Federal Court of Appeal Cour d'appel fédérale

Date: 20210222

Docket: A-393-16

Citation: 2021 FCA 32

Present: **GARNET MORGAN, Assessment Officer**

BETWEEN:

**JUVENAL DA SILVA CABRAL,
PEDRO MANUEL GOMES SILVA,
ROBERT ZLOTSZ,
ROBERTO CARLOS OLIVEIRA SILVA,
ROGERIO DE JESUS MARQUES FIGO,
JOAO GOMES CARVALHO,
ANDRESZ TOMASZ MYRDA,
ANTONIO JOAQUIM OLIVEIRA
MARTINS, CARLOS ALBERTO LIMA
ARAUJO, FERNANDO MEDEIROS
CORDEIRO, FILIPE JOSE LARANJEIRO
HENRIQUES, ISAAC MANUEL LEITUGA
PEREIRA,
JOSE FILIPE CUNHA CASANOVA**

Appellants

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION, MINISTER OF
EMPLOYMENT AND SOCIAL
DEVELOPMENT, HER MAJESTY THE
QUEEN**

Respondents

Assessment of costs without appearance of the parties.
Certificate of Assessment delivered at Toronto, Ontario, on February 22, 2021.

REASONS FOR ASSESSMENT BY: GARNET MORGAN, Assessment Officer

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REASONS FOR ASSESSMENT

GARNET MORGAN, Assessment Officer

[1] This is an assessment of costs pursuant to a Judgment of the Federal Court of Appeal dated January 11, 2018, wherein the Appellants' appeal was "dismissed with costs."

[2] Further to the Court's Judgment, costs will be assessed in accordance with Rule 407 of the *Federal Courts Rules*, SOR/98-106 *(FCR)*, which states:

> 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.

[3] On August 12, 2019, the Respondents filed a Bill of Costs.

[4] On September 24, 2019, a direction was issued to the parties providing the filing dates for documents for the assessment of costs. Subsequent to the direction being issued, the Respondents submitted a letter dated October 7, 2019, to the court registry requesting that the assessment of costs be held in abeyance as the parties were trying to settle the issue of costs. On October 21, 2019, a direction was issued to the parties that the assessment of costs would be held in abeyance until further notice from the parties.

[5] On January 23, 2020, the Respondents submitted a letter to the court registry advising that the parties were not able to settle the issue of costs and requesting that the assessment of costs be resumed. On January 24, 2020, a direction was issued to the parties resuming the assessment of costs and providing the filing dates for documents. In addition, as a result of the

COVID-19 pandemic and the suspension of the filing deadlines for court documents during the spring of 2020, by the Federal Court of Appeal, a follow-up direction was issued to the parties on June 19, 2020.

[6] The following costs material has been filed by the parties for this assessment of costs: on March 6, 2020, the Respondents filed supporting costs material, including written representations and an Affidavit of Jillian Dale; on August 17, 2020, the Appellants filed responding costs material, including a Memorandum of Argument and an Affidavit of Barbora Lukacova; and on September 11, 2020, the Respondents filed reply representations.

I. <u>Preliminary Issues</u>

[7] Before assessing the Respondents costs, the parties have raised some issues in their costs material that I will address as preliminary issues.

A. *Request for an assessment of costs.*

[8] In the Appellants' Memorandum of Argument, it is submitted that the parties settled the quantum of the Respondents' costs and that the only remaining issue is the payment of these costs. Attached as Exhibit A to the Appellants' Affidavit of Barbora Lukacova, sworn on August 13, 2020, are copies of e-mail correspondence between the parties showing that the parties agreed to a settlement amount of $8,000.00. The e-mail correspondence also shows that the Respondents were awaiting payment and that the Appellants raised the issue of the Appellants'

former counsel's (Richard Boraks) trust account being frozen by the Law Society of Ontario preventing a payment from being made.

