Federal Court  Cour fédérale

Date: 20230413

Docket: T-475-21

Citation: 2023 FC 522

[ENGLISH TRANSLATION]

BETWEEN:

SOPREMA INC.

Applicant

and

THE ATTORNEY GENERAL OF CANADA AND 3313045 NOVA SCOTIA COMPANY

Respondents

REASONS FOR ASSESSMENT

Stéphanie St-Pierre Babin, Assessment Officer

I. Introduction

[1] By order and reasons dated July 9, 2021 [Order], the Court granted the motion to strike by the respondent, 3313045 Nova Scotia Company [Nova Scotia], struck the notice of application for judicial review of the applicant, Soprema Inc. [Soprema], and awarded costs to Nova Scotia.

[2] Nova Scotia served and filed its bill of costs on June 10, 2022. On October 27, 2022, a direction was sent to the parties informing them that the assessment of the bill of costs would proceed on the basis of written submissions, and setting out the time limits for filing those submissions. On November 24, 2022, Nova Scotia filed the sworn statement of Guillaume Pelegrin [Statement]. Soprema served and filed a reply in response to the bill of costs on January 9, 2023 [Reply]. Having reviewed the bill of costs, the Statement and the Reply, I will now address two preliminary issues and then consider each of the assessable services claimed.

II. Preliminary Issues

[3] The parties agreed that the bill of costs should be assessed in accordance with column III of Tariff B, but disagree as to the level of costs to be awarded within the range of available units (section 407 of the *Federal Courts Rules*, SOR/98-106 [Rules]). In paragraph 6 of Soprema's Reply, it argued that Nova Scotia claimed the maximum units available under column III for 12 of the 13 assessable services claimed and that this is inconsistent with the established principles for the assessment of costs.

[4] The recent jurisprudence of this Court recalls the established principle that the default level of costs to be awarded is the mid-point of column III (*Allergan Inc v Sandoz Canada Inc*, 2021 FC 186 at para 25). The fact remains that each service to be assessed has its own circumstances and that it is not necessary to award the same level of costs for each service claimed. I will evaluate each service independently considering the full range of units available and recognizing that there may be circumstances justifying costs to be assessed at a level below

or above the mid-point of column III. (*Truehope Nutritional Support Limited v Canada (Attorney General)*, 2013 FC 1153 at para 14).

[5] On the other hand, Soprema argued that Nova Scotia has not presented sufficient evidence to support its bill of costs and that this must result in a conservative assessment of costs (*advance Magazine Publishers Inc v Farleyco Marketing Inc*, 2010 FCA 143 at para 10). While it would have been useful to have a more complete justification from Nova Scotia for not filing written submissions in this assessment, I believe that the services claimed can still be assessed and quantified by a thorough examination of the bill of costs in conjunction with the Court record and the applicable case law. In the circumstances, I will apply the assessment officer's teachings in *Métis National Council of Women v Canada (Attorney General)*, 2007 FC 961:

> [21] … [t]he less that evidence is available, the more that the assessing party is bound up in the assessment officer's discretion, the exercise of which should be conservative, with a view to the sense of austerity which should pervade costs, to preclude prejudice to the payer of costs. However, real expenditures are needed to advance litigation: a result of zero dollars at assessment would be absurd.

III. Assessable Services

A. *Item 2 – Preparation and filing of respondents' documents*

[6] In its bill of costs, Nova Scotia claims 4 units under item 2 for the preparation and filing of its notice to appear on March 31, 2021. The text of item 2 provides for compensation to a respondent for the "[p]reparation and filing of all defences, replies, counterclaims or respondents' records and materials". As it does not expressly provide for the preparation and filing of a notice to appear, I am unable to accept the units claimed under item 2.

[7] To overcome this absence from Tariff B, the assessment officers have nevertheless repeatedly recognized the preparation and filing of a notice to appear under another item in Tariff B, item 27, Which gives assessment officers the discretion to accept services rendered that are not otherwise provided for in items 1 to 26 (*Garbutt v Canada*, 2021 FC 901 at para 12; *Rhéaume v Attorney General of Canada*, 2012 FC 1322 at para 18 (unreported, T-1733-08, November 15, 2012); *Browning v Canada (Attorney General)*, 2010 FC 603 at para 5). Accordingly, I allow 1 unit under item 27 for services rendered in connection with the notice to appear.

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

[8] In its bill of costs, Nova Scotia makes 4 separate claims of 7 units under item 5, which I will deal with one at a time.

(1) Application for review of April 29, 2021, order

[9] First, Nova Scotia claims 7 units for the [TRANSLATION] "motion to review the April 29, 2021, order" (Bill of costs, p 2). In paragraph 15 of its Reply, Soprema disputed this claim and rightly argued that item 5 is limited to the contested motions. A review of the record confirmed that the motion for review of the order made on April 29, 2021, was made informally in a letter dated May 3, 2021. In oral directions dated May 4, 2021, Assistant Justice Steele stated that the Court was not in a position to reconsider or set aside her order of April 29, 2021, in the absence of the filing of a formal motion under section 399 of the Rules. As the text of item 5 specifically

compensates for the "preparation of . . . a contested motion" and no formal motion has been filed in this case, no units are awarded [emphasis added].

(2) Motion for confidentiality order (May 7, 2021) and response record in the motion for consolidation (May 26, 2021)

[10] Second, Nova Scotia claimed 7 units for its record in the motion for a confidentiality order filed on May 7, 2021, under sections 151, 359 and 364 of the Rules, and 7 units for the preparation and filing of a record in response to the consolidation motion (Bill of costs, p 2). At paragraph 18 of its Reply, Soprema correctly submitted that there must necessarily be a decision with an award of costs in order for a contested motion to be assessable and that, in fact, no decision has ever been rendered by this Court (*Turmel v Canada*, 2020 FC 537 at para 18).

[11] A review of the record reveals that both the motion for a confidentiality order and the motion for consolidation were heard at the general meeting held on June 15, 2021, and that the Court took these cases under advisement. It also appears that the Court never ruled on these two motions because it allowed the striking of the notice of application on July 9, 2021, which rendered the motion for a confidentiality and the motion for consolidation moot (Direction of Justice St-Louis, October 5, 2021).

[12] It is well established that only the Court has the discretion to award costs to a party (subsection 400(1) of the Rules). In my duties as an assessment officer, I do not have the authority to award costs in the absence of an order or judgment, as I am not a member of the Court, but rather an officer of the Registry proceeding with the assessment following a decision of the Court awarding costs (sections 2 and 405 of the Rules). In other words, there must

necessarily be an order or judgment containing an apparent reference to the Court awarding costs so that the discretion to award costs is conferred on an assessment officer (*Balisky v Goodale*, 2004 FCA 123 at para 6). Because the Court never ruled on these two motions and as a result there is no award of costs to Nova Scotia, the 14 units claimed—7 units per motion—are not allowed.

(3) Motion to strike notice of application for judicial review (May 14, 2021)

[13] Finally, Nova Scotia claimed 7 units for the preparation and filing of 1) the motion to strike the notice of application for judicial review; 2) the affidavit of Jeffrey M. Hansbro; and 3) the written submissions filed on May 14, 2021. In response, Soprema essentially argued that the claim for 7 units at the upper limit of the range available under column III is not reasonable [TRANSLATION] "since it is a motion prepared at the beginning of the case, even before exhibits or the administrative record was sent", and the preparation was limited to the initial application without exhibits or examinations (Reply, para 17).

[14] Nova Scotia is entitled to claim costs under item 6 for the preparation of a contested motion, as the Order clearly states that the "Motion to Strike is allowed" and that "[c]osts are awarded to Nova Scotia". As for the number of units to be awarded, I note first that the motion record contains written submissions consisting of 90 paragraphs and a list of authorities citing about 40 references. The issues discussed were summarized by the Court as follows:

1) Did Soprema have standing, as required by subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7, since it is not directly affected by the subject matter of the application, its interest is purely commercial and private, and it does not have a public interest?

