

Federal Court



Cour fédérale

Date: 20201210

Docket: T-57-16

Citation: 2020 FC 1143

BETWEEN:

CHRISTOPHER L. KREUTZWEISER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ASSESSMENT

ORELIE DI MAVINDI, Assessment Officer

I. Introduction

[1] On January 17, 2018, the Court dismissed the application for judicial review of the decision of the Chief of the Defence Staff, dated November 27, 2015, dismissing the Applicant's grievance of his medical release from the Canadian Armed Forces, with costs payable by the Applicant to the Respondent.

[2] The Respondent filed its Bill of Costs on July 17, 2020. Subsequently, on July 29, 2020, the following Direction was issued:

Further to the filing of the Respondent's Bill of Costs on July 17, 2020, the assessment of costs will proceed in writing. It is directed that:

1. the Respondent may serve and file all materials (if it has not already done so) including the bill of costs, supporting affidavit(s) and written submissions together with a copy of this direction by Monday August 31, 2020;
2. the Appellant may serve and file any responding materials (affidavit(s) and/or written submissions) by Wednesday, September 30, 2020;
3. the Respondent may serve and file any reply submissions by Friday, October 30, 2020.

[3] On August 31, 2020, the Respondent filed the Respondent's Written Submissions on Costs enclosing an Amended Bill of Costs, the Affidavit of Tenley Desroches sworn on August 27, 2020, and the Respondent's Written Representations. No further materials were received from the parties. The Applicant did not make use of the opportunity to serve and file responding materials by the September 30, 2020 deadline; nor was a request for an extension of time to serve and file said materials received.

II. Preliminary Issue

A. *Service Issues upon the Applicant*

[4] In Exhibit C of the Affidavit of Tenley Desroches, within the Respondent's Written Submissions on Costs, the Respondent outlined service upon the Applicant of their Bill of Costs on March 20, 2018, and Amended Bill of Costs on June 23, 2020. The Applicant did not respond.

[5] On July 29, 2020, the Registry attempted to serve the Applicant with the Direction setting out timelines for the assessment of costs via email, regular mail and registered mail. The Direction sent to the Applicant by way of registered mail was returned by Canada Post as "Unclaimed" on August 12, 2020. The copy of the Direction sent to the Applicant via email had inadvertently been sent to the incorrect address due to a typographical error. In an abundance of caution, on October 1, 2020, the Direction was re-sent to the Applicant at the correct email address. The October 1, 2020, correspondence equally provided the Applicant with the opportunity to request an extension of time of 30 days to file responding submissions, should it be needed. Upon a review of the Court docket, no response or request for an extension of time to file said submissions was received from the Applicant by the Registry.

[6] Accordingly, I will proceed with the assessment of costs as unopposed in light of the comments at paragraph 2 of *Dahl v. Canada*, 2007 FC 192 (*Dahl*) (A.O.):

2 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.

III. Assessable Services

[7] The Respondent claimed \$5,460.00 in assessable services under Tariff B, column III of the *Federal Courts Rules*, SOR/98-106 (the "Rules").

A. *Claims under Items 2, 13(a), 14(a) and 26*

[8] The Respondent's claims under Item 2 (Preparation and filing of all defences, replies, counterclaims or respondents' records and materials), Item 13(a) (preparation for trial or hearing, whether or not the trial or hearing proceeds, including correspondence, preparation of witnesses, issuance of subpoenas and other services not otherwise particularized in this Tariff), Item 14(a) (Counsel fee: to first counsel, per hour in Court) and Item 26 (Assessment of costs) are allowed as claimed. The items claimed are considered reasonable, necessary to advance the proceeding, and sufficiently substantiated by the Respondent's written submissions on costs and the Court file.

B. *Claims under Item 5*

[9] The Respondent made two claims under Item 5 (Preparation and filing of a contested motion, including materials and responses thereto). The first claim concerned the Applicant's motion for an extension of time to file the Application Record, filed on March 28, 2017 (the "motion for an extension of time to file the Application Record"). The second claim concerned the Applicant's motion to appeal the Order of the Court dated April 10, 2017 (the "motion to appeal the Order dated April 10, 2017"). Justification for these claims was at paragraphs 14 to 19 and 33 of the Respondent's Written Representations; paragraph 33 read:

Item 5

c) The Respondent is claiming 4 units for each claim under Item 5, contested motions, totaling 8 units. This request for the low point of Column III is reasonable considering both motions related to delays by the Applicant and the response of the Respondent was reasonable in the circumstances.

