Federal Court of Appeal | Cour d'appel fédérale

Date: 20230112

Docket: A-469-19

Citation: 2023 FCA 6

Present: **Stéphanie St-Pierre Babin, Assessment Officer**

BETWEEN:

KEY FIRST NATION

Appellant

and

STEPHANIE C. LAVALLEE, DONALD WORME, RODNEY BRASS, ANGELA DESJARLAIS, SIDNEY KESHANE AND GLEN O'SOUP

Respondents

Assessment of costs without appearance of the parties.
Certificate of Assessment delivered at Ottawa, Ontario, on January 12, 2023.

REASONS FOR ASSESSMENT BY: STÉPHANIE ST-PIERRE BABIN, Assessment Officer

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REASONS FOR ASSESSMENT

STÉPHANIE ST-PIERRE BABIN, Assessment Officer

I. Introduction

[1] By way of Judgment, the Federal Court of Appeal [FCA] allowed the appeal with costs on June 23, 2021, overturned the Federal Court's previous decision in court file T-1464-18, and allowed the application for judicial review while awarding costs in the Federal Court [FC]. Upon receipt of the Appellant's Bill of Costs filed on November 30, 2021, a direction was issued by an

assessment officer to inform the parties that the assessment would proceed in writing and of the deadlines to file their written representations. Having reviewed the materials filed on behalf of both parties, I will now address two preliminary issues. Thereafter, I will address the assessable services claimed for the proceeding before the FC and for the proceeding before the FCA in turn.

II. Preliminary Issues

A. *Level of Costs*

[2] Both parties agree that the Appellant's Bill of Costs shall be assessed in accordance with Column III of Tariff B pursuant to Rule 407 of the *Federal Court Rules,* SOR-98/106 [Rules], but they disagree as to the level of costs to be allowed within that range. The Appellant argues it is entitled to the maximum allowable amount of units given the factors set out in Rules 400(3) and 409 (Appellant's Reply, paras 3, 40–41). In contrast, the Respondents request that the services be assessed towards the low end or at the low end of Column III throughout their written submissions.

[3] It is well established that each item of Tariff B presents its own unique circumstances and it is not necessary to use the same level throughout the range of units (*Starlight v Canada,* 2001 FCT 999 at para 7; *Bujnowski v The Queen,* 2010 FCA 49 at para 9; *Greater Moncton International Airport Authority v P.S.A.C.*, 2009 FCA 72 at para 7). Although costs are typically assessed around the mid-point of Column III, an Assessment Officer is able to allow costs at a lower or higher level than the mid-point when specific circumstances dictate otherwise (*League for Human Rights of B'Nai Brith Canada v Canada*, 2012 FCA 61 at para 15). Given the absence

of instructions from the Court stating otherwise, I will therefore determine the number of units allowable for each item on an individual basis within the full range of Column III (*Hoffman-La Roche Limited v Apotex Inc*, 2013 FC 1265 at para 8). While doing so, I must remain mindful of the principle that "[c]osts customarily provide partial compensation, rather than reimbursing all expenses and disbursements incurred by a party, representing a compromise between compensating the successful party and burdening the unsuccessful party" (*Canadian Pacific Railway Company v Canada*, 2022 FC 392 at para 23).

B. *Liability for Costs*

[4] In this case, two of the Respondents, Stephanie C. Lavallee and Donald Worme, presented written submissions as to costs. They contend they were not "necessary parties to the application" and that "no relief was sought against them" (Respondents' submissions, paras 4–6, 116–117). On the other hand, the Appellant argues they were necessary parties since they opposed the Application, filed voluminous materials and made oral arguments before both the FC and the FCA (Appellant's Reply, para 13).

