Federal Court Cour fédérale

Date: 20211108

Docket: T-2041-14

Citation: 2021 FC 1197

BETWEEN:

CITRICOLA SALTENA S.A.
AND
AGRI MONDO INC.

Plaintiffs

and

MEDITERRANEAN SHIPPING COMPANY S.A.

Defendant

REASONS FOR ASSESSMENT

GARNET MORGAN, Assessment Officer

I. Background

[1] This assessment of costs is further to the Plaintiff (Agri Mondo Inc.) filing a Notice of Discontinuance on May 31, 2018, which discontinued Agri Mondo Inc.'s action against the Defendant.

[2] In addition, this assessment of costs is further to the Plaintiff (Citricola Saltena S.A.) filing a Notice of Discontinuance on June 1, 2018, which discontinued Citricola Saltena S.A.'s action against the Defendant.

[3] Rule 402 and Rule 412 of the *Federal Courts Rules*, SOR/98-106 *(FCR)*, state the following regarding discontinued proceedings and costs:

> 402. Costs of discontinuance or abandonment - Unless otherwise ordered by the Court or agreed by the parties, a party against whom an action, application or appeal has been discontinued or against whom a motion has been abandoned is entitled to costs forthwith, which may be assessed and the payment of which may be enforced as if judgment for the amount of the costs had been given in favour of that party.
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> […]
>
> 412. Costs of discontinued proceeding - The costs of a proceeding that is discontinued may be assessed on the filing of the notice of discontinuance.

[4] Further to my review of Rule 402 and Rule 412, in the absence of a Court decision specifying any particulars regarding the Plaintiffs' discontinued action proceeding, the Defendant's costs will be assessed in accordance with Rule 407 of the *FCR*, which states the following:

> 407. Assessment according to Tariff B - Unless the Court orders otherwise, party-and-party costs shall be assessed in accordance with column III of the table to Tariff B.

[5] On April 14, 2021, the Defendant filed a Bill of Costs, which initiated the Defendant's request for an assessment of costs.

[6] On April 23, 2021, a direction was issued to the parties regarding the conduct and filing of additional documents for the assessment of costs. Subsequent to the issuance of the direction, the court record shows that the parties acknowledged receipt of the direction and that no additional documents were filed by the parties. Therefore, the only document that has been filed by the parties for this assessment of costs is the Defendant's Bill of Costs, filed on April 14, 2021.

II. Preliminary Issue

A. *The absence of additional documents from the parties for the assessment of costs.*

[7] As noted earlier in these Reasons, the Defendant's costs documents consists of the Bill of Costs filed on April 14, 2021. In *Carlile v Canada*, [1997] F.C.J. No. 885, at paragraph 26, the Assessment Officer stated the following regarding having limited documentation for assessments of costs:

> 26. Taxing Officers are often faced with less than exhaustive proof and must be careful, while ensuring that unsuccessful litigants are not burdened with unnecessary or unreasonable costs, to not penalize successful litigants by denial of indemnification when it is apparent that real costs were indeed incurred. This presumes a subjective role for the Taxing Officer in the process of taxation. My Reasons dated November 2, 1994, in T-1422-90: Youssef Hanna Dableh v. Ontario Hydro cite, [1994] F.C.J. No. 1810, at page 4, a series of Reasons for Taxation shaping the approach to taxation of costs. Dableh was appealed but the appeal was dismissed with Reasons by the Associate Chief Justice dated April 7, 1995, [1995] F.C.J. No. 551. I have considered disbursements in these Bills of Costs in a manner consistent with these various decisions. Further, Phipson On Evidence, Fourteenth Edition (London: Sweet & Maxwell, 1990) at page 78, paragraph 4-38 states that the "standard of proof required in civil cases is generally expressed as proof on the balance of probabilities".

> Accordingly, the onset of taxation should not generate a leap upwards to some absolute threshold. If the proof is less than absolute for the full amount claimed and the Taxing Officer, faced with uncontradicted evidence, albeit scanty, that real dollars were indeed expended to drive the litigation, the Taxing Officer has not properly discharged a quasi-judicial function by taxing at zero dollars as the only alternative to the full amount. Litigation such as this does not unfold solely due to the charitable donations of disinterested third persons. On a balance of probabilities, a result of zero dollars at taxation would be absurd.

[8] In addition, the Plaintiffs did not file any responding costs documents. The absence of responding costs documents from the Plaintiffs has left the Defendant's Bill of Costs substantially unopposed. In *Dahl v Canada*, 2007 FC 192, at paragraph 2, the Assessment Officer stated the following regarding the absence of responding representations (submissions) for assessments of costs:

> 2. Effectively, the absence of any relevant representations by the Plaintiff, which could assist me in identifying issues and making a decision, leaves the bill of costs unopposed. My view, often expressed in comparable circumstances, is that the *Federal Courts Rules* do not contemplate a litigant benefiting by an assessment officer stepping away from a position of neutrality to act as the litigant's advocate in challenging given items in a bill of costs. However, the assessment officer cannot certify unlawful items, i.e. those outside the authority of the judgment and the Tariff. I examined each item claimed in the bill of costs and the supporting materials within those parameters. Certain items warrant my intervention as a function of my expressed parameters above and given what I perceive as general opposition to the bill of costs.

[9] In addition to the *Carlile* and *Dahl* decisions, in *Merck & Co. v Apotex Inc.*, 2008 FCA 371, at paragraph 14, the Court stated the following regarding Assessment Officers having limited material available to conduct assessments of costs:

> 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.

[10] Utilizing the *Carlile* and *Dahl* decisions as guidelines, although there is limited material available for the assessment of the Defendant's costs, as an Assessment Officer, I still have an obligation to ensure that any claims that are allowed are not "unnecessary or unreasonable". In addition to the Defendant's Bill of Costs, I will utilize the court record, the *FCR* and any relevant jurisprudence to assess the Defendant's costs to ensure that they were necessary and are reasonable. This being noted, it is important for me to reiterate the *Merck* decision, to highlight that my determination of what expenses are necessary and reasonable is "likely to do no more than rough justice between the parties" and will involve "the exercise of a substantial degree of discretion", in the performance of my duties as an Assessment Officer.

III. Assessable Services

[11] The Defendant has claimed 49 units ($7,350.00) for assessable services.

A. *Item 7 – Discovery of documents, including listing, affidavit and inspection; Item 8 – Preparation for an examination, including examinations for discovery, on affidavits, and in aid of execution; Item 9 – Attending on examinations, per hour.*

[12] I have reviewed the Defendant's Bill of Costs in conjunction with the court record, the *FCR* and any relevant jurisprudence and I have determined that the Defendant's claims for Item 7, Item 8, and Item 9 were necessary for the litigation of this particular file and that the claims

are reasonable. Specifically, the following units have been allowed for each Item: 10 units are allowed for Item 7, 10 units are allowed for Item 8, and 9 units are allowed for Item 9.

[13] The remaining claims for Item 1, Item 5 and Item 26 have some issues to look into and as a result, they will be reviewed separately below.

B. *Item 1 – Preparation and filing of originating documents, other than a notice of appeal to the Federal Court of Appeal, and application records.*

[14] The Defendant has claimed 7 units for the "[p]reparation and filing of the Statement of Defence". This particular claim is listed in the Defendant's Bill of Costs and there were no submissions provided by the parties for this assessable service. Item 1 in Tariff B of the *FCR* is for the "[p]reparation and filing of originating documents, other than a notice of appeal to the Federal Court of Appeal, and application records" and is designated for assessable services related to the preparation and filing of a moving party's pleadings. Therefore, the Defendant's Statement of Defence does not fall under this particular Item. This being noted, in *Mitchell v Canada*, 2003 FCA 386, at paragraph 12, the Assessment Officer stated the following regarding the positive application of costs provisions:

> 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. […]

[15] Item 2 in Tariff B of the *FCR* states that it is for the "[p]reparation and filing of all defences, replies, counterclaims or respondents' records and materials." Utilizing the *Mitchell* decision as a guideline, I have determined that assessing the Defendant's claim for the Statement of Defence under Item 2 is an acceptable alternative to assessing it under Item 1 and will allow for a positive application of the costs provisions instead of a narrower one. Further to my review of the court record, I have verified that the Defendant performed the service claimed for the Statement of Defence, which was filed on January 9, 2015. Therefore, I have determined that the service performed by the Defendant was necessary and that it is reasonable to allow 7 units for Item 2 for the Defendant's claim for the Statement of Defence, which was initially submitted under Item 1.

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

[16] The Defendant has claimed 7 units for a "motion to strike that was drafted by the Defendant's Counsel but not served or filed in light of Plaintiff's Discontinuance". This particular claim is listed in the Defendant's Bill of Costs and there were no submissions provided by the parties for this assessable service. Further to Rule 402 of the *FCR*, which was cited earlier in these Reasons, Rule 370 of the *FCR* states the following regarding the abandonment of a motion:

> 370(1) Abandonment of motion - A party who brings a motion may abandon it by serving and filing a notice of abandonment in Form 370.
>
> (2) Deemed abandonment - Where a moving party fails to appear at the hearing of a motion without serving and filing a notice of abandonment, it is deemed to have abandoned the motion.

