Federal Court of Appeal  Cour d'appel fédérale

Date: 20230511

Docket: A-155-19

Citation: 2023 FCA 99

Present: **GARNET MORGAN, Assessment Officer**

BETWEEN:

RUMI VESUNA

Appellant

and

HIS MAJESTY THE KING

Respondent

Assessment of costs without appearance of the parties.
Certificate of Assessment delivered at Toronto, Ontario, on May 11, 2023.

REASONS FOR ASSESSMENT BY: GARNET MORGAN, Assessment Officer

Federal Court of Appeal  Cour d'appel fédérale

Date: 20230511

Docket: A-155-19

Citation: 2023 FCA 99

Present: **GARNET MORGAN, Assessment Officer**

BETWEEN:

RUMI VESUNA

Appellant

and

HIS MAJESTY THE KING

Respondent

REASONS FOR ASSESSMENT

GARNET MORGAN, Assessment Officer

I. Introduction

[1] This is an assessment of costs pursuant to a Judgment, and Reasons for Judgment of the Court dated March 31, 2022, wherein the Appellant's appeal proceeding was "dismissed with costs."

[2] This assessment of costs is also pursuant to an Order dated July 10, 2019, regarding the Appellant's motion in writing seeking an order determining the content of the appeal book, which was "dismissed with costs."

[3] Further to the Court's decisions 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

[4] 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 September 27, 2022, the Respondent filed a Bill of Costs, an Affidavit of Disbursements of Carolina Japuncic, sworn on September 8, 2022 (Japuncic Affidavit #1), and Written Submissions as to Costs (Respondent's Submissions);

b) On November 17, 2022, the Appellant filed an Affidavit of Rumi Vesuna, sworn on November 4, 2022, and Written Representations on Costs of the Appellant (Appellant's Representations);

c) On November 17, 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) On December 8, 2022, the Respondent filed a costs record containing an Affidavit of Carolina Japuncic, sworn on December 8, 2022 (Japuncic Affidavit #2), and Respondent's Reply Written Submissions as to Costs (Respondent's Reply).

III. Assessable Services

[5] The Respondent has claimed 14 units for assessable services totalling $2,240.00.

A. *Item 19 – Memorandum of fact and law; and Item 21 – Counsel fee: (a) on a motion, including preparation, service and written representations or memorandum of fact and law*.

[6] 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 19 and 21(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 and align with *Allergan Inc. v. Sandoz Canada Inc.*, 2021 FC 186 [*Allergan*], 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."

[7] 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 for the appeal proceeding, and the motion to determine the contents of the appeal book; 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 19 and 21(a). Therefore, I find it reasonable to

allow the claims for Items 19 and 21(a), as requested in the Respondent's Bill of Costs. Specifically, 5 units are allowed for Item 19, and 2 units are allowed for Item 21(a).

[8] The Respondent's remaining claims for Items 20, 22(a), 25, and 26 have some issues to look into and will be assessed in more detail below.

B. *Item 20 – Requisition for hearing.*

[9] The Respondent has claimed 1 unit for Item 20. In response, the Appellant submitted that the Respondent has claimed costs for the Requisition for Hearing, although it was prepared by the Appellant (Appellant's Representations at para. 6). In reply, the Respondent submitted that the costs related to a Requisition for Hearing "are not limited to the party who prepares and files the document" and cited *Advance Magazine Publishers Inc. v. Farleyco Marketing Inc.*, 2010 FCA 143 [*Advance*], at paragraph 15, in support of this argument (Respondent's Reply at para. 3).

[10] My review of the court record confirmed that the Appellant filed the Requisition for Hearing on December 20, 2019. This being noted, I find that a responding party could be entitled to claim costs related to the preparation of a Requisition for Hearing for the back-and-forth communication conducted between parties to provide dates of availability and other hearing details. My review of the Requisition for Hearing showed that there were dates of availability and signatures for both parties within the document, which indicates that there was some communication between the parties. Utilizing the guidance provided in the *Advance* decision, I find that the Respondent is entitled to some indemnification for the services related to the

communication with the Appellant for the preparation of the Requisition for Hearing. Therefore, I have determined that it is reasonable to allow 1 unit for Item 20 to the Respondent.

C. *Item 22 - Counsel fee on hearing of appeal: (a) to first counsel, per hour.*

[11] The Respondent has claimed 2 units (2 units multiplied by 1 hr) for Item 22(a) for first counsel's attendance at the appeal hearing "held on March 31, 2022, in Calgary, Alberta for a duration of approximately one hour" (Respondent's Submissions at para. 5). In response, the Appellant submitted that the duration of the appeal hearing was "approximately 30 minutes" and that "[t]he Respondent did not make oral submission in Court" (Appellant's Representations at para. 9). The Respondent did not provide any reply submissions.

