Federal Court  Cour fédérale

Date: 20210129

Docket: T-374-19

Citation: 2021 FC 102

BETWEEN:

NOVA-BIORUBBER GREEN TECHNOLOGIES, INC.

Plaintiff

and

SUSTAINABLE DEVELOPMENT TECHNOLOGY CANADA

Defendant

REASONS FOR ASSESSMENT

GARNET MORGAN, Assessment Officer

[1] This is an assessment of costs pursuant to an Order of the Federal Court dated July 22, 2020, wherein the Plaintiff's motion to set aside the Court's Order dated March 2, 2020, was dismissed with costs in favour of the Defendant.

[2] Further to the Court's Order, 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 5, 2020, the Defendant filed a Bill of Costs.

[4] On August 10, 2020, the following assessment of costs direction was issued to the parties:

> Further to the filing of the Defendant's Bill of Costs on August 5, 2020, the assessment of costs will proceed in writing. It is directed that:
>
> > 1. The Defendant shall serve and file any supporting costs material (bill of costs, affidavit(s) of disbursements and written representations) by Friday, September 18, 2020;
> >
> > 2. The Plaintiff may serve and file any responding costs material (affidavit(s) and/or written submissions) by Friday, October 30, 2020;
> >
> > 3. The Defendant may serve and file any reply costs material (affidavit(s) and/or written submissions) by Friday, November 20, 2020.

[5] My review of the court record shows that on August 20, 2020, the Defendant filed supporting costs material, including written representations and an Affidavit of Alyssa Clutterbuck; and on September 16, 2020, the Plaintiff filed written submissions and an Affidavit of Dr. Anvar Buranov. The Defendant did not file any reply costs material.

I. Preliminary Issues

A. *The Plaintiff's financial circumstance.*

[6] In the Plaintiff's responding costs material filed on September 16, 2020, it is submitted that the Plaintiff has been having financial difficulties. On page 2 of the Plaintiff's written submissions, it is submitted that the Court's Order dated March 2, 2020, dismissed the Plaintiff's case for not hiring a lawyer. The Plaintiff has submitted that sales revenue has not occurred yet and that hiring a lawyer would bankrupt the Plaintiff, which is an innovative start-up business. In addition, the Plaintiff has submitted that due to the Covid-19 pandemic, governments have "stopped issuing grants for innovative research and business proposals." Attached to the Affidavit of Dr. Anvar Buranov, sworn on September 14, 2020, are exhibits A, B and C, which contain copies of financial statements and an invoice for research performed by Varty & Company, demonstrating the financial difficulties of the Plaintiff.

[7] Further to the Plaintiff's costs material, 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.

[8] In *Leuthold v Canadian Broadcasting Corp*., 2014 FCA 174, at paragraph 12, the Court stated the following regarding a party's financial circumstance 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.

[9] In addition, in *Carlile v Canada*, [1997] F.C.J. No. 885, at paragraph 26, the Assessment Officer states the following with regards to conducting equitable assessments of costs:

> 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.

[10] Further to the Plaintiff's costs material, the decisions in *Latham*, *Leuthold* and *Carlile* support the premise that although Assessment Officers cannot consider the impecuniosity of a party, Assessment Officers still have an obligation to ensure that any claims that are allowed are not "unnecessary or unreasonable". Utilizing the *Carlile* decision as a guideline, this assessment

of costs will be conducted in such a manner as to not penalize the Defendant by the "denial of indemnification when it is apparent that real costs were indeed incurred" but will also ensure that the Plaintiff is "not burdened with unnecessary or unreasonable costs". To accomplish this task, the parties' costs material; the Court's decision; the court record; the *FCR*; and any related jurisprudence will be utilized.

B. *Dismissal and award of costs.*

[11] On page 3 of the Plaintiff's responding written submissions, it is submitted that:

> Plaintiff strongly believes this is discrimination against Plaintiff due to the ethnicity of Dr. Anvar Buranov. Therefore, I request the court to dismiss the bill of costs filed by Defendant.
>
> Considering financial difficulties of Plaintiff to develop a new biorubber industry for Canada, Plaintiff sincerely requests to award costs to Plaintiff.

[12] My review of the court record for this file indicates that only the Defendant has been awarded costs by the Court and that no costs have been awarded to the Plaintiff. 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.

