Federal Court Cour fédérale

Date: 20230504

Docket: T-966-21

Citation: 2023 FC 648

BETWEEN:

DALE KOHLENBERG

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ASSESSMENT

GARNET MORGAN, Assessment Officer

I. Introduction

[1] This assessment of costs is pursuant to the Federal Court's Judgment and Reasons dated June 15, 2022, wherein the Applicant's application for judicial review was "dismissed with costs."

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

Assessment according to Tariff B	**Tarif B**
407. Unless the Court orders otherwise, party-and-party costs shall be assessed in accordance with column III of the table to Tariff B.	**407** Sauf ordonnance contraire de la Cour, les dépens partie-partie sont taxés en conformité avec la colonne III du tableau du tarif B.

II. Documents filed by the parties

[3] The court record (hard copy file and computerized version) shows that the following documents were filed by the parties for this assessment of costs:

a) On October 20, 2022, the Respondent filed a costs record containing a Bill of Costs, an Affidavit of Ryssa Ndabihore, sworn on October 20, 2022, and Respondent's Submissions Regarding Assessment of Costs (Respondent's Submissions);

b) On October 26, 2022, the Applicant filed an Affidavit of Dale Kohlenberg, sworn on October 25, 2022, and an Applicant's Response to Respondent's Request for Assessment of Bill of Costs (Applicant's Response);

c) On October 27, 2022, a direction was issued to the parties advising that the assessment of costs would proceed in writing and a deadline for the Respondent's reply documents was provided.

d) Further to this direction, on November 9, 2022, the Respondent filed a costs record containing an Affidavit of Leah Teran, sworn on November 9, 2022, and a Respondent's Reply to Applicant's Response to the Request for Assessment of Costs (Respondent's Reply).

III. Assessable Services

[4] The Respondent has claimed 25 units for assessable services totalling $4,000.00.

A. *Item 2 - Preparation and filing of all defences, replies, counterclaims or respondents' records and materials; and Item 13 – Counsel fee: (a) preparation for trial or hearing, whether or not the trial or hearing proceeds, including correspondence, preparation of witnesses, issuance of subpoenas and other services not otherwise particularized in this Tariff.*

[5] I have reviewed the parties' costs documents in conjunction with the court record, and any relevant rules, statutes, and jurisprudence, and I have determined that the assessable services submitted under Items 2 and 13(a) can be allowed as claimed. I did not find that these claims required my intervention as I found the services performed by the Respondent to be necessary, and the amounts claimed are reasonable.

[6] For my assessment of these claims, I reviewed the factors in awarding costs that are listed under Rule 400(3) of the FCR, which I am able to consider as an Assessment Officer pursuant to Rule 409 of the FCR. When I considered factors such as paragraphs, "(a) the result of the proceeding;" "(b) the amounts claimed and the amounts recovered;" "(c) the importance and complexity of the issues;" and "(g) the amount of work;" the court record reflects that the Respondent was the successful party in the judicial review proceeding; the amounts claimed and to be recovered are reasonable; the issues argued were of significant importance and of moderate complexity; and the Respondent performed a moderate amount of work for Items 2 and 13(a). Therefore, I find it reasonable to allow the claims for Items 2 and 13(a), as requested in the Respondent's Bill of Costs. Specifically, 4 units are allowed for Item 2, and 3 units are allowed for Item 13(a).

[7] The Respondent's remaining claims for Items 5, 12, 14, and 26 have some issues to look into and will be assessed in more detail below.

B. *Item 5 – Preparation and filing of a contested motion, including materials and responses thereto.*

[8] The Respondent has submitted a claim of 5 units under Item 5 “for the preparation and filing of two motions pursuant to Rules 8 and 74 and with regards to the filing of the Applicant’s record that was initially filed outside of the prescribed time limit” (Respondent’s Submissions at para 6). The Applicant did not provide any specific submissions regarding Item 5.

