

Federal Court



Cour fédérale

Date: 20210915

Docket: T-1554-20

Citation: 2021 FC 948

BETWEEN:

SCOTT WILSON

Applicant

and

TELUS COMMUNICATIONS INC.

Respondent

REASONS FOR ASSESSMENT

GARNET MORGAN, Assessment Officer

I. Background

[1] This assessment of costs is pursuant to an Order of the Federal Court (“the Court”) dated March 22, 2021, wherein costs were awarded to the former Respondent, Commission for Complaints for Telecom-television Services Inc. (“CCTS”). The Order stated the following:

1. The Applicant’s Notice of Application is struck as against CCTS, without leave to amend;
2. The Application against CCTS is dismissed; and
3. The Applicant shall pay the Respondent CCTS their costs for the within motion.

[2] Further to the Court's Order, 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 April 30, 2021, the CCTS filed a Bill of Costs, which initiated the CCTS' request for an assessment of costs.

[4] On May 11, 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 11, 2021, was e-mailed to the parties on May 11, 2021, with an e-mail confirming receipt being received from the CCTS; and on May 16, 2021, the direction was also sent via regular mail to the Applicant. Therefore, the only documents filed by the parties specifically for this assessment of costs is the CCTS' Bill of Costs filed on April 30, 2021.

II. Preliminary Issue

A. *CCTS' Bill of Costs being substantially unopposed.*

[5] As noted earlier in these Reasons, the Applicant did not file any documents in response to the CCTS' request for an assessment of costs. The absence of any responding documents from the Applicant addressing the CCTS' claims for costs has left the CCTS' 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 *Dahl* decision, in *Carlile v Canada*, [1997] F.C.J. No. 885, at paragraph 26, the Assessment Officer stated:

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 *Dahl* and *Carlile* decisions, although there is an absence of responding documents from the Applicant addressing the assessable services claimed by the CCTS 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 CCTS’ Bill of Costs, the court record, the *FCR* and any relevant jurisprudence will be utilized to assess the costs of the CCTS to ensure that they were necessary and are reasonable.

B. *CCTS’ claims for assessable services made in accordance with column IV of the table to Tariff B in the FCR.*

[8] In the CCTS’ Bill of Costs, the assessable services that have been claimed have been calculated in accordance with column IV of the table to Tariff B in the *FCR*. My review of Court’s Order dated March 22, 2021, did not reveal that costs were awarded to the CCTV in accordance with column IV. As noted earlier in these Reasons, Rule 407 of the *FCR* states, “[u]nless the Court orders otherwise, party-and-party costs shall be assessed in accordance with column III of the table to Tariff B.” In *Pelletier v Canada*, 2006 FCA 418, at paragraph 7, the Court stated the following regarding awards of costs:

7. [...] Section 409 provides that “[i]n assessing costs, an assessment officer may consider the factors referred to in subsection 400(3).” In short, the duty of an assessment officer is to assess costs, not award them. An officer cannot go beyond, or contradict, the order that the judge has made.

[9] Further to the *Pelletier* decision, my role as an Assessment Officer is only to assess costs. I do not have the authority to award costs in accordance with column IV, as I am not a Judge. Therefore, in the absence of a Court decision awarding costs to the CCTS in accordance with column IV, I find that I must adhere to the parameters set out in Rule 407 of the *FCR* and assess the CCTS' costs at the party-and-party level in accordance with column III of the table to Tariff B of the *FCR*.

III. Assessable Services

[10] The CCTS has claimed \$3,474.75 in assessable services.

A. *Item 5 – Preparation and filing of a contested motion, including materials and responses thereto; and Item 26 – Assessment of costs.*

[11] I have reviewed the CCTS' Bill of Costs in conjunction with the court record, the *FCR* and any relevant jurisprudence and I have determined that the CCTS' claims for Item 5 and Item 26 were necessary. As I noted earlier in these Reasons, the units claimed by the CCTS for the assessable services were calculated using column IV of Tariff B, which I have determined I do not have the authority to allow for this particular assessment of costs. Therefore, the issue left for me to determine is the reasonable quantum of costs to allow for Item 5 and Item 26.

[12] To determine the reasonable quantum of costs to allow for Item 5 and Item 26, I utilized the authority provided to Assessment Officers pursuant to Rule 409 of the *FCR* and considered the factors referred to in Rule 400(3) of the *FCR* in the relation to the CCTS' claims.

Considering the factors listed under Rule 400(3), such as; “(a) the result of the proceeding”; “(b)

the amounts claimed and the amounts recovered”; “(g) the amount of work”; and “(i) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding”; I have determined that it is reasonable to allow 7 units for Item 5 and 3 units for Item 26 in accordance with column III of Tariff B of the *FCR*.

