Federal Court  Cour fédérale

Date: 20211210

Docket: T-310-21

Citation: 2021 FC 1391

BETWEEN:

JOSHUA BARRIERA

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ASSESSMENT

GARNET MORGAN, Assessment Officer

I. Background

[1] This assessment of costs is further to the Applicant filing a Notice of Discontinuance on June 9, 2021, which discontinued the Applicant's judicial review proceeding against the Respondent.

[2] Rules 402 and 412 of the *Federal Courts Rules*, SOR/98-106 *(FCR)*, state the following regarding discontinued proceedings and costs:

> 402. Costs of discontinuance or abandonment - Unless otherwise ordered by the Court or agreed by the parties, a party against

> whom an action, application or appeal has been discontinued or against whom a motion has been abandoned is entitled to costs forthwith, which may be assessed and the payment of which may be enforced as if judgment for the amount of the costs had been given in favour of that party.
>
> […]
>
> 412. Costs of discontinued proceeding - The costs of a proceeding that is discontinued may be assessed on the filing of the notice of discontinuance.

[3] Further to my review of Rules 402 and 412, in the absence of a Court decision specifying any particulars regarding the Applicant's discontinued judicial review proceeding, the Respondent's costs will be assessed in accordance with Rule 407 of the *FCR*, which states the following:

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

[4] On July 5, 2021, the Respondent filed a Bill of Costs, which initiated the Respondent's request for an assessment of costs.

[5] On July 7, 2021, a direction was issued to the parties regarding the conduct and filing of additional documents for the assessment of costs. The court record shows that the direction was sent to the parties by e-mail on July 7, 2021, with the Respondent acknowledging receipt via e-mail, and that the direction was also sent to the parties via facsimile on July 12, 2021, with facsimile confirmations being received. In response to the direction, on July 26, 2021, the Respondent filed a revised Bill of Costs, an Affidavit of Marc Roy, affirmed on July 26, 2021

and Written Submissions. The court record shows that the Applicant did not file any responding documents for this assessment of costs.

II. Preliminary Issue

A. *The absence of responding documents from the Applicant for the assessment of costs.*

[6] As noted earlier in these Reasons, the Applicant did not file any documents in response to the Respondent's request for an assessment of costs. The absence of responding documents from the Applicant has left the Respondent's Bill of Costs substantially unopposed. In *Dahl v Canada*, 2007 FC 192, 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 to the *Dahl* decision, in *Carlile v Canada*, [1997] F.C.J. No. 885, 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] Utilizing the *Dahl* and *Carlile* decisions as guidelines, although there is an absence of responding documents from the Applicant for the assessment of the Respondent's costs, as an Assessment Officer, I still have an obligation to ensure that any claims that are allowed are not "unnecessary or unreasonable". In addition to the Respondent's assessment of costs documents, the court record, the *FCR* and any relevant jurisprudence will be utilized to assess the costs of the Respondent to ensure that they were necessary and are reasonable.

III. Assessable Services

[9] The Respondent has claimed $1,650.00 in assessable services.

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

[10] The Respondent has claimed 7 units for Item 5 for the preparation and filing of the Respondent's motion to strike the Applicant's application for judicial review and for security of costs. At paragraph 14 of the Respondent's Written Submissions it is submitted that "[p]ursuant to Rules 402 and 412, the Respondent is entitled to its costs, as the Applicant discontinued both applications for judicial review in T-310-21 and T-789-21 on June 9, 2021." At paragraph 15 of the Respondent's Written Submissions it is submitted that:

> 15. The Respondent incurred significant costs in the two related judicial review applications. The Respondent prepared a motion record for a motion to strike both applications, and for an order for security for costs, also pertaining to both applications. The Respondent had to prepare two affidavits, a notice of motion, a book of authorities and extensive written representations. Furthermore, the Applicant discontinued the two applications on June 9, 2021, days before the scheduled hearing on June 16, 2021, which is an aggravating factor. This rendered the Respondent's motions moot.

[11] In addition, at paragraph 17 of the of the Respondent's Written Submissions it is submitted that:

> 17. As such, the Respondent relies on the following factors in demanding its costs: the result of the two judicial review applications (400(3)(a)); the significant amount of work necessary in the preparation of the Respondent's motions (400(3)(g)); and the conduct of the Applicant, who discontinued at a very late stage, days before the hearing (400(3)(i)).

[12] Further to the Respondent's submissions, Rule 402 of the *FCR* states the following regarding discontinuances or the abandonment of motions and costs:

> 402. Costs of discontinuance or abandonment - Unless otherwise ordered by the Court or agreed by the parties, a party against whom an action, application or appeal has been discontinued or against whom a motion has been abandoned is entitled to costs forthwith, which may be assessed and the payment of which may be enforced as if judgment for the amount of the costs had been given in favour of that party.

