Federal Court of Appeal | Cour d'appel fédérale

Date: 20220127

Docket: A-181-18

Citation: 2020 FCA 152

Present: **GARNET MORGAN, Assessment Officer**

BETWEEN:

ELIZABETH BERNARD

Applicant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

Assessment of costs without appearance of the parties.
Certificate of Assessment delivered at Toronto, Ontario, on October 2, 2020.

AMENDED REASONS FOR ASSESSMENT BY: GARNET MORGAN, Assessment Officer

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AMENDED REASONS FOR ASSESSMENT

GARNET MORGAN, Assessment Officer

[1] This is an assessment of costs pursuant to an Order of the Federal Court of Appeal dated September 20, 2019, wherein the Applicant's application for judicial review was "dismissed with costs in accordance with Column V of Tariff B."

[2] On January 8, 2020, the Respondent filed a Bill of Costs.

[3] On January 14, 2020, the following assessment of costs direction was issued to the parties:

> 1. The Respondent shall serve and file its Affidavit of Disbursements and Written Representations in support of the Bill of Costs by Friday, February 14, 2020;
>
> 2. The Applicant may serve and file any reply materials by Friday, March 13, 2020;
>
> 3. The Respondent may serve and file any rebuttal materials by Monday, March 30, 2020.

[4] Subsequent to the direction dated January 14, 2020, the Respondent's costs material was filed on January 22, 2020 and the Applicant's reply material was filed on March 13, 2020. Further to the Federal Court of Appeal's suspension of the document filing deadlines on March 16, 2020, due to the Covid-19 pandemic, the Respondent's rebuttal material was filed on June 17, 2020.

[5] A review of the court record indicates that no further material, other than a letter from Applicant dated July 27, 2020 was received by the court registry and no request was made by either party to provide additional material after the filing of the Respondent's rebuttal material on June 17, 2020.

I. Assessable Services

[6] The Respondent has claimed $4,915.50 in assessable services.

A. *Item 2 - Preparation and filing of all defences, replies, counterclaims or respondents' records and materials.*

[7] The Respondent has requested 11 units for Item 2. The Respondent's claim is for the preparation and filing of the Respondent's Record.

[8] At paragraphs 5 and 6 of the Respondent's costs submissions, it is submitted:

> 5. The Notice of Application in the current Application was issued June 21, 2018 and was served upon the Respondent on July 4, 2018. From that time until May 14, 2019, when the Applicant was declared a vexatious litigant at this Court, the Respondent had undertaken a significant amount of work on the matter.
>
> O'Brien Affidavit; *Bernard v. Canada (Attorney General)*, 2019 FCA 144.
>
> 6. The among other things, the Respondent had filed its Record with the Court, including its Memorandum of Fact and Law, which was 68 paragraphs in length, and Book of Authorities, on January 14, 2019. The Respondent was, as such, substantially prepared to proceed to hearing on the matter, which was in the process of being scheduled with the Court's Registrar.
>
> Memorandum of Fact and Law, O'Brien Affidavit, Exhibit A.

[9] At paragraph 7 of the Applicant's reply submissions, it is submitted:

> 7. The Court's award of Column V costs already reflects its findings in relation to the factor in Rule 400(3)(k). The Respondent cannot claim double indemnity by inflating the range. The Court could have awarded costs at the upper range, but it did not. In this case, the mid-point of the range, i.e. 10 units, is entirely appropriate and consistent with the Court's order.

[10] At paragraph 7 of the Respondent's rebuttal submissions, it is submitted:

> 7. Contrary to the Applicant's submissions at paragraph 7, the Respondent does not seek a double indemnity with respect to Item 2. It seeks 1 unit more than what has been assessed as reasonable by the Applicant, in light of the amount of work performed.

[11] At paragraph 16 of the Court's Reasons for Order dated September 20, 2019, the Court stated:

> 16. Therefore, I would quash this application with costs. The respondent asks for costs at the level of Column V of Tariff B. I would grant costs on that basis.

[12] Further to my review of the parties' costs material and the Court's Reasons for Order dated September 20, 2019, I did not find that the Court limited the range of units which could be claimed by the Respondent under Column V in Tariff B. Item 2 under Column V has a range of units from 7 to 13 units, with the mid-range of units being 9, 10 and 11 units. Upon my review of the parties' costs material in conjunction with the court record, I find the Respondent's claim of 11 units for Item 2 to be reasonable and it is allowed as claimed.

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

[13] The Respondent has requested 5 units for Item 5. The Respondent's claim for costs is related to the Court's direction dated July 22, 2019, requesting that the parties provide written submissions prior to the scheduling of the judicial review hearing, regarding the Court's "authority under the Rules or its plenary jurisdiction to control its own processes." The Court's direction on this file was related to the Court's Order dated May 14, 2019, for file A-264-18, wherein the Applicant was deemed to be a vexatious litigant.

[14] At paragraphs 10, 11 and 12 of the Applicant's costs submissions, it is submitted:

> 10. On July 22, 2019, the Court issued a direction for submissions.[1] A direction is not a motion, and there is no provision in the Tariff to award costs in relation to a direction from the Court.

> 11. If the Court intended to award costs in relation to its direction, it could have explicitly done so in its order of September 20, 2019, pursuant to Rule 400(4).
>
> 12. An assessment officer does not have jurisdiction to award costs that fall outside of the Tariff.

[15] At paragraph 9 of the Respondent's rebuttal submissions, it is submitted:

> 9. The Applicant employs an overly strict and narrow reading of costs that may be addressed pursuant to Item 5. While there may be a formal difference between a direction initiated by the Court and a motion initiated by a party, that distinction is simply a formality in this case, where the matters contemplated by each mechanism and the amount of work required were the same. Indeed, pursuant to s. 221(1)(c) of the *Rules*, the Respondent could have initiated the same process to have the application dismissed by way of a motion, because it was vexatious, but the Court preferred to proceed by way of a direction.

[16] At paragraphs 12 and 13 of the Respondent's rebuttal submissions, it is submitted:

> 12. In making the current determination, it is also relevant that the Court's cost award at Column V of Tariff B was granted in direct response to the Parties' submissions on the Direction. A result which provides no costs with respect to the Direction would frustrate the context and objective of that award.
>
> 13. In the alternative, the Assessment Officer may allow costs for the work performed in relation to the Direction of Noel C.J. pursuant to another item at Tariff B, such as Item 27, "Such other services as may be allowed by the assessment officer or ordered by the Court."

[17] In *Mitchell v. Canada*, 2003 FCA 386, at paragraph 12, the Court states:

> 12. The Appellants are correct that the wording for item 27 does not generally fetter discretion. However, that discretion, as for other items in bills of costs, is still fettered by reasonable necessity and the limits of an award of costs. 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. Item 27 addresses the

> professional services of counsel not already addressed by items 1 - 26. Its wording, "such other services", is clearly plural and I understand that to permit assessment of discrete services, as opposed to a restriction to a bundling of several services, not already addressed by items 1 - 26, within a single item 27 claim. That is, item 27 may be claimed more than once.

[18] Further to the Applicant's submissions, my review of the court record did not identify any motions which had a corresponding Order granting costs to either party. This being said, the record does show that the Court requested written submissions from the parties on July 22, 2019, which was outside of the usual course of events in a court proceeding. I find the Court's request for written submissions from the parties to be akin to Item 15 in Tariff B, which is for the "preparation and filing of written argument, where requested or permitted by the Court." Item 15 is related to proceedings in the Federal Court, and also applies to judicial review proceedings in the Federal Court of Appeal. Utilizing the *Mitchell* decision as a guideline and further to the Respondent's alternative Item suggestion, I have determined that assessing the Respondent's claim under Item 15 is an acceptable alternative to Item 5 and will allow for a positive application of the costs provisions instead of a narrower one. The range of units for Item 15 under Column V is 5 to 11 units. Taking into consideration the parties' costs material which was reviewed in conjunction with the court record, I have determined that the services performed by the Respondent were necessary as it was requested by the Court, and that it is reasonable to allow 5 units under Item 15 for the Respondent's claims for costs which were initially submitted under Item 5.

C. *Item 13(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.*

[19] The Respondent has requested 4 units for Item 13(a) for pre-hearing work done for the judicial review hearing.

[20] At paragraph 9(c) of the Respondent's costs submissions, it is submitted:

> 9(c) We propose that Item 13 (Counsel fee) be assessed at 4 units, the low-end of the range of 4-11, in light of the work undertaken corresponding with the Applicant and the Court on various procedural matters.

[21] At paragraph 16 of the Applicant's costs submissions, it is submitted:

> 16. The precise language in Item 13, i.e. "the hearing", requires that a hearing be set. On a contextual interpretation, Item 13 is clearly intended to cover steps taken in preparation for the hearing, such as the issuance of subpoenas, etc. which cannot take place until a hearing date has been set. The phrase "whether or not the trial or hearing proceeds" is intended to allow costs where there is a settlement between the time the trial/hearing is set and the trial/hearing date. It is not intended to apply to maters that do not advance as far as the setting of a hearing.