[12] 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 appeal hearing documented as being heard from 2:07 p.m. to 4:01 p.m., which is a duration of 1 hour and 54 minutes. In *Apotex Inc. v. Merck & Co. Inc.*, 2002 FCA 478 [*Apotex*], at paragraph 4, the Assessment Officer expanded on the usefulness of abstracts of hearing in assessing claims for hearing attendance:

> [4] […] An appearance at a hearing necessarily includes some time in the courtroom identifying oneself with the Court Registrar and waiting for the call of the case, none of which is preparation time addressed by other items. Therefore, the abstract of hearing is a useful, but not absolute, guide for attendance at hearing. The record satisfies me that the claim of 8 1/2 hours at 3 units per hour is reasonable for item 22 in these circumstances. […]

[13] In addition, in *Halford v. Seed Hawk Inc*., 2006 FC 422 [*Halford*], at paragraph 211, the Assessment Officer stated the following regarding the usefulness of abstracts of hearing:

> [211] […] I have consistently held that counsel must be in court some time before the scheduled start or resumption times to permit the court registrar to satisfy herself that the hearing is ready to go. I consider that integral to attendance. I compared the court file's abstract of hearing, the Seed Hawk Defendants' asserted hours for item 14, those of the Simplot Defendant, Mr. Halford's evidence and information in the trial transcript.

[14] Utilizing the guidance provided in the *Apotex* and *Halford* decisions, I find that the Respondent's claim of 1 hour is supported by the Court Registrar's Abstract of Hearing dated March 31, 2022, which notes that the Court's reasons were delivered from the bench. Under Column III of Tariff B, Item 22(a) has a range of units of 2 to 3 units, and I find that the Respondent's selection of 2 units is reasonable, and aligns with *Allergan* (above). Therefore, 2 units are allowed for Item 22(a), as requested in the Respondent's Bill of Costs.

D. *Item 25 – Services after judgment not otherwise specified.*

[15] The Respondent has claimed 1 unit for Item 25. In response, the Appellant submitted that the Respondent has unreasonably claimed costs for Item 25 (Appellant's Representations at para. 8). The Respondent did not provide any reply submissions. In *Halford* (above), at paragraph 131, the Assessment Officer stated the following regarding services provided after judgment:

> 131. […] I routinely allow item 25, notwithstanding the absence of evidence, unless I think that responsible counsel did not, in fact, review the judgment and explain associated implications to the client. […]

[16] Utilizing the guidance provided in the *Halford* decision, I have determined that although there is an absence of evidence from the Respondent specifically highlighting the post-hearing services that were performed, it is still reasonable to allow 1 unit for Item 25. As stated in the *Halford* decision, my allowance of Item 25 recognizes the Respondent's counsel's review of the

final decision and any related client communication conducted. Therefore, 1 unit is allowed for Item 25.

E. *Item 26 – Assessment of costs.*

[17] The Respondent has claimed 3 units for Item 26. In response, the Appellant submitted that the parties had verbally agreed on an amount of $1,000.00 for the Respondent's costs, and that subsequent to this agreement the Respondent prepared two Bill of Costs with higher amounts ($1,898.94 and $2,378.94). Further to the parties' agreement, the Appellant has requested that the Respondent's costs be assessed at $1,000.00 (Appellant's Representations at paras. 10 - 11 and 13; Vesuna Affidavit at paras. 2 - 3, and exhibit A). In reply, the Respondent submitted that no offer to settle costs was made before May 10, 2022, and that the Appellant's affidavit (at exhibit A) only provided a partial excerpt of the e-mail correspondence between the parties regarding the settling of costs. The Respondent provided a complete copy of the parties' e-mail correspondence showing that the parties did not reach an agreement on costs (Respondent's Reply at paras. 1 - 2; Japuncic Affidavit #2 at exhibit A).

[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 an attempt to settle costs informally after a court proceeding has concluded 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. Once the parties could not finalize a settlement 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 (Japuncic Affidavit #1 at exhibits B and C; Japuncic Affidavit #2 at exhibit A). 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 19 and 21(a) that were expanded upon earlier in these Reasons (at para. 7). 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 3 units for Item 26.

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

[21] A total of 14 units have been allowed for the Respondent's assessable services totalling $2,240.00.

IV. Disbursements

A. *In-house photocopying and couriers.*

[22] The Respondent has claimed $138.94 for in-house photocopying ($81.25) and couriers ($57.69) for the Respondent's responding motion material and Memorandum of Fact and Law (Japuncic Affidavit #1 at paras. 5 - 6, and exhibit D). In response, the Appellant submitted that the Respondent should not have claimed costs for photocopying and couriers because documents were served electronically, or should have been served electronically, as per the parties' agreement (Appellant's Representations at para. 12; Vesuna Affidavit at para. 4). In response, the Respondent submitted that most of the courier disbursements were for the delivery of documents to the Federal Court of Appeal. Concerning the couriering of documents to the Appellant, the Respondent submitted that the disbursements are for the Notice of Appearance filed prior to the parties' electronic service agreement; and the Book of Authorities, which was printed and tabbed for the Appellant's "ease of use at the in person hearing" on March 31, 2022 (Respondent's Reply at paras. 4 - 5; Japuncic Affidavit #2 at para. 4).

[23] Concerning the service of documents, my review of Rules 139 and 141 of the FCR, which provide the requirements for the electronic service of documents did not reveal that there is an imperative requirement that all documents have to be served electronically if a party has filed a consent pursuant to Form 141A of the FCR. The electronic service of documents is an additional option that a party may choose but they are not compelled to do so by the FCR. An exception would be a Court direction or decision instructing a party to serve their documents electronically. My review of the court record did not reveal that the Court rendered such a

direction or decision for this particular file, therefore I find that it was open to the Respondent to choose the manner by which documents would be served on the Appellant, in accordance with the FCR.

[24] I have reviewed the courier disbursements and I was not able to reconcile the postings dated December 9, 2019, with any specific documents on the court record (Japuncic Affidavit #1 at exhibit D). In the absence of any detailed submissions from the Respondent advising which documents these postings pertain to, I find that these disbursements must be disallowed for a total of $11.50. I was able to reconcile the remaining courier disbursements, which I have determined were necessary and reasonable. Therefore, they are allowed as claimed, totalling $46.19.

[25] Concerning the Respondent's disbursements for in-house photocopying, there were no supporting invoices provided pursuant to subsection 1(4) of Tariff B of the FCR. In *Inverhuron & District Ratepayers Assn. v Canada (Minister of Environment)*, 2001 FCT 410 [*Inverhuron*], at paragraphs 60, 61 and 63, the Assessment Officer stated the following regarding claims for photocopies:

> [60] The Respondents submitted claims for in-house photocopies. The evidence produced in support of these claims is thin. It does not provide any information as to how they arrived at the amount of $0.25/page. At the hearing, it was suggested that this was the "normal standard for the Court". This rate has generally been accepted by Federal Court assessment officers, but I am not prepared to concede that this is what it really costs law firms for in-house photocopies.
>
> [61] The following excerpt from Justice Teitelbaum's decision in *Diversified Products Corp. et al* v. *Tye-Sil Corp.*, 34 C.P.R. (3d) 267 supports my thinking on the actual cost for photocopies;

> The Item of photocopies is an allowable disbursement only if it is essential to the conduct of the action. Therefore, this is not intended to reimburse a party for the actual out-of-pocket cost of the photocopy. The 25 charge by the office of plaintiffs' counsel is an arbitrary charge and does not reflect the actual cost of the photocopy. A law office is not in the business of making a profit on its photocopy equipment. It must charge the actual cost and the party claiming such disbursements has the burden to satisfy the taxing officer as to the actual cost of the essential photocopies.
>
> […]
>
> [63] As said, $0.25/page will not be allowed. No evidence was provided by the parties seeking that amount that justify it. Real costs were indeed incurred and in considering the figures mentioned above, a lump sum of $1500 will be allowed for each Respondent to cover all disbursements related to photocopies in this file.

[26] Utilizing the guidance provided in the *Inverhuron* decision, it indicates that the onus was on the Respondent to provide details related to the actual cost of the in-house photocopies. I reviewed the court record to try to determine a reasonable quantum of costs to allow, taking into consideration the size and number of documents that needed to be prepared for the court registry and the parties, and if any of the documents were electronically served on a party or filed with the court registry. Further to my review, I have determined that it is reasonable to allow 4 copies (3 for the court registry and 1 for the Respondent) for the Respondent's Motion Record, and 5 copies (5 for the court registry) for the Respondent's Memorandum of Fact and Law for a cumulative amount of $44.00.

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

[27] The total amount allowed for the Respondent's disbursements is $90.19.

V. Conclusion

[28] For the above reasons, the Respondent's Bill of Costs is assessed and allowed in the total amount of $2,330.19, payable by the Appellant, Rumi Vesuna, to the Respondent, His Majesty The King. A Certificate of Assessment will also be issued.

"Garnet Morgan"
Assessment Officer

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-155-19
STYLE OF CAUSE:	RUMI VESUNA v. HIS MAJESTY THE KING

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

REASONS FOR ASSESSMENT BY:	GARNET MORGAN, Assessment Officer
DATED:	MAY 11, 2023

WRITTEN SUBMISSIONS BY:

Rumi Vesuna	FOR THE APPELLANT (SELF-REPRESENTED)
Courtney Davidson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Deputy Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT