

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20230613**

**Docket: A-233-21**

**Citation: 2023 FCA 136**

**Present: GARNET MORGAN, Assessment Officer**

**BETWEEN:**

**INTERNATIONAL NAME PLATE SUPPLIES  
LIMITED**

**Appellant**

**and**

**MARKS & CLERK CANADA**

**Respondent**

Assessment of costs without appearance of the parties.  
Certificate of Assessment delivered at Toronto, Ontario, on June 13, 2023.

**REASONS FOR ASSESSMENT BY: GARNET MORGAN, Assessment Officer**

Federal Court of Appeal



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**REASONS FOR ASSESSMENT**

**GARNET MORGAN, Assessment Officer**

I. Introduction

[1] This assessment of costs is further to the Appellant filing a Notice of Discontinuance on January 5, 2023, which wholly discontinued the appeal proceeding against the Respondent.

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

**Costs of discontinuance or abandonment**

**402.** 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.

[...]

**Costs of discontinued proceeding**

**412.** The costs of a proceeding that is discontinued may be assessed on the filing of the notice of discontinuance.

**Dépens lors d'un désistement ou abandon**

**402** Sauf ordonnance contraire de la Cour ou entente entre les parties, lorsqu'une action, une demande ou un appel fait l'objet d'un désistement ou qu'une requête est abandonnée, la partie contre laquelle l'action, la demande ou l'appel a été engagé ou la requête présentée a droit aux dépens sans délai. Les dépens peuvent être taxés et le paiement peut en être poursuivi par exécution forcée comme s'ils avaient été adjugés par jugement rendu en faveur de la partie.

[...]

**Dépens en cas de désistement**

**412** Les dépens afférents à une instance qui fait l'objet d'un désistement peuvent être taxés lors du dépôt de l'avis de désistement.

[3] Further to my review of Rules 402 and 412, in the absence of a Court decision specifying any particulars regarding the Appellant's discontinued appeal proceeding and in the absence of an agreement between the parties, 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

[4] On March 9, 2023, the Respondent filed Costs Submissions with a draft Bill of Costs attached as Schedule A, which initiated the request for an assessment of costs.

[5] On March 14, 2023, a direction was issued to the parties regarding the conduct and filing of additional documents for the assessment of costs.

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

- a) On March 14, 2023, the Appellant filed a costs record containing an Appellant's Reply Costs Submissions, and an Affidavit of Whitney E. Lewis, affirmed on March 14, 2023.
- b) The Respondent did not file any reply documents.

III. Preliminary Issue

A. *The Respondent's request for elevated costs.*

[7] The Respondent is seeking costs at the highest end of column V of the table to Tariff B and an additional lump sum of \$3,500.00 to recognize the "significant preparation" done for the appeal hearing; the unilateral filing of the discontinuance by the Appellant six days before the appeal hearing; and for legal fees expended by the Respondent (Respondent's Costs Submissions at paras. 1 to 9). My review of the court record did not reveal that the Court awarded costs to the Respondent as a lump sum or in accordance with column V of Tariff B in relation to the

Appellant's discontinued appeal proceeding. As noted earlier in these Reasons (at para. 3), Rule 407 of the FCR states, "[u]nless the Court orders otherwise, party-and-party costs shall be assessed in accordance with column III of the table to Tariff B." In *Pelletier v. Canada (Attorney General)*, 2006 FCA 418 [*Pelletier*], at paragraph 7, the Court stated the following regarding awards of costs and the duty of an Assessment Officer:

[7] [...] 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. [...]

[8] In addition, for greater clarity, subsections 400(4) and (5) of the FCR state the following regarding lump sum amounts and assessments of costs under Tariff B:

**Tariff B**

(4) The Court may fix all or 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

**Directions re assessment**

(5) Where the Court orders that costs be assessed in accordance with Tariff B, the Court may direct that the assessment be performed under a specific column or combination of columns of the table to that Tariff.

**Tarif B**

(4) La Cour peut fixer tout ou partie des dépens en se reportant au tarif B et adjuger une somme globale au lieu ou en sus des dépens taxés.

**Directives de la Cour**

(5) Dans le cas où la Cour ordonne que les dépens soient taxés conformément au tarif B, elle peut donner des directives prescrivant que la taxation soit faite selon une colonne déterminée ou une combinaison de colonnes du tableau de ce tarif.

[9] As stated by the Court in the *Pelletier* decision, my role as an Assessment Officer is only "to assess costs, not award them." Pursuant to subsections 400(4) and (5) of the FCR, I do not have the authority to award costs as a lump sum or under column V of Tariff B because I am not a member of the Court but rather an officer of the Registry (Rule 2 of the FCR). In the absence

of a Court decision or direction awarding costs to the Respondent as a lump sum or in accordance with column V of Tariff B, or alternatively any unknown jurisprudence from the Respondent to support the allowance of these costs by an Assessment Officer in the absence of a Court decision or direction, I find that I do not have the authority to assess these types of costs autonomously. Therefore, I have determined that I must adhere to the parameters set out in Rule 407 of the FCR and assess the Respondent's costs at the party-and-party level in accordance with column III of the table to Tariff B of the FCR.

IV. Assessable Services

A. *Item 18 – Preparation of appeal book; and Item 19 – Memorandum of fact and law.*

[10] The Respondent has claimed 1 unit for Item 18 and 7 units for Item 19.

[11] I have reviewed the parties' 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 18 and 19 can be allowed as claimed. I did not find that these claims required my intervention as I found the services performed by the Respondent to be necessary, and the amounts claimed are reasonable.

[12] For my assessment of these claims, I reviewed the factors in awarding costs that are 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. When I considered factors such as paragraphs, "(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;” the court record reflects that the Respondent was the successful party in the appeal proceeding; the amounts claimed and to be recovered are reasonable; the issues argued were of significant importance and of moderate complexity; and the Respondent performed a significant amount of work for Item 19 (Respondent’s Costs Submissions at para. 5). There may be some nuances as to whether the number of units claimed for Item 19 should have been selected at the highest end of column III or one slightly lower, but the Appellant did not provide any specific submissions regarding this claim being particularly excessive in the number of units claimed under column III. 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 v. Canada*, 2007 FC 192, at para. 2).

[13] Having considered the aforementioned facts, I find it reasonable to allow Items 18 and 19 as claimed under column III in the Respondent’s Bill of Costs for \$1,446.40, which is inclusive of the taxes requested.

#### V. Disbursements

[14] The Respondent did not submit any claims for disbursements.

VI. Conclusion

[15] For the above reasons, the Respondent's Bill of Costs is assessed and allowed in the total amount of \$1,446.40, payable by the Appellant to the Respondent. A Certificate of Assessment will also be issued.

"Garnet Morgan"  
\_\_\_\_\_  
Assessment Officer



**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET**

A-233-21

**STYLE OF CAUSE:**

INTERNATIONAL NAME PLATE  
SUPPLIES LIMITED v. MARKS &  
CLERK CANADA

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

**REASONS FOR ASSESSMENT BY:**

GARNET MORGAN, Assessment Officer

**DATED:**

JUNE 13, 2023

**WRITTEN SUBMISSIONS BY:**

Amy M. Thomas

FOR THE APPELLANT

Kenneth D. McKay

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Macera & Jarzyna LLP  
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