[5] Further to my review of the Judgment and the Reasons for Judgment rendered on June 23, 2021, I note that the Appellant was successful before both instances and that the FCA did not specify by which Respondents the costs were payable. It is relevant to reproduce the ruling of the FCA:

> The appeal is allowed with costs. The judgment of the Federal Court is set aside. Rendering the judgment that the Federal Court should have made, the application for judicial review is allowed, with costs in the Federal Court, and the band council resolution dated November 10, 2016 as well as the associated

> decisions to transfer band funds to Semaganis Worme Legal are set aside.
>
> *[Emphasis added.]*

[6] Subsection 400(1) of the Rules states "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" [*emphasis added*]. Further, subsection 5(1) of the Federal Courts Act, RSC, 1985, c F-7 [Act] states "the Court consists of a chief Justice […] and 13 other judges" [*emphasis added*]. From these definitions, it is clear that in my duties as an Assessment Officer, I do not have the authority to determine by whom specifically costs are to be paid as I am not a member of the Court, but rather "an officer of the Registry" (Rule 2). If some respondents had concerns regarding their liability for costs, they could have brought a motion before the Court within 30 days after the Judgment was pronounced (paragraph 403(1)(a) of the Rules). For these reasons, in the course of this assessment, I will determine a total amount payable by all Respondents based on the applicable law and jurisprudence.

III. Assessable Services

A. *Federal Court (T-1464-18)*

(1) Item 1 – Preparation and filing of originating documents

[7] In the Bill of Costs, the Appellant claims 7 units for the preparation and filing of originating documents, which represents the high end of Column III. In response, the Respondents argue that it should be assessed "at or towards the lower end of allowable units" given that "there is nothing overly complicated" (Respondents' submissions, para 28). On the

other hand, the Appellant contends that the matters raised were complicated and nuanced as the FCA "described the issues as 'exceptional and rare'" (Appellant's Reply, para 24).

[8] Item 1 has an available range of 4 to 7 units under Column III of Tariff B. Further to my review of the court record, the applicable documents are as follows: the Notice of Application (10 pages), the Affidavit of Clinton Key (9 pages), the Affidavit of Clarence Papequash (9 pages) and the Memorandum of Fact and Law (28 pages). I have reviewed the aforementioned documents and the parties' submissions while taking into account factors such as: (a) the result of the proceeding in favour of the Appellant; (c) the importance and complexity of the issues raised in the originating documents; and (g) the amount of work accomplished in relation with the originating documents. More specifically with respect to complexity, the Reasons for Judgment states:

> **IV. Conclusion and Disposition**
>
> [72] The situations wherein a band has standing to seek judicial review of a previous decision of the band council are exceptional and rare. […]

[9] This particular statement convinces me of the importance and complexity of the issues considered by the FC. Therefore, I find the allowance of 7 units, the maximum number of units claimed by the Appellant, to be representative of this litigation.

(2) Item 13(a) – Counsel fee for the preparation of pre-hearing motions

[10] In its Bill of Costs, the Appellant claims 5 units for pre-hearing procedures for the judicial review hearing held on June 24, 2019. The Respondents submit Item 13(a) should be

reduced at 2 units given the Appellant's application relied entirely on affidavit evidence, there was no cross-examination and no other services not otherwise particularized by Item 13(a) were identified (Respondents' submissions, paras 30–31). As for the Appellant, it retorts "[a]lthough this matter was heard exclusively on affidavit evidence, that does not detract from the extensive time and effort required in both a hearing and appeal of this nature" (Appellant's Reply, para 25).

[11] In its written submissions, the Appellant did not specify exactly what preparation required extensive time and effort. In the absence of fulsome submissions and evidence, I will rely on *Carlile v Canada (Minister of National Revenue)*, [1997] FCJ No 88 [*Carlile*] which states:

> 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.

[12] Having regard to *Carlile* and considering the importance and complexity of the issues of this file (Rules 400(3)(g), 409), I find reasonable to allow 3 units for Item 13(a).

(3) Item 14(a) – Counsel fee for the attendance before the Court

[13] The Appellant claims 6 units as counsel fees for the hearing of the judicial review held on June 24, 2019. In response, the Respondents submit no evidence was provided by the Appellant to support claiming the maximum number of units and as a result, 4 units should be allowed for Item 14(a) (Respondents' submissions, paras 33–34). Finally, the Appellant argues that reasonable approximation ought to entitle an allowance of no less than 6 units. Item 14(a) has an

available range of 2 to 3 units under Column III of Tariff B. I have reviewed the parties' submissions and considered factors such as: (a) the result of the proceeding was in favour of the Appellant; and (c) the importance and complexity of the issues discussed during the hearing, and have determined the 3 units claimed under Column III to be reasonable (Rules 400(3) and 409).

[14] Turning to the duration of the hearing, the Appellant claimed 2 hours for the hearing held on June 24, 2019. For their part, the Respondents contend that where a service claimed is based on a number of hours, it must be supported by evidence thereof (Section (1(2) of Tariff B in the Rules). In reply, the Appellant argued the sensible approximation of court time was 2 hours. I agree with the Appellant. The abstract of hearing, which provides the hearing details in the court file, shows the total duration of the hearing of the judicial review application held on June 24, 2019, was 1 hour and 57 minutes. Since the abstract of hearing is a reliable source of information prepared by a registry officer of the court, and considering that Item 14 includes some time before the scheduled start of the hearing, the 2 hours are allowed as claimed (*Guest Tek Interactive Entertainment Ltd v Nomadix, Inc*, 2021 FC 848 at para 51). In light of the foregoing, I allow a total of 6 units for Item 14(a) as claimed by the Appellant. This was calculated by multiplying the 2 hours claimed by the Appellant by the 3 units allowed under Column III.

(4) Item 24 – Travel by counsel

[15] In its Bill of Costs, the Appellant claims 5 units for the travel expenses incurred by counsel to attend the FC hearing held on June 24, 2019. On their part, the Respondents contend assessment officers do not have the authority to allow costs for Item 24 given this item is "at the

discretion of the Court" (*Carr v Canada*, 2009 FC 1196 at paras 7–8). I agree with the Respondents.

[16] As already explained in detail at paragraph 6 of these Reasons, as an Assessment Officer, I am not a member of the Court (Rule 2 and subsection 5(1) of the Act). Therefore, I do not have jurisdiction to allow costs for Item 24 in the absence of specific instructions from the Court (*Double Diamond Distribution Ltd v Crocs Canada, Inc*, 2021 FCA 47 at para 16; *Delizia Limited v Sunridge Gold Corp*, 2018 FCA 158 at para 7 (unreported, court file no. A-119-16); *Ade Olumide v Conservative Party of Canada*, 2016 FCA 168 at para 14 (unreported, court file no. A-301-15)). Having reviewed the Judgment and the Reasons for Judgment, there is no indication travel fees were awarded by the Court and consequently, the 5 units claimed under Item 24 are not allowed.

B. *Federal Court of Appeal (A-469-19)*

(1) Items 17, 18 and 20 – Uncontested services

[17] The units claimed for the services rendered under Item 17 (1 unit), Item 18 (1 unit) and Item 20 (1 unit) in the Bill of Costs are not contested (Respondents' submissions at para 26). After careful review of the court record, I consider these items are within the authority of the Judgment and Tariff B. They are allowed as claimed.

(2) Item 19 – Memorandum of fact and law

[18] The Appellant claims 7 units for item 19, the maximum allowance of Column III. At paragraphs 36 and 37 of their written submissions in response, the Respondents submit that paragraphs 39 to 86 and other passages of the Memorandum of fact and law filed by the Appellant with the FCA are "verbatim" with the Memorandum of fact and law filed with the FC. Additionally, they argue the main differences relate to submissions concerning an appeal versus an application. In rebuttal, the Appellant submits it was "never awarded costs in the first instance" and therefore, it "should be entitled to the maximum amount of units" (Appellant's Reply, para 27).

[19] Further to my review of both memorandums, I do note that several portions are substantially the same. In my opinion, the duplication of some portions of the Memorandum of fact was inevitable as the appeal stems from the same legal framework and facts as the judicial review (*Abi-Mansour v Public Service Commission*, 2014 FCA 166 at para 10 (unreported, court file no. A-82-13)). Accordingly, I accept that some effort was nevertheless required from counsel. These efforts do not, however, justify an allowance at the high end of Column III because, contrary to the Appellant's contention, I have already allocated units for the memorandum of fact and law filed with the FC under Item 1. Allowing the maximum number of units would amount to an overpayment in favour of the Appellant. For these reasons, Item 19 is allowed at 5 units.

(3) Item 22(a) – Counsel fee for the attendance before the Court

[20] The Appellant claims 6 units as counsel fees for the attendance at the hearing of the appeal held on March 16, 2021. On their part, the Respondents essentially argue there "was nothing particularly complex" and as a result, 4 units should be allowed (Respondents' submissions, paras 41–42). Finally, the Appellant submits the issues of the appeal were "important, technical and complex," and that significant time, effort and expense was incurred to prepare and attend the hearing (Appellant's Reply, para 28).

