

Federal Court



Cour fédérale

Date: 20200421

Docket: T-1932-18

Citation: 2020 FC 537

BETWEEN:

JOHN C. TURMEL

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ASSESSMENT

GARNET MORGAN, Assessment Officer

[1] This is an assessment of costs further to the Plaintiff filing a Notice of Discontinuance on January 2, 2019.

[2] On September 20, 2019, the Defendant filed a Bill of Costs.

[3] On September 25, 2019, the following direction was issued:

Further to the filing of the Defendant's Bill of Costs on September 20, 2019, the assessment of costs will proceed in writing.

It is directed that:

The Defendant shall serve and file its Affidavit of Disbursements and Written Representations in support of the Bill of Costs by Friday, October 25, 2019;

The Plaintiff may serve and file any reply materials by Friday, November 22, 2019;

The Defendant may serve and file any rebuttal materials by Monday, December 9, 2019.

If a party requires more time to file their materials, please feel free to send me correspondence at the fax number noted below with a copy to the other side for a further direction to be issued.

[4] Subsequent to the direction, the Defendant served and filed Costs Submissions on October 24, 2019, with the court registry, which contained the Affidavit of Marcia Banfield, affirmed on October 23, 2019 and written representations.

[5] A review of the court record indicates that no reply materials were filed by the Plaintiff and no request was made by either party to provide additional material after the filing of the Defendant's Costs Submissions on October 24, 2019.

[6] As no material was received from the Plaintiff, this matter is substantially unopposed.

[7] In *Dahl v Canada*, 2007 FC 192, at paragraph 2, the Assessment Officer states:

Effectively, the absence of any relevant representations by the Plaintiff, which could assist me in identifying issues and making a decision, leaves the bill of costs unopposed. My view, often expressed in comparable circumstances, is that the *Federal Courts Rules* do not contemplate a litigant benefiting by an assessment officer stepping away from a position of neutrality to act as the litigant's advocate in challenging given items in a bill of costs. However, the assessment officer cannot certify unlawful items, i.e. those outside the authority of the judgment and the Tariff. I

examined each item claimed in the bill of costs and the supporting materials within those parameters. Certain items warrant my intervention as a function of my expressed parameters above and given what I perceive as general opposition to the bill of costs.

[8] Utilizing the *Dahl* decision as a guideline, the assessment of costs will proceed based on the material provided by the Defendant in response to the Direction dated September 25, 2019.

[9] The Defendant has claimed \$1,641.50 in assessable services and disbursements.

[10] Concerning Item 5, the Defendant has requested five units under Column III, in Tariff B of the *Federal Courts Rules*, related to the Defendant's motion to strike the Statement of Claim.

[11] At paragraph 6 of the Defendant's written submissions it is submitted:

Rule 402 provides that, unless the Court orders or the parties agree otherwise, a party against whom an action is discontinued is entitled to costs forthwith, which costs may be assessed. In the present case, the Court has not ordered that there be no costs, nor is there any agreement between the parties with respect to costs. Canada is thus necessarily entitled to costs in these circumstances, and the only question on assessment is the appropriate quantum.

[12] At paragraph 11 of the Defendant's written submissions it is submitted:

Counsel expended time and effort to review the plaintiff's claim and prepare a motion record – including a Notice of Motion, an affidavit, written representations and a book of authorities – in support of the motion to strike, which was ultimately rendered moot by the plaintiff discontinuing his claim.

[13] Further to the Defendant's submissions, there are differing Assessment Officer decisions concerning the allowance of costs for motions that have not been abandoned by the moving party and also have no corresponding Court order or direction awarding costs when the entire proceeding is discontinued. Namely, *Sun Valley Co-op Ltd. v Roseau River Tribal Council*, [1989] F.C.J. No. 924 and *National Steel Car Ltd. v Trenton Works Inc.*, [1996] F.C.J. No.678; however, these decisions were rendered prior to 1998, when the current Rule 402 was established. Rule 402 of the *Federal Courts Rules*, SOR/98-106 states:

402. Costs of discontinuance or abandonment - Unless otherwise ordered by the Court or agreed by the parties, a party against whom an action, application or appeal has been discontinued or against whom a motion has been abandoned is entitled to costs forthwith, which may be assessed and the payment of which may be enforced as if judgment for the amount of the costs had been given in favour of that party.

[Underline added for emphasis.]

[14] For additional clarification, Rule 411 of the *Federal Courts Rules*, SOR/98-106, states:

411. Costs of abandoned motion -The costs of a motion that is abandoned or deemed to be abandoned may be assessed on the filing of

(a) the notice of motion, together with an affidavit stating that the notice was not filed within the prescribed time or that the moving party did not appear at the hearing of the motion; or

(b) where a notice of abandonment was served, the notice of abandonment.

[15] Also, Rule 370 of the *Federal Courts Rules*, SOR/98-106, states:

370 (1) Abandonment of motion - A party who brings a motion may abandon it by serving and filing a notice of abandonment in Form 370.

(2) Deemed abandonment - Where a moving party fails to appear at the hearing of a motion without serving and filing a notice of abandonment, it is deemed to have abandoned the motion.

[16] Rules 370, 402 and 411 refer to the abandonment of the moving party's motion. It is subsequent to a moving party abandoning a motion that a responding party would be entitled to costs. This is different from the motion in this particular file, as the moving party (Her Majesty The Queen) did not abandon its motion. The Plaintiff discontinued his matter before the Defendant's motion was heard and therefore there is no Court order or direction awarding costs for this particular motion.

[17] In *Tursunbayev v Canada (Minister of Public Safety and Emergency Preparedness)*, 2019 FC 457, at paragraph 39, the Court states:

As the Defendants point out, apart from the Court's order of November 24, 2016 and the eventual supplementary costs order of March 6, 2017, which the Defendants have satisfied, all of my orders in these proceedings have either expressly awarded no costs or have been silent as to costs. This is because in the instances now raised before me the Plaintiff did not seek costs (either in writing or orally) so that costs were not an issue I was asked to address. As I understand the jurisprudence of this Court, I cannot now re-visit my earlier orders that were silent as to costs. In *Sauve v Canada*, 2015 FC 181, Justice Barnes had the following to say on point:

[5] I am also concerned about the Defendants' claims to costs in connection with a variety of motions that were filed by one or the other dating back as far as 2007.

[6] Almost all of the early motions in this proceeding were concluded by Orders where no award of costs was made. It is not open to the Court

to revisit those matters and to award costs where none were ordered at the time: see *Exeter v Canada*, 2013 FCA 134 at para 14.

[18] Upon my review of the Defendant's costs submissions, Rule 370 and Part 11 of the *Federal Courts Rules* and the aforementioned case law, I find that as an assessment officer, I do not have the authority to allow the claim under Item 5. The motion claimed by the Defendant was not abandoned by the moving party and there is no Court order or direction awarding costs for this motion. Therefore, the Defendant's claim for Item 5 as well as the associated disbursements for photocopies are disallowed for a total amount of \$1191.50.

[19] I have utilized the *Dahl* decision as a guideline for my review of the Defendant's remaining assessable service and considering that it was neither challenged, nor outside of the authority of Tariff B, it is allowed as claimed.

[20] For the above reasons, the Defendant's Bill of Costs has been assessed and allowed in the amount of \$450.00. A Certificate of Assessment will be issued for \$450.00, payable by the Plaintiff to the Defendant.

“Garnet Morgan”
Assessment Officer

Toronto, Ontario
April 21, 2020

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1932-18

STYLE OF CAUSE: JOHN C. TURMEL v HER MAJESTY THE QUEEN

MATTER CONSIDERED AT TORONTO, ONTARIO WITHOUT PERSONAL APPEARANCE OF THE PARTIES

REASONS FOR ASSESSMENT BY: GARNET MORGAN, Assessment Officer

DATED: APRIL 21, 2020

WRITTEN SUBMISSIONS BY:

N/A

FOR THE PLAINTIFF
(SELF-REPRESENTED)

John Bricker
Benjamin Wong

FOR THE DEFENDANT

SOLICITORS OF RECORD:

Attorney General of Canada

FOR THE DEFENDANT