[10] From a review of the Respondent's submissions, the Court file and the Order of the Court dated May 16, 2017, awarding interlocutory costs in the matter, the second claim concerning the motion to appeal the Order dated April 10, 2017, was sufficiently substantiated and is allowed.

[11] The Order of the Court dated April 10, 2017, disposing of the first claim under Item 5 for the motion for an extension of time to file the Application Record was silent on costs. At paragraphs 26 to 28 of the Respondent's Written Representations, it was submitted:

26. A successful party is entitled to recover its costs, assessed on a reasonable and fair basis under the *Federal Court Rules* Tariffs (*Exeter v. Canada (Attorney General)*, 2012 FCA 153 (CanLII), para 13).

27. Orders within the action were almost entirely issued in relation to delays by the Applicant, and moving the litigation forward. Costs were not addressed within these orders.

28. The Federal Court of Appeal has held that where the Court has exercised its Rule 400(1) jurisdiction to award costs, Rule 409 permits an assessment officer to consider Rule 400(3)(a) in relation to orders within the action which are silent on costs (*Latham v. Canada*, 2007 FCA 179 (CanLII), para 9).

[12] At Paragraph of 9 of *Latham v. Canada*, 2007 FCA 179 (*Latham*), cited by the Respondent, the Assessment Officer held:

9 For the T-1232-02 matter, the Applicant asserted that the Court had directed that the judge presiding over the judicial review would reconsider the February 27, 2003 order (motion for production). In fact, the Court did not so direct and instead gave directions relative to a potential appeal. This does not assist in the disposition of assessment issues; but given that the Applicant objects to an item 5 claim further to an order silent on costs, I will disallow it further to my conclusions in *Balisky v. Canada (Minister of Natural Resources)*, [2004] F.C.J. No. 536 (A.O.) at para. [6] and *Aird v. Country Park Village Properties (Mainland) Ltd.*, [2005] F.C.J. No. 1426 (A.O.) at para. [10]. As for the May 9, 2005 order silent on costs in the A-29-05 matter, Rule 409 permits me to apply Rule 400(3)(a) (result), but that does not empower me to assess costs if the Court has not first visibly exercised its Rule 400(1) jurisdiction to award costs to the Respondents. I also disallow this item 5 claim (Emphasis added).

[13] While I accept the Respondent's contention that an assessment officer may consider Rule 400(3)(a) in relation to orders silent on costs, as outlined in *Latham*, this does not empower an assessment officer to assess costs where the Court has not first visibly exercised its Rule 400(1) authority to award costs. As outlined by the Assessment Officer at paragraph 6 of *Balisky v. Canada (Minister of Natural Resources)*, 2004 FCA 123 (*Balisky*), referenced in *Latham*:

Rule 400(1), which vests full discretionary power in the Court over awards of costs, means that orders and judgments must contain visible directions that costs have been awarded. Given the *Federal*

Courts Act, ss. 3 and 5(1) defining the Court and Rule 2 of the *Federal Court Rules, 1998* defining an assessment officer, the absence of that exercise of prior discretion by the Court leaves me without jurisdiction under Rule 405 to assess costs. In *Webster v. Canada (Attorney General)*, [2003] F.C.J. No. 1652 (A.O.), I concluded that the Rule 400(1) discretion in the court for interlocutory costs is exercised independently from the result of the judgment, except where expressly provided by language such as "costs in the cause". This means that I must reject the Appellants' position that the judgment of the Federal Court of Appeal perfected their entitlement to costs for interlocutory events in the Federal Court for which the relevant orders specifically denied costs. Accordingly, I disallow items 5 (preparation of a response to the motion), 13 (preparation for the hearing of the motion), 14 (appearance on the motion) and 24 (travel to the motion's venue).

[14] Furthermore, the Federal Court of Appeal in *Exeter v. Canada (Attorney General)*, 2013 FCA 134 (*Exeter*) at paragraph 14 held:

14 A judge's decision whether or not to award costs on a motion cannot later be overridden by the judge deciding the underlying action or application: *Merck & Co. v. Apotex Inc.*, 2006 FCA 324, 55 C.P.R. (4th) 81 at para. 15; *Polish National Union of Canada Inc.-Mutual Benefit Society v. Palais Royale Ltd.* (1988), 163 D.L.R. (4th) 56 (Ont. C.A.). For this purpose, an order on an interlocutory motion that is silent on costs is treated as an award of no costs: *Janssen-Ortho Inc. v. Novopharm Ltd.*, 2006 FC 1333, 57 C.P.R. (4th) 58 at para. 13; *Delrina Corp. (c.o.b. Carolian Systems) v. Triolet Systems Inc.* (2002), 22 C.P.R. (4th) 332 (Ont. C.A.) at para. 36 (Emphasis added).