[9] The Appellants have submitted that the Respondents "are estopped by conduct, as to the assessment of quantum, and that the Court is therefore without jurisdiction to entertain the within application for assessment of costs." The Appellants have submitted that if the Court does have the jurisdiction to proceed with the assessment of costs that it cannot exceed $8,000.00 in total for the Respondents' Bills of Costs filed in the Federal Court and the Federal Court of Appeal. At paragraph 8 of the Appellants' Memorandum of Argument it is submitted that as an alternative remedy the Court could issue an order to the Law Society of Ontario allowing access to the former counsel's trust account so that payment of the Respondents' costs can be made.

[10] The Respondents' reply representations confirm that the parties agreed to settle the Respondents' Bills of Costs at $8,000.00. The Respondents have submitted that the Court has the jurisdiction to assess and enforce an award of costs and that the Appellants "had many chances between October 2019 and January 2020 to make the payment of costs, but no payment was ever received." Concerning the interim orders of the Law Society Tribunal (LST), at paragraph 11 of the Respondents' reply representations, it is submitted that:

> It appears that Mr. Boraks is indeed aware of the remedies available to him before the LST since Mr. Galati's voicemail to Ms. Marinos on December 2, 2019 advised that they would be going back on December 4, 2019 to finalize the supervision of the accounts so he could access the trust account.[10] It is not clear what, if anything, transpired on December 4, 2019. In any event, the Plaintiffs and Mr. Boraks ought to exhaust all administrative mechanisms prior to seeking judicial intervention from the Federal Court or the Federal Court of Appeal.

[11] The Respondents have submitted that the Appellants failure to make a payment in a timely manner has prolonged the matter and have requested that the Appellants “be ordered to make payment in the amount of $16,029.91.” In the alternative, the Respondents have submitted that if the Court decides that the Appellants should pay $8,000.00, that they also be required to make the payment “within 30 days of the Order.”

[12] Further to my review of the parties’ costs material, I have reviewed the rules governing costs in Part 11 of the *FCR*, of which Rules 419 to 422 specify the requirements for offers to settle in relation to the issue of costs. These rules 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:

> 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.

[13] Further to the clarification provided in the *Canadian Olympic Assn*. decision, an attempt to settle costs informally, after the final disposition of a court proceeding, 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. For this particular assessment of costs, once the parties could not perfect the settlement of costs, it was open to the Respondents to request that an assessment of costs be conducted by an Assessment Officer pursuant to Rule 406(1) of the *FCR*.

[14] Upon my review of the parties' costs material, the court record, Part 11 of the *FCR* and the aforementioned jurisprudence, I have determined that the Respondents' request for an assessment of costs was submitted in accordance with the *FCR.* Therefore, I will proceed with this assessment of costs.

B. *The Appellants' financial circumstances.*

[15] In the Appellants' Memorandum of Argument, it is submitted that due to the ongoing matter at the Law Society of Ontario that the former counsel's finances are inaccessible, preventing a payment from being made to the Respondents. The Appellants have requested that an order be made directing the Law Society of Ontario to allow the former counsel to have access to $8,000.00 to satisfy the costs payable to the Respondents. The Respondents oppose this request and at paragraphs 37 and 38, of the Respondents' written representations, it is submitted that the Appellants have sufficient personal financial means to pay the Respondents' costs. In *Leuthold v. Canadian Broadcasting Corp*., 2014 FCA 174, at paragraph 12, the Court states the following regarding a party's financial circumstances and costs:

> Ms. Leuthold argues that, having regard to her financial circumstances, an order for costs of $80,000 is punitive. It is true that an impecunious claimant with a meritorious claim should not be prevented from bringing his or her claim by an order for security for costs, or advance costs : see *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371, at paragraph 36 and following. However, once a matter has proceeded to trial and judgment has been rendered, a party's impecuniosity is not a relevant factor in the assessment of costs. The person entitled to costs has had to incur the costs of proceeding to trial and has the right to be compensated within the limits prescribed by the Rules of Court. Issues of enforceability are distinct from issues of entitlement.