[21] Item 22(a) has an available range of 2 to 3 units under Column III of Tariff B. I have reviewed the parties' submissions while considering factors such as: (a) the result of the proceeding being in favour of the Appellant; (c) the importance and complexity of the issues discussed; and (g) the amount of work in relation to the hearing, and have determined the 3 units claimed under Column III to be reasonable (Rules 400(3) and 409). As to the duration, further to my review of the abstract of hearing prepared by a registry officer, the 2 hours claimed for counsel's appearance are reasonable since the total duration of the appeal hearing held on March 16, 2021, was 2 hours and 1 minute. In light of the foregoing, I will allow the total of 6 units claimed by the Appellant. This was calculated by multiplying the 2 hours by the 3 units allowed under Column III.

C. *Item 26 – Assessment of Costs*

[22] In its Bill of Costs, the Appellant claims 6 units for the services performed in relation to the assessments of costs. On the other hand, the Respondents contend the Appellant should be

allowed at most 3 units considering the Bill of Costs and the Affidavit of Lynda Troup totalled 5 pages (excluding exhibits and cover pages) (Respondents' submissions, para 52). Finally, the Appellant submits it should be entitled to 6 units, the high end of Column III, since it had to respond to the Respondents' 21 page submissions in response to the Bill of Costs and argues it spent significant time and expense researching and drafting its reply (Appellant's Reply, paras 29–30).

[23] Further to my review of the written submissions provided by both parties and affidavits attached thereto, I find this assessment of costs to be of moderate complexity. Indeed, although the assessment of costs was done in writing and the Appellant did not file written submissions to initially support its Bill of costs, I acknowledge costs were awarded for both the FC and the FCA. This resulted in the parties not agreeing on a considerable number of Tariff B items and disbursements for which they researched and submitted written submissions. In the particular circumstances of this case, I find reasonable to allow 5 units.

IV. Disbursements

A. *Photocopying and Printing*

[24] The Appellant has claimed $851.00 for in-house photocopying and $676.00 for in-house printing. To support its claim, the Appellant provided accounting logs (Affidavit of Lynda Troup, paras 4–5). In response, the Respondents submit no written submissions were provided to support the reasonableness of the amounts claimed and that this should result in a conservative assessment. They also proceeded to evaluate the number of copies filed by the Appellant in both

court files. Additionally, they provided submissions with relation to the colour printing. In rebuttal, the Appellant essentially argues that the amounts claimed are reasonable in the circumstances of this case, they were sufficiently itemized in the Troup Affidavit and they were legitimately incurred to prosecute their application and appeal (Appellant's Reply, para 31).

[25] With regard to any disbursement, the fundamental principle remains that a successful party is entitled to disbursements that are both "reasonable and necessary to the conduct of the proceeding" [*emphasis added*] (*Merck & Co Inc v Apotex Inc*, 2006 FC 631 at para 3). Having reviewed the material filed, I note the Appellant has provided no evidence confirming what was the nature of the documents printed/photocopied nor did it detail the number of copies produced and their necessity. The Respondents rightly pointed out that when there is "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" (*Apotex Inc v Merck & Co Inc*, 2008 FCA 371 at para 14). In these circumstances, I will exercise my discretion in a conservative manner in assessing the number of pages necessary to the conduct of the proceedings before the FC and the FCA.

[26] With regard to the allowance per page, the Appellant's accounting logs indicate the amount of $0.25. Concerning the amount to be charged when an in-house service is used, I share the same opinion as *Justice Teitelbaum in Diversified Products Corp v Tye-Sil Corp*, [1990] FCJ No 1056 (QL):

> …The item of photocopies is an allowable disbursement only if it is essential to the conduct of the action. Therefore, this is intended

> to reimburse a party for the actual out-of-pocket cost of the photocopy. The $0.25 charge by the office of Plaintiffs' counsel is an arbitrary charge and does not reflect the actual cost of the photocopy. A law office is not in the business of making a profit on its photocopy equipment. It must charge the actual cost and the party claiming such disbursements has the burden to satisfy the Taxing Officer as to the actual cost of the essential photocopies.
>
> [*Emphasis added.]*

[27] In the absence of submissions detailing the essential photocopies and their actual out-of-pocket cost, I will allow a lump sum reflecting the material and associated copies filed by the Appellant to satisfy the requirements of the Rules (*Murphy v Canada (Minister of National Revenue)*, 2002 FCA 160 at para 4; *Telford v Canada (Attorney General*), 2008 FC 111 at para 3).