[9] My review of the court record did not reveal that costs were specifically awarded to any party in relation to the aforementioned motions. In *Canada (Minister of Human Resources Development) v Uzoni*, 2006 FCA 344 [*Uzoni*], at paragraph 4, the Assessment Officer stated the following regarding Court decisions that are silent with respect to costs:

> [4] The Respondent has requested 4 units for its item 4 (Preparation and filing of an uncontested motion, including all materials for late filing of Notice of Appearance). I have reviewed the Order of the Federal Court of Appeal dated March 22, 2005, in which the Court granted the Respondent's motion for an extension of time to file its Notice of Appearance. However, the same Order of the Federal Court of Appeal made no reference whatsoever to the issue of costs associated with the Respondent's motion. 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.

> With these points in mind, it is my opinion that the Respondent is not entitled to the costs associated with its extension of time motion and I disallow the 4 units requested for this assessable service.

[10] The *Uzoni* decision illuminates that a Court decision must explicitly award costs for a motion for costs to be assessed. This decision is supported by a more recent decision of the Court in *Tursunbayev v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 457 [*Tursunbayev*], at paragraphs 39 to 43, wherein the Court discusses the issue of decisions that are silent on costs, and concurred that costs cannot be allowed. Utilizing the guidance provided in the *Uzoni* and *Tursunbayev* decisions, I have determined that I do not have the authority to allow the Respondent's claim for Item 5, as there is an absence of Court decisions awarding costs to the Respondent for the motions claimed. Therefore, the Respondent's claim for Item 5 is disallowed.

C. *Item 12 – Notice to admit facts or admission of facts; notice for production at hearing or trial or reply thereto.*

[11] The Respondent has submitted a claim of 2 units under Item 12 "for the preparation of a response to the two requests to admit served by the Applicant" (Respondent's Submissions at para 6; Ndabihore Affidavit at exhibits B and C). In response, the Applicant submitted that the Respondent had objected to the Applicant's Notice to Admit "because it was pursuant to Rule 255, applicable to Actions, in Part 4, and not applicable to Applications, in Part 5," and that the Applicant had abandoned the request. The Applicant has submitted that the Respondent's claim is "unwarranted," as it seeks costs that are applicable for action proceedings, and that "the amount claimed is, at the very least, excessive" (Applicant's Response at para 7). In reply, the

Respondent submitted that the events outlined in paragraph 7 of the Applicant's submissions are regarding another Federal Court proceeding (T-1584-19) and that "the Respondent was required to respond to the Requests to Admit in the present proceeding" (Respondent's Reply at para 5; Teran Affidavit at paras 3 and 4).

[12] My review of the court record revealed that the Respondent performed the services claimed under Item 12, as a Response to Request to Admit was served on the Applicant by e-mail on September 13, 2021, and filed with the court registry on September 21, 2021. Under Column III of Tariff B, Item 12 has a range of units of 1 to 3 units, and I find that the Respondent's selection of 2 units is reasonable, and aligns with *Allergan Inc. v Sandoz Canada Inc.*, 2021 FC 186, at paragraph 25, wherein the Court stated that "[t]he "default" level of costs in this Court is the mid-point of Column III in Tariff B: Rule 407." Therefore, Item 12 is allowed as claimed in the Respondent's Bill of Costs at 2 units.

D. *Item 14 – Counsel fee: (a) to first counsel, per hour in Court.*

[13] The Respondent has submitted a claim of 9 units (2 units multiplied by 4.5 hr) under Item 14(a) for counsel's attendance at the judicial review hearing held on April 21, 2022 (Respondent's Submissions at para 5). In response, the Applicant submitted that "[t]he Respondent appears to claim 2 times the 4.5 units for this Item" and that it "should be limited to a single claim of 4.5 units, for a total of $720.00" (Applicant's Response at para 8). In reply, the Respondent submitted that the hearing had a duration of 4.5 hours and that "the minimum amount of units, which is two units per hour" has been claimed (Respondent's Reply at para 8).

[14] Further to my review of the parties' submissions and the Respondent's Bill of Costs, I find that the Respondent's claim for Item 14(a) was submitted in accordance with Tariff B. Claims for Item 14(a) are calculated by multiplying the hearing duration by a unit number, which was adhered to by the Respondent. The Abstract of Hearing for this file, which is a computerized hearing details report created by the Court Registrar in attendance at a hearing, has the judicial review hearing documented as being heard by videoconference from 9:32 a.m. to 1:53 p.m., with a duration of 4 hours and 30 minutes. Therefore, the court record supports the hearing duration claimed by the Respondent. Having considered the aforementioned facts, including that the lower unit amount was selected for Item 14(a), I find it reasonable to allow 9 units, as requested in the Bill of Costs.

E. *Item 26 – Assessment of costs.*

[15] The Respondent has submitted a claim of 2 units under Item 26 for the services performed for this assessment of costs. The Respondent has submitted that "[g]iven the Applicant's disagreement, the Respondent has been required to prepare a bill of costs, together with an affidavit and submissions to support the amount claimed." The Respondent submitted that this disagreement has "resulted in further expenditure of time" and noted that the Respondent's request of 2 units for Item 26 is "reasonable and appropriate" (Respondent's Submissions at para 7).

[16] In response, the Applicant submitted that the parties were engaged in costs negotiations and that "[i]f the Respondent had accepted the Applicant's proposal for costs, the Applicant would have promptly paid $2,800.00." The Applicant submitted that the Respondent had initially

requested $3,600.00 for costs, which included “excessive and/or unwarranted claims for Items 12 and 14,” and has now requested additional costs for Item 26. The Applicant has requested that the Respondent’s costs be disallowed, as “[t]he Respondent should be encouraged to reach reasonable resolution of differences as to claims of costs and the rejection of this Item would serve to promote this” (Applicant’s Response at paras 9 and 10; Kohlenberg Affidavit at paras 4 to 7).

[17] In reply, the Respondent reiterated the submissions already made, that the Applicant’s disagreement on costs required the Respondent to prepare a bill of costs and other documents, resulting in the further expenditure of time (Respondent’s Reply at para 9).

[18] In addition 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 and related costs. These rules only refer to offers to settle that are made prior to the conclusion of a court proceeding. In *Canadian Olympic Assn. v Olymel, Société En Commandite*, [2000] FCJ No 1725 [*Olymel*], 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.

[19] Further to the guidance provided in the *Olymel* decision, I find that the parties’ attempt to settle costs informally after the Court’s final decision dated June 15, 2022, was a step that the

parties could consider but there are no provisions in the FCR regarding offers to settle costs that are made after a final decision and the possible consequences for non-acceptance. Once the parties could not agree on costs informally, it was open to the Respondent to formally request that an assessment of costs be conducted by an Assessment Officer pursuant to subsection 406(1) of the FCR (Ndabihore Affidavit at exhibit F). I have therefore determined that the Respondent's request for an assessment of costs was submitted in accordance with the FCR, and that the claim for Item 26 is justified.

[20] I have reviewed the factors in awarding costs that are listed under subsection 400(3) of the FCR, such as paragraphs (a), (b), (c) and (g); and the factors for Item 26 mirror Items 2 and 13(a) that were expanded upon earlier in these Reasons (at para 6). Therefore, I have determined that the services performed by the Respondent were necessary to resolve the issue of costs, and that it is reasonable to allow 2 units for Item 26, as requested in the Bill of Costs.

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

[21] A total of 20 units have been allowed for the Respondent's assessable services totalling $3,200.00.

IV. Disbursements

[22] The Respondent did not submit any claims for disbursements.

V. Conclusion

[23] For the above reasons, the Respondent's Bill of Costs is assessed and allowed in the total amount of $3,200.00, payable by the Applicant, Dale Kohlenberg, to the Respondent, Attorney General of Canada. A Certificate of Assessment will also be issued.

"Garnet Morgan"
Assessment Officer

Toronto, Ontario
May 04, 2023

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-966-21
STYLE OF CAUSE:	DALE KOHLENBERG v ATTORNEY GENERAL OF CANADA

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

REASONS FOR ASSESSMENT BY:	GARNET MORGAN, Assessment Officer
DATED:	MAY 04, 2023

WRITTEN SUBMISSIONS BY:

Dale Kohlenberg	FOR THE APPLICANT (SELF-REPRESENTED)
Joel Stelpstra	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT