Federal Court  Cour fédérale

Date: 20210831

Docket: T-1400-16

Citation: 2021 FC 901

BETWEEN:

JONATHAN N. GARBUTT

Applicant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR ASSESSMENT

GARNET MORGAN, Assessment Officer

I. Introduction

[1] This is an assessment of costs pursuant to a Judgment of the Federal Court dated November 22, 2016, which states the following:

> 1. The respondent's motion to strike the applicant's application for judicial review is granted;
>
> 2. The applicant's application for judicial review is dismissed;
>
> 3. Costs are granted to the respondent.

[2] Further to the Court's Judgment, costs will be assessed in accordance with Rule 407 of the *Federal Courts Rules*, SOR/98-106 (*FCR*), which states:

> 407. Assessment according to Tariff B - Unless the Court orders otherwise, party-and-party costs shall be assessed in accordance with column III of the table to Tariff B.

[3] On May 19, 2021, the Respondent filed a Record on Costs, containing a Bill of Costs, an Affidavit of Disbursements of Julie Tychkowsky, affirmed on May 12, 2021 and Written Submissions, which initiated the Respondent's request for an assessment of costs.

[4] On May 20, 2021, a direction was issued to the parties regarding the conduct and filing of documents for the assessment of costs. Further to the issuance of the direction, my review of the court record found that no additional costs documents were received by the court registry from the parties, nor were any requests made to extend the time to file additional costs documents. The court record also showed that the direction dated May 20, 2021, was e-mailed to the parties on May 20, 2021, with an e-mail confirming receipt by the Respondent; and on May 23, 2021, the direction was sent via facsimile to the Applicant, with a successful fax transmission report being received. Therefore, the only documents filed by the parties specifically for this assessment of costs is the Respondent's Record on Costs filed on May 19, 2021.

II. Preliminary Issue

[5] As noted earlier in these Reasons, the Applicant did not file any costs documents in response to the Respondent's request for an assessment of costs. The absence of any responding documents from the Applicant addressing the Respondent's claims for costs has left the

Respondent's Bill of Costs substantially unopposed. In *Dahl v Canada*, 2007 FC 192, at paragraph 2, the Assessment Officer stated:

> 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. 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.

[6] Further to the decision in *Dahl*, in *Carlile v Canada*, [1997] F.C.J. No. 885, at paragraph 26, the Assessment Officer states:

> 26. […] Taxing Officers are often faced with less than exhaustive proof and must be careful, while ensuring that unsuccessful litigants are not burdened with unnecessary or unreasonable costs, to not penalize successful litigants by denial of indemnification when it is apparent that real costs were indeed incurred. This presumes a subjective role for the Taxing Officer in the process of taxation. My Reasons dated November 2, 1994, in T-1422-90: Youssef Hanna Dableh v. Ontario Hydro cite, [1994] F.C.J. No. 1810, at page 4, a series of Reasons for Taxation shaping the approach to taxation of costs. Dableh was appealed but the appeal was dismissed with Reasons by the Associate Chief Justice dated April 7, 1995, [1995] F.C.J. No. 551. I have considered disbursements in these Bills of Costs in a manner consistent with these various decisions. Further, Phipson On Evidence, Fourteenth Edition (London: Sweet & Maxwell, 1990) at page 78, paragraph 4-38 states that the "standard of proof required in civil cases is generally expressed as proof on the balance of probabilities". Accordingly, the onset of taxation should not generate a leap upwards to some absolute threshold. If the proof is less than absolute for the full amount claimed and the Taxing Officer, faced with uncontradicted evidence, albeit scanty, that real dollars were indeed expended to drive the litigation, the

> Taxing Officer has not properly discharged a quasi-judicial function by taxing at zero dollars as the only alternative to the full amount. Litigation such as this does not unfold solely due to the charitable donations of disinterested third persons. On a balance of probabilities, a result of zero dollars at taxation would be absurd. […]

[7] Further to the decisions in *Dahl* and *Carlile*, although there is an absence of responding documents from the Applicant challenging the assessable services or disbursements claimed by the Respondent for this particular assessment of costs, as an Assessment Officer, I have an obligation to ensure that any claims that are allowed are not "unnecessary or unreasonable". In addition to the Respondent's costs documents, the court record, the *FCR* and any relevant jurisprudence will be utilized to assess the costs of the Respondent to ensure that they were necessary and are reasonable.

III. Assessable Services

[8] The Respondent has claimed $3,120.00 in assessable services.

A. *Item 5 – Preparation and filing of a contested motion, including materials and responses thereto; Item 6 – Appearance on a motion, per hour; Item 25 - Services after judgment not otherwise specified.*

[9] I have reviewed the Respondent's costs documents in conjunction with the court record, the *FCR* and any relevant jurisprudence and I have determined that the Respondent's claims for Item 5, Item 6, and Item 25 were all necessary and are reasonable. Therefore, 5 units are allowed for Item 5; 4 units are allowed for Item 6; and 1 unit is allowed for Item 25.

