

Federal Court of Appeal



Cour d'appel fédérale

Date: 20220104

Docket: A-249-17

Citation: 2022 FCA 1

Present: ORELIE DI MAVINDI, Assessment Officer

BETWEEN:

CHRISTOPHER J. PIKE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Assessment of costs without appearance of the parties.
Certificate of Assessment delivered at Toronto, Ontario, on January 4, 2022.

REASONS FOR ASSESSMENT BY: ORELIE DI MAVINDI, Assessment Officer

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REASONS FOR ASSESSMENT

ORELIE DI MAVINDI, Assessment Officer

[1] By way of Judgment dated May 27, 2019, the Court dismissed the appeal with costs in favour of the Respondent. On February 4, 2021, the Respondent filed its Bill of Costs.

[2] On March 9, 2021, the Appellant's solicitor, T. James Bennett, filed a motion for an order to be removed as solicitor of record. On April 19, 2021, the Court granted the motion and T. James Bennett was removed from the record.

[3] On September 7, 2021, I issued the following Direction:

Further to the filing of the Respondent's Bill of Costs on February 4, 2021, and the Order of the Court removing Appellant's counsel dated April 21, 2021, the assessment of costs will proceed in writing.

It is directed that:

1. the Respondent may serve and file all materials (if they have not already done so) including the bill of costs, supporting affidavit(s) and written submissions together with a copy of this direction by Tuesday, September 28, 2021;
2. the Appellant may serve and file any responding materials (affidavit(s) and/or written submissions) by Tuesday, October 19, 2021;
3. the Respondent may serve and file any reply submissions by Tuesday, November 2, 2021.

[4] On September 27, 2021, the Respondent served and filed the Affidavit of Wendy J.

Thompson sworn on February 4, 2021, and the Respondent's Written Submissions, in support of the Bill of Costs.

[5] On October 19, 2021, the Appellant filed responding costs submissions in the form of a letter enclosing supporting material titled "Tax Appeal Letter", "Discovery Hearing", "Tax Appeal", "Nova Scotia Tax Services Office", "Christopher Pike Insurance Claim", 5. "Statement of Claim", "Jim Bennett Appeal" and "Law Society March 2021" (the "Appellant's Costs Material"). The Appellant's letter enclosing the supporting material read:

Appellant's request to have cost dismissed, in the above noted matter, due to the actions of both the solicitors for the Appellant and the Respondent solicitor. It is quite clear and evident that after reading my submitted files, that both solicitors we negligent and erred in their actions against the Appellant Christopher Pike.

[6] The Appellant's Costs Material were received on December 9, 2021, as the Appellant erroneously filed the documents via the Tax Court of Canada's online filing portal, instead of with the Federal Court of Appeal. Having discovered the error and noting that the Federal Court of Appeal docket did not reflect having received the materials, the Taxation Officer at the Tax Court of Canada forwarded the materials to the Federal Court of Appeal. As the client is newly self-represented and the Appellant's Costs Material were submitted on time according to the Tax Court of Canada online filing receipt, the Appellant's Costs Material were accepted for filing.

[7] In reply, on November 1, 2021, the Respondent provided a letter advising that they did not intend to file additional submissions, and continued to rely upon the previously filed Affidavit of Wendy J. Thompson and the Respondent's Written Submissions.

I. Preliminary Issue

[8] In the Appellant's Costs Material, it is submitted that the Respondent should have their costs dismissed in this matter due to actions from the Appellant's former solicitor, and the Respondent's solicitor. It is alleged that the supporting documents establish that both solicitors were negligent and erred in their actions against the Appellant.

[9] At paragraph 17 of the Respondent's Written Submissions, it was submitted that despite the Appellant's changes in representation, citing *Marshall v. Canada*, 2006 FC 1017 (*Marshall*)(A.O.), "the matter at issue is the determination of the final amount of the Respondent's costs and disbursements by the assessment officer; it is not an opportunity for the Appellant to attempt to re-litigate the merits of the appeal". The Respondent outlined the

differences in jurisdiction between an assessment officer and the Court, citing paragraph 4 of *Scheuneman v. Canada (Minister of Human Resources Development)*, 2006 FC 1012

(*Scheuneman*)(A.O.):

4 The *Federal Courts Act*, sections 4 and 5.1(1) defining the Federal Court, and Rule 2 of the *Federal Courts Rules* defining an assessment officer, mean that the terms “Court” (as used in Rule 400) and “assessment officer” refer to separate and distinct entities. My jurisdiction to address the Plaintiff’s request to me either for a nominal award of costs or for denial of costs on humanitarian and constitutional grounds to avoid bringing the administration of justice into disrepute is therefore precluded because both said types of relief fall to the Court under Rule 400(1). The Court is *functus* relative to both types of relief having instead or already awarded party and party costs. That Rule 400(1) exercise of discretion triggered and restricted my jurisdiction to the parameters of Rule 407, i.e. Column III costs under Table B, which are not in the nature of nominal or no costs. Accordingly, I have not summarized the Plaintiff’s position concerning Rule 400(1) and (6)(a) and (d) (the Court’s discretion to award or refuse costs in respect of a particular issue or step and to award costs against a successful party respectively) as I am not the “Court” as that term is used in said Rule.

[10] I am satisfied by the Respondent’s position that the merits of the underlying appeal cannot be re-litigated at the assessment of costs stage, in these circumstances. I am equally satisfied by the Respondent’s reliance on *Scheuneman* to establish that the jurisdiction to award costs rests with the Court. The Court in the May 27, 2019, Judgment dismissing the appeal with costs, exercised its discretion pursuant to Rule 400(1) of the *Federal Courts Rules*, SOR/98-106 (*FCR*) to award them against the Appellant in favour of the Respondent. Rule 400 (1) reads:

Discretionary powers of Court

400 (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.

Pouvoir discrétionnaire de la Cour

400 (1) La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer

[11] Pursuant to Rule 409 of the *FCR*, an assessment officer may consider the relevant enumerated factors in awarding costs outlined at Rule 400(3), such as any steps in the proceeding

that were improper or taken through negligence, mistake or excessive caution, as inferred by the Appellant. However, this does not permit an assessment officer to vary or interfere with the exercise of the Court's Rule 400(1) discretion to award costs against a party in a proceeding. An assessment officer may assess the allowable quantum of costs, in other words, establish a dollar figure for the awarded costs, in view of the Judgment, the *FCR* and jurisprudence. The Respondent's right for recovery of assessed costs from the Appellant in this matter was awarded by the Court, I do not have the jurisdiction to contradict this award by subsequently granting the Appellant's request to have the costs dismissed entirely, based on the purported actions of the solicitors (*Brace v. Canada*, 2021 FCA 136 (A.O.), *Marshall v. Canada*, 2006 FC 1017(A.O.)). As expressed by my colleague in comparable circumstances at paragraphs 12 and 13 of *Nova-Biorubber Green Technologies, Inc. v. Sustainable Development Technology Canada*, 2021 FC 102 (A.O.), I do not find that I have the authority to dismiss the Respondent's costs in this matter:

12 My review of the court record for this file indicates that only the Defendant has been awarded costs by the Court and that no costs have been awarded to the Plaintiff. In *Pelletier v Canada*, 2006 FCA 418, at paragraph 7, the Court states the following regarding awards of costs:

[...] 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.

13 Further to the decision in *Pelletier*, my role as an Assessment Officer is to assess costs. I do not have the authority to dismiss the costs of the Defendant, nor do I have the authority to award costs to the Plaintiff, as I am not a Judge. Therefore, I am unable to consider the Plaintiff's requests that I dismiss the costs of the Defendant and award costs to the Plaintiff.

[12] Accordingly, the Appellant's request to dismiss the Respondent's costs, due to alleged actions from the Appellant's former solicitor, and the Respondent's solicitor, cannot be allowed.

II. Assessment

[13] The Appellant's submissions concerning costs entirely opposed the Respondent's Bill of Costs in general, however the Appellant's Costs Material did not speak to the individual assessable services and disbursements claimed by the Respondent. I will thus proceed with the assessment of costs in light of the following comments at paragraph 2 of *Dahl v. Canada*, 2007 FC 192 (A.O.) (*Dahl*):

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.

A. *Assessable Services*

[14] The Respondent claimed \$3,375.00 in assessable services under column III to Tariff B pursuant to Rule 407 of the *FCR*. Having reviewed the Court file and the materials filed by the Respondent in support of the Bill of Costs, the claims under Item 19 (Memorandum of fact and law), Item 20 (Requisition for hearing), Item 22 (Counsel fee on hearing of appeal: (a) to first counsel, per hour), Item 25 (Services after judgment not otherwise specified) and Item 26 (Assessment of costs) are sufficiently substantiated and allowed as claimed. Certain Items may have warranted my intervention, however absent specific objection from the Appellant, they are allowed as claimed.

[15] The Respondent initially made two claims under Item 21 (Counsel fee: (a) on a motion, including preparation, service and written representations or memorandum of fact and law). The first claim under Item 21 related to the Respondent's written representations and affidavit dated July 9, 2018, in response to the Notice of Status Review. The claim concerning the Notice of Status Review was subsequently withdrawn by the Respondent at paragraph 24 of the Respondent's Written Submissions, in addition to the associated photocopying disbursement. The second claim under Item 21 related to the Respondent's motion record dated August 24, 2018, in response to the Appellant's motion to determine the contents of the appeal book. The Respondent's position concerning this claim can be found at paragraph 25 of the Respondent's Written Submissions:

25. The parties were unable to reach an agreement respecting contents of the Appeal Book. The Appellant filed a motion for determination of same. Dawson J.A. ruled on the motion by Order dated September 18, 2021 and ordered that the documents proposed by the Respondent should be included in the Appeal Book. Clause 3 of the September 18, 2018 Order contained a provision that "the costs of this motion are reserved to the panel of Judges of this Court which hears and adjudicates the merits of this appeal." The appeal was heard on its merits by Dawson, Woods and Laskin JJ.A. The Judgment dismissed the Appellant's appeal and awarded costs to the Respondent. The Respondent submits that motion costs are properly payable to the Respondent as the successful party in the appeal.