[28] I also note that, as rightly pointed out by the Respondents, they are not liable for the photocopying and printing done in relation to the motion for an extension of time filed on September 6, 2018 in court file T-1464-18, because the Order rendered on September 26, 2018 did not award any costs (*Truehope Nutritional Support Limited v Canada (Attorney General)*, 2013 FC 1153 at para 136).

[29] After careful review the materials filed in both court files, their size and copies, the requirement of the Rules and my calculations, I find reasonable to allow a lump sum of $1,000.00 to cover the disbursements related to the photocopying and printing.

B. *Service of Notice of Application*

[30] The Appellant claims a total amount of $392.80 for the service of the Notice of Application and submitted two invoices in support of the Bill of Costs (Affidavit of Lynda Troup, para 6). Pursuant to Rule 138, the personal service of the Notice of Application in court file no. T-1464-18 was required and the Appellant retained the services of World Investigation Inc. on August 13, 2018. The geographical distance between parties i.e. Winnipeg, Manitoba and Saskatoon, Saskatchewan resulted in higher than usual costs for "outside services" (Exhibit C, Affidavit of Lynda Troup). In this regard, the Respondents submit "there are process servers located in Saskatoon, Saskatchewan that could have served the Respondents at a more reasonable cost than those incurred by relying on an out-of-province business" (Respondents' submissions, para 114). Regardless of the process server office retained, either local process servers in Saskatoon or process servers based in Winnipeg, higher costs would inevitably have been incurred by the distance. The fact remains that such expenditure was necessary and I do not consider the amount claimed to be unreasonable. Similarly as in *Smith and Campbell v Her Majesty The Queen* [1985], 85 DTC 5200 (TD) [*Smith*] for the courier and long-distance telephone charges, I conclude the higher process server charges occasioned by the geographical distance between the parties are allowable services (*Smith* at para 5). In these circumstances, the amount of $392.80 is allowed as claimed.

C. *Court Fees*

[31] The Appellant has claimed $150.00 for the fees paid to the registry. A thorough review of the court records confirmed the following fees were paid:

1) A Tariff fee of $50.00 was received by the registry for the filing of the Notice of Application on July 27, 2018, in court file T-1464-18 (paragraph 1(1)(d), Tariff A)

2) A Tariff fee of $50.00 was received by way of letter on January 15, 2019, for the Requisition for hearing in court file T-1464-18 (paragraph 1(2)(f), Tariff A)

3) A Tariff fee of $50.00 was received by the registry on December 19, 2019, for the filing of the Notice of Appeal in court file A-469-19 (paragraph 1(1)(e), Tariff A)

[32] As a result, the Court fees are allowed as claimed in the amount of $150.00 (subsection 1(4), Tariff B).

D. *Courier Services*

[33] As the Respondents have not contested the courier services fees claimed, I have carefully reviewed the invoice attached to the Affidavit of Lynda Troup filed on November 30, 2021. I find this disbursement to be reasonable and I also conclude it was necessary to the conduct of the litigation. Therefore, the claim of $81.38 is allowed as presented.

V. Conclusion

[34] For all of the above reasons, the Appellant's costs are allowed at $6,874.18. This cumulative assessment of costs applies to files A-469-19 and T-1464-18, and a copy of these Reasons will also be placed on Federal Court's file T-1464-18. A Certificate of Assessment will be issued accordingly, payable by the Respondents to the Appellant.

"Stéphanie St-Pierre Babin"
Assessment Officer

Ottawa, Ontario
January 12, 2023

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-469-19
STYLE OF CAUSE:	KEY FIRST NATION v. STEPHANIE C. LAVALLEE, DONALD WORME, RODNEY BRASS, ANGELA DESJARLAIS, SIDNEY KESHANE AND GLEN O'SOUP

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

REASONS FOR ASSESSMENT BY:	STÉPHANIE ST-PIERRE BABIN, Assessment Officer
DATED:	JANUARY 12, 2023

WRITTEN SUBMISSIONS BY:

Lynda K. Troup	FOR THE APPELLANT
Mark Ebert	FOR THE RESPONDENTS, Donald Worme and Stephanie C. Lavallee

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