Federal Court of Appeal | Cour d'appel fédérale

Date: 20230616

Docket: A-246-20

Citation: 2023 FCA 142

Present: **GARNET MORGAN, Assessment Officer**

BETWEEN:

RYAN EDMOND SOULLIERE

Appellant

and

HIS MAJESTY THE KING

Respondent

Assessment of costs without appearance of the parties.

Certificate of Assessment delivered at Toronto, Ontario, on June 16, 2023.

REASONS FOR ASSESSMENT BY: GARNET MORGAN, Assessment Officer

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REASONS FOR ASSESSMENT

GARNET MORGAN, Assessment Officer

I. Introduction

[1] This assessment of costs is pursuant to a Judgment, and Reasons for Judgment of the Federal Court of Appeal dated July 7, 2022, wherein the Appellant's appeal proceeding was "dismissed, with costs."

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

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

II. Documents filed by the parties

[3] On March 22, 2023, the Respondent initiated a request for an assessment of costs by filing a costs record containing Written Submissions, and an Affidavit of Danika Tondreau, affirmed on March 22, 2023, with a Bill of Costs attached at Exhibit "B".

[4] On March 24, 2023, a direction was issued to the parties regarding the conduct and filing of additional documents for the assessment of costs. The direction was e-mailed to the parties on March 24, 2023, and was also sent by fax to the Appellant on March 27, 2023, with a successful fax transmission receipt being received.

[5] The court record (hard copy file and computerized version) shows that the following documents were filed by the parties for this assessment of costs:

a) On May 5, 2023, the Respondent filed a letter, with a cc. to the Appellant, advising that no additional documents would be filed for the assessment of costs.

b) The Appellant did not file any responding documents.

III. Preliminary Issue

A. *The absence of responding documents from the Appellant.*

[6] The Appellant did not file any documents in response to the Respondent's request for an assessment of costs. The absence of responding documents from the Appellant has left the Respondent's Bill of Costs substantially unopposed. In *Dahl v. Canada*, 2007 FC 192 [*Dahl*], at paragraph 2, the Assessment Officer stated the following regarding the absence of relevant representations for assessments of costs:

> [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.

[7] In addition, in *Carlile v. Canada (Minister of National Revenue - MNR),* [1997] FCJ No 885 [*Carlile*], at paragraph 26, the Assessment Officer stated the following regarding having limited material for assessments of costs:

> [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. […]

[8] Further to the guidance provided by the *Dahl* and *Carlile* decisions, they indicate that although there is an absence of responding documents from the Appellant, as an Assessment Officer, I still have an obligation to ensure that any claims that are allowed are not “unnecessary or unreasonable” (*Carlile*, at para. 26). For my assessment of the Respondent’s claims, I will review the court record, and any relevant rules, statutes, and jurisprudence, in conjunction with the Respondent’s costs documents to ensure that any costs allowed were necessary and reasonable.

IV. Assessable Services

[9] The Respondent has claimed 18.75 units for assessable services totalling $3,000.00.

A. *Items 19, 22(a), 25, and 26*

[10] I have reviewed the Respondent’s costs documents in conjunction with the court record, and any relevant rules, statutes, and jurisprudence, and I have determined that the assessable services submitted under Items 19, 22(a), 25, and 26 can be allowed as claimed. I did not find

that these claims required my intervention as I found the services performed by the Respondent to be necessary, and the amounts claimed are reasonable.

[11] For my assessment of these claims, I reviewed the factors in awarding costs that are listed under subsection 400(3) of the FCR, which I am able to consider as an Assessment Officer pursuant to Rule 409 of the FCR. When I considered factors such as paragraphs, "(a) the result of the proceeding;" "(b) the amounts claimed and the amounts recovered;" "(c) the importance and complexity of the issues;" and "(g) the amount of work;" the court record reflects that the Respondent was the successful party in the appeal proceeding; the amounts claimed and to be recovered are reasonable; the issues argued were of significant importance and of moderate complexity; and the Respondent performed a moderate amount of work for Items 19, 22(a), 25, and 26. Therefore, I find it reasonable to allow the claims for Items 19, 22(a), 25 and 26 as requested in the Respondent's Bill of Costs. Specifically, 5 units are allowed for Item 19; 4.5 units are allowed for Item 22(a); 1 unit is allowed for Item 25; and 4 units are allowed for Item 26.

[12] The Respondent's remaining claims for Items 22(b) and 27 have some issues to look into and will be assessed in more detail below.

B. *Item 22(b)*

[13] The Respondent has submitted a claim under Item 22(b) for second counsel's attendance at the appeal hearing held on April 26, 2022. My review of the Respondent's costs documents in conjunction with the court record did not reveal that the Court directed that second counsel fees

could be claimed by the Respondent for the appeal hearing, pursuant to subsection (b) of Item 22 of Tariff B, which states the following:

Counsel fee on hearing of appeal:	Honoraires d'avocat lors de l'audition de l'appel:
(a) to first counsel, per hour; and	a) pour le premier avocat, pour chaque heure;
(b) to second counsel, where Court directs, 50% of the amount calculated under paragraph (a).	b) pour le second avocat, lorsque la Cour l'ordonne: 50% du montant calculé selon l'alinéa a).
[emphasis added]	[non souligné dans l'original]

[14] In *Coca-Cola Ltd. v. Pardhan (c.o.b. as Universal Exporters)*, 2006 FC 45 [*Coca-Cola*], at paragraph 20, the Assessment Officer stated the following regarding Item 22(b) and Court directions:

> [20] […] In my opinion, the key phrase in Item 22 (b) of Tariff B of the Federal Courts Rules is "...where the Court directs..." I have reviewed the material in the Court record and have determined that no such direction exist, therefore, this assessable service is disallowed for each of the appeal proceedings.

[15] Concerning the duty of an Assessment Officer, the Court stated the following in *Pelletier v. Canada (Attorney General)*, 2006 FCA 418 [*Pelletier*], at paragraph 7:

> [7] […] Under section 405, an assessment officer "assesses" costs, which assumes that costs have been awarded. Section 406 provides that an officer does this at the request of "a party who is entitled to costs", which again presupposes that an order for costs was made in favour of that party. Under section 407, the officer assesses the costs in accordance with column III of the table to Tariff B "unless the Court orders otherwise." 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. […]

[16] Upon my review of the Respondent's costs documents in conjunction with the court record and the FCR, and utilizing the *Coca-Cola* decision as a guideline, I find that I do not have the authority to assess the Respondent's claim for second counsel fees. As the Court stated in the *Pelletier* decision, my role as an Assessment Officer is only "to assess costs, not award them." In the absence of a Court direction or decision specifically awarding second counsel fees, or alternatively any unknown jurisprudence from the Respondent to support the allowance of these costs in the absence of a Court direction or decision, I find that I do not have the authority to assess these types of costs autonomously. Therefore, I have determined that the Respondent's claim for 2.25 units for Item 22(b) must be disallowed.

C. *Item 27*

[17] The Respondent has claimed 2 units for Item 27, which is for "[s]uch other services as may be allowed by the assessment officer or ordered by the Court" (Item 27 in Tariff B). The Respondent's Bill of Costs and related costs documents did not reveal what service this particular claim pertains to. In addition, my review of the court record did not reveal a Court direction or decision that awarded "other services" to the Respondent. In my role as an Assessment Officer, I must be mindful to avoid "stepping away from a position of neutrality to act as the litigant's advocate," hence it is not my role to substitute absent submissions for a party due to procedural fairness (*Dahl* (above) at para. 2). Therefore, I have determined that in the absence of evidence on the court record or specific submissions and/or evidence from the Respondent to support the claim for Item 27, that the 2 units requested must be disallowed.

D. *Total amount allowed for the Respondent's assessable services.*

[18] A total of 14.5 units have been allowed for the Respondent's assessable services totalling $2,320.00.

V. Disbursements

A. *In-house photocopying*

[19] The Respondent has claimed $219.12 for in-house photocopying for the Respondent's Condensed Book filed on April 20, 2022, and the parties' Joint Book of Authorities filed on October 21, 2021. There was no corresponding affidavit evidence provided by the Respondent for these disbursements pursuant to subsection 1(4) of Tariff B of the FCR. In *Inverhuron & District Ratepayers Assn. v. Canada (Minister of Environment)*, 2001 FCT 410 [*Inverhuron*], at paragraphs 60, 61, and 63, the Assessment Officer stated the following regarding claims for photocopies:

> [60] The Respondents submitted claims for in-house photocopies. The evidence produced in support of these claims is thin. It does not provide any information as to how they arrived at the amount of $0.25/page. At the hearing, it was suggested that this was the "normal standard for the Court". This rate has generally been accepted by Federal Court assessment officers, but I am not prepared to concede that this is what it really costs law firms for in-house photocopies.
>
> [61] The following excerpt from Justice Teitelbaum's decision in *Diversified Products Corp. et al* v. *Tye-Sil Corp.*, 34 C.P.R. (3d) 267 supports my thinking on the actual cost for photocopies;
>
> > The Item of photocopies is an allowable disbursement only if it is essential to the conduct of the action. Therefore, this is not 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.
>
> […]
>
> [63] As said, $0.25/page will not be allowed. No evidence was provided by the parties seeking that amount that justify it. Real costs were indeed incurred and in considering the figures mentioned above, a lump sum of $1500 will be allowed for each Respondent to cover all disbursements related to photocopies in this file.

[20] Utilizing the guidance provided in the *Inverhuron* decision, it indicates that the onus was on the Respondent to provide details related to the actual cost of the in-house photocopies. I have reviewed the court record to try to determine a reasonable quantum of costs to allow, taking into consideration the size and number of documents that needed to be prepared for the court registry and the parties, and if any of the documents were electronically served on a party or filed with the court registry. Further to my review, I have determined that it is reasonable to allow 4 copies (3 for the court registry and 1 for the Respondent) for the Respondent's Condensed Book; and 0.5 copies (0.5 for the Respondent, as claimed) for the parties' Joint Book of Authorities for a cumulative amount of $154.30.

VI. Conclusion

[21] For the above reasons, the Respondent's Bill of Costs is assessed and allowed in the total amount of $2,474.30, payable by the Appellant to the Respondent. A Certificate of Assessment will also be issued.

"Garnet Morgan"

Assessment Officer

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-246-20
STYLE OF CAUSE:	RYAN EDMOND SOULLIERE v. HIS MAJESTY THE KING

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

REASONS FOR ASSESSMENT BY:	GARNET MORGAN, Assessment Officer
DATED:	JUNE 16, 2023

WRITTEN SUBMISSIONS BY:

N/A	FOR THE APPELLANT
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