Federal Court  Cour fédérale

Date: 20221129

Docket: T-391-21

Citation: 2022 FC 1632

BETWEEN:

FLOYD BERTRAND

Applicant

and

ACHO DENE KOE FIRST NATION

Respondent

REASONS FOR ASSESSMENT

Stéphanie St-Pierre Babin, Assessment Officer

I. Background

[1] By way of Order and Reasons, the Court dismissed the Applicant's motion for interim relief awarding "costs in the cause" to the Respondent on March 25, 2021 [Order and Reasons]. Additionally, on October 13, 2021, the Applicant filed a Notice of Discontinuance of the underlying application for judicial review, thus incurring costs in favour of the Respondent according to Rule 402 of the *Federal Court Rules*, SOR-98/106 [Rules]. Upon receipt of the

Respondent's Bill of Costs on November 12, 2021, a direction was issued informing the parties that the assessment of costs would proceed in writing and of the deadlines to file their written representations. Having reviewed the cost submissions provided on behalf of both parties, I will now proceed with the assessment of the Bill of Costs.

II. Preliminary Issues

A. *Level of costs*

[2] Both parties agree that the Respondent's Bill of Costs shall be assessed in accordance with Column III of Tariff B pursuant to Rule 407, but they disagree as to the level of costs to be allowed within that range. The Respondent argues that assessing all the services claimed at the high end of Column III is justified with reference to the factors set out in Rule 400(3) (Respondent's cost submissions, para 4). In response, the Applicant requests that the assessable services must be assessed on the low end on Column III given the mixed success of the Respondent and pursuant to other factors set out in Rule 400(3) (Applicant's Response, para 6).

[3] Each item of Tariff B presents its own unique circumstances and it is not necessary to use the same level throughout the range of units (*Starlight v Canada*, [2001] FCJ No 1376 at para 7). Although costs are typically assessed around the mid-point of the range of Column III, an Assessment Officer is able to allow costs at a lower or higher level than the mid-point when specific circumstances dictate otherwise (*Truehope Nutritional Support Limited v Canada (Attorney General)*, 2013 FC 1153 at para 14). Given the absence of instructions from the Court stating otherwise, I will therefore determine the number of units allowable for each item on an

individual basis within the full range of Column III (*Hoffman-La Roche Limited v Apotex Inc*, 2013 FC 1265 at para 8). While doing so, I will remain mindful of the principle that "[c]osts customarily provide partial compensation, rather than reimbursing all expenses and disbursements incurred by a party, representing a compromise between compensating the successful party and burdening the unsuccessful party" (*Canadian Pacific Railway Company v Canada*, 2022 FC 392 at para 23).

B. *Costs of the discontinued proceeding*

[4] The Respondent presents claims under items 5, 6, 10, 11, 13, 25, 26 and 28 under various parts of Tariff B in its Bill of Costs. In response, the Applicant contends the Respondent has "attempted to treat this as a full judicial review hearing and/or trial" and is not entitled to costs of the proceeding (Applicant's Response, paras 10–12). Consequently, he contends the Respondent is only entitled to costs related to the motion for interim relief and the assessment of costs which are items 5, 6 and 26 (Applicant's Response, paras 19, 34). In reply, the Respondent relies on Rule 412 to argue its entitlement "to costs related to steps taken on the injunction motion *and* on the underlying judicial review application" [emphasis in the original.] (Respondent's Reply, para 9). I agree with the Respondent.

[5] First, the Respondent is entitled to costs related to the motion for interim relief following to the Order and Reasons dated March 25, 2021. The parties do not dispute this.

[6] Second, the Respondent is entitled to costs of this proceeding since the underlying application for judicial review commenced against it has been discontinued pursuant to Rule 402. Furthermore, Rule 412 is clear as to costs of a discontinued proceeding:

Costs of discontinued proceeding	**Dépens en cas de désistement**
412 The costs of a proceeding that is discontinued may be assessed on the filing of the notice of discontinuance.	**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.
[Emphasis added.]	[Je souligne.]

[7] Therefore, the Respondent was entitled to present claims for assessable services other than those under Part B. Motions with regard to the motion for interim relief. I have yet to determine, however, whether each of these assessable services is allowable according to the applicable law and jurisprudence.

III. Assessment of costs

A. *Factors under Rule 400(3)*

[8] Before I begin my analysis of the Bill of Costs, I must emphasize that during the course of this assessment, I may exercise my discretion and consider the factors referred to under subsection 400(3) pursuant to Rule 409. However, I am under no obligation to consider these factors in making my decision (*Tibilla v Canada (Attorney General)*, 2012 FC 85 at para 10). This will depend of the circumstances of each claim.