[13] Rule 411 of the *FCR* states the following regarding costs for abandoned motions:

> 411. Costs of abandoned motion - The costs of a motion that is abandoned or deemed to be abandoned may be assessed on the filing of
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> > (a) the notice of motion, together with an affidavit stating that the notice was not filed within the prescribed time or that the moving party did not appear at the hearing of the motion; or
> >
> > (b) where a notice of abandonment was served, the notice of abandonment.

[14] In addition, Rule 370 of the *FCR* states the following regarding abandoned motions:

> 370(1) Abandonment of motion - A party who brings a motion may abandon it by serving and filing a notice of abandonment in Form 370.
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> (2) Deemed abandonment - Where a moving party fails to appear at the hearing of a motion without serving and filing a notice of abandonment, it is deemed to have abandoned the motion.

[15] Rules 370, 402 and 411 refer to the abandonment of the moving party's motion. It is subsequent to a moving party abandoning a motion that a responding party would be entitled to costs. This is different from the motion in this particular file, as the moving party (The Attorney General of Canada) did not abandon its motion. The Applicant discontinued the judicial review

proceeding before the Respondent's motion was heard and therefore there is no Court decision awarding costs for this particular motion. In *Tursunbayev v Canada (Minister of Public Safety and Emergency Preparedness)*, 2019 FC 457, at paragraph 39, the Court stated the following regarding decisions that are silent as to costs:

> 39. As the Defendants point out, apart from the Court's order of November 24, 2016 and the eventual supplementary costs order of March 6, 2017, which the Defendants have satisfied, all of my orders in these proceedings have either expressly awarded no costs or have been silent as to costs. This is because in the instances now raised before me the Plaintiff did not seek costs (either in writing or orally) so that costs were not an issue I was asked to address. As I understand the jurisprudence of this Court, I cannot now re-visit my earlier orders that were silent as to costs. In *Sauve v Canada*, 2015 FC 181, Justice Barnes had the following to say on point:
>
> > [5] I am also concerned about the Defendants' claims to costs in connection with a variety of motions that were filed by one or the other dating back as far as 2007.
> >
> > [6] Almost all of the early motions in this proceeding were concluded by Orders where no award of costs was made. It is not open to the Court to revisit those matters and to award costs where none were ordered at the time: see *Exeter v Canada*, 2013 FCA 134 at para 14.

[16] In addition, in *Canada v Uzoni*, 2006 FCA 344, at paragraph 4, the Assessment Officer stated the following with regards to motions and costs:

> 4. The Respondent has requested 4 units for its item 4 (Preparation and filing of an uncontested motion, including all materials for late filing of Notice of Appearance). I have reviewed the Order of the Federal Court of Appeal dated March 22, 2005, in which the Court granted the Respondent's motion for an extension of time to file its Notice of Appearance. However, the same Order of the Federal Court of Appeal made no reference whatsoever to the issue of costs associated with the Respondent's motion. It is a well established principle that costs are at the respective Court's discretion and where an order is silent with respect to costs, it

> implies there is no visible exercise of the respective Court's discretion under Rule 400(1). Reference may also be made to a relevant passage in Mark M. Orkin, Q.C., *The Law of Costs* (2nd Ed.), 2004, paragraph 105.7:
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> ... Similarly if judgment is given for a party without any order being made as to costs, no costs can be assessed by either party; so that when a matter is disposed of on a motion or at a trial with no mention of costs, it is as though the judge had said that he "saw fit to make no order as to costs"...
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> Similarly, I rely on *Kibale v. Canada (Secretary of State)*, [1991] F.C.J. No. 15, [1991] 2 F.C. D-9 which reflects the same sentiment:
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> If an order is silent as to costs, no costs are awarded.

[17] Upon my review of the *Tursunbayev* and *Uzoni* decisions, the Respondent's submissions and Rules 370, 402 and 411 of the *FCR*, I find that as an Assessment Officer, I do not have the authority to allow the claim under Item 5. The Respondent's motion was not abandoned by the moving party and there is no Court decision awarding costs for this motion. Therefore, the Respondent's claim for Item 5 cannot be allowed.

[18] Further to my determination that Item 5 cannot be allowed, the jurisprudence in *Tursunbayev* and *Uzoni* provide guidance regarding Court decisions that are silent as to costs, but they do not provide guidance regarding motions that were not disposed of by the Court and were not abandoned by the moving party when an underlying court proceeding has been discontinued. I have considered the Respondent's request for costs outside of the parameters of Item 5, in conjunction with the court record and Rules 402 and 412 of the *FCR*, and I find that there may be circumstances whereby a party could possibly be indemnified for the preparation

and filing of a motion that was not disposed of by the Court and that was not abandoned by the moving party, depending on the facts pertaining to a particular file.

[19] For this particular file, the court record shows that the Respondent filed its Notice of Motion on May 26, 2021, and that the Court directed on June 1, 2021, that the motion would be heard by videoconference on June 16, 2021. In this direction the Respondent was given until June 4, 2021, to serve and file a moving party Motion Record and the Applicant was given until June 8, 2021, to serve and file a responding Motion Record. My review of the court record found that the Respondent filed a moving party Motion Record on June 4, 2021, and that the Applicant did not file a responding Motion Record and that the Applicant discontinued the underlying judicial review proceeding on June 9, 2021, the day after the Applicant's deadline to file a responding Motion Record. The court record shows that the Respondent performed a considerable amount of work to prepare the motion to strike the Applicant's application for judicial review and for security of costs, which is 170 pages in length and includes two supporting affidavits, Written Representations and several legal citations. It is noted though that the Motion Record for this file was filed jointly with the Motion Record for the Applicant's related file T-789-21.

[20] My review of the court record supports the allowance of some indemnification for the work performed by the Respondent in relation to the motion to strike the Applicant's application for judicial review and for security of costs. In *Mitchell v Canada*, 2003 FCA 386, at paragraph 12, the Assessment Officer stated the following regarding the positive application of costs provisions:

> 12. The Appellants are correct that the wording for item 27 does not generally fetter discretion. However, that discretion, as for other items in bills of costs, is still fettered by reasonable necessity and the limits of an award of costs. Consistent with Rule 3, and with my sentiment in Feherguard Products Ltd. v. Rocky's of B.C. Leisure Ltd., [1994] F.C.J. No. 2012 (A.O.), at para. 10 that 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", application of discretion should be part of a reasoned process to achieve a result on assessment which is equitable for both sides. […]

[21] In addition, Rule 3 of the *FCR*, states the following:

> 3. General principle - These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

[22] Utilizing the *Mitchell* and *Carlile* (supra) decisions and Rule 3 of the *FCR* as guidelines, I have determined that assessing the Respondent's claim under Item 27 is an acceptable alternative to assessing the claim under Item 5 and will allow for a positive application of the costs provisions instead of a narrower one, as "a result of zero dollars at taxation would be absurd." I have considered the factors listed under Rule 400(3) of the *FCR*, which an Assessment Officer can consider in an assessment of costs pursuant to Rule 409, such as, (a) the result of the proceeding; (g) the amount of work; and (i) any conduct that tended to shorten or unnecessarily lengthen the duration of the proceeding, that were submitted by the Respondent, in addition to factor (o) any other matter that it considers relevant. Further to my review of the Respondent's submissions in conjunction with the court record, the *FCR* and the aforementioned jurisprudence, and taking into consideration that the motion material for this file was filed jointly with the motion material for the Applicant's related file T-310-21, I have determined that it is reasonable

to allow 2 units under Item 27 for the work performed by the Respondent in relation to the motion to strike the Applicant's application for judicial review and for security of costs.

B. *Item 26 – Assessment of costs.*

[23] The Respondent has claimed 4 units for the services performed in relation to this assessment of costs. At paragraphs 9 and 10 of the Affidavit of Marc Roy, affirmed on July 26, 2021, it is stated that the Respondent advised the Applicant that costs would be pursued for this file in a letter dated June 15, 2021, and that the Applicant's position was sought in an e-mail dated June 24, 2021, to which no response was received from the Applicant. These correspondence are attached as Exhibits I and J to the Affidavit of Marc Roy. Further to my review of Respondent's assessment of costs documents and taking into consideration that the Respondent attempted to resolve the issue of costs informally with the Applicant prior to requesting an assessment of costs, I have determined that the Respondent's claim of 4 units for Item 26 is reasonable. Therefore, the Respondent's claim for Item 26 is allowed as claimed.

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

[24] A total of 6 units have been allowed for the Respondent's assessable services for a total dollar amount of $900.00.

IV. Disbursements

[25] The Respondent did not submit any claims for disbursements.

V. Conclusion

[26] For the above Reasons, the Respondent's Bill of Costs is assessed and allowed in the total amount of $900.00, payable by the Applicant to the Respondent. A Certificate of Assessment will also be issued.

"Garnet Morgan"
Assessment Officer

Toronto, Ontario
December 10, 2021

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-310-21
STYLE OF CAUSE:	JOSHUA BARRIERA v THE ATTORNEY GENERAL OF CANADA

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

REASONS FOR ASSESSMENT BY:	GARNET MORGAN, Assessment Officer
DATED:	DECEMBER 10, 2021

WRITTEN SUBMISSIONS BY:

J. Todd Sloan	FOR THE APPLICANT
Charles Maher	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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