to the party whose bill is being assessed and of the result obtained; and
(g) the benefit, to the party whose bill is being assessed, of the services rendered by the solicitor.

61(1) La Cour ou un juge peut rendre une ordonnance accordant des dépens spéciaux.

(2) Si une ordonnance de dépens spéciaux est rendue, le registraire alloue les frais qui, à son appréciation, étaient justifiés ou raisonnablement nécessaires pour la conduite de l'instance compte tenu de toutes les circonstances, notamment:

a) la complexité, la difficulté ou la nouveauté des questions en litige;
b) l'habileté, la spécialité et le degré de responsabilité exigés de l'avocat:
c) le montant en cause;
d) le temps raisonnable qu'il a fallu consacrer à la conduite de l'instance;
e) la conduite d'une partie qui a eu pour effet d'abréger ou de prolonger inutilement la durée de l'instance;
f) l'importance que revêt l'instance pour la partie don't la facture fait l'objet d'une liquidation et l'importance de la décision rendue;
g) l'avantage, pour la partie don't la facture fait l'objet d'une liquidation, des services rendus par l'avocat.

[3] The jurisprudence dealing with special costs recognizes that special costs are meant to provide something close to full indemnity, but not quite: *Campbell River Woodworkers & Builders' Supply (1966) Ltd. v. British Columbia* (2004), 22 B.C.L.R. (4th)210 (C.A.). They may not encompass all legal costs actually incurred by the client but they should encompass all reasonably incurred costs. They are what a reasonable client would pay a reasonably competent solicitor for performing the work described in the solicitor's bill. As stated by Bouck J. in *Bradshaw Construction Ltd. v. Bank of Nova Scotia* (1991), 54 B.C.L.R. (2d) 309 (S.C.), affirmed [1992] B.C.J. No. 1657 (C.A.), at p.319:

> A taxation of Special Costs is objective in nature while a taxation under the *Legal Profession Act* is subjective. Put another way, a losing party should not have to pay for the cost of the most experienced and qualified lawyer if that kind of service was not necessary. However, in most instances, a bill for Special Costs will usually be about 80% to 90% of a similar bill assessed under the *Legal Profession Act.*

[4] The objective reasonableness of a special costs award is emphasized in Rule 61(2) which states that the fees allowed must be "proper or reasonably necessary to conduct the proceeding".

[5] The assessment of costs in this case is complicated by the fact that the appellant was self-represented for the initial trial proceedings and then represented by counsel for the appeal. This raises issues concerning the extent of costs recovery to which a self-represented litigant is entitled.

Appellant's Claim:

[6] The appellant's claim must be divided between those costs claimed by M. Halotier personally and those costs claimed by his counsel.

[7] These proceedings commenced by the issuance of a Writ and Statement of Claim on December 17, 2003. The claim was a debt action on an unpaid contract. Summary judgment was granted in favour of the respondent on August 24, 2004. M. Halotier launched an appeal from that judgment with the pro-bono assistance of the executive director of the Yukon Public Legal Education Association, Mr. Robert Pritchard. Throughout this time the appellant was self-represented.

[8] M. Halotier first communicated about this case with his appeal counsel, M. Lepage, in April, 2006. M. Lepage began work on the file in June, 2006.

[9] In October, 2006, M. Halotier obtained a grant from the Court Challenges Program of Canada in the amount of $35,000.00. The funds were to assist M. Halotier to fund the appeal. A condition of the financing agreement requires M. Halotier to repay the Program upon demand:

> 14. Si les dépens sont octroyés au demandeur/à la demanderesse, soit par la voie d'un jugement ou à titre de condition prescrite lors d'un règlement à l'amiable, le Programme pourra à sa discrétion soustraire lesdits dépens du montant payable au demandeur/à la demanderesse pour les frais encourus dans le cadre de la cause.

[10] I was told by M. Lepage that the director of the Program has made demand for reimbursement (although no formal evidence of this was provided).

[11] M. Halotier claims a total of $29,171.40. This is made up of several different components:

(a) The sum of $19,630.00 is claimed as representing the value of M. Halotier's time expended on the trial and the appeal. M. Halotier is a building contractor, in business for himself, and he says that he normally charges $65.00 per hour for his work. He also says that he spent a total of 302 hours on this matter from January 30, 2004, to September 27, 2007.

