Federal Court of Appeal | Cour d'appel fédérale

Date: 20260212

Docket: A-181-21

Citation: 2026 FCA 30

Present: **KARINE TURGEON, Assessment Officer**

BETWEEN:

GREENBLUE URBAN NORTH AMERICA INC.

Appellant

and

DEEPROOT GREEN INFRASTRUCTURE, LLC and DEEPROOT CANADA CORP.

Respondents

Assessment of costs without appearance of the parties.
Certificate of Assessment delivered at Ottawa, Ontario, on February 12, 2026.

REASONS FOR ASSESSMENT BY: KARINE TURGEON, Assessment Officer

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REASONS FOR ASSESSMENT

KARINE TURGEON, Assessment Officer

I. Overview

[1] The appeal and cross-appeal in this Court file were heard consecutively with the appeal in Court file A-116-22.

[2] In the present file, GreenBlue Urban North America Inc. (GrenBlue) appealed and DeepRoot Green Infrastructure, LLC and DeepRoot Canada Corp. (DeepRoot) cross-appealed

the decision that was rendered on the merits in file T-954-18 on July 16, 2021 (2021 FC 501). In file A-116-22, DeepRoot appealed from a contempt interlocutory decision rendered in file T-954-18, on May 12, 2022 (2022 FC 709), dismissing its contempt motion.

[3] By way of Judgment and Reasons for Judgment rendered on September 13, 2023, in the present file (Judgment), the Court dismissed GreenBlue's appeal and allowed DeepRoot's cross-appeal and remitted the issue of the appropriateness of an award of an accounting of profits to the Federal Court for redetermination, with costs of the appeal and cross-appeal to DeepRoot (2023 FCA 184). On the same day, the Court dismissed DeepRoot's appeal in file A-116-22, with costs to GreenBlue.

[4] On May 14, 2025, DeepRoot initiated the assessment in the present file by filing a letter attaching a bill of costs regarding the appeal and a second bill of costs regarding the cross-appeal. On May 21, 2025, a direction confirming that the assessment of both bills of costs would proceed simultaneously in writing and establishing timelines for the filing of costs materials was issued to the parties. On June 20, 2025, DeepRoot served and filed written representations, an affidavit of Cynthia Mazzone sworn on June 20, 2025, along with a book of authorities. On July 25, 2025, GreenBlue submitted written representations in response, an affidavit of Laurence Pilon Filion sworn on July 25, 2025, along with a book of authorities. DeepRoot filed written representations in reply on August 15, 2025.

[5] For context, on June 25, 2025, GreenBlue filed a request for an assessment of costs in file A-116-22. The present file and file A-116-22, which remained separate throughout, are now both

ready for assessment. A separate costs decision will be issued in each file. DeepRoot and GreenBlue also each filed a bill of costs in file T-954-18, which are to be assessed separately from the present assessment. The assessment in file T-954-18 is currently held in abeyance.

[6] A preliminary issue concerning the relevant factors to be considered for this assessment will be analysed below.

II. Preliminary Issue

A. *Which factors are relevant for this assessment of costs?*

[7] An assessment officer may consider the factors listed under subsection 400(3) of the *Federal Courts Rules*, SOR/98-106 [Rules] (Rule 409).

[8] DeepRoot submits that the following factors warrant an allocation of costs at the higher end of the available ranges found under Column III for all assessable services. It states that the result of the proceeding, the complexity of the issues litigated, and the amount of work should operate in its favour pursuant to paragraphs 400(3)(a)(c) and (g) of the Rules. It takes the position that "[u]sing the top of Column III for all items in the Bills of Costs is appropriate as using these amounts is still modest in comparison to the amount of work that was required for this complex proceeding" (written submissions, para. 13). As another factor, it is put forward that the fact that GreenBlue advised only at the submissions stage of the hearing that it was no longer

pursuing several arguments should weigh in DeepRoot's favour (paragraph 400(3)(o) of the Rules; written submissions, para. 14; written submissions in reply, para. 7).

