Federal Court of Appeal | Cour d'appel fédérale

Date: 20230224

Docket: A-295-19

Citation: 2023 FCA 40

[ENGLISH TRANSLATION]

Present: **AUDREY BLANCHET, Assessment Officer**

BETWEEN:

MARITIME EMPLOYERS ASSOCIATION

MONTREAL PORT AUTHORITY

SHIPPING FEDERATION OF CANADA

Applicants

and

SYNDICAT DES DÉBARDEURS, LOCAL 375 OF THE CANADIAN UNION OF PUBLIC EMPLOYEES

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION

CHAMBRE DE COMMERCE DE L'EST DE MONTRÉAL

CONSEIL DU PATRONAT DU QUÉBEC

FÉDÉRATION DES CHAMBRES DE COMMERCE DU QUÉBEC

Respondents

Assessment of costs without appearance of the parties.

Certificate of Assessment delivered at Ottawa, Ontario, on February 24, 2023.

REASONS FOR ASSESSMENT BY: AUDREY BLANCHET, Assessment Officer

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REASONS FOR ASSESSMENT

AUDREY BLANCHET, Assessment Officer

[1] On August 23, 2019, the applicants filed an application for judicial review of a decision by the Canada Industrial Relations Board (the "Board" or "CIRB"). In its decision, the Board had dismissed the applicants' application for recusal of a panel member of the Board ("member Ménard") that was at the time seized with an application to maintain essential services. On January 29, 2020, this Court rendered a judgment dismissing the applicants' judicial review application, with costs (the "Judgment"). This is an assessment of costs in accordance with the Judgment, under Part 11 of the *Federal Courts Rules*, SOR/98-106 ("Rules") and Tariff B. In the absence of any indication from the Court, costs will be assessed in accordance with column III of the table to Tariff B ("Rule 407").

[2] On November 13, 2020, the respondent Syndicat des débardeurs, Local 375 of the Canadian Union of Public Employees (the "respondent"), filed a bill of costs in the amount of $82,170.05. On January 29, 2021, the parties received a direction as to the dates for filing the documents for the assessment of costs. The following documents were filed by the parties for the purpose of this assessment: on February 19, 2021, the respondent filed written submissions in support of the bill of costs and an affidavit from Michel Murray; on March 25, 2021, the applicants filed written submissions in response to the bill of costs and an affidavit from Jean-Pierre Langlois; and, on April 16, 2021, the respondent filed a reply.

I. Assessable services

[3] The respondent is claiming the amount of $9,450.00 for assessable services. Taxes (GST and QST) on these services are claimed, bringing the claim to a total of $10,865.14.

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

[4] The respondent is claiming 7 units under Item 2 for the preparation of a defence. In column III of the table to Tariff B, the number of units that can be allowed ranges from 4 to 7. I am satisfied that the procedure in this case required a great deal of work, as the respondent's record contains numerous volumes. However, upon reviewing the court file and the pleadings, I note that this was not a case of high complexity that would warrant allowing the high-end of column III. Therefore, 6 units are allowed under Item 2.

B. Item 3 – Amendment of documents, where the amendment is necessitated by a new or amended originating document, pleading, notice or affidavit of another party.

[5] Six units are claimed under Item 3 with respect to the respondent's amended memorandum of fact and law. Item 3 concerns the "[a]mendment of documents, where the amendment is necessitated by a new or amended originating document, pleading, notice or affidavit of another party". However, the amendment of the respondent's memorandum resulted not from the filing of a new or amended pleading, but from a court order. Indeed, the amendment of the respondent's memorandum of fact and law followed the respondent's motion under Rule 312 for leave to file an additional affidavit. It appears that the respondent had referred in its

memorandum of fact and law to certain facts contained in an additional affidavit, the filing of which the Court had not authorized. In its order of January 3, 2020, the Court dismissed the respondent's motion and ordered the filing of an amended memorandum of fact and law [TRANSLATION] "in which any reference to facts that are contained only in the said additional affidavit is removed". In these circumstances, the Item 3 claim must be disallowed (*Rachalex Holdings Inc. v. 921410 Ontario Ltd.*, 2010 FC 585 at para. 7; *Balisky v. Goodale*, 2004 FCA 123 at para. 7).