(b) The sum of $2,854.00 is claimed for the costs associated with travel in relation to this case. M. Halotier resides outside of Whitehorse on a property adjacent to the Alaska highway.

(c) The sum of $332.40 is also claimed as the cost of accommodation for M. Lepage during a trip to Whitehorse in June, 2007.

(d) The sum of $400.00 is claimed as a disbursement for the cost of a transcript of the trial.

(e) The sum of $5,250.00 is claimed as payment for the assistance of two interpreters (as well as the additional sum of $315 for GST).

(f) The sum of $390.00 is claimed for M. Halotier's time and the assistance of an interpreter at the originally scheduled costs hearing in December (adjourned at the intervenor's request).

[12] The appellant's counsel submitted a claim totalling $95,039.93. This is broken down as follows:

(a) The sum of $88,770.00 is claimed as fees. This includes all work from June 12, 2006 to January 10, 2008 (the date of this hearing). The total is based on 253.7 hours of work at M. Lepage's fee of $350.00 per hour for work in this area of the law.

(b) There are also claimed the further amounts of $5,668.36 as disbursements and $601.57 as tax on fees and disbursements.

[13] The total amount claimed on behalf of the appellant therefore is $124,211.33.

Respondent's Claim:

[14] The respondent, Kilrich Industries Ltd., claims a total of $78,134.00. This is made up of the following items:

(a) The sum of $69,362.50 as solicitor fees (up to the date of this hearing). The fees are not broken down by hours nor by a set rate since different lawyers worked on the file from 2003 to the present.

(b) The sum of $3,966.34 is claimed for disbursements along with $4,805.16 as tax payable.

The Intervenor's Position:

[15] The intervenor advanced a number of arguments to limit the extent of special costs to be awarded. They can be summarized under four broad headings.

[16] First, the costs claimed are out of all proportion to the amount at stake. This action started as a claim by Kilrich Industries to recover the sum of $13,632.43 outstanding on a contract for the provision of building supplies. The judgment issued

at trial totalled $20,346.00 (including claim, interest and costs). The total amounts claimed, as special costs, argued the intervenor's counsel, are grossly disproportionate to the amount in issue in the original litigation.

[17] Second, the costs claimed are excessive. The intervenor's counsel submitted that the respondent's costs have been run up due to unproductive effort by its counsel at various periods during the course of this litigation and by steps taken that only protracted the proceedings. With respect to the appellant's costs, the intervenor submitted that there was no need to retain someone of M. Lepage's expertise and certainly no need to pay the hourly rate set by M. Lepage.

[18] Third, the intervenor argued that the parties are themselves responsible for not coming to a settlement of this case before the appeal. Here, the intervenor refers to efforts made by it to resolve the language issues at the heart of the appeal and what it calls the self-interested positions taken by the parties (vis-à-vis the monetary dispute between them) that prevented a settlement.

[19] Finally, the intervenor submitted that M. Halotier's self-representation claim should be dismissed or at least discounted because (a) there was no specific direction by the court to authorize it; (b) the bulk of the costs claimed overlap with the time when the appellant was represented by counsel; and (c) a discount should be made for the funding received from the Court Challenges Program.

[20] An assessment of special costs requires a consideration of all of the circumstances, including the criteria stipulated in Rule 61(2). I will therefore conduct my analysis with reference to those criteria. I will also discuss the issues relating to the self-representation costs claimed by the appellant.

Analysis:

1. *The complexity of the proceeding and the difficulty or novelty of the issues involved.*

[21] As noted above, this case started out as a simple contract debt. It quickly became much more than that because of M. Halotier's desire to use French in these proceedings and, what this court's judgment called, the justice system's systemic failure to recognize the scope of the appellant's right to use French in the Yukon

courts. So while this action started out simply enough, by the time it reached this court it raised numerous constitutional and statutory issues regarding language rights. It was therefore complex and difficult.

2. *The skill, specialized knowledge and responsibility required of the solicitor.*

[22] With respect to this second criterion, it is necessary to draw a distinction between the respective positions of the appellant and respondent.

[23] While the case was simply a debt action in the court below the appellant found himself confronting the same problems that most self-represented litigants find: a lack of familiarity with court procedures and ignorance of the rules of evidence. But there is no reason to think he could not have adequately represented himself provided of course that he could use his language. The fact that he could not, and that the rules of court and other documents were not available to him in French, made his task that much more difficult.

[24] When the matter came before this court I think it is fair to say that it would have been extremely difficult for the appellant, or any self-represented litigant working in any language, to adequately outline and articulate the constitutional and legal arguments. It was therefore essential that he obtain the services of legal counsel and particularly counsel who is conversant with the jurisprudence regarding language rights.

[25] There can be no question that M. Lepage is such a counsel. He has litigated language rights cases across Canada and has appeared at the highest levels of court. He has recognized expertise in this area of the law.

[26] The intervenor does not dispute that it was necessary for M. Halotier to go outside of the Yukon to obtain counsel. The intervenor also does not take issue with M. Lepage's expertise in the field. What the intervenor does dispute is the necessity to retain someone as highly specialized as M. Lepage and the appropriateness of a fee of $350.00 per hour.

[27] It is always difficult to assess what would be reasonable for a client to do in any given circumstances. As noted previously the rule requires an assessment of fees that are proper and reasonably necessary to conduct the proceeding. This does not

mean any fee that the solicitor wishes to charge. And, as noted in the case law on the subject, there is a distinction between the "fees" charged by a solicitor to his or her own client, such as would be approved on a solicitor-and-own client taxation, and "special costs" allowed by the rule: see *Tsilhqot'in Nation v. British Columbia*, [2006] B.C.J. No. 2 (C.A.), at para. 58. The specific fee rate of counsel is not one of the explicit criteria noted in Rule 61(2), although of course it comes into play by necessity when considering the time expended on the case and the overall quantum of costs.

[28] Would it have been reasonable for a client in M. Halotier's position to retain counsel at $350 per hour to defend a debt action for $13,000.00? I think the obvious answer is "no". On the other hand, would it be reasonable to do so if one's constitutional and statutory rights had been infringed? That becomes more problematic. It is obvious that M. Halotier does not have the resources to retain counsel at $350.00 per hour for any type of case. But that is not the real issue here.

[29] It is apparent, from the material filed, that M. Halotier and M. Lepage reached an agreement as to costs. First, M. Halotier agreed to apply for a grant from the Court Challenges Program to help finance the litigation. M. Halotier says that part of his obligation is to repay the grant to the Program should he recover costs. This is set out in his affidavit at paragraph 11:

> Me Roger J.F. Lepage m'a avisé que son tarif horaire était 350$/heure car il a un expertise dans le domaine des droits linguistiques et des droits constitutionnels linguistiques. Puisque je n'avais pas la capacité financière de le payer, j'ai fait une entente avec lui que j'obtiendrais du financement du Programme de contestation judiciaire. J'ai réussi à obtenir 35 000$. L'entente que j'ai avec le Programme de contestation judiciaire est que je devais demander pour les dépens et que si je recevais les dépens je devais rembourser le Programme.

[30] M. Halotier also sets out that he and M. Lepage further agreed that, if they were successful in the case, M. Lepage would be paid his fees and expenses. If they were not successful, however, M. Lepage takes the risk and would not be paid. This is set out in paragraph 12 of his affidavit:

> L'entente que j'avais avec Me Roger J.F. Lepage est que s'il gagnait le dossier et s'il obtenait les dépens il pourrait se faire payer le 350$/heure et tous ces débours. De

> l'autre côté, si je perdais le dossier ou ne recevais pas les dépens, il prenait le risque au complet de ne pas se faire payer.

[31] What is not specified in this paragraph, of course, is exactly who would pay M. Lepage should the case succeed.

[32] The arrangements made by M. Halotier and M. Lepage are, in my opinion, immaterial. It is well-recognized in the jurisprudence that costs awards serve many purposes, only one of which is indemnification of the litigant for his or her actual expenses. An award of "special costs", however, takes the case beyond indemnity. Special costs are meant to express the court's disapproval of some conduct. They act as a penalty. Therefore it matters not what arrangements M. Halotier made for payment of M. Lepage's fees. The situation is analogous to that found in *Fullerton v. Matsqui*, [1992] B.C.J. No. 2986 (C.A.), where the plaintiffs were awarded special costs in a case where they were represented on a contingency fee basis at trial and funded by legal aid on appeal.

[33] I think it is also immaterial that M. Halotier received $35,000.00 from the Court Challenges Program. The program is not funded by the Yukon government so it is not entitled to a credit. M. Halotier says he is obliged to repay that amount. In my opinion, it has no bearing on this assessment: see, for example, *Rohani v. Rohani* [2003] B.C.J. No. 2250 (S.C.).

[34] The intervenor suggests that a reasonable hourly rate would be $250.00 per hour. This is not an inconsiderable sum in itself. But that still leaves the question of the number of hours billed by M. Lepage. That will be dealt with further in these reasons.

[35] On this point relating to the skill and specialized knowledge of appellant's counsel, I think one can conclude that what we have in M. Lepage is one of the most knowledgeable and skilful lawyers in the area. While it may be reasonable to hire one of the best it is not reasonable to think that one would do so at $350.00 per hour without placing some limits on it. No reasonable client would give a blank cheque; no responsible lawyer would expect one. In my opinion there should be some reduction of the total fee, either by the hourly rate or by the number of hours.

[36] With respect to counsel for the respondent, it cannot be said that there was any special expertise required or retained. The respondent used the same firm throughout these proceedings although the individual lawyers changed.

[37] Their task was to obtain a judgment on the debt and to try to preserve their judgment. Counsel took a limited role on the appeal with respect to the language issues. As this court noted in its judgment, counsel for Kilrich cannot be faulted for what happened. They too were caught up in a systemic failure. They could do nothing to resolve the substantive issues raised on the appeal.

3. *The amount involved in the proceeding.*

[38] As noted previously, the amount involved in the original litigation was quite modest. One would not expect costs of this magnitude in that type of action. But the issues raised on appeal went far beyond the private interests of M. Halotier and Kilrich Industries. Those issues had a public aspect that affect the administration of justice in the Yukon as well as the ability of the Francophone population of the Yukon to access the courts, today and in the future. From that perspective the case had much more importance than merely the amount involved.

4. *The time reasonably expended in conducting the proceeding.*

[39] The intervenor's counsel raised a number of points to demonstrate that the time spent and claimed for by both the appellant's and respondent's counsel is excessive.

[40] With respect to the respondent's claim, the intervenor concedes that much of the costs claimed for the original trial are appropriate. But those costs should be limited to the "unnecessary expense" incurred by the aborted trial. Since a new trial has been ordered, many of the costs incurred, such as the time spent in preparing and commencing the action have not been wasted. For the period up to the original judgment, the intervenor suggests that 70% of those fees and disbursements would be reasonable.

[41] The intervenor, however, objects to the amounts charged after that time, particularly from September 2004 to June 2006. The intervenor's counsel pointed to costs incurred for the time it took for new counsel to become familiar with the file (counsel changed twice); for unreasonable steps to try to execute on the judgment in

the face of the appeal; for time spent in acrimonious debate with counsel working pro bono on M. Halotier's appeal prior to the involvement of M. Lepage; and for a duplication of work and billing for internal costs of the firm. The intervenor suggests that 25% of the costs claimed in this period be allowed.

[42] It is difficult to assess the value of the work done in this period. There are no hours listed on the accounts. But the fees charged are surprisingly high considering that this was after the trial judgment and before the appeal. From October 13, 2004, to July, 2006, Kilrich's counsel submitted 20 accounts. The fees totalled $44,815.50 with an additional $6,403.53 for disbursements and tax.

[43] I recognize that the matter was complicated throughout this time period by the fact that M. Halotier was acting on his own for much of the period. But, in my opinion, the amount of costs claimed is objectively unreasonable. It should be noted, however, that these costs were incurred prior to Kilrich's current counsel, Ms. Dumont, taking over carriage of the file.

[44] With respect to the appellant's claims, the question of the time expended by the appellant personally will be addressed in my discussion later on of self-representation costs. The question of M. Lepage's time did not really arise (although the intervenor took exception to time expended by M. Lepage in becoming familiar with Yukon statutes and procedures and charging full hourly rate for travel time). The intervenor's primary objection was with respect to M. Lepage's hourly fee as noted above.

[45] There is no doubt that M. Lepage had to come up to speed on the file very quickly. He was retained in June, 2006, almost 2 years after the trial judgment, when preparatory steps for the appeal had already taken place. He reconfigured the appeal and prepared himself. M. Lepage claims to have spent over 220 hours on the file from the time of his retainer until the appeal judgment. This is supported by an extremely detailed statement of account. Other than for the points noted by intervenor's counsel, I cannot say that this amount of time is objectively unreasonable.

5. *Any party's conduct that tended to shorten or unnecessarily lengthen the duration of the proceeding.*

[46] The intervenor's counsel submitted that this criterion is relevant because of the refusal by the appellant and respondent to accept a resolution proposed by the intervenor prior to the appeal.

[47] The Minister of Justice became an intervenor in the appeal on her own initiative as a result of the nature of the issues raised by the appellant. The Minister advised Kilrich that she intended to respond fully to the language issues and suggested that Kilrich minimize its costs by yielding this role. The intervenor submitted that it was unreasonable for Kilrich to disregard this suggestion. But it should be noted, in respect of this, that while Kilrich participated in the appeal it took no position on the language issues. Its arguments on appeal were directed to the fairness of the proceedings before the trial judge.

[48] The Minister also sent a proposal to the appellant and respondent wherein she agreed to indemnify both parties for some of their costs incurred for the summary trial and to provide French language services to the appellant for a new trial. This settlement proposal was never accepted. The appellant wanted various conditions on the settlement to protect himself against steps already taken to execute on the judgment. The respondent wanted security for its claim along with interest and costs.

[49] The intervenor submitted that both parties avoided a settlement, which could have avoided a great deal of expense, for strategic reasons relating solely to the monetary dispute between them that had nothing to do with the language issues raised by the appeal. Thus their actions unnecessarily prolonged the proceeding and dramatically increased the costs.

[50] It is tempting to say that the parties had a chance to resolve this case without the expense of an appeal and therefore they should be penalized on their costs claims. But on reflection it should be apparent that the issues and problems revealed by the appeal are not ones that can be, or should be, resolved merely on a case-by-case basis. The appeal revealed systemic problems. There is nothing in the material to demonstrate that a settlement as proposed by the Minister would have resolved those problems in a systematic manner. Furthermore, it is not incumbent on anyone to have to negotiate the exercise of their constitutional and statutory rights.

[51] For these reasons I give little weight to this argument.

6. *The importance of the proceeding to the party whose bill is being assessed and of the result obtained.*

[52] For M. Halotier, the importance of the proceeding and the result is obvious. He now has an opportunity to defend the respondent's claim using his language and having access to court services and resources in his language. He also has the knowledge that his case has clarified the linguistic rights of the Francophone minority in the Yukon.

[53] For Kilrich, the proceeding and result are less important; indeed, it could be viewed as a step back. Its judgment is set aside and it must relitigate its claim. But that is not due to anything for which Kilrich or its counsel can be faulted.

7. *The benefit to the party, whose bill is being assessed, of the services rendered by the solicitor.*

[54] There is no doubt that the appellant benefitted greatly from the skill and expertise of his appeal counsel. The same is not so clear-cut with respect to the respondent since it was a bystander to the language dispute. Its lawyers however managed to obtain a judgment at first instance and worked to protect its interests when the case expanded beyond its original terms of reference.

8. *Self-Representation Costs.*

[55] As noted earlier, M. Halotier claims a total of $29,171.40 as his personal costs. Of that amount, $9,346.40 represents out-of-pocket expenses for travel, accommodation, interpretation services and transcripts. The balance is made up of an "opportunity cost" claim, i.e., the cost of his time spent calculated at $65.00 per hour.

[56] I will say at the outset that I have no difficulty with respect to M. Halotier's claim for his out-of-pocket expenses. He is entitled to full recovery of those. The intervenor's counsel did not raise a serious concern about it.

[57] The intervenor took the position, however, that M. Halotier is disentitled from recovering costs (other than actual expenses) in the absence of a specific direction by the court to that effect. I do not agree. First, the authority relied on by the intervenor, a decision of an assessment officer in the Federal Court of Appeal case of *Turner v. Canada*, [2001] F.C.J. No. 250, is based on the specific provisions of the Federal Court Rules. It has no application to this case. Second, M. Halotier's entitlement to costs generally is implicit in this court's direction that the minister pay special costs for both the trial and appeal. It was patently apparent that M. Halotier represented himself at the trial. So the question is not M. Halotier's entitlement to costs. It is a question of the quantum of those costs.

[58] It is now well-recognized across Canada that self-represented litigants are entitled to recover costs: *Skidmore v. Blackmore* (1995), 122 D.L.R. (4th) 330 (B.C.C.A.); *Macbeth v. Dalhousie University* (1986), 10 C.P.C. (2d) 69 (N.S.C.A.); *Fong v. Chan* (1999), 181 D.L.R. (4th) 614 (Ont. C.A.); *Sherman v. M.N.R.* (2003), 226 D.L.R. (4th) 46 (Fed. C.A.); *Dechant v. Law Society of Alberta* (2001), 203 D.L.R. (4th) 157 (Alta. C.A.). And this includes what I have referred to as the "opportunity cost" claim, that is to say, compensation for the loss of time spent devoting efforts to their case.

[59] The case law, however, holds that a self-represented litigant is not to be treated the same as a represented litigant. Costs are awarded as a reasonable allowance for the loss of time, and actual expenses incurred, in preparing and presenting the case. All litigants, whether represented by counsel or not, suffer a loss of time through their involvement in litigation. Inevitably there are financial consequences to this. The self-represented litigant should not recover costs for the time and effort that any litigant would have to devote to their case. So an award must take this into account and assess those costs representing the effort made by a self-represented litigant that would not have been made if the litigant were represented.

[60] M. Halotier claims he spent 302 hours on this case between January, 2004, and September 27, 2007. Yet, after June, 2006, he had counsel representing him. He lists 238 hours up until M. Lepage's retainer. At $65 per hour this amounts to $15,470.00.

[61] I am not convinced, however, that simply applying M. Halotier's hourly rate from his contracting business to all of these hours is either reasonable or logical. There is no evidence that he would have been working in his business all of the hours

that he spent on his case. There is no evidence that he gave up work. And, as I previously mentioned, he undoubtedly would have spent some of that time involved in his case even if he had a lawyer. Some reasonable allowance has to be made but it is not a simple arithmetic exercise.

[62] The intervenor's counsel submitted that no costs should be paid to M. Halotier for the time that he was assisted by Robert Pritchard. I do not agree. Mr. Pritchard provided assistance on a pro bono basis. But, for all intents and purposes, M. Halotier was still representing himself. He still had to devote time and effort that he would not have had to in a usual solicitor-client relationship.

9. *Goods & Services Tax.*

[63] The intervenor submitted that it should not be ordered to pay Goods and Services Tax. First, the Government of the Yukon is a tax-exempt body. Second, there is no jurisdiction to order the payment of GST as special costs. Rule 61 is described as a "self-contained" costs provision which does not contain any reference to tax as a component of costs.

[64] I am not convinced that GST cannot be included in a special costs award. Rule 63(4) provides that an amount, equal to the percentage rate of tax payable, must be allowed on an assessment of costs. While this sub-rule is contained in a rule dealing with the "duties of the registrar" on an assessment of costs, and while it contemplates the usual party-and-party type of bill, I see no reason why it would not apply generally to special costs. Rule 61(2) speaks only of "fees" but I doubt that anyone would think that disbursements were not included.

[65] In any event, the intervenor conceded that she is still required to reimburse a party for GST expenses already incurred. That is the way I intend to approach this question.

Conclusions:

[66] With respect to M. Halotier's personal claim as a self- represented litigant, I have concluded that a reasonable assessment is 75% of the amount he claims as fees for the period from January, 2004, until June, 2006. That amount is $15,470.00; so

75% of that is $11,602.50. He should also recover 100% of his out-of-pocket expenses.

[67] With respect to the appellant's costs claim advanced by M.Lepage, again I have concluded that a reasonable assessment for fees is 75% of the total amount of fees claimed. Fees total $88,770.00 so 75% of that is $66,577.50. In addition, M. Lepage will recover the total of his disbursements ($5,668.36). Since the GST listed on M. Lepage's invoices has not been paid by his client, there will be no allowance for that item.

[68] With respect to the respondent's claim, I have concluded that the fee portion should be approached in three segments. First, the fees charged up until September, 2004, totalling $5,018.50, shall be allowed at 75% ($3,763.87). Next, the fees charged for the period of October, 2004, to July, 2006, totalling $44,815.50, will be allowed at 50% ($22,407.75) for the reasons noted above. Then, the fees charged after July, 2006, totalling $19,529.00 will also be allowed at 75% ($14,646.75). The respondent shall also recover its disbursements in full and the GST it has paid.

[69] Therefore, I order as follows:

1. The Minister of Justice shall pay the total sum of $20,948.90 as special costs to the appellant personally.

2. The Minister of Justice shall pay the total sum of $72,245.86 as special costs to the appellant's solicitor.

3. The Minister of Justice shall pay the total sum of $49,589.87 as special costs to the respondent.

[70] These costs awards are all-inclusive including the costs of the hearing before me.

Vertes J.A.