[10] The Respondent's claims for Item 2, Item 15 and Item 26 have some issues to look into and as a result, they will be reviewed individually below.

B. *Item 2 – Preparation and filing of all defences, replies, counterclaims or respondents' records and materials.*

[11] The Respondent has claimed 4 units for Item 2 for the preparation and filing of a Notice of Appearance. There were no specific submissions provided by the parties in relation to this claim. Item 2 in Tariff B of the *FCR* is for the "[p]reparation and filing of all defences, replies, counterclaims or respondents' records and materials" and is designated for assessable services related to the preparation and filing of a responding party's pleadings. Therefore, the Respondent's Notice of Appearance does not fall under this particular Item. This being noted, in *Mitchell v Canada*, 2003 FCA 386, at paragraph 12, the Assessment Officer stated following regarding the positive application of costs provisions and the use of Item 27:

> 12. The Appellants are correct that the wording for item 27 does not generally fetter discretion. However, that discretion, as for other items in bills of costs, is still fettered by reasonable necessity and the limits of an award of costs. Consistent with Rule 3, and with my sentiment in *Feherguard Products Ltd. v. Rocky's of B.C. Leisure Ltd.*, [1994] F.C.J. No. 2012 (A.O.), at para. 10 that the "best way to administer the scheme of costs in litigation is to choose positive applications of its provisions as opposed to narrower and negative ones", application of discretion should be part of a reasoned process to achieve a result on assessment which is equitable for both sides. Item 27 addresses the professional services of counsel not already addressed by items 1 - 26. Its wording, "such other services", is clearly plural and I understand that to permit assessment of discrete services, as opposed to a restriction to a bundling of several services, not already addressed by items 1 - 26, within a single item 27 claim. That is, item 27 may be claimed more than once.

[12] Item 27 in Tariff B of the *FCR* states that it is for "[s]uch other services as may be allowed by the assessment officer or ordered by the Court." Utilizing the *Mitchell* decision as a guideline, I have determined that assessing the Respondent's claim for the Notice of Appearance under Item 27 is an acceptable alternative to Item 2 and will allow for a positive application of the costs provisions instead of a narrower one. Further to my review of the court record, I have verified that the Respondent performed the service claimed for the Notice of Appearance, which was filed on August 28, 2016. Considering that Notices of Appearance are a very simple document to prepare, I have determined that it is reasonable to allow 1 unit for Item 27 for the Respondent's claim for the Notice of Appearance, which was initially submitted under Item 2.

C. *Item 15 - Preparation and filing of written argument, where requested or permitted by the Court.*

[13] The Respondent has requested 4 units for Item 15 for the preparation of letters dated September 8, 2016 and November 18, 2016. The letter dated September 8, 2016, was in response to the Applicant's request for the production of a certified tribunal record pursuant to Rule 317 of the *FCR*; and the letter dated November 18, 2016, was in response to the Applicant's request for leave to file a supplemental record pursuant to Rule 312 of the *FCR*. There were no specific submissions provided by the parties in relation to this claim. Item 15 in Tariff B of the *FCR* is for the "[p]reparation and filing of written argument, where requested or permitted by the Court." In *Biovail Pharmaceuticals Canada v Canada (Minister of National Health and Welfare)*, [2009] FCJ No 858, at paragraph 27, the Assessment Officer stated the following regarding claims for Item 15:

> 27. Fee item 15 (written argument where requested or permitted by the Court) falls under the subheading E. Trial or

> Hearing. Such written argument usually occurs shortly after a hearing, but on occasion has been requested shortly before a hearing. It is not the memorandum of fact and law included in the respondent's materials under fee item 2. As the Court did not request such written argument, I disallow the fee item 15 claim in each matter.

[14] In addition, in *Moodie v Canada (Minister of National Defence)*, [2009] FCJ No 791, at paragraphs 14, 15 and 16, the Assessment Officer stated the following regarding claims for Item 15:

> 14. I am not able to allow the amounts claimed under Item 14(b) for second counsel or Item 15. Under both of these items there is a requirement for the Court to make an award or direction. Item 14(b) includes the provision "where Court directs" and Item 15 includes "where requested or permitted by the Court".
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> 15. *In Balisky v. Canada (Minister of Natural Resources)*, 2004 FCA 123, [2004] F.C.J. No. 536, at paragraph 6 the assessment officer states:
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> > 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.
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> 16. Since an assessment officer is not a member of the Court, and there is no direction or order concerning second counsel or written submissions, I am without jurisdiction to allow the amounts claimed under Items 14(b) and 15.

[15] Further to the *Biovail* and *Moodie* decisions, my review of the court record did not reveal that the Court requested written arguments from the Respondent regarding the Applicant's request for the production of a certified tribunal record pursuant to Rule 317 of the *FCR*; or regarding the Applicant's request for leave to file a supplemental record pursuant to Rule 312 of

the *FCR*. Therefore, I have determined that the Respondent's claim for Item 15 must be disallowed. Although I have determined that I cannot allow costs under Item 15, I do find that the Respondent performed services that were required for the judicial review to proceed. The Applicant's request for the production of a certified tribunal record pursuant to Rule 317, required a response from the Respondent pursuant to Rule 318 of the *FCR* in order for the judicial review to proceed to the hearing stage. In addition, for the Applicant's informal request for leave to file a supplemental record pursuant to Rule 312 of the *FCR*, it necessitated a response from the Respondent so that the Court could make a determination on the Applicant's request.

[16] Utilizing the *Mitchell* (supra) decision as a guideline, I have determined that assessing the Respondent's claim under Item 27 is an acceptable alternative to Item 15 and will allow for a positive application of the costs provisions instead of a narrower one. My review of the Respondent's letters dated September 8, 2016 and November 18, 2016, took into consideration the size of the documents that were read and/or prepared and any related work that may have been required by the Respondent. Further to my review, I have determined that the assessable services performed by the Respondent were necessary and that it is reasonable to allow 2 units for each of the Respondent's letters for a total 4 units under Item 27.

D. *Item 26 – Assessment of costs.*

[17] At paragraph 9 of the Affidavit of Disbursements of Julie Tychkowsky, affirmed on May 12, 2021, the following was stated about the Respondent's claim for services performed for this assessment of costs (taxation):

> 9. I make this affidavit in support of an assessment of costs in the amount of $2,551.12 as stated in the Respondent's Bill of Costs, plus an additional $600 for the taxation of the costs as allowed by the Tariff for a total of $3,151.12. Attached as Exhibit "E", is a copy of the Respondent's Bill of Costs to include the amount for the taxation of costs.

[18] Upon my review of the Respondent's Bill of Costs it did not immediately stand out that the Respondent had made a claim for Item 26, which is for services performed for an "[a]ssessment of costs", as this claim was not clearly itemized in the Bill of Costs. The $600.00 being claimed by the Respondent was entered in the Bill of Costs under the title "TAXED ON". The Respondent's claim should have been entered under Item 26 with the corresponding number of units noted. In addition, on the first page of the Bill of Costs it is noted that the "value assigned per unit is $140.00" for the claims within the Bill of Costs but the claim for the assessment of costs, appears to be calculated with a unit value of $150.00. The range of units for Item 26 under Column III in Tariff B is 2 – 6 units. The Respondent's claim for $600.00 divided by 4 units, equals $150.00 per unit. As noted earlier, the first page of the Bill of Costs states that the unit value for the claims within the Bill of Costs is $140.00. Therefore, this unit amount should remain constant throughout the Bill of Costs and will be applied to Item 26 as well.

[19] Considering the aforementioned facts, and utilizing the *Carlile* and *Mitchell* decisions as guidelines, I have determined that assessing the Respondent's claim for the assessment of costs under Item 26 is an acceptable alternative to assessing the Respondent's claim at zero because it was not clearly identified in the Bill of Costs. Further to my review of the Respondent's costs documents, I am satisfied that the services performed by the Respondent for this assessment of costs were necessary and that allowing 4 units is reasonable but these units will be calculated at $140.00 per unit for a total amount of $560.00.

E. *Total amount allowed for assessable services.*

[20] A total of 19 units have been allowed for the assessable services for a total amount of $2,660.00.

IV. Disbursements

[21] The Respondent has claimed $31.12 for courier services.

[22] I have reviewed the Respondent's costs documents in conjunction with the court record, the *FCR* and any relevant jurisprudence and I have determined that the disbursement for courier services claimed by the Respondent was necessary and is reasonable. Therefore, this disbursement is allowed as claimed for $31.12.

V. Conclusion

[23] For the above Reasons, the Respondent's Bill of Costs is assessed and allowed in the total amount of $2,691.12, payable by the Applicant to the Respondent. A Certificate of Assessment will also be issued.

"Garnet Morgan"
Assessment Officer

Toronto, Ontario
August 31, 2021

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1400-16
STYLE OF CAUSE:	JONATHAN N. GARBUTT 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:	AUGUST 31, 2021

WRITTEN SUBMISSIONS BY:

Jonathan N. Garbutt	FOR THE APPLICANT (SELF-REPRESENTED)
Colin Wetter	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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