Federal Court of Appeal | Cour d'appel fédérale

Date: 20230208

Docket: A-141-18

Citation: 2023 FCA 25

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

BETWEEN:

THE CLOROX COMPANY OF CANADA, LTD.

Appellant

and

CHLORETEC S.E.C.

Respondent

Assessment of costs without appearance of the parties.
Certificate of Assessment delivered at Ottawa, Ontario, on February 8, 2023.

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

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REASONS FOR ASSESSMENT

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I. Introduction

[1] By way of Judgment and Reasons for Judgment [Judgment], the Federal Court of Appeal dismissed with costs the appeal brought by The Clorox Company of Canada Ltd. [Clorox], the Appellant, on April 20, 2020. Upon receipt of the Bill of Costs filed by the Respondent, Chloretec S.E.C. [Chloretec], on November 16, 2021, an assessment officer issued a direction to

inform the parties that the assessment would proceed in writing and of the deadlines to file their written representations. Chloretec did not file written submissions so as not to incur additional costs (Letter dated December 12, 2021 at p 2). As for Clorox, it filed its written submissions in response to the Bill of Costs on February 1, 2022. Having reviewed the costs materials provided on behalf of both parties, I will now address a preliminary issue. Thereafter, I will address the assessable services and disbursements claimed in order to determine the amount payable by Clorox to Chloretec.

II. Preliminary Issue

A. *Level of costs*

[2] Both parties agree that the Bill of Costs shall be assessed under Column III of the table to Tariff B in accordance with Rule 407 of the *Federal Court Rules*, SOR/98-106 [Rules]. For most of the assessable services listed under Column III, a range of units is available. As an assessment officer, I have to determine the number of units to be allowed within that range. In that respect, Clorox submits "[t]he standard unit claim awarded under the Tariff in these matters is typically in the middle of Column III" (Written Submissions of the Appellant, para 3).

[3] While costs are generally assessed around the mid-point of Column III, an assessment officer may allow costs at a higher or at a lower level where the particular circumstances of an item warrant (*League for Human Rights of B'nai Brith Canada v. Canada*, 2012 FCA 61 at para 15). It is, in fact, settled law that each item of Tariff B has unique circumstances and that it is not necessary to allocate the same level of units throughout a bill of costs (*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. Public Service Alliance of Canada*, 2009 FCA 72 at para 7). Given the absence of instructions from the Court as to costs in the Judgment, I will therefore determine the number of allowable units for each item claimed on an individual basis, within the full range of units available under Column III (*Hoffman-La Roche Limited v. Apotex Inc.*, 2013 FC 1265 at para 8).

[4] In doing so, I will remain mindful 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).

III. Assessable Services

A. *Item 16(a) – Counsel fee for the motion for leave to appeal*

[5] Concerning the claim under Item 16(a), it is requested by Chloretec for « tous les services fournis avant l'audition de la requête » [TRANSLATION] "the services rendered before the hearing of the motion" (Bill of Costs at p 1). Clorox refuses this item in its entirety because (i) it brought the appeal before the Federal Court of Appeal; and (ii) there was no motion for leave to appeal as it was an automatic right to appeal (Written Submissions of the Appellant at p 5). I agree with Clorox.

[6] Item 16(a) of Tariff B can be claimed for the filing of a "motion for leave to appeal and all services prior to the hearing thereof." A simple review of the court record confirms the appeal was brought by notice of appeal (Rule 337) rather than by motion for leave to appeal (Rule 352). As a result, the 4 units claimed under Item 16(a) are not allowed.

B. *Item 19 – Memorandum of fact and law*

[7] Chloretec has claimed 7 units for the preparation of the « mémoire des faits et du droit » [TRANSLATION] "memorandum of fact and law" filed on February 15, 2019, which represents the high end of Column III. Clorox argues it should only be entitled to 5.5 units which represents the mid-point. I reviewed the memorandum of fact and law. I first noted it is 30 pages in length and it is supported by an extensive list of authorities. I also noted Chloretec discussed eight issues. Given the complexity of the issues, I find reasonable to allow 6 units for Item 19 (section 409 and paragraph 400(3)(c) of the Rules).

C. *Item 22(a) – Counsel fee on hearing of appeal to first counsel, per hour*

[8] Chloretec claims a total of 9 units as counsel fees for the attendance at the hearing of the appeal held on January 15, 2020 (3 units under Column III of Tariff B multiplied by 3 hours). Clorox argues that Item 22(a) should only be allowed a total of 5 units given that the hearing lasted only 2.5 hours i.e., 2 units under Column III multiplied by 2.5 hours (Written Submissions at p 3).

[9] Item 22(a) has an available range of 2 to 3 units under Column III of Tariff B. I have reviewed the court file together with factors such as (a) the result of the proceeding in favour of Chloretec; and (c) the importance and complexity of the issues discussed during the hearing, and I determine it is reasonable to allow 3 units (section 409 and subsection 400(3) of the Rules).

[10] Turning to the duration of the hearing, the Abstract of Hearing, a court document which provides several details regarding a court hearing, shows the total duration of the hearing of the appeal held on January 15, 2020, was 2 hours and 28 minutes. Since the abstract of hearing is a reliable source of information prepared by a registry officer, and considering a hearing duration includes some time before the scheduled start of the hearing, the 3 hours are allowed as claimed (*Guest Tek Interactive Entertainment Ltd. v. Nomadix, Inc.*, 2021 FC 848 at para 51).

[11] In light of the foregoing, I allow 9 units for Item 22(a) as claimed by Chloretec. This was calculated multiplying the 3 units allowed under Column III by 3 hours.

D. *Item 25 – Services after judgment not otherwise specified*

[12] Chloretec claims 1 unit for Item 25 in its Bill of Costs. Clorox objects this claim as no explanation was provided to specify the services rendered after the Judgment. It is common practice that Item 25 may be allowed when it is reasonable to expect that a lawyer has reviewed the judgment and explained its contents to his clients (*Halford v. Seed Hawk Inc.*, 2006 FC 422 at para 131). In the documentation attached to the Bill of Costs, I note the entry « [p]réparation et envoi d'un courriel à Sylvain Demers avec la décision; étude de la décision avec attention » [TRANSLATION] "prepare and send an email to Sylvain Demers with the decision; study the

decision carefully" dated April 20, 2020 (invoice dated April 30, 2020). In these circumstances, I find reasonable to allow 1 unit.

E. *Item 26 – Assessment of costs*

[13] Chloretec is claiming 6 units under Item 26. Item 26 has an available range of 2 to 6 units under Column III of Tariff B. I note from the court record that, although Chloretec filed a Bill of Costs and attached documents, it did not submit any written submissions justifying its claim at the high end of Column III. Nor did it reply to Clorox's written submissions in response to the Bill of Costs. In the particular circumstances of this assessment, I allow 3 units for Item 26.

F. *Item 27 – Such other services as may be allowed by the assessment officer*

[14] Chloretec claims 2 units under Item 27 for the « préparation de l'audience de l'appel » [TRANSLATION] "preparation of the appeal hearing" (Bill of Costs at p 1). In a footnote to the Bill of Costs, it relied on paragraph 10 of *Gardner v. Canada (Attorney General)*, 2008 FCA 67 in which Item 27 was allowed for this service. In fact, in *Consorzio del Prosciutto di Parma v. Maple Leaf Meats Inc.*, 2002 FC 417, the Federal Court of Appeal recognized that in 1998, Tariff B, unlike its previous versions, had omitted the preparation of appeal hearing, and determined it was authorized to allow the preparation of the hearing of appeal under Item 27 (para 53). In light of the foregoing, I allow 2 units for Item 27.

IV. Disbursements

A. *Photocopies and printing*

[15] The amount of $1,000.77 was claimed for in-house « [p]hotocopies et impression des dossiers d'appel » [TRANSLATION] "photocopies and printing of appeal files" (Bill of Costs, p 2). In support of its Bill of Costs, Chloretec attached a document called « Liste des débours (par date) » [TRANSLATION] "List of Disbursements (per date)" [List of Disbursements] containing entries for photocopies and printing and did not specify the number of pages nor the cost per page. Clorox submits in response that it requested supporting documentation and explanations for all the disbursements claimed in a letter dated October 8, 2020, and that such documentation and explanations were not provided.

[16] In the List of Disbursements, Chloretec does not provide any information as to the number of pages nor the rate per page charged to their client. Concerning the amount to be charged when an in-house service is used, the oft-cited decision *Diversified Products Corp. v. Tye-Sil Corp.*, [1990] F.C.J. No. 1056 (QL) [*Diversified Products*] states:

> …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.

[17] In the decades following *Diversified Products*, there has been conflicting case law on whether the rate of $0.25/page represents the actual cost of photocopies. However, in the recent years, the Court has awarded the rate of $0.25/per page on several occasions (*Leo Pharma inc. v.*

Teva Canada Limited, 2016 FC 107 at para 44; *Eli Lilly Canada Inc. v. Apotex Inc.*, 2018 FC 736 at para 139; *Energizer Brands, LLC v. The Gillette Company*, 2018 FC 1003 at p 51). As a result, I find reasonable to use the rate of $0.25/page to determine the amount allowable as disbursements for photocopies.

[18] Turning to the number of photocopies to be allowed, as like any other 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 [*Merck*]). Again, Chloretec has provided no submissions detailing the photocopies necessary to the conduct of the litigation. 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 the absence of fulsome submissions detailing the essential photocopies, I will allow a lump sum reflecting the materials filed in the court record, including the associated copies filed to satisfy the requirements of the Rules.

[19] After careful examination of the materials filed by Chloretec, their size and number of copies, and following my calculations, I find reasonable to allow a lump sum of $1,000.00, including taxes, to cover the disbursements related to the photocopies and the printing.

B. *Process server and messenger*

[20] Chloretec claims $1,117.27 for messenger services and for the service of documents. Clorox submits the amount appears to be excessive given that there "are no specific supporting documentation" for this disbursement. Chloretec, on his part, did not provide any invoices or explanation as to the necessity of these services.