2) Was the application for judicial review time-barred, having been filed beyond the 30-day period provided for in subsection 18.1(2) of the *Federal Courts Act*, since Soprema knew, by October 6, 2020, that a licence had been issued to Nova Scotia?

[15] Second, I note that the Court stated at paragraph 4 of the Order that Soprema's *bene esse* application for an extension of time was not necessary and that, therefore, the affidavit filed in support of the motion to strike was not relevant. Since the affidavit was not necessary to conduct the litigation, it will not be considered in my determination of the level of units to be awarded under column III.

[16] Considering that the issues addressed presented a certain level of complexity and considering the workload required to produce the record for the motion to strike, while excluding the affidavit of Mr. Hansboro, I determine that it is reasonable to allow 6 units (section 409 and paragraphs 400(3)(c) and (g) of the Rules).

C. *Item 10 - Preparation for conference, including memorandum*

[17] In its bill of costs, Nova Scotia makes two claims of 6 units under item 10, for the following services: [TRANSLATION] "Letter for request for consent to the presentation of motions at the general meeting (May 20, 2021)"; and [TRANSLATION] "Directions for the presentation of the various motions presentable at the general meeting (May 27, 2021)". Soprema objected in every respect to this claim, arguing that item 10 was intended to compensate for the preparation of a preparatory conference but that no conference had taken place. I agree.

[18] It appears from the record that the May 20, 2021, letter made an informal request for the adjournment of two motions that could be made at the general meeting of June 1, 2021.

Regarding the letter filed on May 27, 2021, it sought directions with respect to the filing of various motions that could be made at the general meeting of June 1, 2021. I conclude that these services were not rendered in connection with a preparatory conference, but rather in connection with a general meeting. A careful examination of the record confirms that the Court never chaired a conference. For these reasons, no units are allocated under item 10.

D. *Item 13(a) – Preparation for hearing*

[19] In its bill of costs, Nova Scotia made two identical claims of 5 units under item 13(a) for the preparation of the initial hearing of June 1, 2021. Soprema alleged that the number of units requested is unreasonable, considering that the hearing did not take place on that date and that no witness preparation was necessary. It also argued that Nova Scotia could not bring two identical claims for the preparation of the same hearing. I agree.

[20] In the record, I note two directions from the Judicial Administrator dated May 31, 2021, and June 4, 2021, confirming that the hearing originally scheduled for June 1, 2021, was postponed twice because of exceptional circumstances. Although counsel for Nova Scotia had to prepare on several occasions, all of the preparation was related to one hearing, that of the motion to strike. In the context of an assessment, I must refrain from awarding duplicate costs or accepting more services than necessary, which would not be appropriate (*Novopharm Ltd v AstraZeneca AB*, 2006 FC 678 at para 20). For this reason, and in the absence of written submissions that could explain the duplication in the bill of costs, no units are allowed for the second claim under item 13(a).

[21] Regarding the first claim under item 13(a), I will focus on it further. This item is located in section E *Trial or Hearing* of the table to Tariff B, which is intended to compensate the hearing on the merits of an application for judicial review. However, in this case, we have a hearing of a motion to strike at the interlocutory stage of the case. In section B *Motions*, there are no items to compensate a party for the preparation of the hearing of an interlocutory motion. Thus, I am unable to accept the units claimed under item 13(a).

[22] Nevertheless, as mentioned above, item 27 of the table to Tariff B gives me the discretion to accept services rendered that are not otherwise provided for in items 1 to 26 in the table to Tariff B. I acknowledge that services were rendered to prepare for appearance on the motion to strike because although the motion was heard on June 15, 2021, and Nova Scotia claimed units for the original date of June 1, 2021, in its bill of costs, there is no doubt that services were rendered. In anticipation of the appearance, the record reveals that Nova Scotia filed a voluminous book of authorities on May 18, 2021, outlining excerpts from relevant legislation and jurisprudence. It also reveals that Nova Scotia prepared correspondence, specifically the letters dated May 20 and 27, 2021, described in paragraph 18 of these reasons.

[23] Item 27 has an available unit range of 1 to 3 units. Since the case law allows assessment officers to allocate item 27 several times, I find that it is reasonable, in the circumstances specific to this case, to allocate 1 unit for the preparation of correspondence and 3 units for the preparation of the book of authorities (*Mitchell v Canada*, 2003 FCA 386 at para 12).

E. *Item 14(a) – Attendance at hearing, first counsel*

[24] Regarding item 14(a), Nova Scotia claims a total of 18 units—3 units multiplied by 6 hours—for the fees of first counsel who attended the hearing of the motion to strike. In short, Soprema argued in reply that item 14 concerns the assessment of the trial on the merits and that Nova Scotia should have filed its claim in connection with the motion to strike under item 6, such that this error deprives Nova Scotia of obtaining an assessment of it (Reply, para 23).

[25] Nova Scotia made a claim under item 14(a), which is found in section E *Trial or Hearing* of the table compensating for the hearing on the merits of a case. Again, in this case, it is rather the hearing of a motion to strike heard at the interlocutory stage of the case and Soprema correctly argued that Nova Scotia should instead claim item 6 found in section B *Motions* of the table, which compensates for appearance on a motion, per hour.

[26] However, I do not consider this error to deprive Nova Scotia of compensation for the services rendered. Similarly to *Carlile v Canada (Minister of National Revenue - MNR)*, 1997 FCJ No 885 at paragraph 26, I am in a position where I cannot refuse to award costs, because there is no doubt that counsel for Nova Scotia rendered a service necessary for the conduct of the litigation, namely to appear at the hearing of the motion to strike:

> . . . 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. . . . [Emphasis added.]

[27] Indeed, assessment officers have repeatedly acknowledged that it is justified to allocate units under item 6 even though the claim was originally made under item 14(a) (*Cabral v*

Canada (Citizenship and Immigration), 2021 FC 169 at para 33; *Humby Enterprises Limited Re*, 2008 FC 104 at para 8). It now remains for me to determine the quantum.

[28] Item 6 has an available unit range of 1 to 3 units. After reviewing the file in conjunction with factors such as a) the result of the motion to strike in favour of Nova Scotia, and b) the importance and complexity of the issues dealt with, I determine that it is reasonable to allow 3 units in the circumstances of this case (subsection 400(3) and section 409 of the Rules).

[29] Regarding the number of hours, Nova Scotia claimed 6 hours for the fees of the first counsel who attended the hearing. Soprema argued that this number of hours is not representative, as several motions in several different dockets have been heard, and that only the hours devoted to the motion to strike must be allowed (Reply, para 24).

[30] I am indeed unable to award the number of hours claimed in the bill of costs. At the general meeting of June 15, 2021, the Court heard 1) the motion for a confidentiality order (T-475-21); 2) the motion to strike (T-475-21); and 3) the motion for consolidation (T-478-21). However, as already determined in paragraph 12 of these reasons, no costs can be awarded for the motion for a confidentiality order and the motion for consolidation. Only services rendered in connection with the motion to strike are compensable.

[31] Although the total time listed in the recorded entries in the case management system was 3 hours 25 minutes, I conducted a thorough review of the minutes of the hearing prepared by the Registrar, which contains a detailed statement of the hearing time for each motion. It appears that the following periods dealt with the motion to strike:

- 9:30 am to 9:58 am (28 minutes) - the Court deals with the order of presentation of motions
- 10:18 to 11:04 (46 minutes) - submissions by 3313045 Nova Scotia Company
- 11:16 to 12:26 (70 minutes) - submissions by the Attorney General of Canada
- 12:30 to 12:55 (25 minutes) – submissions by Soprema

[32] Since the time for counsel to attend also includes the time during which the Registrar ensures the presence of the parties and the absence of technical difficulties before the commencement of a hearing held by videoconference, I find it reasonable to round up the appearance to 3 hours (*Nova-Biorubber Green Technologies, Inc v Sustainable Development Technologies Canada*, 2021 FC 102 at para 21).

[33] In consideration of all of the above, 9 units are awarded under item 6. This amount was calculated by multiplying the 3 units awarded under column III by 3 hours.

F. *Item 14(a) – Attendance at hearing, second counsel*

[34] Nova Scotia claimed 9 units for the attendance of a second lawyer at the hearing on June 15, 2021. I agree with Soprema's argument in reply that Nova Scotia cannot be awarded units under this item because the Court did not order it (Reply, para 25). Item 14(b) provides for compensation for counsel fees for the presence of a second counsel at the hearing "where [the] Court directs". As the Order does not contain any specific statement by the Court authorizing me to award costs for the attendance of a second counsel at the hearing of the motion to strike, the units claimed are not allowed.

G. *Item 25 – Services after judgment*

[35] Nova Scotia requested 1 unit for services rendered after judgment. Soprema pointed out in reply that no justification was provided and that no service was required from the Court after the Order was issued. On the one hand, services rendered after the Order may be awarded units under item 25 since there is a final decision that ended the judicial review initiated by Soprema (*Boshra v Canada (Association of Professional employees)*, 2011 FCA 278 at para 20). On the other hand, I note that the Order, which is 15 pages long, addresses many legal concepts. Despite the absence of evidence put forward by Soprema, I conclude that, given the content of the decision awarding costs, counsel had to send a copy to their client and explain the repercussions (*Halford v Seed Hawk Inc*, 2006 FC 422 at para 131). In the circumstances of this case, I find it reasonable to award 1 unit.

H. *Item 26 – Assessment of costs*

[36] Finally, Nova Scotia seeks the maximum number of units available, 6 units, for services rendered in connection with the assessment of costs. Soprema replied that the minimum number of available units, 2 units, should be awarded because the bill of costs was simple and brief. As part of this assessment, Nova Scotia filed its bill of costs and the Statement, but did not file written submissions in support of the bill of costs or in response to the Reply filed on January 9, 2023. As a result, the number of units awarded will be reduced from 6 to 3 units (section 409 and paragraph 400(3)(g) of the Rules).

IV. Conclusion

[37] The bill of costs of the respondent, 3313045 Nova Scotia Company, is assessed and allowed in the amount of $4,415.04. A certificate of assessment will be issued for this amount.

"Stéphanie St-Pierre Babin"
Assessment Officer

Ottawa, Ontario
April 13, 2023

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-475-21
STYLE OF CAUSE:	SOPREMA INC. v THE ATTORNEY GENERAL OF CANADA AND 3313045 NOVA SCOTIA COMPANY

ASSESSMENT OF COSTS CONSIDERED IN WRITING AT OTTAWA, ONTARIO WITHOUT APPEARANCE OF THE PARTIES

REASONS FOR ASSESSMENT BY:	STÉPHANIE ST-PIERRE BABIN, ASSESSMENT OFFICER
DATED:	APRIL 13, 2023

WRITTEN SUBMISSIONS:

Christine Duchaine	FOR THE APPLICANT
Guillaume Pelegrin Rosalind Cooper Gaëlle Obadia	FOR THE RESPONDENT 3313045 NOVA SCOTIA COMPANY

SOLICITORS OF RECORD:

Sodavex Inc. Montréal, Quebec	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT, THE ATTORNEY GENERAL OF CANADA
Fasken Martineau Dumoulin Montréal, Quebec	FOR THE RESPONDENT 3313045 NOVA SCOTIA COMPANY