Federal Court of Appeal | Cour d'appel fédérale

Date: 20240703

Docket: A-164-21

Citation: 2024 FCA 118

Present: **AUDREY BLANCHET, Assessment Officer**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

IRIS TECHNOLOGIES INC.

Respondent

Assessment of costs without appearance of the parties.
Certificate of Assessment delivered at Ottawa, Ontario, on July 3, 2024.

REASONS FOR ASSESSMENT BY: AUDREY BLANCHET, Assessment Officer

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REASONS FOR ASSESSMENT

AUDREY BLANCHET, Assessment Officer

I. Overview

[1] By way of Judgment and Reasons for Judgment dated November 22, 2021 [Judgment], the Court allowed the appeal with costs in favour of the Appellant, the Attorney General of Canada.

[2] Given that "[c]osts shall be assessed by an assessment officer" pursuant to section 405 of the *Federal Courts Rules* SOR/98-106 [Rules], on February 29, 2024, the Appellant filed an assessment request along with their Bill of Costs, which initiated the assessment of costs (Rule

406). In the absence of any indication in the Judgment awarding costs, costs shall be taxed in accordance with column III of the Tariff B (Rule 407).

[3] On March 4, 2024, a direction was issued to the parties regarding the conduct and filing of additional documents for the assessment of costs. On March 27, 2024, the Appellant filed a Costs Record which include an Affidavit of Disbursements and Written Representations, and on April 29, 2024, the Respondent filed their Responding Record. Having reviewed the Respondent's Record, the Appellant advised the Registry of the Federal Court of Appeal on April 30, 2024, that it did not intend to file written representations in reply.

[4] Before proceeding with the assessment of costs, issues specific to this file must be addressed.

II. Preliminary issues

A. *Should the Assessment Officer issue an order directing the Respondent to pay costs to the Appellant in the amount of $2,510.14?*

[5] Although the Appellant has initiated the assessment of costs by the filing of their Bill of Costs in accordance with Rule 406, in their Written Representations, they are requesting that the Court issue an order directing the Respondent to pay costs in the amount of $2,510.14 within 30 days of the issuance of the order.

[6] As an assessment officer, I am not a member of the Court and I cannot issue such an order. Subsection 5(1) of the *Federal Courts Act*, RSC, 1985, c F-7, states that the Federal

Court “consists of a chief justice […], an associate chief justice […] and 39 other judges”, whereas Rule 2 defines an assessment officer as “an officer of the Registry.” As mentioned by the assessment officer in *Iris Technologies Inc. v. Canada (National Revenue*), 2024 FC 906 at paragraph 9, “[i]n their function, [assessment officers] are empowered to issue reasons for assessment and certificates of assessment. They cannot grant Orders or Judgments.”

[7] Nonetheless, it is not uncommon for litigants to misunderstand the role of assessment officers or the assessment of costs process itself as it is a very specific procedure. In this particular case, I am in possession of the Appellant costs material and it is clear that they wish to obtain a decision determining the amount of costs payable by the Respondent, which is not in dispute. While procedures are important for the orderly administration of justice, they should not be applied in a way that prevents them from addressing substantive issues, such as the assessment of costs. In the interest of the proper administration of justice and while respecting my jurisdiction, I will proceed with the assessment of costs in accordance with Part 11 of the Rules and issue these reasons along with a certificate of assessment.

B. *Pursuant to Rule 400(3)(h) and Rule 409, should the notion of public interest be considered in determining the level of cost?*

[8] As an assessment officer, I must determine the number of units that can be allowed based on the entire range of units set out in column III (Rule 407; *Hoffman-La Roche Limited v. Apotex Inc.*, 2013 FC 1265 at para. 8*)*. In doing so, I can apply the criteria listed in Rule 400(3) while taking into consideration that the default level of costs is the mid-point of column III in Tariff B (*Allergan Inc. v. Sandoz Canada Inc*., 2021 FC 186 at para. 25).

[9] In their Written Representations, the Respondent argues that an "assessment officer is not precluded from applying rules 409 and [4]00(3)(h) (public interest) to minimize the assessed costs." To support their position, the Respondent cites *Hiebert v. Canada (Attorney General)*, 2006 FC 1215 at paragraph 5, which is appropriate to reproduce here :

In *Bow Valley Naturalists Society et al. v. Minister of Canadian Heritage et al.*, [2002] F.C.J. No. 1795 (A.O.), I considered the relevance of public interest for assessments of costs and concluded that the application of Rules 409 and 400(3) factors against the interest of successful litigants would require carefully considered discretion. That a judgment for costs does not accord the unsuccessful litigant special consideration relative to costs as a function of public interest does not preclude me from applying Rule 409 and Rule 400(3)(h) (public interest) to minimize assessed costs. The Applicant's argument is compelling. However, I find nothing to suggest that the Court's analysis and findings concerning his institutional treatment would engage the public interest, i.e. by establishing precedent so pervasive as to significantly affect or alter the treatment of prisoners in the future. That is, the Applicant's interest in the outcome here was really of significance to only himself, i.e. the development of the best position for his early release.

[10] While I defer entirely to the reasoning of the assessment officer in that case, my reasoning in this assessment of costs is to the same effect, that is, that I do not find anything in the Court's Judgment that would be of public interest. Moreover, the Respondent has not put forward any argument relevant to this case that would persuade me of the appropriateness of considering the mentioned criterion. In the absence of more substantiated arguments or guidance from the Court on the notion of public interest, I will not consider the criterion set out in Rule

400(3)(h) in assessing costs (*Johnson v. Bell Canada*, [2009] F.C.J. No. 1066 at para. 3). That being said, each item of Tariff B will still be assessed in its own circumstances (*Starlight v. Canada*, [2001] F.C.J. No. 1376 at para. 7).

III. Assessable services

[11] The Appellant has claimed 13 units for assessable services, for a total amount of $1,950.00.

A. *Items 17, 18, 19, 20, 22(a) and 25 of Tariff B*

[12] After my review of the Appellant's Bill of Costs in conjunction with their Written Representations, the Court record and the Rules, I found the amounts claimed under Items 17, 18, 19, 20, 22(a) and 25 to be reasonable and the services performed to be necessary for the litigation of this Court file. Specifically, 1 unit is allowed for Items 17, 18, 20 and 25, 5 units are allowed for Item 19 and 2 units are allowed for Item 22(a).

B. *Item 21 – Counsel fee: (a) on a motion, including preparation, service and written representations or memorandum of fact and law*

[13] In their Bill of Costs, the Appellant has claimed a total of 2 units for the services rendered in relation with the following:

1. Appellant's Motion Record and Reply Submissions – Interim and Interlocutory Stay of the Order of the Federal Court dated June 2, 2021 (granted costs in the Order of Justice Mactavish dated August 19, 2021).

2. Respondent’s Motion seeking orders declaring the Appellant in contempt in Court File Nos. A-310-20, A-134-21, A-163-21, A-164-21, A-175-21 (granted costs in the Order of Justice Mactavish dated August 19, 2021).

[14] My review of the Court record indicates that the Appellant is entitled to costs following the order of August 19, 2021, as the costs of their Motion for Interim and Interlocutory Stay of the Order of the Federal Court dated June 1, 2021, were awarded in the cause.

[15] As for the Respondent’s Motion seeking orders declaring the Appellant in contempt, no order was specifically rendered addressing this issue. For that purpose, the Respondent indicates in their Written Representations that their Motion Record in relation with the Appellant’s contempt was withdrawn on September 2, 2021, and therefore, they should not be ordered to pay the related costs. I note, however, that in the Appellant's Bill of Costs, no units are specifically claimed for this motion. Rather, the 2 units claimed seem to relate exclusively to the Motion for Interim and Interlocutory Stay of the Order of the Federal Court dated June 1, 2021.

[16] In a context where the Appellant is entitled to the costs of the Motion for Interim and Interlocutory Stay of the Order of the Federal Court dated June 1, 2021, and the minimum number of units has been claimed under Item 21(a), it would be pointless to pursue further the assessment of this claim. The two-unit claim under Item 21(a) is allowed as it is.

C. *Total amount allowed for the Appellant’s assessable services*

[17] A total of 13 units have been allowed for the Appellant’s assessable services totalling $1,950.00.

IV. Disbursements

[18] The Appellant has claimed $560.14 as disbursements. After my review of the Appellant's Costs Record, the Court file and the Rules, I accept the amounts claimed for court fees ($50.00) and servicing fees ($63.00) as they are both substantiated in accordance with subsection 1(4) of Tariff B. These claims do not require further consideration and are allowed as they are. The costs associated with photocopying, on the other hand, require a more in-depth analysis.

A. *Photocopies*

[19] The Appellant has claimed a total of $447.14 ($359.37 and $87.77) for copying fees related to the Appeal Book and Joint Book of Authorities. These claims are supported by the invoices provided in Exhibit D and E of the Affidavit of Disbursements affirmed on March 27, 2024, by Breanne Peacock. Apart from a mere mention in the Appellant's Bill of Costs that the photocopies were "counsel copies for hearing," no written submissions were filed in support of these claims.

[20] In their Written Representations, the Respondent argues that "[t]his was a remote hearing with electronic filing. Three photocopies of the authorities and two copies of the appeal book were not reasonable." While I reach the same conclusion as the Respondent, my reasoning takes a somewhat different approach.

[21] Subsection 1(4) of Tariff B of the Rules states that "[n]o disbursement […] shall be assessed or allowed under this Tariff unless it is reasonable […]". In addition to subsection 1(4)

of Tariff B, case law has also established that in matters of assessment of disbursements, the successful party may claim disbursements that are reasonable and necessary for the litigation (*Merck & Co. Inc. v. Apotex Inc*., 2006 FC 631 at para. 3).

[22] Although it is given that the photocopies costs claimed were indeed incurred by the Appellant, the claim having been substantiated by documentary evidence, the question of whether these expenses were necessary and reasonable for the conduct of the litigation remains.

[23] Having review the Court file, I note that an electronic copy of the Appeal Book was filed by the Appellant on August 9, 2021. No paper copy was provided to the Registry for the judiciary. As for the Joint Book of Authorities, a single paper copy was filed with the Registry by the Appellant on October 12, 2021.

[24] Regardless, the Bill of Costs specifies that the photocopy claim in the amount of $359.37 was intended for two counsel present at the hearing. Tariff B provides for compensation of the second counsel's assessable services only, "where Court directs" (Item 22(b)). Since assessable services and disbursements are inherently linked, and given that the Judgment or any direction therein does not allow for the costs related to a second counsel to be claimed, I do not have the authority to award such costs. As an assessment officer, I can only allow assessable services and their associated disbursements "if they have been previously awarded by the Court" (*Mugford v. Nunatsiavut (First Minister*), 2012 FC 821, at para. 9).

[25] Considering the above, the Appellant is only entitled to one copy of the Joint Book of Authorities and Appeal Book for counsel during the hearing, and one additional paper copy of the Joint Book of Authorities for the registry. The claim for $87.77 is allowed as is it reasonable and necessary. However, the claim for $359.37 is halved to cover the cost of a single copy of each document, resulting in a total of $267.46 for photocopies.

B. *Total amount allowed for the Appellant's disbursements*

[26] A total of $380.46 is allowed for the Appellant's disbursements.

V. Conclusion

[27] For the above reasons, the Appellant's Bill of Costs is assessed and allowed at $2,330.46. A Certificate of Assessment will be issued.

"Audrey Blanchet"
Assessment Officer

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	**A-164-21**
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. IRIS TECHNOLOGIES INC.

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

REASONS FOR ASSESSMENT BY:	AUDREY BLANCHET, Assessment Officer
DATED:	JULY 3, 2024

WRITTEN SUBMISSIONS BY:

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