[13] Further to the decision in *Pelletier*, my role as an Assessment Officer is to assess costs. I do not have the authority to dismiss the costs of the Defendant, nor do I have the authority to

award costs to the Plaintiff, as I am not a Judge. Therefore, I am unable to consider the Plaintiff's requests that I dismiss the costs of the Defendant and award costs to the Plaintiff.

II. Assessable Services

[14] The Defendant has claimed $4,576.50 in assessable services.

A. *Item 5: Preparation and filing of a contested motion, including materials and responses thereto. Item 6: Appearance on a motion, per hour. (Plaintiff's motion appealing the Court's Order dated March 2, 2020, heard on July 21, 2020.)*

[15] The Defendant has claimed 7 units for Item 5 and 19 units for Item 6 related to the Plaintiff's motion appealing the Court's Order dated March 2, 2020, which was heard on July 21, 2020, on a general sittings motions day in Vancouver, British Columbia by videoconference.

[16] At paragraph 9 of the Defendant's written representations, it is submitted that:

> In the July 2020 Order dismissing the Plaintiff's motion, Madam Justice St-Louis noted that a prothonotary conducting a status review has the discretion to dismiss the proceeding after reviewing the parties' written representations. Madam Justice St-Louis further noted that the Plaintiff did not point to any errors by Madam Prothonotary Ring in the March 2020 Order.

[17] The Defendant has submitted that the Court granted costs to the Defendant without any specific conditions and that the Assessment Officer may take into account the factors enumerated in Rule 400(3) of the *FCR*. The Defendant also submitted that three copies of the Defendant's Motion Record were filed with the court registry, which included Court directions and decisions,

correspondence and written representations; and that first counsel attended the July 21, 2020, hearing by videoconference.

[18] In response, the Plaintiff submitted that the Court has rejected the Plaintiff's attempts to be represented by the owner of the company, including the Court's Order dated March 2, 2020, which dismissed the case for not having a lawyer, even though financial difficulties have prevented a lawyer from being hired. On page 2 of the Plaintiff's written submissions, it is submitted that:

> Defendant is claiming $6.2 hours (19 units) for the court session on July 21, 2020. This is not true. Defendant only participated for 2 hours of court session on July 21, 2020. Defendant also claims 7 units for "Preparation of filing of a contested motion, including materials and and [sic] responses thereto. Defendant cannot claim for the costs for the preparation of this claim.

[19] Further to my review of the parties' costs material, my review of the court record shows that the Defendant performed a considerable amount of work to prepare the responding Motion Record for this file. Taking into consideration the factors contained in Rule 400(3) of the *FCR*, such as (a) the result of the proceeding; and (g) the amount of work; I find that the Defendant's claim for Item 5 is supported by the court record. Therefore, I find it reasonable to allow 7 units for Item 5, as claimed in the Defendant's Bill of Costs.

[20] Concerning Item 6, my review of the details for the hearing on July 21, 2020, shows that the hearing was scheduled by a direction of the Chief Justice, Federal Court, dated July 2, 2020. The motion was scheduled to begin at 9:30 am Pacific Daylight Time (PDT) for a duration of 2 hours, on a general sittings motions day in Vancouver, British Columbia. The court record shows

that the Court Registrar documented the hearing as beginning at 1:01 pm and concluding at 1:55 pm PDT, which is 54 minutes. Further to the Plaintiff's submissions, I do not find the Defendant's claim of 6.2 hours to be supported by the court record. In *Dewji & Gheciu Consultants Inc. v A&A Consultants & Felicia Bilc*, [1999] F.C.J. No. 1263, at paragraph 2, the Assessment Officer states the following regarding general sittings motions days and costs:

> In the claim under item 6 of Tariff B for appearance on the injunction motion, the defendants include time spent waiting for their motion to be called by the presiding Judge. The total claimed in the Bill is 5.5 hours, while the Court record shows that only 1.5 hours were actually spent in arguing the motion. In the case of Melo's Food Centre Ltd. v. Borges Food Ltd., (unreported) Court file no. T-916-89, dated August 8, 1996, the Assessment Officer reasoned that in an assessment on a party-and-party scale it would be inappropriate to burden the opposing party with the additional cost of waiting time. I agree with that approach and also express the view that I would likely have taken a more generous view if costs had been awarded on a solicitor-and-client scale. This item will be reduced to 1.5 hours. For similar reasons, the defendants' claim for 3 hours with respect to appearance on a motion before the Prothonotary will also be reduced to 2 hours.

[21] Utilizing the *Dewji* decision as a guideline, I have taken into consideration that the hearing of the motion was conducted by videoconference and that this requires a party to be ready to proceed well before the hearing begins so that the Court Registrar can ensure that the parties are present and that there are no technical difficulties. I have added 30 minutes to the hearing duration to recognize the time that counsel had to be ready before the starting time for the hearing. This time also provides counsel with a few minutes at the end of the hearing to wrap things up. In *Halford v Seed Hawk Inc*., 2006 FC 422, at paragraph 211, the Assessment Officer states the following with regards to allowing additional time to counsel for hearings:

> I have consistently held that counsel must be in court some time before the scheduled start or resumption times to permit the court registrar to satisfy herself that the hearing is ready to go. I consider

> that integral to attendance. I compared the court file's abstract of hearing, the Seed Hawk Defendants' asserted hours for item 14, those of the Simplot Defendant, Mr. Halford's evidence and information in the trial transcript.

[22] Therefore, further to my review of the parties' costs material in conjunction with the court record and utilizing the *Dewji* and *Halford* decisions as guidelines, I have determined that it is reasonable to allow 4.5 units for Item 6 for the Defendant's attendance at the hearing of the Plaintiff's appeal motion, heard at a general sittings motions day in Vancouver, British Columbia by videoconference.

B. *Item 25 - Services after judgment not otherwise specified.*

[23] The Defendant has requested 1 unit for the Defendant's attempt to settle the issue of costs with the Plaintiff, which is noted at paragraph 10 of the Defendant's written representations. In addition, at paragraphs 3 and 4 of the Affidavit of Alyssa Clutterbuck, sworn on August 19, 2020, it states that:

> 3. Between July 28 and 31, 2020, my colleague Kevin O'Brien and Dr. Anvar Buranov (representative for the Plaintiff/Appellant) exchanged communications with respect to a settlement of the costs amount for the above-noted motion. No such settlement was reached.
>
> 4. In those communications, Mr. O'Brien provided Dr. Buranov with a copy of SDTC's Bill of Costs for this matter.

[24] In response, at page 2 of the Plaintiff's written submissions, it is submitted that the Defendant has claimed 1 unit for Item 25 "without any further definition."

[25] In *Chisholm v Bank of Nova Scotia*, [2000] F.C.J. No. 1810, at paragraph 32, the Assessment Officer states the following regarding Item 25:

> Item 25 in the tariff provides for services after judgment not otherwise specified. The Court dismissed this appeal with Costs. The drafting and preparation of the Bill of Costs is a service which, in my opinion, clearly falls within the ambit of this tariff item and thus is clearly assessable. Item 25 is allowed as claimed.

[26] Further to my review of the parties' cost material and utilizing the *Chisholm* decision as a guideline, I have determined that it is reasonable to allow 1 unit for Item 25. The Defendant's attempt to settle the issue of costs with the Plaintiff qualifies as a service after judgment, as this step would be taken after an award of costs is made by the Court but prior to formally requesting an assessment of costs be conducted by an Assessment Officer, which could have been claimed under Item 26 by the Defendant. Therefore, 1 unit is allowed for Item 25.

[27] A total of 12.5 units have been allowed for the Defendant's assessable services for a total amount of $2,118.75.

III. Disbursements

[28] The Defendant's Bill of Costs did not have any claims for disbursements.

IV. Conclusion

[29] For the above Reasons, the Defendant's Bill of Costs is assessed and allowed in the total amount of $2,118.75. A Certificate of Assessment will be issued for $2,118.75, payable by the Plaintiff to the Defendant.

"Garnet Morgan"
Assessment Officer

Toronto, Ontario
January 29, 2021

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-374-19
STYLE OF CAUSE:	NOVA-BIORUBBER GREEN TECHNOLOGIES, INC. v SUSTAINABLE DEVELOPMENT TECHNOLOGY CANADA

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

REASONS FOR ASSESSMENT BY:	GARNET MORGAN, Assessment Officer
DATED:	JANUARY 29, 2021

WRITTEN SUBMISSIONS BY:

Dr. Anvar Buranov President/CEO	FOR THE PLAINTIFF (SELF-REPRESENTED)
Kevin O'Brien Emily MacKinnon	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Osler, Hoskin Harcourt LLP Toronto, Ontario	FOR THE DEFENDANT