

Federal Court of Appeal



Cour d'appel fédérale

Date: 20230829

Docket: A-193-21

Citation: 2023 FCA 181

Present: Stéphanie St-Pierre Babin, Assessment Officer

BETWEEN:

DOMINIC COLVIN

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Assessment of costs without appearance of the parties.
Certificate of Assessment delivered at Ottawa, Ontario, on August 29, 2023.

REASONS FOR ASSESSMENT BY:

**STÉPHANIE ST-PIERRE BABIN,
Assessment Officer**

Federal Court of Appeal



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REASONS FOR ASSESSMENT

Stéphanie St-Pierre Babin, Assessment Officer

I. Background

[1] On January 12, 2023, the Appellant, Mr. Dominic Colvin [Appellant], wholly discontinued his Appeal by filing a Notice of Discontinuance against the Respondent.

[2] On March 22, 2023, the Respondent, the Attorney General of Canada [AGC], filed a Bill of Costs requesting that an assessment of costs be conducted by an assessment officer pursuant to subsection 406(1) and section 405 of the *Federal Courts Rules*, SOR/98-106 [Rules].

[3] Upon receipt of the AGC's Bill of Costs, I issued a Direction on March 28, 2023, to inform the parties that the assessment would proceed in writing and of the deadlines to file their respective representations.

[4] Following the issuance of the aforementioned Direction, the parties filed the following documentation:

- Respondent's submissions on costs filed on April 11, 2023, thereby submitting a Revised Bill of Costs as Exhibit "S" to the Affidavit of Marla McKittrick [Revised Bill of Costs].
- Appellant's submissions on costs filed on April 25, 2023.
- Reply submissions on costs of the Respondent, filed on May 9, 2023.

[5] Having reviewed the documentation provided on behalf of both parties, I will now address two preliminary issues. Thereafter, I will address the assessable services and disbursements claimed to finally determine the amount due for this assessment of costs.

II. Preliminary Issues

A. *Which party is entitled to costs?*

[6] In its Revised Bill of Costs, the AGC claims a total amount of \$4,781.21 including related disbursements. The AGC contends that it is entitled to costs pursuant to Rule 402. For his part, the Appellant seeks an order of costs against the AGC in the amount of \$4,871.21 or, in the alternative, he seeks an order stating that no costs are payable in any regard. In reply, the AGC finally submits that the Appellant's arguments and requested amount are unsupported by any evidence.

[7] In this case, the AGC is the sole party entitled to costs because the filing of the Notice of Discontinuance filed by the Appellant triggered an award of costs under the mechanism set out in Rule 402, which provides that the party against whom the appeal has been discontinued is entitled to costs. In other words, since the Appellant withdrew his appeal against the AGC on January 12, 2023, the AGC is entitled to costs. Although Rule 402 may be waived by an order of the Court stating otherwise or by an agreement between the parties, that is not the case here.

[8] Further, as an assessment officer, I am an officer of the registry (Rule 2). I am not a member of the Court which has the sole and full discretionary power over the allocation of costs, as well as the determination of by whom they are to be paid (subsection 400(1) of the Rules). I do not have the authority to order and modify the award of costs triggered by Rule 402 to order costs against the AGC. Neither can I dispense with the AGC's entitlement to costs further to discontinuance and issue an order stating that no costs are payable in any regard (*Cape Cod*

Fishing Co. v. Hearn, 2008 FC 1097 at para. 9). After all, my duty is only to assess costs, not to award them, i.e., establish a dollar figure after costs were awarded (*Pelletier v. Canada (Attorney General)*, 2006 FCA 418 at para. 7).

B. *What is the impact of the parties' absence of submissions with regard to the assessable services and disbursements?*

[9] In support of the Revised Bill of Costs, the AGC essentially submits that given the result of the proceeding, the complexity of the issues, the failure to acknowledge the mootness of the appeal, the late timing of the discontinuance and the failure to respond to an offer to settle, the Revised Bill of Costs is reasonable as presented (paragraphs 400(3)(a),(c), (j), (i) and (e) of the Rules). The AGC has not provided any arguments regarding the assessable services and disbursements on an individual basis. As for the Appellant, he contested the Revised Bill of Costs as a whole due to the conduct of the AGC that has unnecessarily lengthened the duration of the proceedings, also without specifically addressing the individual assessable services and disbursements claimed (paragraph 400(3)(i) of the Rules).

[10] Without stepping away from a position of neutrality, I will therefore assess the Revised Bill of Costs while ensuring that the assessable services and disbursements claimed comply with the procedural steps followed in this case, the Rules and the applicable jurisprudence (*Dahl v Canada*, 2007 FC 194 at para 2). I may decide to consider the aforementioned factors outlined in subsection 400(3) of the Rules in the course of this assessment. However, I am under no obligation to do so in making my decision (Rule 409; *Tibilla v. Canada (Attorney General)*, 2012 FC 85 at para. 10). It will depend on the circumstances of each claim.

III. Assessment of Costs

[11] The AGC has presented a Revised Bill of Costs for assessable services (\$3,360.00) and disbursements (\$1,511.21) for a total amount of \$4,871.21. The parties do not dispute that the Revised Bill of Costs shall be assessed in accordance with column III of the table to Tariff B in accordance with Rule 407.

A. *Assessable services claimed*

(1) Item 18

[12] The AGC claims 1 unit for the preparation of an Appeal Book (available range of 1 unit). The court record indeed confirms that an Appeal Book was filed by the AGC on August 26, 2021. Item 18 is allowed as claimed.