B. *Item 25 - Services after judgment not otherwise specified.*

[13] Concerning Item 25, the CCTS have claimed 4.5 units for second counsel fees for the “service and filing of CCTS Motion Record and Book of Authorities served and filed February 26, 2021.” The claim for Item 25 is the same as the CCTS’ claim for Item 5, except that it is for second counsel fees. My review of Tariff B in the *FCR*, has shown that for judicial review proceedings, only Item 14 has a specific provision for second counsel fees, which is for counsel’s attendance at hearings, such as judicial reviews or motion hearings. There is no provision in Item 5 nor Item 25 for second counsel fees that is equivalent to the provision found in Item 14, which may be awarded pursuant to a Court direction under subsection (b) of Item 14 of Tariff B in the *FCR*.

[14] Further to my review of the court record and more specifically the Court’s Order dated March 22, 2021, they did not reveal that the Court made a direction and/or decision awarding second counsel fees to the CCTS under any Item in Tariff B. The motion that the CCTS has made claims for under Item 5 and Item 25, was a motion that was dealt with by the Court solely based on the parties’ written material. If this particular motion had been dealt with in person, there may have been an opportunity to claim second counsel fees, if the Court had directed that

these costs could be included in the CCTS' Bill of Costs pursuant to Item 14(b) of Tariff B. That is not the case for this particular file.

[15] In *Novopharm Ltd. v AstraZeneca AB*, 2006 FC 678, at paragraph 30, the Assessment Officer stated the following regarding Item 5 and Court directions:

30. The Novopharm Applicant has requested costs for both proceedings as well as second counsel fees for Item 5 (Preparation and filing of a contested motion, including materials and responses thereto.) and Item 6 (Appearance on a motion, per hour.). For the reasons I have outlined above in paragraphs [20] and [25] regarding the issue of costs for both proceedings and second counsel fees, I am of the opinion these two items were specific assessable services that were common to both proceedings. In addition, I note that there is no Order of the Federal Court allowing second counsel fees for Item 5 and Item 6. For greater clarity, I do not wish to allow a duplication of fees or an over-payment of fees which is clearly not appropriate in any assessment of costs. For these reasons, I only allow the unit value of 7 units and 7.5 units, respectfully for Item 5 and Item 6 for a total of 14.5 units (\$1,595.00) for both proceedings.

[16] In addition, in *4059573 Canada Inc. v Pelletier*, 2007 FC 1125, at paragraph 8, the Assessment Officer stated the following regarding second counsel fees:

8. [...] Further, all the items 9 to do with the attendance of a second counsel cannot be awarded, since under Tariff B there is no mention of a second counsel for this item. If we look at Tariff B, by analogy, in item 14(b) where a second counsel is mentioned this must be obtained from the Court. As the order of October 2, 2006 says nothing about this, I cannot allow this request.

[17] Utilizing the *Pelletier* (supra), *Novopharm* and *4059573 Canada Inc.* decisions as guidelines, I find that there are ambiguities with CCTS' claim for Item 25 and in the absence of a Court direction and/or decision, specifically awarding CCTS second counsel fees; I find that the

onus was on the CCTS to clearly substantiate this particular claim, which was not done. CCTS did not provide any submissions and/or evidence to support the claim for Item 25. Further to my review of the CCTS' Bill of Costs in conjunction with the court record, the *FCR*, and the aforementioned jurisprudence, I have determined that the CCTS' claim for Item 25 must be disallowed, as it pertains to the facts for this particular file.

C. *Total amount allowed for assessable services.*

[18] A total 10 units have been allowed for the assessable services for a total amount of \$1,695.00.

IV. Disbursements

[19] The CCTS did not make any claims for disbursements.

V. Conclusion

[20] For the above Reasons, the Commission for Complaints for Telecom-television Services Inc.'s Bill of Costs is assessed and allowed in the total amount of \$1,695.00, payable by the Applicant to the Commission for Complaints for Telecom-television Services Inc.

“Garnet Morgan”
Assessment Officer

Toronto, Ontario
September 15, 2021

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1554-20

STYLE OF CAUSE: SCOTT WILSON v TELUS COMMUNICATIONS
INC.

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

**REASONS FOR ASSESSMENT
BY:** GARNET MORGAN, Assessment Officer

DATED: SEPTEMBER 15, 2021

WRITTEN SUBMISSIONS BY:

Scott Wilson

FOR THE APPLICANT
(SELF-REPRESENTED)

Wendy J. Wagner
Hunter Fox

COMMISSION FOR COMPLAINTS FOR
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