

Federal Court of Appeal



Cour d'appel fédérale

Date: 20230419

Docket: 19-A-73

Citation: 2023 FCA 80

Present: GARNET MORGAN, Assessment Officer

BETWEEN:

ROBERT HAROLD KEENAN

Moving Party

and

HIS MAJESTY THE KING

Respondent

Assessment of costs without appearance of the parties.
Certificate of Assessment delivered at Toronto, Ontario, on April 19, 2023.

REASONS FOR ASSESSMENT BY: GARNET MORGAN, Assessment Officer

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REASONS FOR ASSESSMENT

GARNET MORGAN, Assessment Officer

I. Background

[1] This is an assessment of costs pursuant to an Order of the Federal Court of Appeal dated April 14, 2020, wherein the Moving Party's motion in writing under Rule 397 of the *Federal Courts Rules*, SOR/98-106 [FCR], for reconsideration of the Court's Order dated February 4, 2020, was "dismissed with costs, payable to the respondent forthwith."

[2] Further to the Court's Order, the Respondent's costs will be assessed in accordance with Rule 407 of the FCR, which states the following:

Assessment according to Tariff 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.

Tarif 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

[3] On August 25, 2022, the Respondent filed a Bill of Costs, an Affidavit of Disbursements of Olinda Samuel, sworn on July 22, 2022, and Written Submissions on Costs, which initiated the Respondent's request for an assessment of costs. On August 30, 2022, a direction was issued to the parties regarding the conduct and filing of additional documents for the assessment of costs.

[4] My review of the court record (hard copy file and computerized version) shows that no additional documents were filed by either party for this assessment of costs.

III. Preliminary Issue

A. *The absence of responding documents from the Moving Party for the assessment of costs.*

[5] The Moving Party did not file any documents in response to the Respondent's request for an assessment of costs. The absence of responding documents from the Moving Party has left the Respondent'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.

[6] In addition, in *Carlile v. Canada (Minister of National Revenue - MNR)*, [1997] F.C.J. 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. [...]

[7] Further to the guidance provided by the *Dahl* and *Carlile* decisions, they indicate that although there is an absence of responding documents from the Moving Party, 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 the Respondent’s claims, I will review the court record, and any relevant rules, statutes, and jurisprudence, in conjunction with the Respondent’s costs documents to ensure that any costs allowed were necessary and reasonable.

IV. Assessment of Costs

[8] I have reviewed the Respondent’s assessment of costs documents in conjunction with the court record, and any relevant rules, statutes, and jurisprudence, and I have determined that the assessable services (Items 21, 25 and 26) and disbursements (printing and process serving) 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 necessary services and disbursements for the Respondent’s litigation of this court file. The claims submitted were verifiable with the court record, and the requirements of subsection 1(4) of Tariff B regarding evidence for disbursements was adhered to by the Respondent.

[9] For my assessment of the Respondent’s claims, I reviewed the factors in awarding costs that are listed under Rule 400(3) of the FCR, which I am able to consider as an Assessment Officer pursuant to Rule 409 of the FCR. When I considered factors such as, “(a) the result of the proceeding;” “(b) the amounts claimed and the amounts recovered;” and “(g) the amount of work;” the court record reflects that the Respondent was the successful party for the motion for

reconsideration; the amounts claimed, and to be recovered by the Respondent, are reasonable; and the Respondent performed a moderate amount of work to respond to the motion for reconsideration.

[10] Having considered the aforementioned facts, the Respondent's assessable services and disbursements are allowed for a total amount of \$1,394.76.

V. Conclusion

[11] For the above reasons, the Respondent's Bill of Costs is assessed and allowed in the total amount of \$1,394.76, payable by the Moving Party, Robert Harold Keenan, to the Respondent, His Majesty The King. A Certificate of Assessment will also be issued.

"Garnet Morgan"
Assessment Officer

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: 19-A-73

STYLE OF CAUSE: ROBERT HAROLD KEENAN v. HIS
MAJESTY THE KING

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

REASONS FOR ASSESSMENT BY: GARNET MORGAN, Assessment Officer

DATED: APRIL 19, 2023

WRITTEN SUBMISSIONS BY:

N/A

FOR THE MOVING PARTY
(SELF-REPRESENTED)

Laura Zumpano
Mark Shearer

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Deputy Attorney General of Canada
Vancouver, British Columbia

FOR THE RESPONDENT