(1) Process server

[21] First, on page 1 of the List of Disbursements, I note two entries named « Signification (Paquette: 831833: REQ REJET) » [TRANSLATION] "Service (Paquette: 831833: MOT STRIKE)" in the amounts of $266.30 and $36.68 on July 16, 2018. After comparative analysis with the court record, it appears these claims are related to Chloretec's motion to strike filed on the same date. That motion was dismissed without costs on October 10, 2018 and, as a result, the process server fees related to that motion are not allowed.

[22] Second, I note the following entries:

1) « Signification (Paquette: 871684: Requête) » and « Signification (Paquette: 872076: Lettre) » [TRANSLATION] "Service (Paquette: 871684: Motion)" and "Service (Paquette: 872076: Letter)," both in the amounts of $249.00 (List of Disbursements, p 4).

2) « Signification (Paquette: 929111: LETTRE) » [TRANSLATION] "Service (Paquette: 929111: LETTER)" of $241.30 (List of Disbursements, p 5).

[23] I compared the above entries with the court record and I was able to find the affidavits of service filed by the process server. Since court documents may be serve by personal service, I

conclude it is reasonable to allow $739.30 as process server fees (paragraph 139(1)(a) of the Rules).

(2) Messenger

[24] Chloretec claims a total of $74.99 for messenger services. After comparative analysis with the court record, I was able to link every amount claimed from the List of Disbursements to the filing of letters and/or proceedings with the registry. As parties may file documentation by way of delivery, I conclude it is reasonable to allow $74.99 as messenger fees (subsection 71(1) of the Rules).

C. *Travel*

[25] Chloretec claims a total of $1,065.46 as travel expenses. As Clorox did not dispute these costs, I have reviewed the List of Disbursements filed with the Bill of Costs to determine their necessity and reasonableness. At page 5 of that list, there are amounts related to travel: (1) $484.00 for accommodation; (2) $574.20 for transport entered on December 10, 2019; and (3) $7.26 entered on January 29, 2020, for a taxi charge.

[26] After thorough review of the court record, it is clear that these expenses were necessary to the conduct of the litigation since Chloretec’s Montréal-based counsel had to incur expenses to attend the in-person appeal hearing held in Toronto on January 15, 2020. Although Chloretec did not provide invoices or written submissions detailing these expenses, the fact remains that I cannot refuse to allow such disbursements because it is apparent that expenses were indeed

incurred (*Carlile v. Canada (Minister of National Revenue*), [1997] F.C.J. No. 885 at para 26). Moreover, I do not need absolute proof but rather satisfactory proof to trigger my discretion to determine what is reasonable and necessary (*Lundbeck Canada Inc. v. Canada (Health)*, 2014 FC 1049 at para 10). Finally, as I concluded travel expenses were necessary to attend the appeal hearing, a result of zero dollars at assessment would be absurd (*Abbott Laboratories v. Canada (Health)*, 2008 FC 693 at para 71). In these circumstances, I find reasonable to allow the amount of $1,065.46 as claimed.

D. *GST and QST*

[27] In its Bill of Costs, Chloretec claims $2,979.27 for service taxes (GST) and $7,658.07 for sales taxes (QST) paid on legal fees. It provided 10 invoices « pour services professionnels rendus » [TRANSLATION] "for professional services rendered" to support its claim. With regard to taxes, Tariff B reads as follows:

Disbursements	Débours
(3) A bill of costs shall include disbursements, including	(3) Le mémoire de frais comprend les débours, notamment
[…]	[…]
(b) any service, sales, use or consumption taxes paid or payable on counsel fees or disbursements allowed under this Tariff.	(b) les taxes sur les services, les taxes de vente, les taxes d'utilisation ou de consommation payées ou à payer sur les honoraires d'avocat et sur les débours acceptés selon le présent tarif.

[emphasis added.] [non souligné dans l'original.]

[28] In response, Clorox rightly pointed out that Chloretec cannot claim these amounts because the taxes covered by paragraph 1(3)(b) of Tariff B relate to counsel fees allowed under Tariff B, and not to legal fees charged by a counsel to their client to represent them (*Montréal (City) v. Montreal Port Authority*, 2012 FC 221 at paras 19–20). Furthermore, allowing the taxes as claimed would amount to a duplication of costs because Chloretec, in the context of the present assessment of costs, is entitled to GST and QST on the units allowed above for the assessable services. As a result, the taxes claimed as disbursements are not allowed.

V. Conclusion

[29] For all of the above reasons, Chloretec's costs are assessed and allowed in the amount of $6,501.46. A Certificate of Assessment will be issued accordingly, payable by the Appellant, The Clorox Company of Canada, Ltd., to the Respondent, Chloretec S.E.C.

"Stéphanie St-Pierre Babin"
Assessment Officer

Ottawa, Ontario
February 8, 2023

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-141-18
STYLE OF CAUSE:	THE CLOROX COMPANY OF CANADA, LTD. v. CHLORETEC S.E.C.

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

REASONS FOR ASSESSMENT BY:	STÉPHANIE ST-PIERRE BABIN, Assessment Officer
DATED:	FEBRUARY 8, 2023

WRITTEN SUBMISSIONS BY:

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