Federal Court  Cour fédérale

Date: 20230602

Docket: T-89-18

Citation: 2023 FC 770

BETWEEN:

MUD ENGINEERING INC.

Plaintiff

and

SECURE ENERGY (DRILLING SERVICES) INC. AND SECURE ENERGY SERVICES INC.

Defendants

AND BETWEEN

SECURE ENERGY (DRILLING SERVICES)

INC.

Plaintiff by Counterclaim

and

MUD ENGINEERING INC. AND AN-MING (VICTOR) WU

Defendants by Counterclaim

REASONS FOR ASSESSMENT

GARNET MORGAN, Assessment Officer

I. Introduction

[1] This assessment of costs is in relation to several motions for which the Court awarded costs to Secure Energy (Drilling Services) Inc. and Secure Energy Services [hereafter collectively referred to as Secure].

[2] Concerning the motion for summary trial under Rules 213 and 216 of the *Federal Courts Rules*, SOR/98-106 [FCR], filed by Mud Engineering Inc. [hereafter referred to as Mud], and Defendants by Counterclaim, Mud and Mr. An-Ming (Victor) Wu, the Court rendered the following Judgment on June 30, 2022:

> 1. The Motion for Summary Trial is dismissed.
>
> 2. Mud Engineering Inc's action is dismissed.
>
> 3. Secure Energy (Drilling Services) Inc.'s counterclaim is dismissed.
>
> 4. Costs are awarded to Secure according to Rule 407.

[3] Concerning Mud's motion for a declaration that the Federal Court has the jurisdiction to determine issues related to the disputed patents, the Court's Orders dated November 12, 2020, and December 23, 2020 (which amended the Nov. 12th Order), determined that "the costs shall be costs in the cause." Pursuant to the Court's Judgment dated June 30, 2022, costs will be assessed in favour of Secure.

[4] Concerning Secure's motion to strike portions of the affidavit of Mr. An-Ming (Victor) Wu, the Court ordered on June 15, 2022, that "[c]osts of this Motion are awarded in favour of Secure."

[5] Further to the Court's decisions costs will be assessed in accordance with Rule 407 of the 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

[6] On November 18, 2022, Secure filed a Bill of Costs, which initiated its request for an assessment of costs.

[7] On November 22, 2022, a direction was issued to the parties regarding the conduct and filing of additional documents for the assessment of costs. The direction was e-mailed to the parties by the court registry and confirmation of receipt e-mails were received from counsel for Secure and Mud on November 22, 2022.

[8] The court record (hard copy file and computerized version) shows that the following additional documents were filed by the parties for this assessment of costs:

a) On January 13, 2023, Secure filed a Book of Authorities, an Affidavit of Jaimee Middelkamp, sworn on January 12, 2023, and Written Representations;

b) Mud did not file any responding documents.

III. Preliminary Issues

A. *The absence of responding documents.*

[9] Mud did not file any documents in response to Secure's request for an assessment of costs. The absence of responding documents from Mud has left Secure's Bill of Costs substantially unopposed. In *Dahl v Canada*, 2007 FC 192 [*Dahl*], at paragraph 2, the Assessment Officer stated the following regarding the absence of relevant representations 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.

[10] In addition, in *Carlile v Canada (Minister of National Revenue - MNR)*, [1997] FCJ No 885 [*Carlile*], at paragraph 26, the Assessment Officer stated the following regarding having limited material 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. […]

[11] Further to the guidance provided in the *Dahl* and *Carlile* decisions, they indicate that although there is an absence of responding documents from Mud, as an Assessment Officer, I still have an obligation to ensure that any claims that are allowed are not “unnecessary or unreasonable” (*Carlile* at para 26). For my assessment of Secure’s claims, I will review the court record, and any relevant rules, statutes, and jurisprudence, in conjunction with Secure’s costs documents to ensure that any costs allowed were necessary and reasonable.

B. *Assessable Services - level of costs under Column III of Tariff B of the FCR*

[12] All of Secure’s claims for assessable services have been submitted at the highest end of Column III, which was intended “[t]o strike a balance between the complexity of this patent

proceeding and the ordinary default scale in Rule 407." Secure has submitted that pursuant to subsection 400(3) of the FCR, factors "such as the result of the proceeding, the amounts claimed and recovered, the importance and complexity of the issues, the amount of work, and the justification of expert witness expenses" can be considered for this assessment of costs. To support this level of costs, Secure cited the following jurisprudence: *Truehope Nutritional Support Limited v Canada (Attorney General)*, 2013 FC 1153 [*Truehope*], at paragraphs 11 to 14; *Venngo Inc v Concierge Connection Inc (Perkopolis)*, 2017 FCA 96, at paragraph 85; *Teva Canada Limited v Janssen Inc*, 2018 FC 1175, at paragraph 6; and *Porto Seguro Companhia de Seguros Gerais v Belcan SA*, 2001 FCT 1286, at paragraphs 13 to 18. The aforementioned jurisprudence support the premise that the complexity of issues and specific factors for intellectual property proceedings may justify elevated costs (Secure's Written Representations at paras 13 to 17).

[13] In addition to the jurisprudence cited by Secure, in *Allergan Inc v Sandoz Canada Inc*, 2021 FC 186 [*Allergan*], the Court stated the following at paragraphs 25 and 26, regarding the level of costs for intellectual property proceedings in the Federal Court:

> [25] The "default" level of costs in this Court is the mid-point of Column III in Tariff B: Rule 407; *Sanofi-Aventis Canada Inc v Novopharm Limited*, 2009 FC 1139 at para 4 [*Sanofi-Novopharm FC*], aff'd 2012 FCA 265; *Apotex v Sanofi-Aventis*, 2012 FC 318 at para 5 [*Apotex v Sanofi-Aventis*]; *Dennis v Canada*, 2017 FC 1011 at para 8; *Bernard v Professional Institute of the Public Service of Canada*, 2020 FCA 211 at para 38. Column III is intended to provide partial indemnification (as opposed to substantial or full indemnification) for "cases of average or usual complexity": *Thibodeau*, above, at para 21; *Novopharm Ltd v Eli Lilly and Co*, 2010 FC 1154 at para 5 [*Novopharm v Eli Lilly*].
>
> [26] In recognition of the particular attributes of intellectual property proceedings, it is common for increased costs to be awarded in those proceedings: see, e.g., *Consorzio*, above, at para

> 6; *Lainco Inc c Commission scolaire des Bois-Francs*, 2018 FC 186 at para 8(c). Those particular attributes include greater than average complexity, sophisticated parties, legal bills far in excess of what is contemplated by Column III of Tariff B, and "giving parties an incentive to litigate efficiently": *Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2020 FC 505 at para 4 [*Seedlings*]. For cases that involve drug patent disputes and a cost award fixed by reference to the tariff, the high end of Column IV is often considered to be reasonable and appropriate: *Sanofi-Novopharm FC*, above, at para 13, aff'd 2012 FCA 265; *Novopharm v Eli Lilly*, above, at para 7; *Apotex v Sanofi-Aventis*, above. See also Federal Court of Appeal and Federal Court Rules Committee, *Review of the Rules on Costs: Discussion Paper*, October 5, 2015, at page 8.

[14] In *Allergan*, the Court stated that the default level of costs in the Federal Court is “the mid-point of Column III in Tariff B” and that “[i]n recognition of the particular attributes of intellectual property proceedings, it is common for increased costs to be awarded in those proceedings.” The particular attributes that the Court may consider for increased costs are “greater than average complexity, sophisticated parties,” and “legal bills far in excess of what is contemplated by Column III of Tariff B.” The *Allergan* decision recognizes that “it is common for increased costs to be awarded” for intellectual property proceedings, but did not state that increased costs are absolute for these types of proceedings [emphasis added]. My review of the Court’s decisions dated November 12, 2020, December 23, 2020, June 15, 2022, and June 30, 2022, did not reveal that the Court highlighted any of the aforementioned attributes as being significant factors that influenced the level of costs awarded to Secure. The Court did not award increased costs under Columns IV or V of Tariff B, nor were there stipulations that a higher range of units should be applied within Column III of Tariff B.

[15] Further to my consideration of the aforementioned facts and jurisprudence, I will note that I did not find that Secure was precluded from selecting any particular range of units within Column III. It was open to Secure to select any number of units within Column III that it considered to be appropriate for the assessable services claimed. Although there was no preclusion for Secure's selection of units within Column III, I did not find that sufficient justification was presented by Secure to compel me to make a blanket allowance for all of the claims for assessable services at the highest end of Column III. In *Starlight v Canada*, [2001] FCJ No 1376 [*Starlight*], at paragraph 7 (cited in *Truehope* at para 13), the Assessment Officer stated the following regarding assessing each assessable service based on its own circumstances:

> [7] The structure of the Tariff embodies partial indemnity by a listing of discrete services of counsel in the course of litigation, not necessarily exhaustive. The Rules are designed to crystallize the pertinent issues and eliminate extraneous issues. For example, the pleading and discovery stages may involve a complex framing and synthesizing of issues leaving relatively straightforward issues for trial. Therefore, each item is assessable in its own circumstances and it is not necessary to use the same point throughout in the range for items as they occur in the litigation. If items are a function of a number of hours, the same unit value need not be allowed for each hour particularly if the characteristics of the hearing vary throughout its duration. In this bill of costs, the lower end of the range for item 5 and the upper end of the range for item 6 are possible results. Some items with limited ranges, such as item 14, required general distinctions between an upper and lower assignment in the range for the service rendered.

[16] Utilizing the *Starlight* decision as a guideline, I will assess Secure's claims for assessable services individually to determine the quantum of costs to allow for each claim. For my assessment of each claim, I will consider the full range of units available under Column III, in conjunction with the factors listed under subsection 400(3) of the FCR, which I am able to consider as an Assessment Officer pursuant to Rule 409 of the FCR. My assessment of each

claim will also include a review of Secure's costs documents, the court record, and any relevant rules, statutes and jurisprudence that may be applicable for a particular claim.

IV. Assessable Services

[17] Secure has claimed 258.75 units for assessable services totalling $41,400.00.

A. *Items 2, 3, 5, 7, 11, 13(a) and (b), 14(a), 15 and 26*

[18] I have reviewed Secure's 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 2, 3, 5, 7, 11, 13(a) and (b), 14(a), 15 and 26 can be allowed as claimed. I did not find that these claims required my intervention as I found the services performed by Secure to be necessary for the litigation of this particular intellectual property proceeding.

[19] My review of the factors listed under subsection 400(3) of the FCR, such as "(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;" found that Secure was the successful party in the action proceeding; the amounts claimed and to be recovered are justifiable at a level higher than the mid-point of Column III for the aforementioned Items; the issues argued were of significant importance and moderate complexity; and Secure performed a substantial amount of work to litigate the action proceeding and for this assessment of costs. There may be some nuances as to whether the number of units for an individual claim should have been selected at the highest end of Column III or one slightly lower, but Mud did not

provide any submissions regarding any individual claims being particularly excessive in the number of units claimed. In my role as an Assessment Officer, I should not step "away from a position of neutrality to act as the litigant's advocate," hence it is not my role to substitute absent submissions for a party due to procedural fairness (*Dahl* (above) at para 2).

[20] Therefore, I have determined that based on my review of the factors listed under subsection 400(3) of the FCR, and Mud's non-opposition to Secure's Bill of Costs, that it is reasonable to allow Secure's claims for Items 2, 3, 5, 7, 11, 13(a) and (b), 14(a), 15 and 26, as requested. Specifically, the following units are allowed, 14 units for Item 2; 18 units for Item 3; 21 units for Item 5; 5 units for Item 7; 16.8 units for Item 11; 10 units for Item 13(a); 6 units for Item 13(b); 69.3 units for Item 14(a); 14 units for Item 15; and 6 units for Item 26.

[21] Secure's claims for Items 10, 14(b) and 24 have some issues to look into and will be assessed in more detail below.

