Federal Court of Appeal | Cour d'appel fédérale

Date: 20260212

Docket: A-116-22

Citation: 2026 FCA 29

Present: **KARINE TURGEON, Assessment Officer**

BETWEEN:

DEEPROOT GREEN INFRASTRUCTURE, LLC and DEEPROOT CANADA CORP.

Appellants

and

GREENBLUE URBAN NORTH AMERICA INC.

Respondent

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

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I. Overview

[1] The appeal in this file was heard consecutively with the appeal and cross-appeal in Court file A-181-21.

[2] In the present file, DeepRoot Green Infrastructure, LLC and DeepRoot Canada Corp. (DeepRoot) appealed from a contempt interlocutory decision rendered in file T-954-18 on May

12, 2022 (2022 FC 709) dismissing its contempt motion. In file A-181-21, GreenBlue Urban North America Inc. (GreenBlue) appealed, and DeepRoot cross-appealed, the decision rendered on the merits in file T-954-18, on July 16, 2021 (2021 FC 501).

[3] By way of Judgment and Reasons for Judgment rendered on September 13, 2023, in the present file (Judgment), the Court dismissed the DeepRoot's appeal, with costs to GreenBlue (2023 FCA 185). On the same day, in file A-181-21, 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.

[4] On June 25, 2025, GreenBlue initiated the assessment in the present file by filing a letter attaching a bill of costs. On July 4, 2025, a direction confirming that the assessment would proceed in writing and establishing timelines for the filing of costs materials was issued to the parties. On August 6, 2025, GreenBlue served and filed written representations, an affidavit of Laurence Pilon Filion affirmed on August 6, 2025, an affidavit of Dean Bowie affirmed on August 5, 2025, along with a book of authorities. On September 10, 2025, DeepRoot submitted written representations in response and an affidavit of Cynthia Mazzone sworn on September 10, 2025. GreenBlue filed costs materials in reply on October 8, 2025, pursuant to the direction issued on October 1, 2025, extending the previously established timelines.

[5] For context, on May 14, 2025, DeepRoot filed a request for assessment of two bills of costs in file A-181-21. The present file and file A-181-21, 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 set out in subsection 400(3) of the *Federal Courts Rules*, SOR/98-106 [Rules] (Rule 409).

[8] GreenBlue states that some factors warrant an allocation "at least at the top of Column III" of the table to Tariff B of the Rules for all assessable services (written representations, para. 14; written representations in reply). In response, DeepRoot submits that these factors do not justify allowing heightened costs and that "costs ought to be assessed at the middle of Column III" (written representations in response, para. 15).

[9] From the outset, it must be clarified that the Judgment and Rule 407 do not confer me jurisdiction to allow costs beyond the maximum levels available under Column III. Although GreenBlue appears, in some areas of its submissions, to suggest the possibility of an allowance

in excess of Column III, it nonetheless acknowledges that Rule 407 applies to this assessment (written representations, para. 13; written representations in reply, para. 16).

[10] Regarding the factors that should be weighed in favour of an allocation at the higher end of the available ranges, GreenBlue states the result of the proceeding, the importance and complexity of the issues litigated, the amount of work, whether any step in the proceeding was improper or vexatious and any other matter that is relevant, pursuant to paragraphs 400(3)(a)(c)(g)(k) and (o) of the Rules (written submissions, paras. 15–23; written representations in reply, paras. 2–13).

[11] With regard to the importance and complexity of the issues that were litigated, GreenBlue refers to the complex evidentiary contempt hearing that was before the Federal Court and contends that "an assessment of costs at least at the top of Column III is reasonable given that it is still well below an award granted as a lump-sum, which is the typical manner of assessing costs in a complex intellectual property cases." In addition, it compares the costs that could be allowed if the present assessment proceeded at the top of Column V rather than at the top of Column III (written submissions, paras. 17–18). DeepRoot responds to these arguments by noting that "there is no basis to compare an assessment of costs at the top of Column III and a lump-sum award or Column V," and that the appeal of the contempt proceeding should be the focus of this assessment (written representations in response, para. 10).

[12] As other factor submitted under paragraphs 400(3)(k) and (o) of the Rules, GreenBlue states the serious nature of the contempt of court allegations, with which DeepRoot disagrees

(written submissions, paras. 19–23; written representations in reply, paras. 9–13; written representations in response, paras. 11–15).

[13] To begin with, as jurisprudence establishes that each assessable service is discrete and must be assessed separately, the same level of cost will not necessarily be used to assess claims made for assessable services in this matter (*Starlight v. Canada*, 2001 FCT 999 at para. 7).

[14] As further explained below, I find that the result of the proceeding, the importance and complexity of the issues litigated, and the amount of work are relevant factors for this assessment, while whether a step taken by DeepRoot was improper or vexatious will not be taken into account.

[15] First, the outcome of the proceeding favours GreenBlue and will be considered where relevant. Second, I will take into account the importance and complexity of the issues that were litigated, as well as the amount of work, where applicable. I agree with GreenBlue that the issues in this file were more complex than those in other files, although I share DeepRoot's view that this assessment must proceed in light of the proceedings that took place before the Federal Court of Appeal and in consideration of its Judgment in this file. In my view, the fact that the Court could have awarded a lump sum or costs based on Column V, but instead awarded them within Column III, does not assist in determining the level of costs to be used within Column III.

[16] Lastly, as there is no indication in the Judgment that DeepRoot would have taken an improper or vexatious step in the present file, I will not take this factor into account.

[17] Before analysing the claims by category, my review of the costs materials revealed that DeepRoot'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

[18] On June 25, 2025, GreenBlue filed a bill of costs based on Column V. However, it subsequently submitted costs materials supporting an allocation of the highest value of the ranges available under Column III. As previously indicated, a disagreement remains between the parties concerning the level of that column that should apply.

[19] 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 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).

[20] As set out below, the permissible claims 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 19, 20 and 25 will be allowed in full. The claims made under Items 22, 26 and 27 will be partially allowed, after correction where applicable.

A. *Item 19 – Memorandum of Fact and Law*
Item 20 – Requisition for Hearing
Item 25 – Services after judgment not otherwise specified

[21] GreenBlue claims an allocation at the top of the range available under Column III for the preparation of the memorandum of fact and law, while DeepRoot's position is that the midpoint is warranted. The range of units found under Column III for Item 19 is 4 to 7, with a midpoint at either 5 or 6, which must be rounded up or down following subsection 2(2) of Tariff B (*Miller Thomson LLP v. Hilton Worldwide Holding LLP*, 2020 FCA 134 at para. 162). Considering the result of the proceeding, the importance and complexity of the issues, and having regard to the amount of work performed to prepare this document, I find it appropriate to allow 7 units (Rule 409 and paragraphs 400(3)(a)(c) and (g) of the Rules).

[22] One unit is claimed under Item 20 and 1 unit is also claimed under Item 25. Both units are allowed, as GreenBlue participated in the preparation of the requisition for hearing to the extent expected of a respondent and given that counsel reviewed the Judgment and explained it to the client.

B. *Item 22 – Counsel fee on hearing of appeal (a) to first counsel, per hour*

[23] The appeal in this file was set down to be heard consecutively with the appeal in file A-181-21, on May 10 and 11, 2023. The minutes of hearing found in the Court file indicate that the

appeal and cross appeal in file A-181-21 proceeded on the first day, and that the appeal in this file proceeded on the second day.

[24] As explained below, the claim made for the first counsel in attendance is allowed at 6 units, while the claim for second counsel is disallowed.

(1)	(a) to first counsel per hour

[25] GreenBlue claims 2 hours for first counsel's attendance at the appeal hearing on May 11, 2023. The file confirms the hearing proceeded for at least that duration.

[26] Three units per hour of attendance is claimed. The range of units available under Column III for this item is 2 or 3 units per hour. Given the result of the proceedings and the importance and complexity of the issues litigated, I find it appropriate to allow the 3 units per hour, and therefore, 6 units (2 hours multiplied by 3 units) 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)

[27] While GreenBlue admits that "second counsel services typically cannot be claimed in the absence of an order or direction from the Court explicitly allowing them," it requests that if second counsel costs are allowed to DeepRoot under Item 22(b) in file A-181-21, costs for

second counsel should also be allowed in the present file given the gravity of the contempt allegations (written representations, paras. 24–27).

[28] Tariff B and the jurisprudence do not give me jurisdiction to allow units for a second counsel in this file since the Court did not specify that costs were awarded for a second counsel in attendance at the hearing (*Coca-Cola Ltd. v. Pardhan (c.o.b. as Universal Exporters)*, [2006] F.C.J. No. 72 at para. 20; *Pelletier v. 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).

[29] Given the above conclusion, there is no need to analyze DeepRoot's argument that an agreement would have precluded GreenBlue from claiming for attendance by a second counsel, and no units are allowed under Item 22(b).

C. *Item 26 – Assessment of costs*

[30] The range of units available under Column III for Item 26 is 2 to 6, which places the midpoint at 4. In its submissions, GreenBlue claims an allowance of 6 units.

[31] In the absence of any specific argument explaining why an allocation at the highest end of the range would be warranted for this item, I find that 5 units will reasonably compensate GreenBlue for the amount of work it performed for the purposes of this assessment (Rule 409 and paragraph 400(3)(g) of the Rules).

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

[32] GreenBlue formulates five separate claims under Item 27, which are each for 3 units according to its submissions. The range available under Column III for this item is 1 to 3. Multiple claims can be made under Item 27, as long as not formulated for the same service (*Mitchell v Canada*, 2003 FCA 386 [Mitchell] at para 12). As indicated in its title, this item is permissible only if no compensation can be obtained under another item of Tariff B.

[33] The first claim made is for preparing and filing a notice of appearance. GreenBlue had to file it pursuant to subsection 341(1) of the Rules, although this document was not complicated to prepare. Given the state of the jurisprudence, I cannot find any justification for allowing the top or even the midpoint of the range available for this item (*Soprema Inc. v. Canada (Attorney General)*, 2023 FC 522 at para. 7). Therefore, 1 unit is allowed (Rule 409 and paragraph 400(3)(g) of the Rules).

[34] The second claim, for reviewing the tables of contents of the appeal book and signing the agreement as to its contents, should have been formulated under Item 18, which encompasses these services.

[35] Rule 3 provides that the "Rules shall be interpreted and applied (a) as to secure the just, most expeditious and least expensive outcome of every proceeding […]". In the same vein, the Assessment Officer stated in the decision *Mitchell*, at paragraph 12, "Consistent with Rule 3,

[…] the best way to administer the scheme of costs in litigation is to choose positive applications of its provisions as opposed to narrower and negative ones […]".

[36] Given Rule 3 and the *Mitchell* decision, I will move the second claim made under Item 27 under Item 18, to not penalize GreenBlue "by denial of indemnification when it is apparent that real costs were indeed incurred" (*Carlile v. Canada (Minister of National Revenue – M.N.R.)*, [1997] F.C.J. No. 885 at para. 26). One unit is allowed for this second claim, as a single unit is available under Column III for Item 18.

[37] The third, fourth and fifth claims will each be allowed for 2 units, corresponding to the midpoint of Column III, in accordance with DeepRoot's general position on the level of costs in this assessment.

[38] The third claim is for preparing sidelined and bookmarked authorities cited by the GreenBlue in the memorandum of fact and law for the purposes of the joint book of authorities. While I recognize that this claim is for services that are distinct from those encompassed by Item 19, I also note that the preparation of the joint book of authorities required efforts from both parties. Given the amount of work factor, this claim is allowed for 2 units (Rule 409 and paragraph 400(3)(g) of the Rules).

[39] The fourth and the fifth claims are respectively for preparing and filing the respondent's compendium, and for "preparing hearing binder / notes." Since the preparation of the compendium ultimately lay within GreenBlue's discretion and given that no further particulars

are provided in the costs materials regarding the fifth claim, I am of the view that allowing 2 units for each claim will reasonably compensate GreenBlue without unduly burdening DeepRoot (Rule 409 and paragraph 400(3)(g) of the Rules; *M.K. Plastics Corporation v. Plasticair Inc.*, 2007 FC 1029 at para. 20).

[40] As a result, a total of 7 units is allowed under Item 27.

[41] In summary, a total of 28 units amounting to $4,760 is allowed for assessable services. Before turning to disbursements, the amount of taxes claimed on assessable services will be briefly examined.

E. *Taxes on assessable services*

[42] Given that the assessable services claimed are allowed for a reduced number, the amount of taxes to be allowed on assessable services must be adjusted accordingly (paragraph 1(3)(b) of Tariff B). Since the amount of $4,760 is allowed for assessable services, HST is allowed in the amount of $618.80, for a total of $5,378.80 allowed for assessable services, inclusive of HST.

IV. Disbursements

[43] The only claim made for disbursement is an amount of $8,916.09, for travel fees incurred for the attendance of Mr. Dean Bowie, President of GreenBlue Urban North America Inc. and

Chief Executive Officer of GreenBlue Urban Limited UK, at the appeal hearing held in this matter. Excel workbooks are submitted in support of this claim (written representations, paras. 28–29; Affidavit of Mr. Dean Bowie affirmed on August 5, 2025; written representations in reply, paras. 14–15).

[44] DeepRoot underlines that Mr. Bowie did not testify at the appeal hearing and maintains that it was not reasonable and necessary for him to travel from the United Kingdom as he could have joined virtually. It points out that no authority is offered to support that these expenses would be reasonable and necessary in the circumstances of this file. DeepRoot argues that such expenses have traditionally been borne by the client and submits *Janssen-Ortho Inc. v. Novopharm Ltd.*, 2006 FC 1333 [*Janssen-Ortho*] at paragraph 25, in support of its position. Alternatively, DeepRoot takes the position that if such expenses are found permissible, the amount claimed should be reduced by 2/3, to account for GreenBlue not having been awarded costs in file A-181-21 (written submissions in response, paras. 18–22).

[45] GreenBlue replies that the principle that the client or its representative travel fees are not allowable should not be rigidly applied in the present case. It maintains that the disbursements claimed are reasonable and necessary since Mr. Bowie did not attend as a passive observer, “but to provide necessary support to counsel in giving instructions, clarifying technical aspects of the record, and assisting with the management of litigation strategy as the hearing unfolded” (written submissions in reply, para.15).

[46] Subsection 1(4) of Tariff B indicates that a disbursement must be reasonable, and the jurisprudence has established that a disbursement must have been necessary for the conduct of the proceeding (*Merck & Co. Inc. v. Apotex Inc.*, 2006 FC 631 at para. 3).

[47] Firstly, in light of this framework, some of the travel expenses for meals and transportation appearing in the worksheets bear dates between May 2 and 5, 2023, and would not meet the necessity criterion as they are too remote from the hearing dates of May 10 and 11, 2023.

[48] Secondly, I agree with GreenBlue that should these travel fees be accepted as reasonable and necessary, they would need to be reduced to reflect that GreenBlue was not awarded costs in file A-181-21.

[49] Thirdly, in *Beloit Canada Ltd. v. Valmet-Dominion Inc.* (F.C.A.), [1991] F.C.J. No. 1080, at paragraph 5, the Federal Court of Appeal made the following comment with regard to client travel expenses: “I am aware of no authority for the proposition that a party and party award of costs embraces the travelling and living expenses of the successful party in instructing counsel and attending the hearing, however necessarily they may have been incurred.” In light of this comment and of the state of the jurisprudence, I agree with DeepRoot’s primary position that the travel expenses claimed must be disallowed in full, since travel expenses relating to attendance of a client or its representative at a hearing do not meet the reasonableness and necessity criteria (*Hoffman-La Roche Limited v. Apotex Inc.*, 2013 FC 1265 at para. 55, citing amongst other cases *Janssen-Ortho*).

[50] Lastly, given that Mr. Bowie did not testify in this file, it was not suggested that these travel expenses could qualify as disbursements incurred by a witness (paragraphs 1(3)(a) and (b) of Tariff B).

[51] As underlined by GreenBlue, DeepRoot did not submit any case law supporting that Mr. Bowie's travel expenses would be recoverable in the circumstances of this file.

[52] Therefore, the amount claimed for travel expenses is disallowed in full.

V. Conclusion

[53] For the above reasons, the respondent's bill of costs is assessed and allowed in the amount of $5,378.80, payable by the appellants DeepRoot Green Infrastructure, LLC and DeepRoot Canada Corp. to the respondent GreenBlue Urban North America Inc. A certificate of assessment will be issued.

"Karine Turgeon"
Assessment Officer

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-116-22
STYLE OF CAUSE:	DEEPROOT GREEN INFRASTRUCTURE, LLC and DEEPROOT CANADA CORP. v. GREENBLUE URBAN NORTH AMERICA INC.
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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