B. *Item 5 and Item 6 – Preparation and appearance on a contested motion*

[9] Both parties agree the Respondent is entitled to costs for the preparation and filing of the motion for interim relief filed on March 9, 2022 (Item 5), and for the appearance at its hearing held on March 23, 2021 (Item 6).

[10] Turning to Item 5, the Respondent claims 7 units while the Applicant submits the Respondent is entitled to 3 units. In his cost submissions, the Respondent relies on paragraphs 400(3)(a), (c), (g), (k) and (i) of the Rules to support an assessment of costs at the high end of Column III. In response, the Applicant contends "[t]he filing of multiple affidavits, by choice, does not change the allowable amount in Tariff B for a motion record. Indeed, that the Respondent made this litigation choice (filing multiple affidavits on the motion, as opposed to the main application) should not be born by the Applicant" (Applicant's Response, para 30). Additionally, he argues the motion was not complex (Applicant's Response, para 31).

[11] In the Order and Reasons rendered on March 25, 2021, there is some indication as to the complexity of the issues raised by the Applicant (Rule 400(3)(a)). It states the "issues raised by Mr. Bertrand are serious" and "deserve careful consideration" (*Bertrand v Acho Dene Koe First Nation*, 2021 FC 257 [*Bertrand*] at para 18). In addition, the Court observed that Mr. Bertrand raised a number of grounds, three in total (*Bertrand* at para 17). As rightly pointed out by the Respondent, "regarding the importance and complexity of the issues, it is legal significance and complexity, including the number of issues, that are to be considered and not the factual subject matter" [emphasis added.] (*Balfour v Norway House Cree Nation*, 2006 FC 616 at para 15 citing

Aird v Country Party Village Property (Mainland) Ltd, 2004 FC 945 at para 6). Therefore, I conclude the motion showed some level of complexity. On the other hand, although the Court concluded the evidentiary record was incomplete, there is no clear comment as to the apparent amount of work in preparation (Rule 400(3)(g)) nor is there a clear indication that the motion brought by the Applicant was, according to Rules 400(3)(k) and (i), improper, vexatious, unnecessary or taken through negligence, mistake or excessive caution (*Bertrand* at para 18). Given these circumstances, I find the allowance of 6 units for Item 5 and the allowance of 2 units for Item 6 to be reasonable.

[12] Turning to Item 6 the Respondent indicated the total duration of the hearing was 3 hours in the Bill of Costs while the Applicant suggested the total duration was 2 hours in the bill of costs attached to his cost submissions in response. For its part, the abstract of hearing, which provides the hearing details, shows the total duration of the hearing held on March 23, 2021 was 3 hours and 8 minutes. Since the abstract of hearing is a reliable source of information prepared by a registry officer of the court, and noting the Respondent rounded down the number of units from the total duration of the hearing, I find the 3 units claimed to be reasonable and they are allowed as claimed.

[13] In light of the foregoing, I allow a total of 6 units for Item 6. This was calculated by multiplying the 3 hours claimed by the Respondent by the 2 units allowed under Column III.

C. *Item 10 and Item 11 – Preparation and attendance at a conference*

[14] The Respondent claims 6 units for the preparation of case management conferences [CMC] respectively held on March 10, 2021, August 13, 2021, and October 8, 2021 (Item 10) and 3 units for the attendance at said conferences (Item 11). In response, the Applicant argues that items 10 and 11 should be disallowed as claims under "Tariff B Part D. Pre-Trial and Pre-Hearing Procedures" are meant to compensate for services in the context of an action, not a judicial review (*Archambault v Canada (Customs and Revenue Agency)*, 2010 FC 832 at para 5 [*Archambault*]). In his cost submissions, in reply the Respondent relies on *Narte v Gladstone*, 2021 FC 1429 to retort the opposite and submits that claims under items 10 and 11 are allowable in the judicial review context. I agree with the Respondent.

[15] Indeed, there are a significant number of cases confirming fees under items 10 and 11 may be allowed for CMCs in the judicial review context (*Quinn v Canada (Attorney General)*, 2021 FC 470 at paras 26, 29; *Narte v Gladstone*, 2021 FC 1429 at paras 8–26 [*Narte*]; *Métis National Council of Women v Canada (Attorney General)*, 2007 FC 961 at paras 40-41). With respect to *Archambault*, this case does not refer to any authority supporting the contention that items 10 and 11 are not allowable for judicial reviews. Therefore, I conclude the Respondent was entitled to submit claims under these items with respect to CMCs.

[16] Turning to Item 10, the Respondent claims a total of 6 units for the amount of work accomplished in preparation of all three (3) CMCs. In response, the Applicant contends, "there is no evidence that any work or expenses were incurred in preparation for these procedural case

management conferences" (Applicant's cost submissions, para 15). In reply, the Respondent argues Item 10 was allowed in *Narte*, a case supported by similar arguments and material (Respondent's cost submissions in reply, para 15).

[17] As per my review of the court record, I acknowledge correspondences and/or informal submissions were exchanged between the parties prior to the CMCs. Additionally, McHaffie J. recently recognized that "even scheduling matters typically require some preparation, and a claim may be made under Item 10 of Tariff B for preparation even in respect of more routine case conferences" (*Guest Tek Interactive Entertainment Ltd v Nomadix, Inc*, 2021 FC 848 at para 42). In keeping with *Guest Tek* and further to my review of the court record, I find reasonable to allow the cumulative 6 units for Item 10 as claimed by the Respondent.

[18] With regard to Item 11 for the attendance at the CMCs, and further to my review of the abstracts of hearings, I note they respectively dealt with:

- March 10, 2021: discussions before the hearing judge in relation to the motion for interlocutory relief; matter heard concurrently with T-1274-20;
- August 13, 2021: CMC heard concurrently with T-1178-21 and T-1241-21 – discussions regarding next steps of the proceeding and other discussions;
- October 8, 2021: discussions held regarding recent correspondence concerning the issue of costs; matter heard concurrently with T-1241-21 and T-1274-20.

[19] Upon considering the aforementioned details and further to my review of the minutes of hearing, the issues strictly related to court file T-391-21 discussed during the CMCs were from low to moderate complexity. Therefore, I determine that 2 units under Column III is reasonable for each CMC under Item 11, which represents the mid-range of Column III. I will now discuss the number of units claimed for the duration of each CMC.

[20] As per my review of the court record and abstract of hearings, the durations were the following:

- March 10, 2021: Total duration: 36 minutes (0.6 hours);
- August 13, 2021: 90 minutes (1.5 hours);
- October 8, 2021: 50 minutes (0.75 hours).

[21] Further to my review of the minutes of hearing and considering the above-mentioned durations, I find the 0.5 unit claimed per CMC to be reasonable as the duration of each CMC was reduced by the Respondent, notably in consideration that the CMCs were heard concurrently with other related court files (Respondent’s reply, para 13).

[22] For these reasons, I allow a total of 3 units for Item 11. This was calculated by multiplying the 1.5 units allowed for the duration of the CMCs (0.5 units x 3 CMCs) by the 2 units allowed under Column III.

D. *Item 13 – Preparation for hearing*

[23] In his cost submissions, the Respondent claims 5 units for pre-hearing procedures for the judicial review hearing (Item 13(a)), arguing reasonable work was accomplished "to prepare litigation strategy, including the possible filing of response evidence." More specifically, the preparation "included legal research, discussions with potential witnesses, and the ongoing provision of legal advice" (Respondent's cost submissions, para 29). The Applicant provided no specific submissions on Item 13(a).

[24] As my colleague rightly points out in *Bernard v Professional Institute of the Public Service*, 2020 FCA 152 [*Bernard*], Tariff B "does not explicitly state that a hearing must be scheduled in order for Item 13(a) to be claimed by a party" (Bernard at para 23). Rather, it states that a counsel fee may be claimed, "whether or not the trial or hearing proceeds." Further to my review of the court record and the parties' cost submissions, I recognize the necessity for a party to stand ready and minimally continue its preparation until a hearing has commenced or the proceeding has been discontinued. For these reasons, I allow 2 units for Item 13(a) which represents the low-end of Column III.

E. *Item 25 – Services after judgment*

[25] Turning to the claim for the services rendered after judgment, the Respondent submits that costs are claimed for the "ongoing efforts […] made to have this matter discontinued so it can proceed to a costs assessments" (Respondent's cost submissions, para 30). In response, the

Applicant contends that no services after judgment should be allowed as "there [w]as no Judgment" (Applicant's Response at para 33).

[26] It is well established that claims under Item 25 relate to services rendered after a final judgment as opposed to an interlocutory decision (*Boshra v Canada (Association of Professional Employees)*, 2011 FCA 278 at para 20; *Manson v Canada*, 2008 FCA 312 at para 5; *Chilton v Canada*, 2008 FC 1327 at para 4). Although the notice of discontinuance filed in this case resulted in an entitlement of costs that "may be assessed […] as if judgment for the amounts of the costs had been given" pursuant to Rule 402, it appears the Respondent's efforts were made prior to the filing of the notice of discontinuance (Respondent's cost submissions, para 30). Given these circumstances, as Item 25 provides for services after judgment, the units claimed are not allowed.

F. *Item 26 – Assessment of costs*

[27] For Item 26 concerning the services performed in relation to the assessments of costs in the present case, the Applicant concedes the Respondent is entitled to these costs but argues that 2 units – the lower hand of Column III – should be allowed given the offer to settle the issue of costs. On the other hand, 6 units were claimed by the Respondent – the high end of Column III – due to the Applicant's conduct in delaying the assessment of costs. Further to my review of the court record, although the assessment was conducted in writing, I acknowledge that a substantial amount of work was performed given the amount of correspondence exchanged to resolve the issue of costs (paragraph 400(3)(g)). Such amount of work also included written submissions

(i.e. cost submissions, a response and a reply), affidavits, exhibits attached thereto and extensive case law. Given the particular circumstances of this case, I find the allowance of 5 units to be reasonable.

G. *Item 28 – Services by students-at-law and law clerks*

[28] The Respondent claims 3 units for the services rendered by students-at-law and law clerks. Paragraph 33 of the Respondent's cost submissions states:

> The assistance of students-at-law and law clerks was required in preparing for and filing the contested motion (line 5), in preparing for the three case management conferences that took place (line 10), and for undertaking the preparation for a potential hearing on the underlying application for judicial review (line 13).

The Applicant has not presented arguments in response to this particular claim other than arguing the Respondent is only entitled to items 5, 6 and 26 (Applicant's response at paras 19, 34).

[29] Item 28 of the Table to Tariff B provides for "[s]ervices in a province by students-at-law, law clerks or paralegals that are of a nature that the law society of that province authorizes them to render." What can be claimed will depend on the nature of the services rendered (*Apotex Inc v Syntex Pharmaceuticals International Ltd*, 176 FTR 142). In order to allow these services under Item 28, I must be able to distinguish the services rendered by the counsel from the services rendered by the students-at-law and law clerks. By doing so, I avoid a duplication or an overpayment of costs already allowed above for Item 5, Item 10 and Item 13 (*Corporation*

xprima.com v IXL Marketing inc, 2011 FC 624 at para 12; *Novopharm Ltd v AstraZeneca AB*, 2006 FC 678 at para 25).

[30] As per my review of the costs documentation, it appears that the Respondent has not provided any evidence to demonstrate the exact nature of the services rendered (*Tuquabo v Canada*, 2009 FCA 126 at para 10). Furthermore, no written submissions were provided to detail exactly what are the "services […] that are of the nature that the law society of that province authorizes [students-at-law and law clerks] to render" (item 28). Rather, the Respondent's cost submissions state the "assistance of students-at-law and law clerks was required in preparing for and filing the contested motion (line 5), in preparing for the three case management conferences that took place (line 10), and for undertaking the preparation for a potential hearing […] (item 13)." These general assertions do not allow me to distinguish the services rendered by counsel from the services rendered by the students-at-law and law clerks. Therefore, the units claim for Item 28 are not allowed.

H. *Disbursements*

[31] The Respondent claims $326.28 for printing services "of materials for the preparation of and participation in the motion hearing," and an invoice from PaperCut MF has been filed to support the Bill of Costs (Affidavit of Shadie Bourget, para 15). In response, the Applicant has provided no specific written submissions with regard to disbursements, other than stating the assessable services should be in the amount of $1,050 "plus allowable disbursements" (Applicant's Response, para 6).

[32] As the Applicant has not contested this disbursement. I have reviewed the materials filed and the court record, and find this claim to be reasonable and necessary. The Respondent's claim for printing services is allowed as presented.

IV. Conclusion

[33] For the reasons detailed above, the Respondent's costs are assessed and allowed in the total amount of $ 4,736.28. A Certificate of Assessment will be issued accordingly, payable by the Applicant, Floyd Bertrand, to the Respondent, Acho Dene Koe First Nation.

"Stéphanie St-Pierre Babin"
Assessment Officer

Ottawa, Ontario
November 29, 2022

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-391-21
STYLE OF CAUSE:	FLOYD BERTRAND v ACHO DENE KOE FIRST NATION

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

REASONS FOR ASSESSMENT:	STÉPHANIE ST-PIERRE BABIN, Assessment Officer
DATED:	NOVEMBER 29, 2022

WRITTEN SUBMISSIONS BY:

Orlagh O'Kelly	FOR THE APPLICANT
Madelaine Mackenzie	FOR THE RESPONDENT

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