[9] GreenBlue's position is that no more than the middle of Column III should be allowed (written submissions in response, para. 27). It contends that DeepRoot overstates the extent of its success, and that regarding the cross-appeal bill of costs, DeepRoot should not be entitled to benefit from any complexity it created by resisting to the bifurcation proposed by GreenBlue in the Federal Court file. GreenBlue also indicates that it decided not to use certain grounds in the interest of efficiency and judicial economy, which should not favour DeepRoot and instead lower costs (written submissions in response, paras. 2 and 19).

[10] From the outset, as jurisprudence supports that each assessable service is discrete and must be assessed separately, the same level of cost will not be necessarily used to assess claims made for assessable services in this matter (*Starlight v. Canada*, 2001 FCT 999 at para. 7). As set out below, I find that the result of the proceeding, the complexity of the issues litigated, and the amount of work are relevant factors for this assessment.

[11] The Judgment expressly states, at paragraph 105, that DeepRoot was largely successful in both the appeal and cross-appeal. I cannot accept the argument that DeepRoot overstates its success. Accordingly, where relevant, the factor pertaining to the result of the proceeding will be weighted in favour of DeepRoot. In addition, I will take into account the complexity of the issues litigated, as I agree with DeepRoot that patent infringement proceedings are inherently complex (written representations at para. 12; written representations in reply, para. 6).

[12] The amount of work will also be considered, even though DeepRoot's argument that the amount it paid its counsel would warrant an allocation at the top of Column III is found irrelevant. The Judgment granted costs on a party-and-party basis, not on a solicitor-and-client basis. Therefore, this assessment must proceed on the basis of the partial indemnification offered by Tariff B, rather than on the basis of the amount paid by the client. The amount paid by the client will not be treated as an indicator of the amount of work performed.

[13] With respect to the cross-appeal, I agree with DeepRoot that its resistance to the bifurcation motion before the Federal Court does not preclude an allocation at the top of Column III. I do not find that the way the proceedings unfolded in file T-954-18 is relevant to the present assessment, given that the present file is distinct and must be assessed on the basis of its own context and procedural history.

[14] Lastly, I agree with GreenBlue that its abandonment of certain arguments at the hearing should not be considered a factor contributing to increased costs against it, as judicial economy should be encouraged (paragraph 3(a) of the Rules).

[15] Before analysing the claims by category, my review of the costs materials revealed that GreenBlue's submissions did not specifically engage with some of those claims. In these circumstances, for each claim substantially unopposed, my role will be to assess its conformity with the Judgment, the Rules, Tariff B, and the jurisprudence. I will intervene on a case-by-case basis to ensure that no unlawful item is certified where I conclude that a claim for assessable

services or disbursements does not comply with the applicable framework (*Dahl v. Canada*, 2007 FC 192 at para. 2).

III. Assessable Services

[16] With respect to both bills of costs, the parties agree that Column III of the table to Tariff B of the Rules applies to this assessment (Rule 407). However, they disagree on the level of that column that should apply.

[17] DeepRoot claims an allocation at the maximum levels available under Column III, while GreenBlue puts forward that when permissible, no more than the midpoint should be allowed (written representations, paras. 3–4 and reply, para. 1; response, paras. 6 and 27).

[18] The midpoint of Column III is the default level of costs for a file of average complexity (*Allergan Inc. v. Sandoz Canada Inc.*, 2021 FC 186 [*Allergan*] at para. 25). An assessment officer may allow costs at a higher or at a lower level where warranted (*Clorox Company of Canada, Ltd. v. Chloretec S.E.C.*, 2023 FCA 25 at para. 3).

[19] For the reasons set out below, the permissible claims contained in each bill of costs will be allowed either at the top of Column III or at the midpoint, which in some instances will correspond to the same number of units. The claims made under Items 17, 18, 19 and 21 will be allowed in full. The claims made under Items 22 and 27 will be partially allowed.

A. *Item 17 – Preparation, filing and service of notice of appeal*
Item 18 – Preparation of appeal book
Item 19 – Memorandum of fact and law

[20] The unit claimed under Item 17 in the cross-appeal bill of costs is allowed, given that a notice of cross-appeal was filed and Column III provides for a single unit for this item. The claim made for 1 unit in each bill of costs for the preparation of two different sets of appeal books filed respectively on November 8, 2021, and June 20, 2022, is allowed as submitted under Item 18, these documents having been filed and Column III also providing for a single unit for this assessable service.

[21] Subsection 2(2) of Tariff B prohibits the allowance of a fraction of a unit. Accordingly, GreenBlue's position implies that a maximum of 5 or 6 units should be allowed under Item 19 in each bill of costs for the preparation of DeepRoot's memoranda of fact and law filed on January 25, 2022, for the purposes of the appeal, and on April 13, 2022, for the purposes of the cross-appeal (*Miller Thomson LLP v. Hilton Worldwide Holding LLP.*, 2020 FCA 134 at para. 162). Nonetheless, given the range of units available under Column III for Item 19 is 4 to 7, and considering the result of the proceedings, the importance and complexity of the issues, and the amount of work it required to prepare these documents, I find it appropriate to allow the 7 units claimed in each bill of costs (Rule 409 and paragraphs 400(3)(a)(c) and (g) of the Rules).

B. *Item 21 – Counsel fee: (a) on a motion, including preparation, service and written representations or memorandum of fact and law*

[22] In the appeal bill of costs, DeepRoot claims 3 units for the responding motion record prepared in relation to the contents of the appeal book filed on September 2, 2021, and the same number of units for the motion record filed in response to GreenBlue's motion to reconsider filed on November 24, 2023.

[23] My review of the Court file confirms that the costs of these two interlocutory motions were awarded to DeepRoot by way of Orders rendered on October 8, 2021, and on January 25, 2024. The following remark found in the first order is of particular interest: "there are numerous documents in the list initially proposed by the Appellant that should not have been included." With respect to the second order, the Court mentions: "There is no merit to the appellant's assertion in this regard. There are also several reasons why this motion should be dismissed."

[24] Given Subsection 2(2) of Tariff B, a midpoint that corresponds to a fractional number as in the present case must be rounded either up or down. In light of the result of the proceeding and the amount of work DeepRoot had to perform in responding to these motions, the 3 units claimed for each responding motion record are allowed (Rule 409 and paragraphs 400(3)(a) and (g) of the Rules).

C. *Item 22 – Counsel fee on hearing of appeal*

[25] The appeal and cross-appeal hearings in the present file were set down to be heard consecutively with the appeal in file A-116-22, on May 10 and 11, 2023. The minutes of hearing found in these Court files indicate that the appeal and cross-appeal in the present file proceeded on the first day, while the appeal in the other file proceeded on the second day.

[26] The claim made in each bill of costs for the attendance of first counsel will be allowed as submitted, while the one made for the attendance of a second counsel will be disallowed.

(1) *(a) to first counsel, per hour*

[27] DeepRoot claims 5.25 hours for the attendance of Mr. Mowatt at the appeal portion of the hearing held on May 10, 2023, and 2.63 hours for his attendance at the cross-appeal portion. The minutes of hearing confirm that this apportionment is accurate and that, therefore, allowing the number of hours claimed would not result in double indemnification.

[28] Three units per hour of attendance by first counsel are claimed. Given the result of the proceedings and the importance and complexity of the issues, I find it appropriate to allow the 3 units claimed per hour. Therefore, the 15.75 units claimed in the appeal bill of costs and the 5.25 units claimed in the cross-appeal bill of costs are allowed (Rule 409 and paragraphs 400(3)(a) and (c) of the Rules).

(2) *(b) to second counsel, where Court directs, 50% of the amount calculated under paragraph (a)*

[29] DeepRoot puts forward arguments in support of an allowance for a second counsel in each bill of costs but offers no jurisprudence in support.

[30] GreenBlue argues that a claim made under Item 22(b) cannot be allowed by an assessment officer unless previously directed by the Court. The decision *Soulliere v. Canada*, 2023 FCA 142, at paragraph 13, is submitted by GreenBlue in support of its position (written representations in response, paras. 20–21).

[31] Item 22 (b) states, "Counsel fee on hearing of appeal: (b) to second counsel, where Court directs, […]" [emphasises added]. Even if the minutes of hearing indicate that Mr. Gaikis attended the hearing on May 10, 2023, Tariff B does not give me jurisdiction to allow units for his attendance as the Court did not expressly grant costs for a second counsel (*Coca-Cola Ltd v. Pardhan (c.o.b. as Universal Exporters)*, [2006] F.C.J. No. 72 at para. 20; *Pelletier c. Canada (Attorney General)*, 2006 FCA 418 at para. 7; *Richards v. Canada (Minister of Public Safety and Emergency Preparedness*), [2009] F.C.J. No. 1452 at para. 3).

[32] Therefore, the 7.88 claimed in the appeal bill of costs and the 2.63 units claimed in the cross-appeal bill of costs are disallowed.

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

[33] In the appeal bill of costs, a total of 6 units is claimed under Item 27. More precisely, 3 units are claimed for a compendium, and 3 additional for a joint book of authorities. The same two claims are made in the cross-appeal bill of costs, for the distinct compendium and the joint book of authorities filed in the cross-appeal.

[34] The Court file confirms that two separate sets were filed for the appeal and the cross-appeal. So long as double indemnification is not permitted, the jurisprudence supports that multiple claims can be made under Item 27 (*Mitchell v. Canada*, 2003 FCA 386 at paras. 12–13).

[35] While Exhibit C to the affidavit of Cynthia Mazzone supports that DeepRoot participated in the preparation of each set of joint book of authorities, preparation of these documents required efforts from both parties. Regarding the compendia, their preparation was ultimately within DeepRoot's discretion.

[36] Given GreenBlue's position on the level of costs and the amount of work factor, allowing 2 units for each of the 4 claims made under Item 27, for a total of 4 units allowed per bill of costs for this item, will reasonably compensate DeepRoot without unduly burdening GreenBlue (paragraph 400(3)(g) of the Rules; *M.K. Plastics Corporation v. Plasticair Inc.*, 2007 FC 1029 at para. 20).

[37] In summary, a total of 33.75 units is allowed for the appeal bill of costs, and 18.25 units are allowed for the cross-appeal bill of costs. Before turning to disbursements, the amount of taxes claimed on assessable services will be briefly examined.

E. *Taxes on assessable services*

[38] Given that the assessable services claimed in each bill of costs will be allowed for reduced amounts, the amounts of taxes to be allowed on assessable services must be adjusted accordingly (paragraph 1(3)(b) of Tariff B). Since 33.75 units (corresponding to $5,737.50) and 18.25 units (corresponding to $3,102.50) are allowed for the appeal and cross-appeal bills of costs, HST in the amount of $745.88 is allowed for the appeal bill of costs, and HST in the amount of $403.33 is allowed for the cross-appeal bill of costs.

IV. Disbursements

[39] In each bill of costs, disbursements are claimed by DeepRoot for printing and binding, special secretarial work, meeting expenses, and associated HST. It is submitted that these "disbursements were reasonable and necessary for the proceeding, were paid in full by DeepRoot, and should be recoverable in their entirety" (written representations, para.19). In its submissions, GreenBlue only addresses the claims for printing and binding, which it submits should be substantially reduced.

[40] The decision in *Allergan* indicates at paragraph 36 that "disbursements are typically assessed in full, provided they are reasonable". This decision must be read in light of Tariff B, which provides that "no disbursement […] shall be assessed, unless […] it is established by affidavit or by the solicitor appearing on the assessment that the disbursement was made or is payable by the party" (subsection 1(4) of Tariff B). The jurisprudence has also established that a disbursement must have been necessary for the conduct of the proceeding (*Merck & Co. Inc. v. Apotex Inc.*, 2006 FC 631 [*Merck*] at para. 3).

[41] In light of the above framework, the costs materials submitted, and my role to allow only lawful claims, the disbursements claimed for special secretarial work and meeting expenses will be disallowed, and a reduced amount will be allowed for printing and binding.

