Federal Court Cour fédérale

Date: 20250821

Docket: T-1534-24

Citation: 2025 FC 1399

BETWEEN:

DAVID CHARLES PENNER

Plaintiff

and

HIS MAJESTY THE KING

Defendant

REASONS FOR ASSESSMENT

KARINE TURGEON, Assessment Officer

I. Overview

[1] By way of Judgment and Reasons rendered on August 28, 2024, the Court granted the Defendant's motion to strike the Statement of Claim in the present file, with costs [Judgment].

[2] The Defendant served and filed a Bill of Costs, an affidavit, and written submissions on December 3, 2024, which initiated this assessment of costs.

[3] The recorded entries indicate that after communicating with the Plaintiff, documents were returned to him by the Registry on January 7, 2025. These documents took the form of a payment made into Court of the costs claimed by the Defendant, despite the absence of a Court ruling or statutory provision permitting such filing. Shortly thereafter, the undersigned issued a first Direction to the parties, on January 8, 2025, regarding the conduct and filing of documents for the purpose of this assessment.

[4] Pursuant to a Court Direction (Battista J.) issued on January 10, 2025, confirming that the assessment of costs would proceed in accordance with section 406 of the *Federal Courts Rules*, SOR/98-106 [Rules], a further Direction was issued by the undersigned on January 14, 2025, restating the timelines previously established for the filing of costs materials. On the same date, the Defendant reasserted its request for an assessment of costs in this matter.

[5] On February 6, 2025, the Plaintiff submitted to the Registry unserved materials dated January 25, 2025. Both parties were advised by Direction on February 12, 2025, that these materials would be accepted on the record as the Plaintiff's response to the request for assessment, except for five pages containing financial information of an unclear public status. These five pages were communicated to the Defendant as an attachment to the Direction, along with the remainder of the Plaintiff's unserved material. The parties were also advised that the information in the five pages could be resubmitted by the Plaintiff in a manner suitable for public viewing.

[6] In addition, to allow time for discussion between the parties and given that the Plaintiff had not adhered to the established filing sequence, the previously set timelines were extended in the Direction of February 12. This Direction also clarified that if the Plaintiff consented to the payment of the claimed costs, the amount was to be paid directly to the Defendant, rather than to the Registry or the Court. It also stated that the assessment of costs would proceed unless the parties settled the matter and the request for assessment was discontinued.

[7] The Defendant did not file additional materials following the Direction of February 12, but the Plaintiff filed supplemental materials in response on March 31, 2025. These materials indicated that documents, which appeared to be considered by the Plaintiff as a means of payment, had been delivered to the Defendant. Given that there was no indication of service of the supplemental materials, they were attached to a further Direction issued on July 8, 2025, which allocated time for the Defendant to provide a reply with respect to them.

[8] Following this Direction, the Defendant served and filed a reply on July 24, 2025, confirming that the assessment of costs was still required and stating its position that no effective payment of the costs awarded in the Judgment had been made.

[9] Finally, it was recently noted that a short letter from the Plaintiff was placed in the Court record by the Registry on July 16, 2025. This letter, which consists solely of questions raised by the Plaintiff, was placed in the record to ensure completeness, although it was not submitted in accordance with any of the established timelines and did not indicate whether it had been provided to the Defendant. This letter will not be taken into consideration, as it does not contain

submissions or evidence. For greater certainty, had it been considered, the outcome of this assessment would have been the same.

[10] Before proceeding with this assessment of costs, preliminary issues must be addressed. The first concerns the impact of the absence of opposition on this assessment, and the second pertains to the role of an assessment officer.

II. Preliminary Issues

A. What is the impact of the absence of opposition on this assessment of costs?

[11] The Plaintiff does not dispute the amount of costs claimed in the Bill of Costs or its content, but asserts, in the documents he submitted, that the costs claimed have been extinguished.

[12] The case law indicates that, in the absence of substantive opposition, as is the case here, "the assessment officer cannot certify unlawful items, i.e. those outside the authority of the judgment and the Tariff" (*Dahl v Canada*, 2007 FC 192 [*Dahl*] at para 2). In the same manner, neither express nor implied consent to costs would bind an assessment officer with respect to claimed items that do not comply with the applicable legal framework. Therefore, without departing from a position of neutrality, I will ensure that the assessable services claimed comply with the Judgment, the procedural steps followed in this case, the Rules and the applicable jurisprudence.

B. Can an assessment officer determine whether costs claimed have been extinguished or receive payment of costs claimed by a party?

[13] In its Reply, the Defendant takes the position that it did not receive payment from the Plaintiff of the costs claimed. It submits that neither the letter claiming purporting to include payment dated January 27, 2025, nor the package dated March 21, 2025, containing a document described as a bill of exchange, amounted to actual payment. In this regard, the Defendant notes that a "bill of exchange similar to the bill of exchange relied on by the Plaintiff in his now-struck Statement of Claim" was sent (Defendant's Reply, p 2).

[14] As previously noted, the Plaintiff does not dispute the quantum of costs claimed in the Bill of Costs but disagrees with the Defendant's position that these costs have not been extinguished by the Plaintiff's action.

[15] The documents filed by the Plaintiff in response to this assessment included references to a bill of exchange having been tendered in the sum of $1,440, as a payment for the costs claimed. They also referred to a "remittance being sent to set off and discharge the amount stated on the Respondent Bill of Costs for Hearing dated August 19, 2024" (Plaintiff's response filed on February 6, 2025, pp 2 and 7). The additional response filed on March 31, 2025, globally alleged that payment had been delivered by sending a "bill" to the Defendant on March 24, 2025, and that "if the holder of a bill refuses to receive payment under protest, he loses his right of recourse against any party who would have been discharged by that payment" (Plaintiff's response filed on March 31, 2025, p 1).

[16] I take note of the parties' submissions. However, the purpose of an assessment of costs is not to determine the validity of a method of payment or whether costs claimed have been extinguished, matters which fall outside the jurisdiction of an assessment officer. Nor is it the role of the assessment officer to receive payment of costs payable to a party, unless specifically instructed by the Court, which is not the case here.

[17] Assessment officers and the Court are distinct entities. Subsection 5.1(1) of the *Federal Courts Act*, RSC 1985, c F-7, states that "[t]he Federal Court consists of a chief justice […] and 39 other judges," whereas I am an officer of the Registry, appointed as an assessment officer by the Court (see definition of "assessment officer" under Rule 2). The jurisdiction of an assessment officer is to establish the quantum of costs awarded by the Court (Rule 405; *Pelletier v Canada (Attorney General)*, 2006 FCA 418 [*Pelletier*] at para 7).

[18] In that regard, it is relevant to note that the Defendant contends that actions taken by the Plaintiff during the course of this assessment were improper (Defendant's Reply, p 2). That said, I have not taken this argument into consideration, as it concerns the validity of documents submitted by the Plaintiff, a matter outside my jurisdiction.

[19] As the parties have not settled the matter since the filing of the Bill of Costs, and the request for assessment has been maintained, the Defendant is entitled to obtain an assessment to establish the amount of costs payable by the Plaintiff.

III. Assessable Services

[20] In the Bill of Costs, the Defendant claims 8 units for assessable services, totalling $1,440. No disbursements are claimed. As previously indicated, the Plaintiff did not substantially oppose the content of the Bill of Costs.

[21] As submitted by the Defendant, and in the absence of any different instructions in the Judgment, the Bill of Costs was to be prepared in accordance with Column III, as per Rule 407. The Defendant's submissions indicate that it intended to claim the low end of the range available under Column III, although the Bill of Costs includes a different number of units for certain items (Defendant's Written Submissions, para 3; Affidavit of Jessica Vallatti, para 4).

[22] As will be set out in greater detail below, the 8 units claimed in the Bill of Costs will be allowed, with some adjustments required to comply with the Judgment.

[23] From the outset, the single unit available under Item 25 of Tariff B, claimed in the Bill of Costs for "Services after judgment not otherwise specified", is allowed as submitted. This item is routinely permitted to cover counsel's review of the final decision concluding the file, as in the present case (*Halford v Seed Hawk Inc*, 2006 FC 422 [*Halford*] at para 131). The single unit claimed at the lower end of the range available under Item 6, for the Defendant's attendance at the hearing of the motion to strike, is also allowed as submitted, given its compliance with the Judgment, and the submissions and evidence provided by the Defendant (Defendant's Written Submissions, paras 1 and 3; Affidavit of Jessica Vallatti, para 2).

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

[24] First, 5 units are claimed in the Bill of Costs, under Item 5, for preparing and filing the Motion to Strike the Statement of Claim that led to the Judgment. This is 2 units above the low end of Column III. Even so, the Defendant's costs materials state that its intent was to formulate all claims based on the low end of Column III.

[25] In addition, upon review of the Bill of Costs, the claim made under Item 26 is 1 unit below the minimum number of units found under Column III warranted by the Judgment. However, an assessment officer "cannot go beyond, or contradict, the order that the judge has made" (*Pelletier* at para 7). The jurisprudence provides that "the assessment officer, not being the Court, cannot depart from Column III and exercise the jurisdiction of the Court in changing the minimum amount allowable" (*Interactive Sports Technologies Inc v Canada (Attorney General)*, [2012] FCJ No 326 at para 6). As this discrepancy regarding Item 26 cannot be reconciled with any other information found in the Defendant's costs materials, Rule 3 will be applied to resolve the issue.

[26] Rule 3 provides that the "Rules shall be interpreted and applied (a) as to secure the just, most expeditious and least expensive outcome of every proceeding […]."

[27] With regard to the interpretation of Rule 3 in the course of an assessment of costs process, the Assessment Officer stated the following in *Mitchell v Canada*, 2003 FCA 386 [*Mitchell*] at paragraph 12:

> Consistent with Rule 3, and with my sentiment in *Feherguard Products Ltd. v. Rocky's of B.C. Leisure Ltd.*, [1994] F.C.J. No. 2012 (A.O.), at para. 10 that the "[…] best way to administer the scheme of costs in litigation is to choose positive applications of its provisions as opposed to narrower and negative ones […], application of discretion should be part of a reasoned process to achieve a result on assessment which is equitable for both sides."