[16] In addition, in *Latham v. Canada*, 2007 FCA 179, at paragraph 8, the Assessment Officer states the following regarding the issue of financial hardship:

> The existence of outstanding appeals does not prevent the Respondents from proceeding with these assessments of costs: see *Culhane v. ATP Aero Training Products Inc.,* [2004] F.C.J. No. 1810 (A.O.) at para. [6]. In *Clarke v. Canada (Attorney General)*, [2005] F.C.J. No. 814 (A.O.), the Applicant (an inmate), in arguing before me that his limited resources coupled with the potential amount of assessed costs would interfere with his rehabilitation, correctly conceded in my view that both capacity to pay and likelihood of satisfaction of the assessed costs are irrelevant in the determination of issues of an assessment of costs. That is, I cannot interfere with the exercise of the Court's Rule 400(1) discretion which established the Respondents' right for recovery here of assessed costs from the Applicant/Appellant. I do not think that financial hardship falls within the ambit of "any other matter" in Rule 400(3)(o) as a factor relevant and applicable by an assessment officer, further to Rule 409, to minimize assessed litigation costs. Self-represented litigants and litigants represented by counsel receive the same treatment relative to the provisions for litigation costs: see *Scheuneman v. Canada (Human Resources Development)*, [2006] F.C.J. No. 1278 (A.O.). The Courts here made their findings concerning entitlements to costs: I have no jurisdiction to interfere.

[17] In *Pelletier v. Canada*, 2006 FCA 418, at paragraph 7, the Court states the following regarding awards of costs:

> […] 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.

[18] Further to the decisions in *Leuthold* and *Latham*, as an Assessment Officer, I cannot consider the financial circumstances of a party in an assessment of costs. The Appellants' ongoing financial matter with the Law Society of Ontario is not an issue that I am able to consider as an Assessment Officer. As stated in the *Pelletier* decision, my role as an Assessment Officer is only to assess costs. I have reviewed the Court's Reasons for Judgment dated January 11, 2018, and it states that the appeal is dismissed, "with costs." Therefore, pursuant to the

Court's Reasons for Judgment dated January 11, 2018, any costs allowed for this assessment of costs will be payable by the Appellants to the Respondents. As a result, I am unable to consider the Appellants' request that an order be issued to the Law Society of Ontario allowing access to the former counsel's trust account so that payment of the Respondents' costs can be made, as I am not a Judge.

C. *Awarding costs and lump sums.*

[19] Further to the *Pelletier* decision (supra), which states that "the duty of an assessment officer is to assess costs", I am also unable to consider the Appellants' request made at paragraph 9 of the Appellants' Memorandum of Argument that $1,000.00 be awarded to the Appellants in relation to the assessment of costs. In addition, I am unable to award an unspecified amount of supplemental costs to the Respondents for the assessment of costs, as requested at paragraphs 7 and 12 of the Respondents' reply representations.

[20] Concerning an allowance of a lump sum of $8,000.00 for the Respondents' costs, Rule 400(4) of the *FCR*, states the following:

> (4) Tariff B – The Court may fix all of part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, any assessed costs.

[21] Rule 400(4) specifies that the Court may award lump sums. Although, the parties may have informally consented to a cumulative amount of $8,000.00 for the Respondents' Bills of Costs filed in the Federal Court and the Federal Court of Appeal, there is no consensus between the parties regarding the quantum of costs for this assessment of costs. At paragraph 12 of the Respondents' reply representations the following is submitted:

> The Defendants reiterate their request that the Plaintiffs be ordered to pay $16,029.91 in costs. Alternatively, the Defendants request the Plaintiffs be ordered to pay $8,000 in costs as well as the costs of this motion.

[22] In the absence of the explicit consent of the parties that the Respondents' costs be assessed at $8,000.00 for the two Bills of Costs, I do not have the discretion to make that allowance for costs. The Respondents' costs material has requested as a first option that the Respondents' costs be assessed at $16,029.91. Therefore, I find that as an Assessment Officer, I am obligated to fully assess the Respondents' Bills of Costs filed in Federal Court and the Federal Court of Appeal pursuant to Rule 400(4) and Rule 405 of the *FCR*, which states that "[c]osts shall be assessed by an assessment officer."

II. Respondents' Bill of Costs

[23] My review of the Appellants' costs material did not disclose any submissions that specifically addressed the Respondents' claims for assessable services or disbursements, which are contained in the Respondents' Bill of Costs. The absence of specific submissions from the Appellants addressing the Respondents' claims for costs has left the Bill of Costs substantially unopposed. In *Dahl v. Canada*, 2007 FC 192, at paragraph 2, the Assessment Officer states:

> 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.

[24] Further to the decision in *Dahl*, in *Carlile v. Canada*, [1997] F.C.J. No. 885, at paragraph 26, the Assessment Officer states:

> […] 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.

[25] Further to the decisions in *Dahl* and *Carlile*, although there is an absence of specific submissions from the Appellants challenging the individual assessable services or disbursements claimed by the Respondents for this particular assessment of costs, as an Assessment Officer, I have an obligation to ensure that any claims that are allowed are not "unnecessary or unreasonable". In addition to the Respondents' costs material, the court record, the *FCR* and any relevant jurisprudence will be utilized to assess the costs of the Respondents to ensure that they were necessary and are reasonable.

A. *Assessable Services*

Item 19 – Memorandum of fact and law; Item 22(a) – Counsel fee on hearing of appeal: (a) to first counsel, per hour; Item 25 – Services after judgment not otherwise specified.

[26] Further to previous paragraph, I have reviewed of the Respondents' costs material in conjunction with the court record, the *FCR* and any relevant jurisprudence and I have determined that the Respondents' claims under Item 19, Item 22(a) and Item 25 to be necessary and reasonable. Specifically, 6 units are allowed for Item 19; 7.5 units are allowed for Item 22(a); and 1 unit is allowed for Item 25.

[27] The claim for Item 22(b) had an issue to look into and as a result, it will be individually reviewed below.

> *Item 22 – Counsel fee on hearing of appeal: (a) to first counsel, per hour; and (b) to second counsel, where Court directs, 50% of the amount calculated under paragraph (a).*

[28] Concerning Item 22(b), the Respondents have claimed first and second counsel fees for the Respondents' attendance at the appeal hearing on October 16, 2017. Further to my review of the Court's Reasons for Judgment dated January 11, 2018, and the court record, there does not appear to be a Court direction allowing second counsel fees to be assessed under Item 22(b). In *Coca-Cola Ltd v. Pardhan 2006 FC 45*, the Assessment Officer addressed this issue at paragraph 20:

> In my opinion, the key phrase in Item 22(b) of Tariff B of the Federal Courts Rules is "...where the Court directs..." I have reviewed the material in the Court record and have determined that no such direction exist, therefore, this assessable service is disallowed for each of the appeal proceedings.

[29] Absent a Court direction allowing Item 22(b) to be claimed, the Respondents' second counsel fee of $350.00 is disallowed.

[30] 14.5 units have been allowed for assessable services, for a total amount of $2,030.00.

B. *Disbursements*

[31] Further to my review of the Respondents' costs material in conjunction with the court record, the *FCR* and any relevant jurisprudence, I have determined that the disbursements

claimed by the Respondents were necessary and are reasonable. The disbursements are therefore allowed as claimed.

[32] The total amount allowed for disbursements is $1,395.32.

III. Conclusion

[33] For the above Reasons, the Respondents' Bill of Costs is assessed and allowed in the total amount of $3,425.32. A Certificate of Assessment will be issued for $3,425.32, payable by the Appellants to the Respondents.

"Garnet Morgan"
Assessment Officer

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-393-16
STYLE OF CAUSE:	JUVENAL DA SILVA CABRAL, ET AL v. MINISTER OF CITIZENSHIP AND IMMIGRATION, ET AL

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

REASONS FOR ASSESSMENT BY:	GARNET MORGAN, Assessment Officer
DATED:	FEBRUARY 22, 2021

WRITTEN SUBMISSIONS BY:

Rocco Galati	FOR THE APPELLANTS
Angela Marinos Meva Motwani	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Rocco Galati Law Firm Professional Corporation Toronto, Ontario	FOR THE APPELLANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENTS