

**IN THE MATTER OF THE SECURITIES ACT,
R.S.O. 1990, CHAPTER S.5, AS AMENDED**

- and -

**IN THE MATTER OF FIRST FEDERAL CAPITAL (CANADA)
CORPORATION and MONTE MORRIS FRIESNER**

Hearing: July 9, 2004

Panel:	Paul M. Moore, Q.C.	Vice-Chair of the Commission (Chair of the Panel)
	M. Theresa McLeod	Commissioner
	Harold P. Hands	Commissioner

Counsel:	Walter Fox	For First Canadian Capital (Canada) Corporation and Monte Morris Friesner
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	Alexandra S. Clark	For Staff of the Commission
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DECISION AND REASONS

I. Background

[1] This panel's reasons on the merits of this matter were released on February 3, 2004. We held that it was in the public interest to order that the respondents pay the costs of the Commission's investigation and hearing, pursuant to section 127.1 of the *Ontario Securities Act*, R.S.O. 1990, c.S.5 (the Act). We invited the parties to arrange for the exchange of information and to arrange a costs hearing. The matter before us is the hearing into the quantum of costs.

II. Preliminary Issue – Motion for Adjournment

[2] As a preliminary issue, counsel for Friesner moves for an adjournment. He submits that disclosure of costs by staff of the Commission (staff) is insufficient to meet the test set out in the Divisional Court decision of *Donnini v. Ontario Securities Commission* (2003), 37 B.L.R. (3d) 46 (*Donnini*). An adjournment, he argues, would permit staff to provide a more detailed accounting of how its bill of costs was arrived at and to allow for cross-examination of those mentioned in the accounts. He notes that Friesner was unrepresented by counsel until the day before this hearing. As a result, he only became aware of staff's bill of costs in late June 2004 and was unable to request an adjournment on his own. An affidavit by Friesner was tendered in support of the second ground.

[3] We have considered the motion as presented, the arguments of counsel, and Friesner's affidavit. We dismiss this motion as being out of time according to the Commission's Rules of Practice. We shall not exercise our discretion to waive the time limits in the Rules of Practice and will deal with the issue of the adequacy of staff's bill of costs in the body of these reasons.

III. Staff's Bill of Costs and Dockets

[4] Staff has submitted a bill of costs in the amount of \$32,332.60, covering the period April 1, 2000 to May 26, 2003. Disbursements are supported by invoices totalling \$256.10. Fees are broken down into two components, \$27,470.00 in respect of litigation hours and \$4,606.50 in respect of investigation hours. In support of these calculations are the dockets of the sole investigator, Colin McCann, and the dockets of enforcement legal counsel who worked on the file at various times, Sara Oseni, Kate Wooton, and Alexandra Clark.

[5] The dockets are in a common format. Under the name of each member of staff who worked on this file is a list of entries. Each entry is a single line that groups under descriptions the tasks performed on a weekly basis, and the number of hours spent performing the task. The tasks are grouped under generic words or short phrases, such as "Analysis", "Settlement", and "Preparing hearing/court proceedings". Staff advises us that the dockets are entered electronically on a weekly basis, and that the software used by the Enforcement branch of the Commission allows only preset task categories under which relevant tasks are grouped. The software does not allow for the entry of free-text descriptions or elaborations of activities performed by staff. A task description such as "Analysis", staff explains, may encompass several tasks, such as reviewing the file and reviewing caselaw.

[6] Counsel for staff advise that there are no other notes or docket information in existence.

[7] In correspondence dated May 27, 2003, staff provided Ron Pelletier, then-counsel for Friesner, with its bill of costs and disbursement invoices. On February 24, 2004, staff provided Jim Douglas, who succeeded Ron Pelletier as Friesner's counsel, with copies of the dockets mentioned above.

IV. Submissions of the Parties

[8] Staff submits that sufficient particulars have been provided to support the bill of costs in this matter. The bill of costs itself represents an appropriate balancing of the interests of the capital markets and fairness to Friesner. Staff argues that, as part of this balancing, the costs allocated to Friesner have been significantly discounted.

[9] Staff distinguishes this case from that of *Donnini*. In *Donnini*, no dockets were provided in support of a bill of costs amounting to \$186,052.30. Staff submits that dockets in the identical format to those presented today have been accepted as the evidentiary basis for the calculation of the bill of costs by the Commission in matters following *Donnini*.

[10] Staff quotes the Divisional Court's statement in *Donnini*: "a claim for costs in this amount justifies a more intense and searching examination than the OSC is prepared to allow." She submits that, pursuant to *Donnini*, the degree of detail required in support of a bill of costs is proportional to the amount of costs claimed.

[11] Counsel for Friesner submits that the dockets are insufficient: they do not provide full information about the specific activities performed by staff. They are, he contends, only summaries of dockets, insufficient to allow the Commission to reach a conclusion about the adequacy of the bill of costs.

[12] Counsel for Friesner argues that Friesner deserves a limited form of discovery to uncover further particulars underlying the dockets. He submits that Friesner should be allowed to cross-examine those named in the dockets about their activities, and he cites *Donnini* in support of his argument.

[13] Staff replies that, while the Commission has discretion to allow cross examination in a cost proceeding, cross-examination is an extraordinary procedure that should only be used where there is a reasonable concern that there is a material error in the dockets. She contends that there is no such evidence before us and that cross-examination would be inappropriate in this hearing. Staff further submits that the Divisional Court's statement quoted by counsel for Friesner can again be distinguished on the basis that no dockets had been submitted in *Donnini* in support of that bill of costs.

V. Analysis & Conclusion

[14] In our decision on the merits, this panel determined that it was in the public interest to order that the respondents pay the costs of the Commission's investigation and hearing with respect to this matter. We must now determine the quantum of costs. This is a question of fact for the Commission to determine. We must consider all of the evidence before us in deciding the appropriate amount of costs.

[15] The sections of the Divisional Court's ruling in *Donnini* that are most relevant to this hearing are found in paragraphs 38 and 39 of its reasons:

38. ... In our view, a claim for costs in this amount justifies a more intense and searching examination than the OSC is prepared to allow.

39. We are of the view that the OSC erred in this regard. An order for costs is simply a fine by another name, unless it is a true reflection of the actual and reasonable costs of the nature specified as recoverable in section 127.2 of the Act. These are questions of fact and, like all such questions, must be resolved upon evidence, disclosure, documents and including cross-examination. Accordingly, we direct that the manner of costs be referred back to the OSC to conduct an inquiry into the extent of the bill and to make available for counsel for Donnini all docket, time docket, journal and/or diary entries and other back-up material in support of it, and to make available all participants whose names appear on it for cross-examination by counsel for Donnini at a mutually convenient time.

[16] This is not a case where cross-examination would be appropriate.

[17] We accept staff's statement that the costs in this matter have not been fully included in the bill of costs. However, we disagree with staff's submission that a lower bill of costs requires less detail in support of it. Every determination of the quantum of costs is a question of fact for the panel, and must be supported by appropriately detailed evidence and documents.

[18] In this case, we find the docket entries to be insufficiently detailed to be given full weight.

[19] Since the bill of costs did not include costs incurred by the Commission prior to April 1, 2000 or subsequent to May 26, 2003 (which excluded costs for the three days prior to the hearing and the day of the hearing), we also will ignore the unincurred costs. We have concerns with the paucity of detail provided in staff's docket. Accordingly, we are not satisfied that the full value of the costs reflected in the bill of costs has been justified in this case. We believe that a substantial discount is warranted.

[20] For the above reasons, we fix the quantum of costs in this matter at \$20,000.00.

[21] We order that costs in this amount be paid, jointly and severally, by the respondents.

Dated at Toronto this 3rd day of August, 2004

"Paul M. Moore"

Paul M. Moore, Q.C.

"M. Theresa McLeod"

M. Theresa McLeod

"Harold P. Hands"

Harold P. Hands