[16] While the Order of the Court dated September 18, 2018, does reserve the costs of the motion to determine the contents of the appeal book to the panel of Judges of this Court which hears and adjudicates the merits of this appeal, the Judgment of the Court dated May 27, 2019, dismissing the appeal with costs in favour of the Respondent is silent on the matter. An assessment officer does not have the jurisdiction to allow costs in relation to an interlocutory motion where the Court has not visibly exercised its Rule 400 (1) authority to award costs. As

outlined by the Assessment Officer at paragraph 6 of *Balisky v. Canada (Minister of Natural Resources)*, 2004 FCA 123 (A.O.) (*Balisky*):

6 Rule 400(1), which vests full discretionary power in the Court over awards of costs, means that orders and judgments must contain visible directions that costs have been awarded. Given the *Federal Courts Act*, ss. 3 and 5(1) defining the Court and Rule 2 of the *Federal Court Rules, 1998* defining an assessment officer, the absence of that exercise of prior discretion by the Court leaves me without jurisdiction under Rule 405 to assess costs. In *Webster v. Canada (Attorney General)*, [2003] F.C.J. No. 1652 (A.O.), I concluded that the Rule 400(1) discretion in the court for interlocutory costs is exercised independently from the result of the judgment, except where expressly provided by language such as “costs in the cause”. This means that I must reject the Appellants' position that the judgment of the Federal Court of Appeal perfected their entitlement to costs for interlocutory events in the Federal Court for which the relevant orders specifically denied costs. Accordingly, I disallow items 5 (preparation of a response to the motion), 13 (preparation for the hearing of the motion), 14 (appearance on the motion) and 24 (travel to the motion's venue).

[17] Further, in the absence of a visible exercise of the Court's Rule 400(1) authority to award the reserved costs for the motion to determine the contents of the appeal book, it was open to the Respondent to file a motion for directions to be given to the assessment officer pursuant to Rule 403(1) of the *FCR*, within 30 days after the Judgment. The Respondent may have also filed a motion for reconsideration pursuant to Rule 397(b) of the *FCR*, within 10 days after the Judgment of the Court, had they been satisfied that the matter of costs concerning the motion to determine the contents of the appeal book had been overlooked or accidentally omitted.

[18] Thus, in accordance with *Dahl*, *Balisky* and the *FCR*, in the absence of a visible exercise of the Court's Rule 400(1) authority to award the reserved costs for the motion to determine the contents of the appeal book, the Respondent's corresponding claim under Item 21 cannot be allowed.

B. *Disbursements*

[19] The Respondent claimed \$223.95 in disbursements. The disbursements were supported at Exhibit C to the Affidavit of Wendy J. Thompson, in accordance with subsection 1(4) of Tariff B. The claimed disbursements were detailed further at paragraphs 29 to 37 of the Respondent's Written Submissions, in support of the Bill of Costs.

[20] The \$9.98 claimed to courier an electronic version of the Respondent's Memorandum of Argument, the \$10.67 claimed to courier the Respondent's Memorandum of Fact and Law, the \$30.00 claimed for the photocopying of the Respondent's Memorandum of Fact and Law, and the \$52.00 claimed for the photocopying of the Respondent's Book of Authorities are sufficiently substantiated in the Affidavit of Wendy J. Thompson and the Respondent's Written Submissions. I find these disbursements reasonable and necessary to advance the proceeding; thus, they are allowed as claimed.

[21] As abovementioned, at paragraph 24 of the Respondent's Written Submission, the Respondent withdrew their claims concerning the Notice of Status Review. \$34.00 was withdrawn for the in-house photocopying of the Written Representations and Affidavit in response to the Notice of Status Review.

[22] With respect to the disbursements related to the Respondent's motion record dated August 24, 2018, in response to the Appellant's motion to determine the contents of the appeal book, \$12.45 is claimed for courier and \$74.00 is claimed for in-house photocopying. As

aforementioned, without a visible exercise of the Court's Rule 400(1) authority to award the reserved costs in relation to this motion, the corresponding disbursements cannot be allowed.

III. Conclusion

[23] For the above Reasons, the Respondent' Bill of Costs is assessed and allowed at \$2,578.50. A Certificate of Assessment will be issued.

"Orelie Di Mavindi"
Assessment Officer

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-249-17

STYLE OF CAUSE: CHRISTOPHER J. PIKE. v. HER
MAJESTY THE QUEEN

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

REASONS FOR ASSESSMENT BY: ORELIE DI MAVINDI, Assessment Officer

DATED: JANUARY 04, 2022

WRITTEN SUBMISSIONS BY:

Christopher J. Pike

FOR THE APPELLANT
ON HIS OWN BEHALF

Amy Kendell

FOR THE RESPONDENT

SOLICITORS OF RECORD:

A. François Daigle
Deputy Attorney General of Canada
Halifax, Nova Scotia

FOR THE RESPONDENT