[22] At paragraphs 15 and 16 of the Respondent's rebuttal submissions, it is submitted:

> 15. The Respondent received the Applicant's Requisition for Hearing on or around February 12, 2018, [sic 2019] the Respondent then wrote to the Court's Administrator on February 21, 2018 [sic 2019] to confirm its availability for a hearing. The Respondent also corresponded with the Court and the Applicant with respect to other preliminary matters. In addition, by virtue of the work that the Respondent completed in conjunction with preparing its Record, it was substantially prepared to proceed to a hearing by the time it received the Direction of Noel C.J. Though the hearing did not ultimately proceed, which is an eventuality contemplated by Item 13, the Respondent incurred unavoidable costs in preparing for a hearing that was requested by the Applicant.
>
> > Applicant's Requisition for Hearing, Supplementary O'Brien Affidavit, Exhibit C; Respondent's Correspondence to Court Administrator, Supplementary O'Brien Affidavit, Exhibit D.
>
> 16. The Respondent claims the low end of the range of Column V in respect of Item 13 in recognition of the fact that had the hearing date been scheduled, further work would have had to have been completed in order to prepare for the hearing, which was avoided.

[23] Further to my review of parties' costs material, my review of the court record does reflect that this particular file was nearing the final hearing stage, as the Applicant's Requisition for Hearing was filed on February 12, 2019. After the service and filing of the Applicant's Requisition for Hearing, the Respondent was in communication with the Court in February 2019 regarding potential hearing dates and both parties were in communication with the Court in July 2019, regarding the potential scheduling of the hearing for this file. Both of these communications with the Court could be perceived as an indication that a hearing could be scheduled imminently. Though the Applicant has correctly identified that no hearing was actually scheduled for this particular file, the wording of Item 13(a) in Tariff B, does not explicitly state that a hearing must be scheduled in order for Item 13(a) to be claimed by a party. Item 13 in Tariff B of the *FCR* states the following:

> 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; and
>
> (b) preparation for trial or hearing, per day in Court after the first day.

[24] Further to the concerns raised in the Applicant's submissions though, there should be some parameters associated with assessing Item 13(a), especially in a situation where no hearing was actually scheduled and a party submits a claim under Item 13(a) for pre-hearing work. After a Requisition for Hearing has been filed and based on a party's submissions and evidence of the pre-hearing work performed on a particular file, it may support an allowance of costs by an Assessment Officer. This being said, my review of the Respondent's costs material did not fully illuminate the pre-hearing work that was done by the Respondent, which was not already

claimed under Item 2 and Item 5 (assessed under Item 27). More detailed submissions and evidence, such as an itemized listing of counsel's billable hours with the specific tasks performed would have been helpful in assessing Item 13(a).

[25] In *Merck & Co. v Apotex Inc.* 2008 FCA 371, at paragraph 14, the Court states:

> [14] In view of the 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. Like officers in other recent cases, the Assessment Officer in this complex case, involving very large sums of money, gave full reasons on the basis of a careful consideration of the evidence before him and the general principles of the applicable law.

[26] Utilizing the *Merck* decision and the aforementioned jurisprudence in *Mitchell* as guidelines, I find that the Respondent is entitled to some indemnification for the services related to the communication with the Court in February 2019, regarding the Applicant's Requisition for Hearing. As there is no specific Item in Tariff B for Requisitions for Hearing for judicial review proceedings, I will use Item 20 in Tariff B of the *FCR*, which is for work related to Requisitions for Hearing for appeals in the Federal Court of Appeal, as a guideline for assessing the Respondent's costs for this particular service. Taking into consideration my review of the parties' costs material in conjunction with the court record; Tariff B of the *FCR* and the aforementioned jurisprudence, I have determined that the services performed by the Respondent in relation to the Requisition for Hearing was necessary as it was requested by the Court and I will allow 1 unit under Item 27, for the Respondent's claim for costs which was initially submitted under Item 13(a).

D. *Item 26 - Assessment of costs.*

[27] The Respondent has requested 7 units for Item 26 for the assessment of costs.

[28] At paragraph 9(d) of the Respondent's costs submissions, it is submitted:

> 9(d). We propose Item 26 (Assessment of costs) be assessed at 7 units, the mid-range of a possible 5-10 units at Column V, in light of the present submissions and the unsuccessful attempt to resolve the matter directly with the Applicant.

[29] At paragraphs 19, 20 and 21 of the Applicant's costs submissions, it is submitted:

> 19. This assessment of costs is entirely unnecessary. I already paid the Respondent a very reasonable settlement, but they returned my bank draft. As a result, rule 400(3)(i) applies to this assessment of costs.
>
> 20. Moreover, Rule 400(3)(e) allows the assessment officer to consider my written offer to settle, dated November 19, 2019 (copy attached).
>
> 21. Finally, Rule 408(3) allows an assessment officer to refuse to allow the costs of an assessment to either party. Given my reasonable offer to settle, with full payment provided, no costs should be awarded under Item 26.

[30] At paragraph 4 of the Respondent's rebuttal submissions, it is submitted:

> 4. In her submissions, the Applicant does not advise the Court that the Respondent sent her a counter-proposal with respect to a settlement on costs. The Respondent on November 21, 2019 responded to the Applicant's November 19 offer and proposed a settlement of costs in the amount of $3,500.00. The Respondent's counter-offer was entirely reasonable in the circumstance. The offer was $2,331.93 lower than is currently being sought pursuant to the Respondent's Bill of Costs. The Applicant's refusal to respond to the Respondent's counter-offer resulted in the current submissions.

[31] At paragraph 17 of the Respondent's rebuttal submissions, it is submitted:

> 17. As stated at paragraph 4, above, the Respondent, too, made an offer to settle for an amount that was significantly less than what the Respondent has assessed in its Bill of Costs, even excluding the amount pursuant to Item 26. Had the Applicant accepted the Respondent's offer, there would have been no need for

> the current submissions. However, the Applicant did not respond to the Respondent's offer.
>
> Supplementary O'Brien Affidavit.

[32] At Exhibit A of the Affidavit of Amy O'Brien, sworn on March 31, 2020, is a copy of a letter dated November 21, 2019, from the Respondent to the Applicant, acknowledging receipt of the Applicant's cheque for $2,449.00, with a counter-offer of $3,500.00. The letter requested that the Applicant respond by November 29, 2019.

[33] Further to the Respondent's rebuttal costs material, the Applicant submitted a letter dated July 27, 2020 to the court registry, wherein the Applicant states that the Respondent has provided "a false and misleading statement" that the Applicant did not respond to the Respondent's counter-offer. Attached to the Applicant's letter is a copy of an e-mail exchange dated November 29, 2019, between the Applicant and an employee (J. Bell) at Goldblatt Partners regarding the Respondent's counter-offer, wherein the Applicant states "[a]s a matter of principle, I must decline. I have already paid you what the Court ordered me to pay."

[34] Rules 419 to 422 in Part 11 of the *FCR* specify the requirements for offers to settle in relation to the issue of costs, which are the factors that an Assessment Officer can consider under Rule 400(3)(e) of the *FCR*. Rules 419 to 422 only refer to offers to settle which are made prior to the final disposition of a court proceeding. In *Canadian Olympic Assn. v. Olymel, Société en commandite***,** [2000] F.C.J. No. 1725, at paragraph 11, the Court states:

> 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.

[35] Further to the clarification provided in the *Canadian Olympic Assn*. decision, an offer to settle costs which is made by a party after the final disposition of a court proceeding is not a factor that an Assessment Officer can consider under Rule 400(3)(e) of the *FCR*. An attempt to settle costs informally after the final disposition of a court proceeding, without the involvement of an Assessment Officer, is a step that parties may consider but there is no imperative requirement in the *FCR* that this step must be taken or that any offer made to settle costs must be accepted by the parties involved. In this particular case, once the parties could not agree on the offers to settle costs, it was open to the Respondent to file a Bill of Costs requesting that an assessment of costs be conducted by an Assessment Officer.

[36] Upon my review of the parties' costs material, which includes taking note that the Applicant did respond to the Respondent's counter-offer on November 29, 2019; and Part 11 of the *FCR*, I have determined that the Respondent's request for an assessment of costs was submitted in accordance with the *FCR*. As this is a fairly straight forward assessment of costs, I have determined that 6 units is a reasonable amount to allow for Item 26.

[37] A total of 23 units have been allowed for the Respondent's assessable services for at total amount of $3,898.50, which includes HST.

II. Disbursements

[38] The Respondent has claimed $916.43 in disbursements.

[39] Further to my review of the parties' costs material regarding the Respondent's claims for disbursements, it appears that there is one contentious disbursement, which is related to the Respondent's claims for legal research for $57.00. This particular disbursement will be reviewed in detail later in these reasons.

A. *Photocopies and Postage/Priority Post*

[40] Upon my review of the parties cost material in conjunction with the court record, I find the Respondent's claims for photocopies for $738.20 and for postage/priority post for $15.80 to be reasonable and they will be allowed as claimed.

B. *Legal Research*

[41] As noted earlier in these Reasons, the Respondent's claim for legal research for $57.00, is disputed by the Applicant and will be reviewed in detailed. At paragraph 24 of the Applicant's costs submissions, it is submitted:

> 24. Legal research is not listed as a separate item; it is generally subsumed in the block tariff, i.e. items 1-26. Moreover, the dates on the documentation provided suggest that any legal research related to the Court's July 22, 2019 direction. As noted above, responding to a direction from the Court is not an assessible [sic] amount under the Tariff. If the Court intended to allow costs in relation to its direction, it would/could have done so pursuant to Rule 400(4).

[42] At paragraphs 18 and 19 of the Respondent's rebuttal submissions, it is submitted:

> 18. Legal research is frequently considered a disbursement by the Federal Court. The Federal Court's position was summarized in *Truehope Nutritional Support Limited v. Canada (AG)*, where Assessment Officer Bruce Preston wrote, "I consider disbursements for electronic legal research similar to disbursements for photocopying."
>
> *Truehope Nutritional Support Limited v. Canada (Attorney General)*, 2013 FC 1153 at para. 124.
>
> 19. The Court does require evidence that the legal research in question was relevant. Here, contrary to what the Applicant has suggested, this legal research was conducted while preparing the Respondent's Memorandum of Fact and Law, in January 2019. Specifically, the relatively modest disbursement of $57.00 related to research on some older Federal Court cases regarding cost sanctions that were not readily available on CanLII.
>
> Supplementary O'Brien Affidavit.

[43] At paragraph 8 of the Supplementary Affidavit of Amy O'Brien, sworn on March 31, 2020, it states:

> 8. I am informed by Gabriel Hoogers, who is an Associate for Goldblatt Partners and was its articling student in January 2019, and do verily believe, that the disbursements for legal research in January 2019 were with respect to the Respondent's cost submissions in its Memorandum of Fact and Law and that he employed Lexis because some of the relevant cases were not recent, and were not readily available on CanLII.

[44] In *Condo v. Canada*, 2006 FCA 286, at paragraph 9, the Court states:

> 9. My decision in Englander v. Telus Communications Inc., [2004] F.C.J. No. 440 (A.O.) confirms that I routinely allow costs for online computer research. However, that process includes consideration of whether all, none or only part of the research was reasonably necessary or irrelevant, i.e. some of the searches may extract cautionary or secondary authorities, keeping in mind the professional obligation of counsel both to the client for diligent representation and to the Court for as much assistance as reasonably possible on all aspects of the law potentially affecting final adjudication on the substantive issues of the litigation.

[45] Further to my review of the parties' costs material in conjunction with the court record and the aforementioned jurisprudence in *Truehope* and *Condo*, I find that it is permissible for a party to submit claims for disbursements related to legal research. While the time and effort spent by counsel to conduct legal research may be claimed under various Items in Tariff B of the *FCR*, as submitted by the Applicant; third party costs associated with accessing various research tools may be eligible for reimbursement as a disbursement. I find that the Respondent's explanation with regards to the purpose of the legal research is satisfactory and that the amount claimed is reasonable. Therefore, the disbursement for legal research for $57.00 is allowed as claimed.

[46] The total amount allowed for the Respondent's disbursements is $916.43, which includes HST.

III. Conclusion

[47] For the above reasons, the Respondent's Bill of Costs has been assessed and allowed in the amount of $4,814.93. A Certificate of Assessment will be issued for $4,814.93, payable by the Applicant to the Respondent.

"Garnet Morgan"
Assessment Officer

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-181-18
STYLE OF CAUSE:	ELIZABETH BERNARD v. PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

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

REASONS FOR ASSESSMENT BY:	GARNET MORGAN, Assessment Officer
DATED:	OCTOBER 2, 2020
AMENDED:	JANUARY 27, 2022

WRITTEN SUBMISSIONS BY:

Elizabeth Bernard	FOR THE APPLICANT (SELF-REPRESENTED)
Peter Engelmann Colleen Bauman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

GOLDBLATT PARTNERS LLP Ottawa, Ontario	FOR THE RESPONDENT