[17] Rule 370 and Rule 402 refer to the abandonment of a moving party's motion. It is subsequent to a moving party abandoning a motion that a responding party is entitled to costs. This is different from the motion being claimed by the Defendant for this particular file, as the moving party (the Defendant) did not abandon the motion. The Plaintiffs discontinued the action proceeding before the Defendant's motion was filed with the court registry and disposed of by the Court. In *Tursunbayev v Canada (Minister of Public Safety and Emergency Preparedness),* 2019 FC 457, at paragraph 39, the Court stated the following:

> 39. As the Defendants point out, apart from the Court's order of November 24, 2016 and the eventual supplementary costs order of March 6, 2017, which the Defendants have satisfied, all of my orders in these proceedings have either expressly awarded no costs or have been silent as to costs. This is because in the instances now raised before me the Plaintiff did not seek costs (either in writing or orally) so that costs were not an issue I was asked to address. As I understand the jurisprudence of this Court, I cannot now re-visit my earlier orders that were silent as to costs. In *Sauve v Canada*, 2015 FC 181, Justice Barnes had the following to say on point:
>
> > [5] I am also concerned about the Defendants' claims to costs in connection with a variety of motions that were filed by one or the other dating back as far as 2007.
> >
> > [6] Almost all of the early motions in this proceeding were concluded by Orders where no award of costs was made. It is not open to the Court to revisit those matters and to award costs where none were ordered at the time: see *Exeter v Canada*, 2013 FCA 134 at para 14.

[18] Upon my review of the Defendant's Bill of Costs in conjunction with the court record, Rule 370 and Rule 402 of the *FCR,* and the aforementioned jurisprudence, I find that as an Assessment Officer, I do not have the authority to allow the claim for Item 5. The motion claimed by the Defendant was not abandoned by the moving party and there is no Court decision awarding costs for this particular motion. In addition, there is an absence of jurisprudence,

submissions and evidence from the Defendant to support the allowance of this claim. Therefore, I have determined that the Defendant's claim for Item 5 for the unserved and unfiled motion to strike must be disallowed, as it pertains to the facts for this particular file.

D. *Item 26 – Assessment of costs.*

[19] The Defendant has claimed 6 units for the "[p]reparation of Assessment of Costs". This particular claim is listed in the Defendant's Bill of Costs and there were no submissions provided by the parties for this assessable service. As noted earlier in these Reasons, the only document that was filed by the Defendant for the assessment of costs was the Bill of Costs, filed on April 14, 2021. Considering that only a Bill of Costs with one invoice attached was filed by the Defendant for this assessment of costs, I find that the Defendant's selection of 6 units to be excessive when compared to the services performed for this assessment of costs. Item 26 has an unit range of 2 to 6 units under column III in Tariff B of the *FCR* and I have determined that is reasonable to allow 3 units to the Defendant for Item 26, for the services performed for this assessment of costs.

E. *Total amount allowed for the Defendant's assessable services.*

[20] A total of 39 units have been allowed for the Defendant's assessable services for a total dollar amount of $5,850.00.

IV. Disbursements

[21] The Defendant has claimed $3,287.60 for disbursements.

A. *Fees payable on issuance – Statement of Defence.*

[22] The Defendant has claimed $150.00 for the issuance of the Statement of Defence. This particular claim is listed in the Defendant's Bill of Costs and there were no submissions provided by the parties for this disbursement. My review of the court record shows that the court registry filed the Defendant's Statement of Defence on January 9, 2015. The court record also shows that no fee was charged by the court registry for the filing and issuance of the Statement of Defence, as it did not include a counterclaim or a third party claim adding a new party, which would trigger the fee collection by the court registry pursuant to Tariff A of the *FCR*. Considering the aforementioned facts for this particular file, I have determined that the disbursement for $150.00 for the filing and issuance of the Statement of Defence must be disallowed, as the court record does not reflect that the Defendant was charged a fee by the court registry for this document.

B. *Invoice from Capt. Ivan I. Coric Maritime Inc.*

[23] The Defendant has claimed $1,463.60 for the expert services of Captain Ivan I. Coric Maritime Inc. for the surveying of cargo, which is listed in the Defendant's Bill of Costs. There were no submissions provided by the parties for this claim but the Defendant did submit an invoice dated July 6, 2013, for this particular disbursement. My review of the court record shows that the invoice is dated before the Plaintiffs' Statement of Claim was filed on September 30, 2014. This being noted, my review of the court record also shows that the invoice for surveying is directly related to the Plaintiffs' action proceeding. Considering the aforementioned facts for this particular file, I have determined that the surveying disbursement was necessary and that it is reasonable to allow the claim for $1,463.60 for this disbursement.

