Federal Court of Appeal | Cour d'appel fédérale

Date: 20240918

Docket: A-50-21

Citation: 2024 FCA 146

Present: **AUDREY BLANCHET, Assessment Officer**

BETWEEN:

HESAMEDDIN ABBASPOUR TAZEHKAND

Appellant

and

BANK OF CANADA

Respondent

Assessment of costs without appearance of the parties.
Certificate of Assessment delivered at Ottawa, Ontario, on September 18, 2024.

REASONS FOR ASSESSMENT BY: AUDREY BLANCHET, Assessment Officer

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REASONS FOR ASSESSMENT

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I. Overview

[1] By way of order dated March 12, 2024, [Order] dismissing the Appellant's motion for an extension of time to request leave to appeal [Motion], costs were awarded by the Court in favour of the Respondent.

[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 April 10, 2024, the Respondent filed an assessment request along with a Bill of Costs, which initiated the assessment of costs (Rule 406). In the absence of any indication in the Order awarding costs, costs shall be taxed in accordance with column III of Tariff B (Rule 407).

[3] On April 12, 2024, the parties received a direction concerning the conduct of the assessment of costs in writing and the timetable for filling their costs submissions. The Respondent filed Written Submissions and an Affidavit of Noel Platte on May 10, 2024, and on June 7, 2024, the Appellant filed their Written Response. Reply submissions were filed on June 28, 2024, by the Respondent.

[4] At this time, the timeframes prescribed by the direction have elapsed. Before proceeding with the assessment of costs, issues specific to this file must be addressed.

II. Preliminary issues

A. Should the costs in file A-50-21 be deferred and assessed jointly with file A-118-21 (consolidated with file A-202-21)?

[5] The Respondent requests that the amounts claimed in its Bill of Costs be allowed in one half attributable to Court file A-50-21, which represents $1,967.01 inclusive of disbursements and HST. The other half of costs was intended to be assessed in file A-118-21 (consolidated with A-202-21), for which the assessment of costs was deemed premature (Reasons for Assessment dated April 19, 2024).

[6] The Appellant argues that the assessment of costs in files A-50-21 and A-118-21 (consolidated with A-202-21) should be considered as inseparable due to the filing of a single Bill of Costs, and therefore, the assessment of costs herein should be delayed in order to align with file A-118-21(consolidated with A-202-21).

[7] While I agree that the filing of a single Bill of Costs for two separate awards of costs from two separate files is unusual, I note that the files themselves have proceeded in an unusual manner from the outset. As stated by the Respondent: “the Appellant conjoined these two files within a single Motion. […] [This] manner of proceeding necessitated a holistic response” (Respondent’s Written Reply Submissions, paras. 2-3). I am of the same opinion.

[8] With regards to the deferral of this assessment of costs, I agree with the Respondent’s argument that its entitlement to costs should not be delayed because the Appellant combined multiple files in a single Motion. First, I note that the Court awarded costs incurred on the Motion to the Respondent with respect to file A-50-21. Second, the cause of action in this file is a separate cause of action from the one in file A-118-21 (consolidated with A-202-21) and is then subject to its own assessment of costs. In the present case, costs of the Motion were awarded after the matter before the Federal Court of Appeal was concluded i.e., after a final determination of the appeal was made. Thus, costs of the Motion in this case ought to be fixed by the Assessment Officer without delay based on the parties’ submissions. I will therefore proceed to assess the costs as if the Respondent's Bill of Costs had been filed exclusively in file A-50-21, while considering that only half of the costs are requested for this file.

B. What is the applicable level of costs under column III of Tariff B?

[9] 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) (Rule 409).

[10] For this purpose, the Respondent submits that "[t]he importance and complexity of issues raised in a proceeding militate in favour of an increased award of costs" and that the Appellant's conduct warrants an increased allowance of costs (Respondent's Written Reply Submissions at paras. 7 and 15). The Appellant objects to the Respondent's allegations, which he describes as mischaracterizations, and requests that minimal costs be awarded.

[11] Despite the arguments put forward by the parties, I note that, since only half the costs are requested for this file, the assessable services claimed in relation with the Motion represent the low end of column III in Tariff B. There is therefore no need to dwell further on the level of costs to be allowed, nor to address in greater detail the respective position of each party. In any event, when determining the number of units to allocate for each of the services to be taxed, I have to consider each item separately, according to its own circumstances, in conjunction with the criteria listed in Rule 400(3) (*Starlight v. Canada*, 2001 FCT 999 at para. 7; *League for Human Rights of B'Nai Brith Canada v. Canada*, 2012 FCA 61 at para. 15).

[12] As for impecuniosity of the Appellant, I will simply state that the Respondent rightly points out that it is neither a criterion listed in Rule 400, nor a relevant factor in the assessment of costs (*Leuthold v. Canadian Broadcasting Corporation*, 2014 FCA 174 at para. 12). In fact, "[i]n

awarding costs, neither the ability to pay nor the difficulty of recovery should be a deciding factor" (*Nike Canada Ltd. v. Jane Doe*, [1999] F.C.J. No. 1018 at para. 11).

III. Assessable services

[13] The Respondent has claimed a total of $1,967.01 ($ 3,361.75) for assessable services, inclusive of HST.

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

[14] The Respondent has claimed 3.5 units (7 units) under Item 5 for the preparation and filing of its Response to Motion served on December 8, 2023. This claim cannot be awarded since Item 5 provides compensation for the preparation and filing of a contested motion, including materials and responses thereto, at the Federal Court. Item 5 is located in section B. *Motions* of the table to Tariff B, whereas the services to be assessed in relation with motions to the Federal Court of Appeal are set out in section F. *Appeals to the Federal Court of Appeal*, under Item 21 (a) and (b).

[15] While the Respondent's assessable services were not claimed under the rightful item under Tariff B, an assessment officer should not penalize a successful party by denying them costs when it is clear that real costs have been incurred (*Carlile v. Canada (Minister of National Revenue M.N.R.)*, [1997] F.C.J. No. 885 [*Carlile*], at para 26). Based on the teachings in *Carlile* and the fact 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" (*Mitchell v. Canada*,

2003 FCA 386 at para 12), I conclude that it is appropriate to allow the Respondent's claim for the preparation and filing of material in response to a motion at the Federal Court of Appeal under Item 21(a) instead of Item 5. Given that the range under 21(a) is 2 to 3 units, I will allow the low end of the range of column III to take into consideration that the Respondent's material was also filed in file A-118-21 (consolidated with A-202-21) and that the workload was distributed between these files (Subsection 400(3)(g)). Thus, 2 units are allowed under Item 21(a).

B. Item 25 - Services after judgment not otherwise specified.

[16] The Respondent has claimed 0.5 unit (1 unit) for the preparation of the Bill of Costs as a service after judgment not otherwise specified in Tariff B. However, the preparation of said Bill of Costs is subsumed within the provision of Item 26, which relates to the assessment of costs process. In fact, the provision of Item 25 does not include compensation for the assessment of costs, but rather covers the review of the judgment and the explanation of its implications to the client (*AstraZeneca AB v. Novopharm Ltd.*, 2004 FCA 258 at para. 10). This claim is therefore disallowed.

C. Item 26 - Assessment of costs.

[17] The Respondent has claimed 3 units (6 units) for this assessment of costs. Considering that this assessment of cost was contested, that written submissions were filed by both parties, and that the claim is minimal, 3 units are allowed as claimed.

D. Item 28 - Services in a province by students-at-law, law clerks or paralegals that are of a nature that the law society of that province authorizes them to render, 50% of the amount that would be calculated for a solicitor.

[18] The Respondent has claimed 3.5 units (7 units) under Item 28. This item provides for "services in a province by students-at-law, law clerks or paralegals that are of a nature that the law society of that province authorizes them to render, 50% of the amount that would be calculated for a solicitor."

[19] The Appellant opposes this claim and points out that the Respondent had not specified in its Bill of Costs which assessable services this claim pertains to. In reply, it is stated that "[t]he Respondent was not required to identify the student-at-law who performed work with respect to Court File No. A-50-21, nor was it required to identify the specific work performed" (Respondent's Written Reply Submissions at para. 8).

[20] Having reviewed the Respondent's Written Submissions and Written Reply Submissions, I note that there is indeed no specification as to which services were rendered, by whom they were rendered nor which services are being claimed. This information would have been useful in substantiating the claim and ensuring there was no double indemnification for costs previously allowed under Tariff B (*Advance Magazine Publishers Inc. v. Farleyco Marketing Inc.*, 2010 FCA 143 at para. 18). As neither the Respondent's submissions nor the court record contain information allowing me to determine which services were performed by a student-at-law, a law clerk or a paralegal in relation with the Motion, the amount claimed is disallowed.

E. Total amount allowed for the Respondents' assessable services.

[21] The Respondent is allowed 5 units for a total of $ 960.50 inclusive of HST.

IV. Disbursements

[22] The Respondent has claimed $286.14 ($572.28) for disbursements incurred in this file. This amount is claimed for the purpose of legal research on Westlaw and is opposed by the Appellant.

[23] I have reviewed the Respondent's costs material in conjunction with the court record, the FCR and any relevant jurisprudence, and have determined that the disbursements claimed in relation with legal research expenses cannot be allowed.

[24] First, 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 and it is established by affidavit […] that the disbursement was made or is payable by the party." The Respondent has filed an Affidavit of Noel Platte on May 10, 2024, attesting to adherence to these procedural requirements, however, relevant jurisprudence also needs to be considered.

[25] 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). It is on this aspect that the Respondent's claim falters. The Respondent's Affidavit and Written Submissions fail to provide adequate evidence of the reasonableness and necessity of the claimed disbursements. Despite a mere mention at paragraph 10 of the Respondent's Written Reply

Submissions that the legal research expenses were not “the law firm’s general overhead”, and that “Westlaw bills users on both a subscription and per-item basis”, no evidence is put forth to support this claim.

[26] It is recognized that legal research is part of the expenses incurred during the course of a litigation and that parties should not have to spend a disproportionate sum of money to prove a disbursement. There is nonetheless a burden of proof to be met with regards to its relevancy (*Janssen Inc. v. Teva Canada Ltd.*, 2012 FC 48 at para. 152). “Courts have found circumstances when online research could be seen as part of overhead and not a necessary disbursement to be passed along on a party and party assessment” (*Truehope Nutritional Support Limited v. Canada* (*Attorney General*), 2013 FC 1153 at para. 124). It all comes down to the submissions or evidence provided to support this claim and what appears in the court record.

[27] After careful review of the file, I note that the Respondent has provided authorities in support of its motion record. The list of authorities contains hyperlinks to either CanLII database or courts Websites. Across all 25 decisions cited by the Respondent, only 2 were not available on free databases. I also note that the legal issues related to the Motion do not concern a particularly complex area of law or the need to have recourse to foreign case law, which is usually outside the scope of a standard subscription.

[28] Having found that the Respondent has not provided evidence concerning the relevance and necessity of the searches and in view of the court file, the Respondent’s disbursements for legal research expenses is disallowed.

V. Conclusion

[29] For the above reasons, the Respondent's costs are assessed and allowed in the total amount of $960.50. A Certificate of Assessment will be issued accordingly, payable by the Appellant to the Respondent.

"Audrey Blanchet"
Assessment Officer

Ottawa, Ontario
September 18, 2024

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-50-21
STYLE OF CAUSE:	HESAMEDDIN ABBASPOUR TAZEHKAND v. BANK OF CANADA

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

REASONS FOR ASSESSMENT BY:	AUDREY BLANCHET, Assessment Officer
DATED:	SEPTEMBER 18, 2024

WRITTEN SUBMISSIONS BY:

Hesameddin Abbaspour Tazehkand	ON HIS OWN BEHALF
Kyle Shimon	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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