[28] As it will be explained below, considering the Defendant's costs materials, and given Rule 3 and *Mitchell*, 2 units claimed under Item 5 will be subtracted and reallocated to Item 26, to comply with the Judgment and to secure a just outcome to this assessment.

[29] Accordingly, after subtracting the 2 units reallocated to Item 26, 3 units are allowed under Item 5.

C. Item 26 – Assessment of costs

[30] In the Bill of Costs, the Defendant claims 1 unit under Item 26 for the work completed in connection with this assessment of costs. However, this does not correspond to the minimum number of units under Column III, but rather to the minimum levels provided under Column I and II of Tariff B. As per previously indicated and based on the Defendant's submissions and supporting evidence, it appears that an error was made in preparing the Bill of Costs with respect to Item 26.

[31] Rule 408(3) provides that "[a]n assessment officer may assess and allow, or refuse to allow, the costs of an assessment […]." The Defendant prepared comprehensive costs materials, and I am mindful that the increased number of Directions issued to guide the parties also

required effort and attention. I conclude that units should be allowed for the work performed for this assessment. That said, allowing only the single unit claimed would not comply with the Judgment, which requires the use of Column III.

[32] In *Carlile v Canada (Minister of National Revenue - MNR)*, [1997] FCJ No 885 [*Carlile*] at paragraph 26, the Assessment Officer stated that "[…] the Taxing Officer has not properly discharged a quasi-judicial function by taxing at zero dollars as the only alternative to the full amount."

[33] Applying the *Mitchell* decision previously cited, the *Carlile* decision, and Rule 3, I have determined that correcting the number of units claimed for Item 26 is appropriate to ensure compliance with the Judgment. Therefore, 2 units previously moved from Item 5 will be added to the unit already claimed under Item 26, resulting in a total of 3 units allowed for Item 26. This amount falls within the lower end of the range available under Column III, which is within the authority of the Judgment. Furthermore, it aligns with the level of costs the Defendant intended to claim and takes into consideration the following factors listed under Rule 400(3).

[34] The Defendant noted in its Reply that the Court concluded in the Judgment that the Plaintiff "may be engaging in vexatious and abusive conduct" (Defendant's Reply, p 1). As this conclusion relates to the outcome of the litigation, I have taken into account the factor of "the result of the proceeding" in allowing 3 units (Rule 400(3)(a)). The factor "the amount of work" completed by the Defendant for the purpose of this assessment was also considered (Rule 400(3)(g)).

D. Item 27 – Such other services as may be allowed by the assessment officer or ordered by the Court

[35] In its Reply, the Defendant asks "for an additional unit of costs pursuant to Item 27 of Tariff B," and alleges that the Plaintiff would have drawn out "the payment of costs by relying on defunct […] forms of payment [which] is improper and a waste of court time," and that "[t]his behavior should be met with additional costs consequences. Given the above, the Defendant asks for an additional unit of costs pursuant to Item 27 […]" (Defendant's Reply, p 2). This unit will not be allowed for the following reasons.

[36] To submit a claim under Item 27, the Defendant should have included it in its Bill of Costs, or in a revised Bill of Costs, in accordance with Tariff B (Rule 406; subsection 1(2) of Tariff B). In any event, had the Bill of Costs included such claim, no unit would be allowed under Item 27 based on the submissions received in support of this request.

[37] According to the Defendant, Item 27 is intended to indemnify counsel for extraordinary items not covered elsewhere in the Tariff [emphasis added] (Defendant's Reply, p 2). Section 1 of Tariff B establishes only two types of costs that can be allowed, being assessable services or disbursements. Like all other assessable services found in the table to Tariff B, Item 27 is intended to compensate the successful party for assessable services performed by counsel, and not for work or additional work performed by the assessment officer or judicial resources in the course of an assessment of costs.

[38] Even if the request made under Item 27 were interpreted as being made solely for the purpose of compensating the Defendant for assessable services performed by its Counsel, my conclusion would be that the compensation should have been claimed under Item 26 instead, given that work completed for the purpose of an assessment falls within the scope of Item 26.

[39] As noted in the jurisprudence, "[…] Item 27 only comes into play for services not otherwise addressed by Items 1 to 26" (*Halford* at para 131). Moreover, Counsel for the Defendant has already been compensated with 3 units under Item 26. Allowing an additional unit under Item 27 would result in double indemnification, which is not permitted.

[40] In conclusion, 8 units are allowed for assessable services, for a total amount of $1,440.

IV. Conclusion

[41] For the above reasons, the Defendant's Bill of Costs is assessed and allowed at $1,440 payable by the Plaintiff to the Defendant. A Certificate of Assessment will be issued.

"Karine Turgeon"
Assessment Officer

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1534-24
STYLE OF CAUSE:	DAVID CHARLES PENNER and HIS MAJESTY THE KING

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

REASONS FOR ASSESSMENT BY:	KARINE TURGEON, Assessment Officer
DATED:	AUGUST 21, 2025

WRITTEN MATERIALS BY:

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