



Ottawa, Thursday, March 4, 2004

**File No. PR-2003-013**

IN THE MATTER OF a complaint filed by Montage-DMC e-Business Services, A Division of AT&T Canada, under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND FURTHER TO a determination made pursuant to section 30.16 of the *Canadian International Trade Tribunal Act* awarding the Canada Customs and Revenue Agency its reasonable costs incurred in relation to responding to the complaint, which costs were to be paid by Montage-DMC eBusiness Services, A Division of AT&T Canada.

### **ORDER**

In a determination made on September 12, 2003, the Canadian International Trade Tribunal (the Tribunal) awarded the Canada Customs and Revenue Agency (CCRA) its reasonable costs incurred in relation to responding to the complaint.

On October 10, 2003, the CCRA submitted its claim for costs to the Tribunal in the amount of \$29,198.23. On November 7, 2003, Montage-DMC eBusiness Services, A Division of AT&T Canada (Montage), forwarded its comments regarding the CCRA's claim for costs to the Tribunal. On November 12, 2003, the CCRA provided further comments to the Tribunal.

The CCRA claimed \$28,968.75 for legal fees. This consisted of 65.0 hours at \$125.00 per hour for work performed by external counsel (excluding GST), 80.0 hours at \$200.00 per hour for work performed by a first in-house counsel, and 34.2 hours at \$125.00 per hour for work performed by a second in-house counsel. An additional \$229.48 was claimed for disbursements.

Montage submitted that it had no objection to the rate charged by the CCRA's outside counsel. However, it submitted that certain claimed services exceed the scope of the Tribunal's cost award. Specifically, Montage submitted that the time entries after the date of the Government Institution Report appear to relate to administrative matters and do not relate to responding to the complaint. In addition, entries for September 12 and 15, 2003, appear to relate to the review of the Tribunal's decision and to the preparation of the claim for costs, activities which, Montage submitted, should not be covered by the cost award.

Montage also objected to the CCRA's claim for costs for in-house counsel. According to Montage, the absence of time and service details negates the Tribunal's ability to assess the reasonableness of the fee claimed, the extent and nature of the provider's participation, the complexity of the services provided and the potential for duplication of tasks among legal counsel. Montage submitted that this part of the CCRA's claim for costs should be disallowed in its entirety.

In response to Montage's comments, the CCRA pointed out that the Tribunal has repeatedly said that the time allowed for "preparing and proceeding with a complaint" occurs between the drafting of the complaint and the filing of the claim for costs. Similarly, the activities on behalf of the CCRA "in relation to responding to the complaint" should extend to the filing of the claim for costs. The CCRA's claim for costs did not include a claim for the entry on September 15, 2003, regarding the preparation of the claim.

With respect to the costs claimed for in-house counsel, the CCRA stated that the time-keeping system proves that the related time was spent to respond to Montage's complaint. The time-keeping printout represents an accurate invoice, as required by section 5.3.1 of the Tribunal's *Procurement Cost Guidelines* (the *Guidelines*), of counsel's time spent to respond to Montage's complaint.

With respect to the rates requested for in-house counsel, the CCRA stated that both in-house counsel are employees of the Department of Justice (Justice Canada). However, the CCRA submitted, their being Crown counsel does not justify an award which is lower than the award that external counsel may receive. The CCRA submitted that awarding costs at a lower rate than that used for external counsel for these reasons is inconsistent with the objects and purpose of the *Canadian International Trade Tribunal Act*.<sup>1</sup> The CCRA continued by submitting that the fallacy of awarding costs for experienced Crown counsel at the "in-house" rate specified in the Tribunal's *Guidelines* is illustrated by comparing costs available to in-house counsel with those available to "representatives" under the *Guidelines*. The CCRA further submitted that an experienced lawyer with Justice Canada may be awarded costs at a significantly lower rate than a "representative" with no experience before the Tribunal.

In reviewing the CCRA's claim for costs, the Tribunal finds that the rates requested for the CCRA's external counsel are reasonable. Accordingly, the Tribunal allows the costs for external counsel, with the exception of the time charged on September 12 and 15, 2003.<sup>2</sup> This time related to the preparation of the claim for costs and is not allowed.

With respect to the claim for costs for in-house counsel, the Tribunal notes that section 5.2.3 of its *Guidelines* specifically states the following: "Costs will not generally be recoverable in respect of employees, officers or directors of a claimant who, acting in their usual capacity as employees, officers, or directors, expended time in connection with a claimant's participation in a procurement proceeding. However, where one of a claimant's employees, officers or directors acts as the claimant's counsel or representative, the claimant may recover its costs in accordance with paragraph 5.2.1 and Appendix B of these guidelines." In this connection, the Tribunal has generally not allowed costs where the activities of external counsel and the in-house representative or counsel overlap. In the Tribunal's opinion, such a situation occurred in this case. Moreover, the Tribunal is of the opinion that the complexity of this case does not warrant three counsel. Accordingly, the Tribunal will not allow the claim relating to the use of in-house legal counsel.

With respect to the disbursements claimed, the Tribunal finds these reasonable under the circumstances and allows the full amount<sup>3</sup> of \$226.25 (excluding GST).

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1. R.S.C. 1985 (4th Supp.), c. 47.

2. This totalled 1.8 hours or \$225.00 (1.8 x \$125.00).

3. GST is not included since all GST collected will eventually be remitted to the government.

In consideration of the above, the Tribunal allows the CCRA costs of \$8,126.25<sup>4</sup> for responding to the complaint and directs Montage to take appropriate action to ensure prompt payment.

Meriel V. M. Bradford  
Meriel V. M. Bradford  
Presiding Member

Richard Lafontaine  
Richard Lafontaine  
Member

James A. Ogilvy  
James A. Ogilvy  
Member

Michel P. Granger  
Michel P. Granger  
Secretary

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4. This comprises legal fees of \$7,900.00 (excluding GST) and disbursements of \$226.25.