Federal Court of Appeal | Cour d'appel fédérale

Date: 20220218

Docket: A-473-19

Citation: 2022 FCA 31

Present: **GARNET MORGAN, Assessment Officer**

BETWEEN:

TARIQ RANA

Applicant

and

TEAMSTERS LOCAL UNION NO. 938

Respondent

Assessment of costs without appearance of the parties.
Certificate of Assessment delivered at Toronto, Ontario, on February 18, 2022.

REASONS FOR ASSESSMENT BY: GARNET MORGAN, Assessment Officer

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REASONS FOR ASSESSMENT

GARNET MORGAN, Assessment Officer

I. Background

[1] This is an assessment of costs pursuant to a Judgment of the Federal Court of Appeal dated November 4, 2020, wherein the Applicant's judicial review proceeding was "dismissed with costs."

[2] Further to the Court's Judgment, costs will be assessed in accordance with Rule 407 of the *Federal Courts Rules*, SOR/98-106 *(FCR)*, which states:

> 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.

[3] On June 28, 2021, the Respondent filed a Bill of Costs, which initiated the Respondent's request for an assessment of costs.

[4] On June 28, 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 June 28, 2021, with the Applicant acknowledging receipt via e-mail, and that the direction was also sent to the Respondent by facsimile on July 1, 2021, with a facsimile confirmation being received. Further to the issuance of the direction, on July 30, 2021, the Respondent filed a Bill of Costs, an Affidavit of Melissa O'Connor, affirmed on July 30, 2021, and Written Submissions. On September 1, 2021, the Applicant filed Submissions on Costs, and an Affidavit of Tariq Rana, affirmed on August 31, 2021. On September 24, 2021, the Respondent filed Reply Written Submissions.

II. Preliminary Issues

A. *The parties' proposed settlement of costs.*

[5] In the Applicant's costs documents it is stated that the parties had previously settled the issue of costs at $2,500.00. The Applicant's Affidavit of Tariq Rana, affirmed on August 31, 2021, states that payments were made by cheque and electronic money transfers, which were not

accepted as payment by the Respondent. At paragraphs 10 and 11 of the Applicant's affidavit the following is stated:

> 10. I have already paid the Respondent $2,500.00 as settlement for this Court's Costs award, as mutually agreed upon between myself and the Respondent. I paid this amount as legitimate Interac Email Money Transfers to a proper, registered email domain belonging to the Respondent, Teamsters Local Union No. 938. I paid this amount in a manner accommodating my personal finances and to preserve my credit standing with my bank by preventing the Respondent from hanging onto several bite sized cheque payments to make one large deposit of all cheques simultaneously, risking me defaulting with insufficient funds. […]
>
> 11. I no longer maintain any paper personal cheques in my possession to write and have discontinued the use of paper based payment methods in favour of personal electronic banking.

[6] In addition, at Exhibit "A" of the Applicant's affidavit, copies of e-mail exchanges between the parties are attached, which show that the issue of costs was discussed between the parties and that a payment arrangement was agreed to by the parties. In reply, at paragraph 2 of the Respondent's Reply Written Submissions it is submitted that "[t]he only dispute remaining in this matter is whether the Applicant has satisfied the costs agreement of $2,500.00 in this matter. The fact is that he has not." At paragraphs 3 and 4, it is submitted that without prior discussion, the Applicant sent two e-transfers to Rick Davies at the Teamsters Local Union No. 938, and that these funds had to be returned to the Applicant because Mr. Davies is not permitted to accept payments for the Respondent. In addition, the Respondent submitted that "by the Applicant's own admission, the sum has [sic] of $2,200 has never been deposited (neither into Mr. Davies' account, nor the Respondent's account)."

[7] Further to my review of the parties' costs documents, I reviewed the rules governing costs contained in Part 11 of the *FCR*, of which Rules 419 to 422 specify the requirements for

offers to settle in relation to the issue of costs. These rules only refer to offers to settle which are made prior to the conclusion of a court proceeding. In *Canadian Olympic Assn. v. Olymel, Société en commandite*, [2000] F.C.J. No. 1725, at paragraph 11, the Court stated the following:

> 11. The purpose of the offer to settle rule, as pointed out by Morden A.C.J.O. in Data General, supra, is to encourage the termination of litigation by agreement of the parties -- more speedily and less expensively than by judgment of the Court at the end of a trial. He added the impetus to settle is a mechanism which enables a plaintiff to make a serious offer respecting his or her estimate of the value of the claim which will require the defendant to give early and careful consideration to the merits of the case.

[8] Further to the clarification provided in the *Canadian Olympic Assn*. decision, an attempt to settle costs informally, after the final disposition of a court proceeding, is a step that parties may consider but there is no imperative requirement in the *FCR* that this step must be taken or that any offer made to settle costs must be accepted by the parties involved. For this particular assessment of costs, once the parties could not perfect the settlement of costs with the Applicant providing payments in a method accepted by the Respondent, it was open to the Respondent to request that an assessment of costs be conducted by an Assessment Officer pursuant to Rule 406(1) of the *FCR*.

[9] Upon my review of the parties' costs documents, Part 11 of the *FCR* and the aforementioned jurisprudence, I have determined that the Respondent's request for an assessment of costs was submitted in accordance with the *FCR*. Therefore, I will proceed with this assessment of costs.

B. *Awarding lump sum amounts for costs.*

[10] At paragraph 20 of the Respondent's Written Submissions it is requested that the Assessment Officer issue "[a]n Order awarding costs in the amount of $2,500.00, all inclusive, payable to the Respondent forthwith" or "in the alternative, an Order awarding costs in the amount of $10,468.74, plus interest, payable to the Respondent forthwith in accordance with the Bill of Costs provided by the Respondent".

[11] Concerning the awarding of a lump sum of $2,500.00 for the Respondent's costs, Rule 400(4) of the *FCR*, states the following:

> (4) Tariff B – The Court may fix all or part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, any assessed costs.

[12] In *Pelletier v. Canada*, 2006 FCA 418, at paragraph 7, the Court stated 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] Rule 400(4) of the *FCR* specifies that the Court may award lump sums for costs. As stated in the *Pelletier* decision, my role as an Assessment Officer is only to assess costs not to award costs. In the absence of a signed consent of the parties that the Respondent's costs be assessed at $2,500.00, I do not have the discretion to make that allowance for costs. Therefore, I find that as an Assessment Officer, I am obligated to fully assess the Respondent's Bill of Costs, pursuant to Rule 400(4) and Rule 405 of the *FCR*, which states that "[c]osts shall be assessed by an assessment officer."

C. *The Applicant's request for costs.*

[14] The Applicant, who is a self-represented litigant, has requested $522.50 in costs at paragraph 10 of the Applicant's Submissions on Costs. My review of the court record did not reveal that there are any Court decisions awarding costs to the Applicant for this particular file. In *Canada v. Uzoni*, 2006 FCA 344, at paragraph 4, the Assessment Officer stated the following regarding Court decisions being silent with respect to costs:

> 4. […] 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:
>
> > ... 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"...
> >
> > 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:
> >
> > If an order is silent as to costs, no costs are awarded.

[15] Concerning the Applicant being a self-represented litigant, in *Yu v. Canada*, 2011 FCA 42, at paragraphs 37 and 38, the Court stated the following regarding self-represented litigants and costs:

> 37. The appellant is seeking costs. The rule against awarding costs to self-represented litigants has been somewhat alleviated in recent years: *Sherman v. Canada (Minister of National Revenue)*, 2003 FCA 202, [2003] 4 F.C. 865 at paragraphs 46 to 52; *Thibodeau v. Air Canada*, 2007 FCA 115, 375 N.R. 195 at paragraph 24. This new approach to costs for self-represented litigants seeks to provide a moderate allowance for the time and effort devoted to preparing and

> presenting a case insofar as the successful self-represented litigant incurred an opportunity cost by foregoing remunerative activity.
>
> 38. In light of the circumstances of the appellant, who has been incarcerated in a penitentiary throughout these proceedings, I cannot conclude that he has incurred any opportunity cost by foregoing remunerative activity in order to prepare and present his case. Consequently, I would not exercise the discretion of this Court to award costs for fees. However, the appellant should be reimbursed by the respondent for his disbursements in this Court and in the Federal Court.

[16] In the *Yu* decision, the Court states that remuneration for assessable services is possible for self-represented litigants if they can demonstrate that there was an opportunity cost incurred as a result of acting as their own counsel. These awards of opportunity costs are made by the Court though and not by an Assessment Officer. This issue was addressed in *Stubicar v. Canada*, 2015 FCA 113, at paragraphs 10 and 11, wherein the Assessment Officer stated the following:

> 10. In other words, as Assessment Officers are not members of the Court, my jurisdiction is limited as I am not permitted to vary an award of the Court. Therefore, in situations when the Court exercises its jurisdiction and awards assessable services to a self-represented litigant, an Assessment Officer may allow claims for services (See: *Carr v Canada*, 2009 FC 1196). On the other hand, if the Court does not exercise its jurisdiction to award assessable services to a self-represented litigant, Assessment Officers lacks the jurisdiction to allow services on an assessment of costs. This was the situation in *Dewar v Canada*, [1985] F.C.J. No. 538, where the Assessment Officer held:
>
> > A lay litigant is restricted to taxing disbursements and may not tax fees calculated to be an equivalency, in terms of his time or out-of-pocket loss, to solicitor's fees or otherwise.
>
> 11. I have reviewed the award of costs and although it awards costs in both the Federal Court of Appeal and the Federal Court, there is no indication that the Court has exercised its jurisdiction to award assessable services to the Appellant.

[17] Utilizing the *Uzoni*, *Yu* and *Stubicar* decisions as guidelines, I find that in the absence of a Court decision awarding opportunity costs to the Applicant as a self-represented litigant, or a decision specifically awarding costs for the judicial review proceeding to the Applicant, that I do

not have the authority to allow any costs to the Applicant. As a result, I have determined that the Applicant's request for costs for responding to this assessment of costs and for the costs associated with cancelled cheques and expired money orders must be disallowed, as they pertain to the facts for this particular file.

D. *The Respondent's Bill of Costs being substantially unopposed.*

[18] My review of the Applicant's Submissions on Costs and the Affidavit of Tariq Rana, affirmed on August 31, 2021, did not disclose that they specifically addressed the Respondent's claims for assessable services or disbursements, which are contained in the Respondent's Bill of Costs. The absence of specific submissions from the Applicant addressing the Respondent's claims for costs has left the Bill of Costs substantially unopposed. In *Dahl v. Canada*, 2007 FC 192, at paragraph 2, the Assessment Officer stated the following:

> 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.

[19] Further to the *Dahl* decision, in *Carlile v. Canada*, [1997] F.C.J. No. 885, at paragraph 26, the Assessment Officer stated the following:

> 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.

[20] Utilizing the *Dahl* and *Carlile* decisions as guidelines, although there is an absence of specific submissions from the Applicant challenging the individual assessable services or disbursements claimed by the Respondent for this particular assessment of 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 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

[21] The Respondent has claimed 43 units for assessable services for a total dollar amount of $7,288.50, inclusive of HST.

[22] I have reviewed the Respondent's costs documents in conjunction with the court record, the *FCR* and any relevant jurisprudence and I have determined that the assessable services claimed by the Respondent for Items 2, 13(a), 14(a) and 25 were necessary and are reasonable. Therefore, these assessable services are allowed as claimed for a total of 17 units, which is a total dollar amount of $2,881.50, inclusive of HST.

[23] The Respondent's claims for Items 7, 15 and 28 have some issues to look into and as a result, they will be individually assessed below.

A. *Item 7 - Discovery of documents, including listing, affidavit and inspection.*

[24] The Respondent has claimed 5 units for Item 7. There were no specific submissions provided by the Respondent for this particular claim. My review of the court record did not reveal that there were any discoveries of the parties' documents, as specified in Rules 222 to 233 of the *FCR*, for this particular judicial review proceeding. In *Merck & Co. v. Apotex*, 2008 FCA 371, at paragraph 14, the Court stated the following regarding Assessment Officers having limited material available for assessments of costs:

> 14. In view of the limited material available to assessment officers, determining what expenses are "reasonable" is often likely to do no more than rough justice between the parties and inevitably involves the exercise of a substantial degree of discretion on the part of assessment officers.

[25] Utilizing the *Dahl* and *Carlile* decisions (supra), in addition to the *Merck* decision as guidelines, I have determined that in the absence of evidence on the court record or specific submissions and/or evidence from the Respondent supporting the claim for Item 7, that it must be disallowed.

B. *Item 15 – Preparation and filing of written argument, where requested or permitted by the Court.*

[26] The Respondent has claimed 7 units for Item 15 but it was not specified in the Respondents' costs documents, which document(s) this claim pertains to. In *Biovail Pharmaceuticals Canada v. Canada (Minister of National Health and Welfare),* [2009] FCJ No 858, at paragraph 27, the Assessment Officer stated the following regarding Item 15:

> 27. Fee item 15 (written argument where requested or permitted by the Court) falls under the subheading E. Trial or Hearing. Such written argument usually occurs shortly after a hearing, but on occasion has been requested shortly before a hearing. It is not the memorandum of fact and law included in the respondent's materials under fee item 2. As the Court did not request such written argument, I disallow the fee item 15 claim in each matter.

[27] Further to my review of court record, it did not reveal that the Court requested any written argument from the Respondent shortly before the judicial review hearing held on November 4, 2020, or subsequent to the hearing. Utilizing the *Biovail Pharmaceuticals Canada* decision as a guideline, I have determined that in the absence of evidence on the court record or specific submissions and/or evidence from the Respondent supporting their claim for Item 15, that it must be disallowed.

C. *Item 28 – Services in a province by students-at-law, law clerks or paralegals that are of a nature that the law society of that province authorizes them to render, 50% of the amount that would be calculated for a solicitor.*

[28] The Respondent has claimed 14 units for Item 28 but it was not specified in the Respondents' costs documents, which specific services are being claimed and if the services were performed by a student-at-law, a law clerk or a paralegal. In *Air Canada v. Canada*

(Minister of Transport), [2000] FCJ No 101, at paragraph 15, the Assessment Officer stated the following regarding claims for Item 28:

> 15. By contrast, item G28 does not suggest an indemnity additional to an indemnity already sought and approved for supervising counsel. Rather, it suggests indemnification at "50% of the amount that would be calculated for a solicitor" (my emphasis). That is, the lawyer delegates to the non-lawyer who then provides a service, and the supervising lawyer may bill the client accordingly at a lower hourly rate. Item G28 then reflects a reduced indemnification in the party and party scheme of costs. Further, I doubt that the scheme of this Tariff, requiring a special direction of the Court in the circumstances of items E14(b) and F22(b), was intended to leave unfettered the access to indemnification for non-lawyers. In other words, if the supervising lawyer, by the authority of the law society of the relevant province, delegates a particular service to the non-lawyer, the limit imposed by item G28 is that the litigant to be indemnified cannot recover once for the supervising lawyer and again for the non-lawyer. For example, if the non-lawyer handles all aspects of an assessment of costs, an activity which I do not think the Ontario practice, ie. paragraph 1 of Rule 16 in the Professional Conduct Handbook, precludes for paralegals, a claim cannot be made under both items G26 and G28. If the lawyer and non-lawyer shared responsibility, I would expect a claim to be properly advanced under item G26, thereby precluding item G28. Here, the Defendants were indemnified already under items D13(a) and E14(a) thereby precluding the claim for item G28. The Plaintiff consented to item D13(a) under item G28. Here, a consent cannot create jurisdiction for me. I remove the $250.00 and $3,399.30 for items D13(a) and E14(a) respectively claimed under the aegis of item G28.

[29] In addition, in *Guest Tek Interactive Entertainment Ltd. v. Nomadix, Inc.*, [2021] FCJ No 979, at paragraphs 54 and 55, the Court stated the following regarding claims for Item 28:

> 54. Clearly not all student time is unrecoverable overhead, or it would not be described in Item 28 of Tariff B: "Services in a province by students-at-law, law clerks or paralegals that are of a nature that the law society of that province authorizes them to render, 50% of the amount that would be calculated for a solicitor." Justice Reed of this Court noted in Apotex v Syntex that whether a student's time is recoverable depends on the nature of the work: Apotex Inc v Syntex Pharmaceutical International Ltd, 1999 CanLII 8811 (FC) at para 22, varied on other grounds, Syntex Pharmaceuticals International Ltd v Apotex Inc, 2001 FCA 137. Nevertheless, as Justice Harrington noted, fees for students-at-law are not usually taxed on assessment: Apotex Inc v H Lundbeck A/S, 2013 FC 1188 at para 31, citing Janssen-Ortho Inc v Novopharm Ltd, 2006 FC 1333 at para 25.

> 55. Despite this general approach, Justice Grammond recently noted that where costs are not being awarded by assessment but by lump sum, it is not appropriate to disallow expenses related to articling students as long as they were incurred: Seedlings Life Science Ventures, LLC v Pfizer Canada ULC, 2020 FC 505 at para 12.

[30] My review of the *Air Canada* decision indicates that fees for the services of non-lawyers are incorporated into the service fees for the supervising lawyer. This is further supported by the following jurisprudence: *Truehope Nutritional Support Ltd v. Canada (Attorney General)*, [2013] F.C.J. No. 1297, at paragraph 81. In addition, the *Guest Tek Interactive Entertainment Ltd*. decision indicates that claims for Item 28 are unusual for assessments of costs being conducted by an Assessment Officer. This being noted, depending on the submissions and/or evidence provided by a party awarded costs by the Court, it may be possible that costs could be allowed for Item 28 in an assessment of costs being conducted by an Assessment Officer. For this particular file though, I have determined that in the absence of evidence on the court record, such as a Court decision specifically awarding costs for Item 28, or specific submissions and/or evidence from the Respondent supporting the claim for Item 28, that it must be disallowed.

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

[31] A total of 17 units have been allowed for the Respondent's assessable services for a total dollar amount of $2,881.50, inclusive of HST.

IV. Disbursements

[32] The Respondent has claimed $3,180.24 for disbursements, inclusive of HST.

[33] I have reviewed the Respondent's costs documents in conjunction with the court record, the *FCR* and any relevant jurisprudence and I have determined that the disbursements for photocopies, civil litigation transaction levy, courier, automated civil litigation fee and process serving claimed by the Respondent were necessary and are reasonable. In the Respondent's Bill of Costs there was a miscalculation of the applicable HST for the disbursements claimed. I have corrected the HST miscalculation for the disbursements and they have been allowed for a total amount of $3,098.00, which is inclusive of HST.

A. *Total amount allowed for the Respondent's disbursements.*

[34] The total amount allowed for the Respondent's disbursements is $3,098.00, inclusive of HST.

V. Conclusion

[35] For the above Reasons, the Respondent's Bill of Costs is assessed and allowed in the total amount of $5,979.50, payable by the Applicant to the Respondent. A Certificate of Assessment will also be issued.

"Garnet Morgan"
Assessment Officer

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-473-19
STYLE OF CAUSE:	TARIQ RANA v. TEAMSTERS LOCAL UNION NO. 938

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

REASONS FOR ASSESSMENT BY:	GARNET MORGAN, Assessment Officer
DATED:	FEBRUARY 18, 2022

WRITTEN SUBMISSIONS BY:

Tariq Rana	FOR THE APPLICANT (SELF-REPRESENTED)
Alex St. John	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Wright Henry LLP Toronto, Ontario	FOR THE RESPONDENT