Federal Court  Cour fédérale

Date: 20221215

Docket: 21-T-61

Citation: 2022 FC 1728

BETWEEN:

CHANDRAHAS JOG

Applicant

and

BANK OF MONTREAL

Respondent

REASONS FOR ASSESSMENT

AUDREY BLANCHET, Assessment Officer

I. Background

[1] By way of an Order and Reasons dated February 22, 2022, the Court dismissed the Applicant's motion in writing pursuant to Rule 369 of the *Federal Courts Rules* [Rules], with costs.

[2] On May 5, 2022, the Respondent filed a Bill of Costs, which initiated the Respondent's request for an assessment of costs.

[3] On May 17, 2022, a direction was issued to the parties regarding the conduct and filing of additional documents for the assessment of costs. Further to the issuance of the direction, on July 13, 2022, the Applicant filed Written Representations. On August 4, 2022, the Respondent filed Reply Written Representations on Costs. My review of the court record shows that both parties served and filed their respective costs documents within the prescribed timeframes.

II. Preliminary Issues

A. *The deferral of the assessment of costs*

[4] On March 7, 2022, the Applicant filed a Notice of Appeal appealing the aforementioned Order and Reasons in court file A-49-22. In the course of action of this file, it was later ordered by the Federal Court of Appeal that file A-49-22 be consolidated with another Applicant's Notice of Appeal in file A-66-22, while stating that file A-49-22 shall be the lead file.

[5] The Applicant requests that the assessment of costs be deferred given the appeal proceedings before the Federal Appeal Court. The Applicant claims "that the Respondent can ask costs throughout before the FCA hearing of lead file A-49-22" (Applicant's Response, para 14).

[6] In its written submissions, the Respondent raised the argument that the appeals in both file A-66-22 and file A-49-22 do not have any impact on the assessment of costs. The Respondent also added that costs should be determined at the conclusion of each stage of the legal proceedings and ought to be fixed by the Assessment Officer based on the parties' submissions (Respondent's reply, paras 3-4).

[7] In *Suresh v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15812 (FC) [*Suresh*], the Assessment Officer stated the following regarding the deferral of the assessments of costs :

> [6] I have considered the argument by counsel and reviewed the above mentioned jurisprudence as well as other relevant cases, and in the circumstances of this case, I am of the view that in order for an assessment officer to exercise his/her discretion to defer an assessment of costs awarded by the Court, compelling circumstances would have to exist. While I am not proposing that an outstanding appeal has no bearing or effect on this assessment, I am not, however, convinced that the existence of an appeal, by itself, is sufficient to compel me to defer the assessment. While I find the plaintiff's argument on this point to be articulate, it is my view that it is the kind of argument that should have been made to the Court on a motion for stay of the order. As an assessment officer, I am not empowered to make such an order. No such stay was ordered nor was one sought. Consequently, what I have before me today is a valid Court order providing for an award of costs to the defendant. And, as the order provides, those costs are to be determined either by way of assessment or through the agreement of the parties. No agreement having been reached, I am bound by the order of the Court to assess costs.

[8] In *Elders Grain Co Ltd v Ralph Misener (Ship)*, 2005 FCA 139, [*Elders Grain*], the Court held that 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, except under specific circumstances:

> [13] The trial Judge's decision regarding the procedure to be followed at trial was a discretionary one. An appellate court is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the trial judge. However, if the decision was based on an error of law or if the appellate court reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations or that the trial judge considered irrelevant factors or failed to consider relevant factors, then an appellate court is entitled to exercise its own discretion: [Citations omitted.]

[9] Taking into account the above principles set out in *Suresh* and *Elders Grain*, costs shall be assessed without delay by an Assessment Officer pursuant to Rule 405.

B. *The deadline for filing a motion for directions pursuant to Rule 403 of the Federal Courts Rules*

[10] The Applicant claims that the Respondent missed the deadline for a motion for directions pursuant to Rule 403 whereby the trial Judge would have included costs amount in the order dated February 22, 2022.

[11] Rule 403 (1) reads as follows:

Motion for directions **403 (1)** A party may request that directions be given to the assessment officer respecting any matter referred to in rule 400, **(a)** by serving and filing a notice of motion within 30 days after judgment has been pronounced; or **(b)** in a motion for judgment under subsection 394(2).	**Requête pour directives** **403 (1)** Une partie peut demander que des directives soient données à l'officier taxateur au sujet des questions visées à la règle 400 : **a)** soit en signifiant et en déposant un avis de requête dans les 30 jours suivant le prononcé du jugement; **b)** soit par voie de requête au moment de la présentation de la requête pour jugement selon le paragraphe 394(2).

[12] Rule 403 may be utilized in order to clarify, complete or particularize a costs order. The use of 'may' indicates a discretion to proceed within that time and does not compel an obligation. The inference that it is to be given a mandatory meaning fails.

[13] Contrary to the appellant's contention, if no directions are requested to be given to the Assessment Officer in regards to costs, costs shall be assessed in accordance with Rule 407:

Assessment according to Tariff B **407.** Unless the Court orders otherwise, party-and-party costs shall be assessed in accordance with column III to the table of Tariff B.	**Tarif B** **407.** Sauf ordonnance contraire de la Cour, les dépens partie-partie sont taxés en conformité avec la colonne III du tableau du tarif B.

[14] In this case, the Respondent did not file a motion for directions under Rule 403, but rather filed a Bill of Costs for an Assessment Officer to assess costs in accordance with Rules 405 and 406.

C. *The Respondent's Bill of Costs being substantially unopposed*

[15] Apart from the issues previously addressed, the Applicant's Written Representations did not include any submissions that specifically addressed the Respondent's claims. This leaves said Bill of Costs substantially unopposed.

[16] With respect to the standard to be applied by an Assessment Officer in assessing a substantially unopposed bill of costs, the Assessment Officer in *Dahl v Canada,* 2007 FC 192 [*Dahl*] stated the following :

> [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. […]

[17] In addition to the *Dahl* decision, in *Merck and Co v Apotex Inc*, 2006 FC 631 [*Merck*], the Court held:

> [3] In general a successful party is entitled to recover costs to be assessed on a Column III basis together with disbursements that are reasonable and necessary for the conduct of the proceeding. […]

[18] Bearing in mind the principles set out in *Dahl* and *Merck*, and further to the Court's decision, I will only allow costs claimed by the Respondent for which it is entitled and that are within the range of units set out in Column III of Tariff B, and any disbursements that I consider reasonable and necessary.

III. Assessable services

[19] The Respondent's Bill of Costs only includes claims for assessable services, which total $2,373.00, including HST.

A. *Item 5 - Preparation and filing of a contested motion, including materials and responses thereto*

[20] The Respondent claims 7 units for the preparation and filing of a response to the Applicant's motion for an extension of time for filing an application for judicial review pursuant to Rule 369. Having reviewed the Respondent's written submissions, I note that there is no

specific evidence on this claim. Given that this case is of usual complexity and that the default level of costs in the Federal Court is the mid-point of Column III in Tariff B, I find it reasonable to allow 5 units (Allergan Inc v Sandoz Canada Inc, 2021 FC 186 at para 25).

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

[21] The Respondent claims 1 unit under Item 25, without evidence to substantiate their claim. Notwithstanding the absence of evidence, Item 25 is routinely allowed to review the judgment and explain associated implications to the client (*Halford v Seed Hawk Inc*, 2006 FC 422 at para 131). Therefore, I conclude that the Respondent is entitled to 1 unit as claimed.

C. *Item 27 - Such other services as may be allowed by the assessment officer or ordered by the Court*

[22] In the Respondent's Bill of Costs, 3 units are claimed under item 27 with a reference to "submission of costs" (Respondent's Bill of Costs). Whereas submissions on costs should be claimed under Item 26, which specifically provides for the assessment of costs, I allow 3 units under Item 26 instead of Item 27.

D. *Item 28 - Services in a province by students-at-law, law clerks or paralegals that are of a nature that the law society of that province authorizes them to render, 50% of the amount that would be calculated for a solicitor*

[23] The Respondent claims $525.00 for Item 28, with a mention of 7 units. Item 28 of Tariff B provides for "services in a province by students-at-law, law clerks or paralegals that are

of a nature that the law society of that province authorizes them to render, 50% of the amount that would be calculated for a solicitor."

[24] Having reviewed the Respondent's written submissions, I note that there is no specification as to which services were rendered nor which services are being claimed. The claim does specify however that the services were performed by S. Atwell, Law Clerk. My review of the court record reveals that on January 17, 2022, an affidavit of Sonia Atwell was filed with the court in support of the Motion Record on behalf of the Respondent.

[25] Whereas costs were already allowed under Item 5 for the Respondent's Motion Record, allowing Item 28 for said service would result in double indemnification. In *Advance Magazine Publishers Inc v Farleyco Marketing Inc*, 2010 FCA 143, the Assessment Officer states:

> [18] The Respondent has claimed 50% of the amount claimed for the assessment of costs for the work of a law clerk in preparing the Bill of Costs. Although claimed under Item 26, the services of a student-at-law, a law clerk or paralegal are found under Item 28 in Tariff B of the *Federal Courts Rules*. In *Bayer AG v. Novopharm Ltd.*, 2009 FC 1230 at paragraph 14 it was held that as the work of the law clerk had been previously allowed for under Item 26, "Item 28 is not allowed in order to prevent indemnification twice for the same service". The same reasoning applies in the current circumstance. Therefore, the claim for the services of a law clerk is not allowed.

[26] As neither the Respondent's submissions nor the court record contain any other information allowing me to determine which services, other than those related to the Motion Record, were performed by a law clerk, the amount claimed is not allowed.

IV. Conclusion

[27] For the above reasons, the Respondent's costs are assessed and allowed in the total amount of $1,627.20. A Certificate of Assessment will be issued accordingly, payable by the Applicant, Chandrahas Jog, to the Respondent, the Bank of Montreal.

"Audrey Blanchet"
Assessment Officer

Ottawa, Ontario
December 15, 2022

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	21-T-61
STYLE OF CAUSE:	CHANDRAHAS JOG v BANK OF MONTREAL
MATTER CONSIDERED AT OTTAWA, ONTARIO WITHOUT PERSONAL APPEARANCE OF THE PARTIES	
REASONS FOR ASSESSMENT BY:	AUDREY BLANCHET, Assessment Officer
DATED:	DECEMBER 15, 2022

WRITTEN SUBMISSIONS BY:

Chandrahas Jog	SELF-REPRESENTED
Christine Lonsdale Stephanie Willsey	FOR THE RESPONDENT

SOLICITORS OF RECORD:

McCarthy Tétrault LLP Barristers and Solicitors Toronto, Ontario	FOR THE RESPONDENT