[15] Thus, in keeping with *Dahl*, *Latham*, *Balisky* and *Exeter*, I find that as an assessment officer, I do not have the authority to allow the first claim under Item 5 for the motion for an extension of time to file the Application Record. The Respondent's entitlement to costs from the result of the judgment was exercised independently from the outcome of the April 10, 2017, interlocutory Order at issue. As the Order disposing of the motion was silent on the matter of costs, it can be viewed as an award of no costs under which I am without jurisdiction. An

assessment officer may assess the allowable quantum of costs in view of jurisprudence, the Rules and Tariff B, but may not vary or interfere with the Court's underlying decision of an award of no costs.

C. *Disbursements*

[16] The Respondent claimed \$260.00 in disbursements for the photocopying of the Certified Tribunal Record. The Respondent outlined that the \$260.00 was based on a calculation of 1,080 pages x 6 copies = 6,480 copies at a rate of \$0.40 per page. This calculation featured in the Bill of Costs filed on July 17, 2020, and the Amended Bill of Costs filed on August 31, 2020. It would appear that this calculation was a clerical error, as \$260.00 reflects a rate of approximately \$0.04 per page. The Respondent's intention to seek \$0.40 per page was further demonstrated at paragraphs 39 and 40 of the Respondent's Written Representations filed on August 31, 2020:

39. The Respondent submits that the disbursement fees sought are reasonable, necessarily incurred for the conduct of the litigation, and calculated pursuant to Tariff B of the *Federal Court Rules*.

40. As permitted by Tariff B, the Respondent is seeking disbursement fees in the amount of \$0.40 per page in relation to obtaining copies of the certified Tribunal Record.

[17] Thus, I am satisfied that the calculation for the claimed disbursements with respect to the photocopying of the Certified Tribunal Record would more properly be 6,480 copies at \$0.40 per page totaling \$2,592.00.

[18] Having resolved the matter of the amount claimed for the photocopying of the Certified Tribunal Record, the Respondent has provided less than exhaustive evidence substantiating a claim for six copies of the document or a rate of \$0.40 per page.

[19] Tariff B 1(3)(4) of the Rules provides the following with respect to disbursements:

Disbursements

(3) A bill of costs shall include disbursements, including:

(a) payments to witnesses under Tariff A; and

(b) any service, sales, use or consumption taxes paid or payable on counsel fees or disbursements allowed under this Tariff.

Evidence of disbursements

(4) No disbursement, other than fees paid to the Registry, shall be assessed or allowed under this Tariff unless it is reasonable and it is established by affidavit or by the solicitor appearing on the assessment that the disbursement was made or is payable by the party.

Débours

(3) Le mémoire de frais comprend les débours, notamment :

(a) les sommes versées aux témoins selon le tarif A;

(b) les taxes sur les services, les taxes de vente, les taxes d'utilisation ou de consommation payées ou à payer sur les honoraires d'avocat et sur les débours acceptés selon le présent tarif.

Preuve

(4) À l'exception des droits payés au greffe, aucun débours n'est taxé ou accepté aux termes du présent tarif à moins qu'il ne soit raisonnable et que la preuve qu'il a été engagé par la partie ou est payable par elle n'est fournie par affidavit ou par l'avocat qui comparaît à la taxation.

[20] While the Respondent satisfied the Tariff B 1(4) requirement that evidence of disbursements be established by affidavit or by the solicitor appearing on the assessment, the

evidence put forward by the Respondent did not sufficiently establish the reasonableness, or the necessity, of the claim as presented.

[21] As aforementioned, at paragraph 40 of the Respondent's Written Representations filed on August 31, 2020, the Respondent claimed \$0.40 per page on the basis that the quantum was permitted by the Tariff. Tariff B and more specifically, Tariff B 1(3)(4) on disbursements is silent on the quantum for photocopies and does not propose \$0.40 per page as suggested. Tariff A 1(3) for Court fees does provide a fee of \$0.40 per page for requests of paper copies of documents from the Court Registry, however, as outlined by the Assessment Officer in *Canadian Union of Public Employees, Local 4004 v. Air Canada*, [1999] F.C.J. No. 464 at paragraph 3, with respect to photocopy disbursements, "any comparison to the \$0.40 per page charged by the Registry in Tariff A 1(3) is irrelevant because that is predicated on a different rationale for partial cost recovery from users of a Court".

[22] Concerning the number of copies claimed for the photocopying of the Certified Tribunal Record, the Respondent has provided no evidence or submissions substantiating the reasonableness and necessity of the six copies claimed. As Rule 318 is silent on the number of copies to be filed, generally in similar circumstances, one copy would be required for Respondent's counsel, one copy for the self-represented Applicant, one copy for the Court and one local office copy for filing at the Winnipeg office pursuant to Rule 25. Without full argument or context, it is unclear what the intended purpose was for the fifth and sixth copies claimed of the Certified Tribunal Record. In particular, whether the additional copies claimed by the Respondent contemplated client copies, which do not form part of party and party costs (see:

Compulife Software Inc. v. Compuoffice Software Inc., 2002 FCT 1120 at para 27, *Halford v. Seed Hawk Inc.*, 2006 FC 422 at para 247, *Abbott Laboratories v. Canada (Health)*, 2008 FC 693 (*Abbott*) at para 115 and *Fournier Pharma Inc. v. Canada (Health)*, 2008 FC 929 at para 19). In *Diversified Products Corp v. Tye-Sil Corp*, [1990] FCJ No 1056, the Federal Court states:

The item of photocopies is an allowable disbursement only if it is essential to the conduct of the action. Therefore, this is intended to reimburse a party for the actual out-of-pocket cost of the photocopy. The \$.25 charge by the office of Plaintiffs' counsel is an arbitrary charge and does not reflect the actual cost of the photocopy. A law office is not in the business of making a profit on its photocopy equipment. It must charge the actual cost and the party claiming such disbursements has the burden to satisfy the Taxing Officer as to the actual cost of the essential photocopies (Emphasis added).

[23] Nonetheless, a result of zero for the photocopying of the Certified Tribunal Record would be inappropriate, from a review of the Court file, it is evident that necessary costs were incurred pursuant to Rule 318 in order to produce the Certified Tribunal Record filed by the Respondent on November 23, 2016. I will thus proceed in light of the Assessment Officer's comments at paragraph 71 of *Abbott*:

71 However, that is not to suggest that litigants can get by without any evidence by relying on the discretion and experience of the assessment officer. The proof here was less than absolute, but I think there is sufficient material in the respective records of the Federal Court and the Federal Court of Appeal for me to gauge the effort and associated costs required to reasonably and adequately litigate Apotex's position. A lack of details makes it difficult to confirm whether the most efficient approach was indeed used or that there were no errors in instructions, as for example occurred in *Halford*, requiring remedial work. A paucity of evidence for the circumstances underlying each expenditure make it difficult for the respondent on the assessment of costs and the assessment officer to be satisfied that each expenditure was incurred further to reasonable necessity. The less that evidence is available, the more that the assessing party is bound up in the assessment officer's discretion, the exercise of which should be conservative, with a view to the sense of austerity which should pervade costs, to preclude prejudice to the

payer of costs. However, real expenditures are needed to advance litigation: a result of zero dollars at assessment would be absurd.

[24] The determination of photocopies will also be guided by the Federal Court of Appeal's finding in *Apotex Inc. v. Merck & Co. Inc.*, 2008 FCA 371 at paragraph 14:

14 In view of the limited material available to assessment officers, determining what expenses are "reasonable" is often likely to do no more than rough justice between the parties and inevitably involves the exercise of a substantial degree of discretion on the part of assessment officers. Like officers in other recent cases, the Assessment Officer in this complex case, involving very large sums of money, gave full reasons on the basis of a careful consideration of the evidence before him and the general principles of the applicable law.

[25] Further to the absence of fulsome submissions on the matter of the photocopies of the Certified Tribunal Record, a review of the Court file and the jurisprudence outlined above, I have determined that \$950.00 is reasonable to allow for this disbursement, in these circumstances.

IV. Conclusion

[26] For the above reasons, the Respondent's Bill of Costs is assessed and allowed at \$5,850.00. A Certificate of Costs will be issued.

"Orelie Di Mavindi"

Assessment Officer

Toronto, Ontario
December 10, 2020

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-57-16

STYLE OF CAUSE: CHRISTOPHER L. KREUTZWEISER v
ATTORNEY GENERAL OF CANADA

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

**REASONS FOR ASSESSMENT
BY:** ORELIE DI MAVINDI, Assessment Officer

DATED: DECEMBER 10, 2020

WRITTEN SUBMISSIONS BY:

N/A FOR THE APPLICANT (SELF-REPRESENTED)

Cheryl Giesbrecht FOR THE RESPONDENT

SOLICITORS OF RECORD:

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Saskatoon, Saskatchewan