(2) Item 19

[13] The AGC claims 7 units for the preparation of his memorandum of fact and law filed on October 18, 2021 [Memorandum], which represents the high end of column III of Tariff B (available range of 4 to 7 units). Although the AGC is entitled to be compensated for the work performed in relation to the Memorandum, I cannot allow the number of units as requested for the following reasons.

[14] A thorough examination of the file revealed the Memorandum was filed in 3 consolidated Court Files: A-183-21, A-191-21 and A-193-21. I consider that it would be excessive to allow

the maximum number of units under column III of Tariff B, since the Memorandum has already been compensated by the Court for two of the three Court Files (Rule 409 and paragraph 400(3)(o) of the Rules). Specifically, on January 17, 2023, the Court dismissed the appeals in Court Files No. A-183-21 and A-191-21 with costs payable to the AGC “in a total amount of \$5,000.00 to be divided between the two appeals.” Allowing the maximum number of units under column III would amount in an overpayment of costs in favour of the AGC, which is not appropriate for any assessment of costs (*Novopharm Ltd. v. AstraZeneca AB*, 2006 FC 678 at para. 25).

[15] In light of the foregoing, I determine that an allowance of 4 units at the low end of column III is more appropriate in the particular circumstances of this case.

(3) Item 21(a)

[16] The AGC claims 3 units for the preparation of a contested motion i.e., the motion to dismiss the appeals for mootness filed on October 7, 2022 (filed in Court File No. A-183-21). After careful review of the file, I note that the Court has not rendered an Order following the filing of said motion. The Court instead decided to address the issue at the outset of the hearing of the consolidated appeals which, in the end, never took place due to the Appellant’s discontinuance (Order dated November 8, 2022, at para 1). As my jurisdiction to allow costs stems directly from an Order awarding costs, I am not authorized to allow this claim in the absence of such decision (*Stubicar v. Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 8 at para. 4). Therefore, the first claim under Item 21(a) is denied.

(4) Item 21(a)

[17] The AGC claims 3 units for the preparation of an uncontested motion i.e., the motion to amend the Appeal Books filed on November 25, 2022 (filed in Court File No. A-183-21). On December 6, 2022, the Court issued a subsequent order which stated:

IT IS ORDERED that:

[...]

2. The respondent is allowed to amend the Supplemental Appeal Book of the respondent to add Order in Council, Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation, and Other Obligations), PC 2021-0001, (2021) C Gaz, Part 1, Vol 155, No 3, January 6, 2021 (PC 2021-0001).

3. The amended appeal books shall be served and filed no later than December 15, 2022.

"Judith Woods"

J.A.

[18] It is clear from the above that the Court remained silent on the issue of costs. In that respect, the Federal Courts have consistently held that an order on an interlocutory motion which does not address costs is considered as an award of no costs (*Exeter v. Canada (Attorney General)*, 2013 FCA 134 at para. 14; *Janssen-Ortho Inc. v. Novopharm Ltd.*, 2006 FC 1333 at para. 13). The absence of an award of costs thus precludes the AGC from claiming any assessable services or disbursements related to the motion to amend the appeal books. Consequently, the second claim presented under Item 21(a) is also denied.

(5) Item 26

[19] The AGC claims 6 units – the high end of column III – for the services performed in relation to the assessment of costs (available range of 2 to 6 units). In my view, an allowance of 6 units would be excessive given the small number of claims presented and considering that the issues presented in the context of this assessment of costs were not overly complex (Rule 409 and paragraph 400(3)(c) of the Rules). However, I acknowledge that a substantial amount of work was performed by the AGC: the Bill of Costs and supporting documents filed on March 22, 2023, the submissions on costs filed on April 11, 2023 (including an affidavit and 19 exhibits attached thereto), and the reply submissions on costs filed on May 9, 2023 (Rule 409 and paragraph 400(3)(g) of the Rules). For these reasons, 5 units are allowed for Item 26.

B. *Disbursements claimed*

(1) Photocopies and Process Services

[20] In the Revised Bill of Costs, the AGC first claims disbursements for the photocopying expenses (\$1,443.40) and process server fees (\$67.81) incurred to produce and file the motion to amend the appeal books. As already explained at paragraph 18 of these Reasons, the Court remained silent in the Order rendered on December 6, 2022, and that, as a result, any disbursements related to that motion cannot be reimbursed.

(2) GST

[21] Finally, the AGC claims \$160.00 as GST on the assessable services claimed in its Revised Bill of Costs. Paragraph 1(3)(b) provides that a party can claim taxes on the assessable services which represent the counsel fees allowed under Tariff B. However, I share the comments made in *MacDonald v. Canada (A.G.)*, 2006 FC 1068 at para. 7 to the effect that the Attorney General of Canada cannot claim GST for counsel fees in the absence of evidence or written representations supporting that their client was indeed invoiced for such disbursement. As no evidence or written representations to support this claim were submitted, GST is not allowed.

IV. Amount due

[22] For all of the above reasons, the AGC's costs are assessed and allowed in the amount of \$1,600.00. A Certificate of Assessment will be issued accordingly, payable by the Appellant, Mr. Dominic Colvin, to the Respondent, the Attorney General of Canada.

Stéphanie St-Pierre Babin
Assessment Officer

Ottawa, Ontario
August 29, 2023

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-193-21

STYLE OF CAUSE: DOMINIC COLVIN v THE ATTORNEY
GENERAL OF CANADA

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

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

DATED: AUGUST 29, 2023

WRITTEN SUBMISSIONS BY:

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