C. Item 5 – Preparation and filing of a contested motion, including materials and responses thereto.

[6] The respondent is claiming 7 units for the preparation and filing of a motion that it brought under Rule 312. The motion at issue was contested by the applicants and dismissed with costs. Since the respondent is not entitled to the costs of this motion, the Item 5 claim is disallowed.

D. Item 6 – Appearance on a motion, per hour.

[7] Under Item 6, the respondent is claiming 3 units per hour for appearance on a motion, without specifying the motion its claim concerns. Upon reviewing the Court record and docket entries, I note that the motions heard in this case were decided by the Court without the appearance of the parties. Indeed, the Court pointed out in its direction dated August 27, 2019, that the motions were heard in writing, [TRANSLATION] "as recently explained in Stratas J.A.'s judgment in *SNC-Lavalin Group Inc. et al. v. The Director of Public Prosecutions*, 2019 FCA 108 at paras. 13 and 14". Thus, no units are allowed under Item 6.

E. Item 7 – Discovery of documents, including listing, affidavit and inspection.

[8] In its bill of costs, the respondent is claiming 5 units under Item 7. However, this provision concerns the discovery of documents within the meaning of Rule 223. Indeed, Item 7 is reserved for the discovery of documents listed in Rules 222 to 232 and 295 that apply to actions, and it "does not apply to proceedings instituted through an application for judicial review" (*Montreal (City) v. Montreal Port Authority*, 2012 FC 221 at para. 9; *Turcotte v. Canada (Attorney General)*, 2011 FC 1090 at para. 5; *Omary v. Canada (Attorney General)*, 2010 FC 813 at para. 7). Moreover, the respondent's submissions do not indicate whether inspections or examinations entitling it to an Item 7 claim have been conducted. I am therefore unable to conclude that the 5 units claimed are justified in the context of an application for judicial review. Consequently, no units will be allowed.

F. Item 10 – Preparation for conference, including memorandum.

[9] The respondent is claiming 6 units under Item 10 for preparation for the case management conference held on October 17, 2019. In column III of the table to Tariff B, the number of units that can be allowed ranges from 3 to 6. In its written submissions, the respondent did not substantiate its claim in a manner that justifies why it should be granted the maximum number of units. Given that this case is of usual complexity and that the default level of costs is the mid-point of column III of the table to Tariff B, I find it reasonable to allow 4 units (*Allergan Inc. v. Sandoz Canada Inc.*, 2021 FC 186 at para. 25 [*Allergan*]).

G. Item 11 – Attendance at conference, per hour.

[10] The respondent is claiming 3 units for its counsel's attendance at the case management teleconference held on October 17, 2019. However, the number of hours claimed and/or the total number of units claimed are not specified. According to the hearing summary in the Court record, it appears that the conference lasted 15 minutes. I consider an additional 15 minutes for counsel to set up for the teleconference to be reasonable (*Nova-Biorubber Green Technologies, Inc. v. Sustainable Development Technology Canada*, 2021 FC 102 at para. 21). Therefore, 1.5 units, equivalent to 3 units per hour for a duration of 30 minutes, are allowed.

H. Item 13(a) – Counsel fee: 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;

[11] The respondent is claiming 5 units under Item 13(a) without, however, substantiating why it should be allowed the maximum number of units. Under Item 13(a) of Tariff B, the number of units that can be allowed under column III ranges from 2 to 5 units. Based on *Allergan*, above, it is appropriate to allow 3 units.

I. Item 14(a) – Counsel fee: to first counsel, per hour in Court;

[12] Twelve (12) units are claimed under Item 14(a), which are equivalent to 4 hours multiplied by 3 units for attendance in Court by the respondent's lead counsel during the hearing of January 29, 2020. Since it appears from the hearing summary entered in the record that it lasted 4 hours and 30 minutes, the claim is reasonable and allowed as is.

J. Item 24 – Travel by counsel to attend a trial, hearing, motion, examination or analogous procedure, at the discretion of the Court.

[13] In its bill of costs, the respondent is claiming 12 units for the travel expenses its counsel incurred to attend the hearing of January 29, 2020. Item 24 states that the costs are awarded "at the discretion of the Court". Under subsection 5(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, "[t]he Federal Court of Appeal consists of a chief justice called the Chief Justice of the Federal Court of Appeal, who is the president of the Federal Court of Appeal, and 14 other judges". Therefore, as an assessment officer, I do not have the necessary jurisdiction to award costs under this item (*Double Diamond Distribution Ltd. v. Crocs Canada, Inc.*, 2021 FCA 47 at para. 16; *Delizia Limited v. Sunridge Gold Corp*, 2018 FCA 158 at para. 7 (unreported, A-119-16); *Ade Olumide v. Conservative Party of Canada*, 2016 FCA 168 at para. 14 (unreported, A-301-15)). Since the Judgment of the Court rendered further to the hearing of January 29, 2020, did not specifically award these costs, the claim is disallowed.

K. Item 25 – Services after judgment not otherwise specified.

[14] In its bill of costs, the respondent is claiming 1 unit for services after judgment. Despite the absence of evidence, Item 25 is routinely allowed because it is customary for counsel to have reviewed the judgment and explained its implications to the client (*Halford v. Seed Hawk Inc.*, 2006 FC 422 at para. 131). As a result, I find that the respondent is entitled to 1 unit as claimed.

L. Item 26 – Assessment of costs.

[15] Under Item 26, the respondent is claiming 3 units for services performed to prepare this assessment of costs. This claim is not disputed by the applicants and does not require my intervention either. I find that it is reasonable to allow the 3 units claimed.

II. Disbursements

A. *Ubiqus transcripts*

[16] In its bill of costs, the respondent is claiming the amount of $44,856.66 for the [TRANSLATION] "transcription of audio files and transcription of oral submissions" by the Ubiqus company. In support of this claim, the respondent has submitted eight invoices showing that legal transcription services were rendered.

[17] In its written submissions, the respondent states that [TRANSLATION] "the invoices from the Ubiqus company reflect the transcription of the thirty-two (32) CIRB hearing days that took place for the decision that is the subject of the applicants' application for review".

[18] In the written submissions in response, the applicants vehemently object to this claim. In very detailed submissions, the applicants essentially advance arguments that can be summarized as follows:

(i) These disbursements are not reasonable or necessary to the litigation. No evidence was presented.

(ii) There is no legislation or orders authorizing the respondent to claim transcription costs.

(iii) This was not a transcription of stenographic notes offering a guarantee of reliability. The transcripts were not filed in the Court record. At most, they are personal notes for the respondent's use.

(iv) The transcripts relate to hearing days that are of no relevance to the litigation. The applicants had previously submitted the stenographic transcripts relevant to the litigation.

(v) The respondent had obtained the complete recordings of the hearings before the Board.

(vi) The respondent filed stenographic notes relating to the same recording of the hearing.

(vii) Some hearings were transcribed subsequent to the date the record was perfected and/or the hearing before this Court and therefore may have been useful during the hearing before the Board but not in this litigation.

(viii) The invoices are not sufficiently detailed and cannot be used to identify the proportion of costs for transcribing each hearing day.

(ix) The respondent did not mitigate its costs, for example, by making inquiries with the applicants to share costs.

[19] In reply to the applicants' submissions, the respondent provided detailed invoices of the services rendered by Ubiqus. On that same occasion, it stated that the transcripts were necessary for its defence because the applicants' application relied on, among other things, statements made by member Ménard at various points during the hearings and their content had created a reasonable apprehension of bias. The respondent argues that, in order to rebut these allegations, it had to obtain transcripts of all the hearings to demonstrate that counsel of the Maritime Employers Association was the one that displayed disrespectful conduct toward the Board members and lacked deference.

[20] In reply to the applicants' argument that the transcripts were received after perfection of the record and the hearing of the judicial review application on January 29, 2020, the respondent stated that it had to refer to the arguments that took place before the Board from October 7 to 29,

2019 in its additional memorandum filed further to the direction issued by the Court on February 7, 2020, in relation to the motion to stay, the hearing of which was held on February 21, 2020.

[21] Lastly, the respondent argues that, by retaining Ubiqus's transcription services, it mitigated its disbursements because obtaining the stenographic transcripts for all the hearings before the Board would have been much more onerous than the option selected.

[22] Before analyzing the respective positions of the parties, it is appropriate to review the relevant legislation. To begin, the Rules explicitly require that a party include the portions of any transcript on which it intends to rely. Rule 310(2) reads as follows:

Respondent's record	**Contenu du dossier du défendeur**
(2) The record of a respondent shall contain, on consecutively numbered pages and in the following order, …	**(2)** Le dossier du défendeur contient, sur des pages numérotées consécutivement, les documents suivants dans l'ordre indiqué ci-après : …
(d) the portions of any transcript of oral evidence before a tribunal that are to be used by the respondent at the hearing; …	**d)** les extraits de toute transcription des témoignages oraux recueillis par l'office fédéral qu'il entend utiliser à l'audition de la demande; …

[23] With regard to the burden of proof applicable to disbursements, subsection 1(4) of Tariff B of the Rules sets out the following:

Evidence of disbursements	**Preuve**
(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.	**(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.

[24] In addition to subsection 1(4) of Tariff B of the Rules, the case law has established that, in matters of disbursement assessments, the successful party may claim disbursements that are reasonable and necessary to the litigation (*Merck & Co. v. Apotex Inc.*, 2006 FC 631 at para. 3).

[25] In terms of the transcription services performed by Ubiqus, there is no doubt that the respondent did indeed incur the costs claimed. The documentary evidence on this point is exhaustive. The question now is whether these costs were necessary and reasonable for the conduct of the litigation.

[26] The applicants rightly object that the respondent was not justified in obtaining the transcription of 32 hearing days before the Board to prepare a proper defence, as it is evident that none of these transcripts were filed in the Court record. Furthermore, the respondent had obtained the complete recordings of the hearings before the Board. It would have sufficed to simply listen to the recordings, without having them transcribed. I agree with the argument that the transcripts were, at most, notes for the respondent's personal use to prepare its case and that the disbursements are not assessable ones meeting the test of necessity. While the assessment of

costs must not be considered retrospectively, I find that I have not been presented with evidence justifying the need to incur such costs for the conduct of the litigation. In *Dableh v. Ontario Hydro*, [1994] F.C.J. No. 1810 at paragraph 15 ("*Dableh*"), the Court states the following:

> […] The test or threshold, for indemnification of disbursements such as these, is not a function of hindsight but whether, in the circumstances existing at the time a litigant's solicitor made the decision to incur the expenditure, it represented prudent and reasonable representation of the client […].

[27] Although *Dableh* addresses the matter of expert witnesses, like the assessment officer in *Janssen Inc. v. Teva Canada Limited*, 2012 FC 48 at paragraph 68, I find the same "reasoning to be sound for many disbursements", including transcription costs.

[28] While I do not agree with the applicants' argument that the respondent already had in its possession the excerpts referred to in the record, and I find that it is entirely justified for the respondent to prepare its own evidence, I have difficulty accepting the fact that the respondent could incur such costs knowing that stenographic transcripts would subsequently be prepared. Furthermore, in *Apotex Inc. v. H. Lundbeck A/S*, 2013 FC 1188, the Court stated the following:

> [36] As every trial lawyer knows, an accurate transcript prepared by an independent reporter is crucial. Examinations for discovery are transcribed in order to adequately and properly deal with undertakings and objections. The transcript may be used at trial as read-ins or to bring an inconsistent testimony to a witness' attention. [Emphasis added.]

[29] I also find that this claim is unreasonable because, in addition to these transcripts, stenographic notes for the hearings on June 11 and 14, July 19, and August 28, 2019, had to be prepared to be filed in the Court record. As the applicants rightly argue, the respondent also failed to mitigate its costs. It could have asked the applicants to share costs or simply listened to

the recordings rather than incur significant costs of $44,856.66. Furthermore, in *Leithiser v. Pengo Hydra Pull of Canada Ltd.*, [1973] F.C.J. No. 1106, a case in which the respondent had obtained the full trial transcript without consulting the opponent, the Court determined that the transcript constituted "a luxury, and should not have to be paid for by the opposing party", and disallowed the claim. I am of the view that the same reasoning applies to this case, especially since the transcripts here are not stenographic.

[30] The Federal Courts have noted time and again that the objective of the cost assessment rules is not to reimburse all the costs that one party incurred in the conduct of a litigation but to provide partial indemnity (*Canadian Pacific Railway Company v. Canada*, 2022 FC 392 at para. 23; *Sherman v. Canada (Minister of National Revenue)*, 2004 FCA 29 at para. 8). *A fortiori*, party-and-party costs should not be punitive or extravagant but represent a compromise between compensating a successful party and not unduly burdening an unsuccessful party (*Apotex Inc. v. Wellcome Foundation Ltd.*, [1998] F.C.J. No. 1736 at para. 7; *M. K. Plastics Corporation v. Plasticair Inc.*, 2007 FC 1029 at para. 20).

[31] For the reasons set out above, this claim is disallowed in its entirety.

B. *Stenographic fees*

[32] In support of its bill of costs, the respondent provided 2 invoices from Florence Béliveau, official stenotypist. The first invoice covers the transcription of the recordings of the Board hearings of June 14, July 19, and August 28, 2019, and totals $2,560.28. The second invoice, in

the amount of $2,327.37, is for the transcription of recordings of excerpts of Board hearings on June 11 and 14, 2019. The applicants do not dispute these disbursements.

[33] Upon reviewing the Court record, I find that the transcription was necessary and relevant to the conduct of the litigation. Accordingly, the cost totalling $4,887.65 for transcribing stenographic notes may be included as disbursements in the costs allowed to the respondent.

C. *Production and printing costs*

[34] The respondent is claiming disbursements for the production and printing of the proceedings by a specialized firm. The mandate included the following: file review, document processing, numbering, headers, layout, proofreading, preparation of cover pages and tables of contents, printing and binding and, service and filing. In this regard, the respondent submitted seven detailed invoices totalling $21,141.08. The applicants do not dispute these costs.

[35] Upon reviewing the Court record, I note that, apart from the respondent's motion record dated December 13, 2019, for which it is not entitled to costs, the claim for the copied documents is justified. The number of copies prepared is appropriate, and the invoice dates and descriptions coincide with their respective dates of filing in the Court record. However, I am unable to ascertain whether all the costs claimed, such as those for back pages, tabs, bindings, and other miscellaneous costs, are accurate. In *Apotex Inc. v. Merck & Co. Inc.*, 2008 FCA 371, the Court states the following with respect to the assessment of evidence:

> [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 […].

[36] Despite the foregoing, I am nonetheless able to see that the costs of service claimed do not accurately match the bailiff's fees associated with the various proceedings served in the context of this litigation. Upon reviewing the bailiff's invoices, I note that the costs of service amount to $1,479.63, leaving a $255 discrepancy between the costs charged to the respondent and those claimed in its bill of costs. This amount and the disbursements related to the respondent's motion record are deducted from the amount claimed. Therefore, the disbursements allowed as costs of producing and preparing proceedings come to $18,007.50.

D. *Accommodation costs*

[37] The respondent is claiming accommodation costs incurred for the hearing held in Ottawa on January 29, 2020. According to the invoice provided in support of its bill of costs, 3 hotel rooms were booked, totalling $419.52. The Court record and the summary of the hearing of the application for judicial review indicate that the respondent was represented by 2 counsel. In light of the foregoing, the claim for accommodation costs is allowed in part, in the amount of $279.68, representing accommodation costs for 2 hotel rooms.

III. Conclusion

[38] The respondent's bill of costs is assessed and allowed in the amount of $28,434.94. A certificate of assessment will be issued for this amount.

"Audrey Blanchet"
Assessment Officer

Translation certified true
on this 10th day of September, 2024.

Vera Roy, Jurilinguist

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-295-19
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ASSESSMENT IN WRITING AT OTTAWA, ONTARIO, WITHOUT PERSONAL APPEARANCE OF THE PARTIES

REASONS FOR ASSESSMENT BY:	AUDREY BLANCHET, Assessment Officer
DATED:	FEBRUARY 24, 2023

WRITTEN SUBMISSIONS BY:

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