C. *The absence of evidence for the following disbursements: Online Research, Copies, Long Distance Calls; Fax, Delivery Messenger, Binders.*

[24] The Defendant did not provide any supporting invoices and no submissions were provided by the parties for the following disbursements: online research ($650.00), copies ($594.00), long distance calls ($150.00), fax ($125.00), delivery messenger ($75.00), and binders ($80.00). At section 1(4) in Tariff B of the *FCR*, it states the following regarding disbursements and evidence:

> 1.(4) Evidence of disbursements – No disbursement, other than fees paid to the Registry, shall be assessed or allowed under this Tariff unless it is reasonable and it is established by affidavit or by the solicitor appearing on the assessment that the disbursement was made or is payable by the party.

[25] Further to the requirement for evidence that is stipulated in section 1(4) in Tariff B of the *FCR*, in *Teledyne Industries, Inc. et al v Lido Industrial Products Ltd.*, [1981] F.C.J. No. 1149, at paragraph 23, the Court stated the following regarding receipts:

> 23. In the taxation of a party-and-party bill of costs acceptance without inquiry of the propriety of a disbursement is wrong in principle and should be reviewed: vide IBM v. Xerox, supra at p. 186. Of course, all disbursements, even when properly expended, should be proved to the satisfaction of the Taxing Officer. But it does not follow that all items of expenditure should rigorously be supported by a receipt from the payee. There are other ways to prove that a bill has been paid. In my view, the prothonotary was perfectly right in allowing those costs as they were obviously incurred, and properly so, in connection with the various examinations for discovery. The entire amount is therefore taxable.

[26] Utilizing the *Teledyne* and *Carlile* (supra) decisions as guidelines, although there is an absence of evidence from the Defendant regarding the aforementioned disbursements, as an Assessment Officer, I have an obligation to fully assess the Defendant's costs. As noted earlier in these Reasons, in addition to the Defendant's Bill of Costs, I will utilize the court record, the

FCR and any relevant jurisprudence, to assess the Defendant's costs for the aforementioned disbursements. This being noted, I will reiterate the *Merck* decision (supra) again, to highlight that my determination of what expenses are reasonable is "likely to do no more than rough justice between the parties" and will involve "the exercise of a substantial degree of discretion", in the performance of my duties as an Assessment Officer.

(1) Copies

[27] The Defendant has claimed $594.00 for copies, which is listed in the Defendant's Bill of Costs. In *Inverhuron & District Ratepayers Assn. v Canada*, 2001 FCT 410, at paragraphs 60 and 61, 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.
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> 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;
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> > 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.

[28] Utilizing the *Inverhuron* decision as a guideline, it indicates that the onus was on the Defendant to provide details related to the actual cost of the copies, such as a client invoice showing how much was charged for the copies. In addition, the Defendant did not indicate if the copies were prepared in-house or requisitioned through a third party company, as the amount per page can vary depending on this factor. Utilizing the *Dahl*, *Carlile* and *Merck* decisions (supra) as guidelines, I reviewed the court record to try to determine a reasonable quantum of costs to allow. My review took into consideration the size and the number of documents that needed to be prepared for the court registry and/or the parties. Further to my review of the court record in conjunction with the aforementioned jurisprudence, I have determined that the Defendant's claim for copies was necessary and that it is reasonable to allow $300.00 for this disbursement.

(2) Long Distance Calls, Fax, Delivery Messenger, Binders

[29] The Defendant has claimed $150.00 for long distance calls, $125.00 for faxing, $75.00 for delivery messenger, and $80.00 for binders, which are listed in the Defendant's Bill of Costs. All of the aforementioned claims are common disbursements in litigation, and my review of the court record shows that they are all plausible for this particular file, given the geographical distance between the parties and the various documents that were prepared by the Defendant. This being noted, the claims for these disbursements do not appear to be the precise dollar amounts. Utilizing the *Dahl*, *Carlile* and *Merck* decisions (supra) as guidelines, I have determined that these disbursements were necessary and that is reasonable to allow $100.00 for long distance calls, $83.00 for faxing, $50.00 for delivery messenger, and $53.00 for binders.

(3) Online Research

[30] The Defendant has claimed $650.00 for online research, which is listed in the Defendant's Bill of Costs. In *Truehope Nutritional Support Limited v Canada (Attorney General)*, 2013 FC 1153, at paragraphs 124, 125, 126 and 128, the Assessment Officer stated the following regarding claims for online research:

> 124. From the case law submitted, there appears to be a trend toward limiting or eliminating allowances for on-line computer research. Although 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, I find that there are still circumstances when it may be a justifiable claim. As was held in *Aram Systems Ltd v Novatel Inc* (*supra*), I consider disbursements for electronic legal research similar to disbursements for photocopying. However, in keeping with *Janssen Inc v Teva* (*supra*), I find that there is also a requirement to provide evidence that the research is relevant. Further, considering that the charges for on-line research can mount up, the justification for on-line charges claimed is essential.
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> 125. With this in mind, and considering the jurisprudence above, I find that, in order to determine whether on-line searches are reasonable and necessary, there is a need for the production of evidence concerning the relevance and necessity of the on-line searches claimed in the Bill of Costs. Further, given the Respondents' evidence that they pay a flat-rate monthly fee, there is a need to provide evidence of how these charges were calculated for this specific matter while ensuring that the amounts claimed in the Bill of Costs are a reflection of the actual disbursements. In light of these requirements, it is important to note that, despite the need for proof, the cost of proving the expenditures for computer research should not exceed the amount claimed (see: *Almecon Industries Ltd. v. Anchortek Ltd*., [2003] F.C.J. No. 1649). Taking this into consideration, I find that, in the present assessment, the Respondents have not provided the evidence required to justify on-line computer searches.
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> 126. Concerning the relevance and necessity of the on-line searches claimed by the Respondents, I have reviewed the evidence provided in the Affidavit of Tabitha Potts and the cross-examination of Ms. Potts and find that there is no evidence concerning relevance. The Respondents have provided no evidence

> concerning what the searches relate to, whether they relate to the Judicial Review or a motion, or whether they relate to the *Charter* challenge or the striking of an affidavit. On cross-examination, Ms. Potts was not able to provide any assistance in determining which searches related to motions and which did not. As evidence of necessity, the Respondents have submitted that 20 volumes of their Application Record consisted of authorities. However, there is no evidence concerning the cost of researching those specific authorities and there is no evidence suggesting which of the on-line searches related to those authorities. It is left to the Assessment Officer to reach a conclusion concerning the relevance and necessity of the searches based on the dates of the searches. This is an impossible task. Without evidence relating to the subject matter being researched, it is impossible to reach a determination concerning the relevance and necessity of individual searches. Therefore, it is impossible to make a finding of relevance and necessity concerning on-line searches based on nothing more than the volume of authorities filed.
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> […]
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> 128. Having found that the Respondents have not provided evidence concerning the relevance and necessity of the searches or the nature and application of the flat rate fee, the Respondents' disbursements for on-line computer searches are not allowed.

[31] In addition, in *Condo v Canada*, 2006 FCA 286, at paragraph 9, the Assessment Officer stated the following regarding online research:

> 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. […]

[32] Further to my review of the *Truehope* and *Condo* decisions, I find that the Defendant has not met the minimum threshold for the disbursement for online research to be allowed. The

aforementioned jurisprudence outlines that it is permissible for an Assessment Officer to allow claims related to online research but there is a requirement that the party that submitted the claim substantiate this disbursement. The Defendant did not provide any submissions and/or evidence to support this claim, such as an invoice or the document references on the court record where the Defendant's online research could be found. Considering the aforementioned facts for this particular file, in conjunction with the *Truehope* and *Condo* jurisprudence, I have determined that the Defendant's claim for online research must be disallowed.

D. *Total amount allowed for the Defendant's disbursements.*

[33] The total amount allowed for the Defendant's disbursements is $2,049.60.

V. Conclusion

[34] For the above Reasons, the Defendant's Bill of Costs is assessed and allowed in the total amount of $7,899.60, payable by the Plaintiffs to the Defendant. A Certificate of Assessment will also be issued.

"Garnet Morgan"
Assessment Officer

Toronto, Ontario
November 8, 2021

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2041-14
STYLE OF CAUSE:	CITRICOLA SALTENA S.A. AND AGRI MONDO INC. v MEDITERRANEAN SHIPPING COMPANY S.A.

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

REASONS FOR ASSESSMENT BY:	GARNET MORGAN, Assessment Officer
DATED:	NOVEMBER 8, 2021

WRITTEN SUBMISSIONS BY:

A. Barry Oland	FOR THE PLAINTIFFS
Gianni F. De Sua	FOR THE DEFENDANT

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