B. *Item 10*

[22] Secure has submitted multiple claims under Item 10 for the preparation for case management [CMC], and trial management conferences. All of these conferences have been claimed at the highest end of Column III. 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 most of the conferences mirror the Items that were expanded upon earlier in these Reasons (at para 19). The exceptions are the CMCs held on November 12, 2020, December 17, 2020, January 28, 2021, and March 24, 2021. For these particular CMCs, the court record did not

reveal that the Court requested any material from the parties prior to the CMCs being held. Nor did the court record reveal that Secure prepared and filed any material on its own, such as a letter, similar to other claims for Item 10. In the absence of any specific submissions from Secure for these CMCs, it is difficult to determine what preparation was required. This being noted, in *Guest Tek Interactive Entertainment Ltd v Nomadix, Inc*, 2021 FC 848 [*Guest Tek*], at paragraph 42, the Court stated that even "routine case conferences" require some preparation. Further to my consideration of the aforementioned facts, and utilizing the *Guest Tek, Carlile* (above) and *Allergan* (above) decisions as guidelines, I find it reasonable to allow these four CMCs at the mid-point of Column III (4 units each), as a moderately low amount of preparation was seemingly required by Secure for these particular CMCs. This being found, a cumulative total of 34 units are allowed for Item 10 for all of the claims.

C. *Items 14(b) and 24*

[23] Secure has submitted claims under Item 14(b) for second counsel's attendance at the summary judgment motion held by videoconference on May 25 to 27, 2021, and on December 17, 2021. Secure has also submitted a claim under Item 24 for counsel's travel to Toronto, Ontario, for attendance at the in-person motion to strike held on August 16, 2018.

[24] Concerning Item 14(b), my review of the Court's Judgment dated June 30, 2022, for the summary judgment motion, did not reveal that the Court specifically awarded costs for second counsel fees. For Item 24, the Court's Order dated October 9, 2018, did not specifically award costs for travel for the motion to strike, and stated that "neither party is entitled to any costs whatsoever" (Order at page 9). The assessable services listed in Tariff B that specifically

mention second counsel fees or travel by counsel (Items 14(b), 22(b) and 24), all indicate that costs can only be assessed with a direction from the Court, or at the Court's discretion. In *Capra v Canada (Attorney General)*, 2009 FC 916 [*Capra*], at paragraphs 8 and 9, the Assessment Officer stated the following regarding claims submitted under Item 14(b) for second counsel fees:

> [8] In *Balisky v. Canada (Minister of Natural Resources)*, 2004 FCA 123, [2004] F.C.J. No. 536, at paragraph 6 the assessment officer states:
>
> > Rule 400(1), which vests full discretionary power in the Court over awards of costs, means that orders and judgments must contain visible directions that costs have been awarded. Given the Federal Courts Act, ss. 3 and 5(1) defining the Court and Rule 2 of the Federal Court Rules, 1998 defining an assessment officer, the absence of that exercise of prior discretion by the Court leaves me without jurisdiction under Rule 405 to assess costs.
>
> [9] Item 14(b) includes the provision "where Court directs". As an assessment officer is not a member of the Court, and there being no direction or order of the Court concerning second counsel on file, I am without jurisdiction to allow the amount claimed under Item 14(b).

[25] Concerning Item 24, in *Marshall v Canada*, 2006 FC 1017 [*Marshall*], at paragraph 6, the Assessment Officer stated the following regarding claims for travel by counsel:

> [6] The *Federal Courts Act* sections 4 and 5.1(1) defining the Federal Court, and Rule 2 of the *Federal Courts Rules* defining an assessment officer, mean that the terms "Court" (as used in item 24 of Column III of Tariff B for the time of counsel to travel to a venue) and "assessment officer" refer to separate and distinct entities. The Court did not exercise visible direction here for the travel fees of counsel to attend examinations for discovery and therefore I do not have the jurisdiction to allow anything for item 24. That restriction does not apply to the associated travel disbursements, for which I retain jurisdiction under Rule 405. That is, counsel fees and disbursements are distinct and discrete items of

> costs addressed by different portions of the Tariff, i.e. items 1 to 28 in the TABLE in Tariff B address counsel fees and Tariff B1 addresses disbursements. Accordingly, item 24 addresses counsel fees, but not disbursements. The discretion reserved to the Court to authorize assessment officers to address item 24, or even item 14(b) for second counsel, is exercised distinct from the discretion vested in me by Rule 405 and Tariff B1. There is no implied caveat impeding me from allowance of travel disbursements for counsel in the absence of an item 24 direction from the Court for fees for the time of counsel to travel to and from a hearing venue. […]

[26] Concerning the duty of an Assessment Officer, the Court stated the following in *Pelletier v Canada (Attorney General)*, 2006 FCA 418 [*Pelletier*], at paragraph 7:

> [7] […] Under section 405, an assessment officer "assesses" costs, which assumes that costs have been awarded. Section 406 provides that an officer does this at the request of "a party who is entitled to costs", which again presupposes that an order for costs was made in favour of that party. Under section 407, the officer assesses the costs in accordance with column III of the table to Tariff B "unless the Court orders otherwise." Section 409 provides that "[i]n assessing costs, an assessment officer may consider the factors referred to in subsection 400(3)." In short, the duty of an assessment officer is to assess costs, not award them. An officer cannot go beyond, or contradict, the order that the judge has made. […]

[27] Further to my review of Secure's costs documents in conjunction with the court record and the FCR, and utilizing the *Capra* and *Marshall* decisions as guidelines, I find that I do not have the authority to assess Secure's claims for second counsel fees and travel by counsel as an assessable service. As the Court stated in the *Pelletier* decision, my role as an Assessment Officer is only "to assess costs, not award them." In the absence of a Court direction or decision specifically awarding second counsel fees or travel by counsel as an assessable service, or alternatively any jurisprudence from Secure to support the allowance of these costs in the absence of a Court direction or decision, I find that I do not have the authority to assess these

types of costs autonomously. Therefore, I have determined that Secure's claims for second counsel fees and travel by counsel as an assessable service must be disallowed as they pertain to the facts for this particular file. The amounts disallowed are 34.65 units for Item 14(b) and 5 units for Item 24.

D. *Total amount allowed for Secure's assessable services.*

[28] 214.10 units have been allowed for Secure's assessable services totalling $35,968.80, which is inclusive of GST.

V. Disbursements

[29] Secure has claimed $83,659.48 for disbursements, which is inclusive of any applicable taxes. This total is lower than the Bill of Costs, as Secure withdrew a disbursement for professional fees ($1,925.00), which was not for this particular file (Secure's Written Representations at paras 3 and 4; Schedule A – Q2 2021 Explanatory Notes).

[30] I have reviewed Secure's costs documents in conjunction with the court record, and any relevant rules, statutes, and jurisprudence, and I have determined that the disbursements can be allowed as claimed. I did not find that any of these claims required my intervention, as I found the claims to be reasonable and justifiable expenditures for the litigation of this particular intellectual property proceeding (*Janssen Inc v Teva Canada Ltd*, 2022 FC 269, at para 10; *Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25, at para 20). Claims were

verifiable with the court record and the requirements found at subsection 1(4) of Tariff B regarding evidence of disbursements were adhered to.

[31] Having considered the aforementioned facts, and Mud's non-opposition to Secure's Bill of Costs, I have determined that it is reasonable to allow Secure's claims for disbursements as requested for $83,659.48, which is inclusive of any applicable taxes.

VI. Conclusion

[32] For the above reasons, Secure's Bill of Costs is assessed and allowed in the total amount of $119,628.28, payable by the Plaintiff, Mud Engineering Inc., to the Defendants, Secure Energy (Drilling Services) Inc. and Secure Energy Services. A Certificate of Assessment will also be issued.

"Garnet Morgan"
Assessment Officer

Toronto, Ontario
June 2, 2023

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-89-18
STYLE OF CAUSE:	MUD ENGINEERING INC. v SECURE ENERGY (DRILLING SERVICES) INC. AND SECURE ENERGY SERVICES INC. AND BETWEEN SECURE ENERGY (DRILLING SERVICES) INC. AND MUD ENGINEERING INC. AND AN-MING (VICTOR) WU

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

REASONS FOR ASSESSMENT BY:	GARNET MORGAN, Assessment Officer
DATED:	JUNE 2, 2023

WRITTEN SUBMISSIONS BY:

N/A	FOR THE PLAINTIFF Defendants by Counterclaim
Emilie Feil-Fraser Patrick Smith Mathew Brechtel Benjamin Pearson Mike Myschyshyn	FOR THE DEFENDANTS Plaintiff by Counterclaim

SOLICITORS OF RECORD:

Smart & Biggar LLP Toronto, Ontario	FOR THE PLAINTIFF Defendants by Counterclaim
Seastone IP LLP Vancouver, British Columbia	FOR THE DEFENDANTS Plaintiff by Counterclaim