A. *Special Secretarial Work*

[42] In each bill of costs, DeepRoot claims $210.00 for overtime work performed by a legal administrative assistant employed by DLA Piper, the law firm representing it (written representations, para. 18; Exhibit F to the affidavit of Cynthia Mazzone, sworn on June 20, 2025).

[43] This type of fee does not qualify as a disbursement that can be claimed under Tariff B. In fact, such fee is part of the law firm's operations and is considered overhead compensated under the assessable services category (*Teledyne Industries, Inc. et al. v. Lido Industrial Products Ltd.*, [1981] 56 C.P.R. (2d) 93, 1981 CanLII 5055 (FC) at para. 5; *AlliedSignal Inc. v. DuPont Canada*

Inc., [1998] F.C.J. No. 625, 1998 CanLII 7795 (FC) [*AlliedSignal*] at para. 130). Therefore, this claim is disallowed in each bill of costs, and the same applies to the associated HST.

B. *Meeting Expenses*

[44] An amount of $180.85 is claimed in each bill of costs for expenses incurred for two lunches ordered by DLA Piper from a downtown Toronto caterer for 6 to 10 individuals. The first one is for a meeting held in Toronto on May 1, 2023, and the second one is for a meeting held in Toronto on May 10, 2023, the day of the hearing held in this file (Exhibit G to the Affidavit of Cynthia Mazzone, sworn on June 20, 2025). These claims will be disallowed, as neither the costs materials nor the file substantiates that these expenses were reasonable and necessary.

[45] The Court file indicates that the hearing took place in Toronto, in close proximity to the office of DLA Piper, while the jurisprudence holds that only exceptional circumstances can justify a claim for a meal while counsel is not in travel status. Under Tariff B, only expenses claimed by counsel while in travel status are considered reasonable and necessary (*Canada (Attorney General) v. Sam lévy et associés inc*., 2008 FC 980 at para. 13; *Hershkovitz v. Tyco Safety Products Canada Ltd.*, [2010] F.C.J. No. 468 at para. 53; *Janssen Inc. v. Teva Canada Limited*, 2012 FC 48 at para. 125; *dTechs EPM Ltd. v. British Columbia Hydro and Power Authority*, 2023 FC 1446 [*dTechs*] at para. 77).

[46] In addition, the National Joint Council Travel Directive [NJC Directive], a tool used by the Federal Government found relevant as a guideline for determining the reasonableness and necessity of travel disbursements, does not provide for reimbursement of meals while not in travel status (*Halford v Seed Hawk Inc*, 2006 FC 422 at para. 108; *McLaughlin v. Canada (Attorney General)*, [2010] F.C.J. No. 1029 at para. 24; *dTechs* at para. 77).

[47] Upon review of the costs materials and the Court file, they do not disclose special circumstances justifying the necessity and reasonableness of ordering these lunches for counsel while not in travel status. Moreover, I find no indication that lawyers present at these meetings were in travel status. Furthermore, the analysis below leads to the conclusion that these expenses would not be admissible for other individuals who attended these meetings in the circumstances of this file.

[48] Client expenses, including travel expenses, are not normally accepted under Tariff B (*AlliedSignal* at para. 111; *Janssen-Ortho Inc. v. Novopharm Ltd.*, 2006 FC 1333 [*Janssen-Ortho*] at para. 25; *Hoffman-La Roche Limited v. Apotex Inc.*, 2013 FC 1265 at para. 55.) Expenses, including travel expenses, associated with employees of the law firm representing a client were also found not permissible, as they are normally considered overhead, as set out in the previous subheading (*Janssen-Ortho* at para. 25; *Jérôme Bacon St-Onge et Le Conseil des Innus de Pessamit et al.*, 2022 CF 627 at para. 32, unreported decision rendered in Court file T-2135-16). As no witnesses were called at the appeal hearing, the claimed expenses could not be associated with permissible meals purchased for witnesses.

[49] Accordingly, the claim made in each bill of costs for meeting expenses, together with the associated HST, is disallowed.

C. *Printing and binding*

[50] In each bill of costs, DeepRoot claims $4,168.79 and associated HST for third party printing and binding. A copy of the amount invoiced by the third party, inclusive of HST, is provided at Exhibit E to the affidavit of Cynthia Mazzone sworn on June 20, 2025.

[51] Upon review of the Court file, and based solely on the size of the memoranda, compendia and appeal books, approximately ten thousand pages would have been printed or bound for the appeal and cross-appeal hearing in this matter, which is consistent with the number of printed pages claimed by DeepRoot (written representations, para. 18).

[52] GreenBlue submits that no evidence was provided to justify the necessity and reasonableness of these claims, and that, in line with prior assessment decisions, the two claims should be allowed for a total lump sum of no more than $2,000 for the entire case (written representations in response, paras. 22–24). For its part, DeepRoot replies that some documents had to be prepared in three copies pursuant to the Federal Court of Appeal's Consolidated Practice Direction, and that in some instances, separate sets were required for the appeal and the cross-appeal (written representations in reply, paras. 9–10).

[53] For the reasons set out below, a reduced amount will be allowed for each claim, although this amount will exceed the amount proposed by GreenBlue.

[54] As a starting point, the jurisprudence holds that, where the available costs materials are limited, a substantial degree of discretion is vested in the assessment officer when determining the reasonableness of a claim for disbursements (*Apotex Inc. v. Merck & Co. Inc.*, 2008 FCA 371 at para. 14).

[55] Second, with regard to the costs materials received, I am of the view that the present file is distinguishable from the authorities cited by GreenBlue, which either involve claims for smaller amounts or consist of older jurisprudence.

[56] Third, the size of this Court file must also be taken into account in assessing the reasonableness and necessity of these claims. DeepRoot's public and confidential compendia alone totalled more than four thousand pages. Furthermore, upon electronic service effected by GreenBlue, it is reasonable to conclude that DeepRoot needed to print one set of the eight thousand pages contained in the public books of appeal. Hence, I conclude that the number of pages claimed is reasonable and necessary.

[57] Nonetheless, printing 80% of the copies in colour was neither reasonable nor necessary. In the absence of submissions explaining why so many of these outsourced copies were printed in colour, it will be considered that 5% had to be in colour to preserve the intelligibility of the record. Such allowance will reasonably compensate DeepRoot without unreasonably burdening

GreenBlue (*Carlile v. Canada (Minister of National Revenue – M.N.R.)*, [1997] F.C.J. No. 885 at para. 26).

[58] Based on my estimate of the fees associated with outsourced copies, the amount of $1,769.91 plus $230.09 in associated HST, totalling $2,000.00 is allowed for printing and binding for the appeal bill of costs, and the same amounts are allowed for the cross-appeal bill of costs. As previously explained, HST is only recoverable on the allowed portion of a claim.

V. Conclusion

[59] For the above reasons, the respondents' bill of costs filed for the purposes of the appeal is assessed and allowed in the amount of $8,483.38, payable by the appellant GreenBlue Urban North America Inc. to the respondents DeepRoot Green Infrastructure, LLC and DeepRoot Canada Corp. The respondents' bill of costs filed for the purposes of the cross-appeal is assessed and allowed in the amount of $5,505.83, payable by the appellant GreenBlue Urban North America Inc. to the respondents DeepRoot Green Infrastructure, LLC and DeepRoot Canada Corp.

[60] As a result, a total amount of $13,989.21 is payable by the appellant GreenBlue Urban North America Inc. to the respondents DeepRoot Green Infrastructure, LLC and DeepRoot Canada Corp. A Certificate of Assessment will be issued.

"Karine Turgeon"
Assessment Officer

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-181-21
STYLE OF CAUSE:	GREENBLUE URBAN NORTH AMERICA INC. v. DEEPROOT GREEN INFRASTRUCTURE, LLC and DEEPROOT CANADA CORP.
MATTER CONSIDERED AT OTTAWA, ONTARIO WITHOUT PERSONAL APPEARANCE OF THE PARTIES	
REASONS FOR ASSESSMENT BY:	KARINE TURGEON, Assessment Officer
DATED:	FEBRUARY 12, 2026

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