Federal Court  Cour fédérale

Date: 20230208

Docket: T-712-16

Citation: 2023 FC 174

BETWEEN:

THE CLOROX COMPANY OF CANADA, LTD.

Applicant

and

CHLORETEC S.E.C.

Respondent

REASONS FOR ASSESSMENT

Stéphanie St-Pierre Babin, Assessment Officer

I. Introduction

[1] By way of Judgment and Reasons [Judgment] rendered on April 16, 2018, the Court dismissed the appeal brought under section 56 of the *Trademarks Act* (RSC, 1985, c T-13) by the Applicant, The Clorox Company of Canada, Ltd. [Clorox], and awarded costs in favour of the Respondent, Chloretec S.E.C. [Chloretec]. Upon receipt of Chloretec's Bill of Costs filed on August 5, 2021, an assessment officer issued a direction informing the parties that this

assessment of costs would proceed in writing and of the deadlines to file their written submissions. Chloretec decided not to file written submissions in support of its Bill of Costs so as not to incur additional costs (Letter dated December 14, 2021 at p 2). As for Clorox, it filed written submissions in relation to the present assessment of costs in the related Federal Court of Appeal file A-141-18 on February 1, 2022, in which Chloretec was also awarded costs. Having reviewed the costs materials provided on behalf of both parties, I will now address a preliminary issue. Thereafter, I will address the assessable services and disbursements claimed in order to determine the amount payable by Clorox to Chloretec.

II. Preliminary Issue

A. *Level of Costs*

[2] Both parties agree the Bill of Costs shall be assessed under Column III of the table to Tariff B in accordance with Rule 407 of the *Federal Court Rules*, SOR/98-106 [Rules]. For most of the assessable services listed under Column III, a range of units is available. As an assessment officer, I have to determine the number of units to be allowed within a range. In that respect, Clorox submits that "[t]he standard unit claim awarded under the Tariff in these matters is typically in the middle of Column III" (Written Submissions at para 3).

[3] While costs are generally assessed around the mid-point of Column III, an assessment officer may allow costs at a higher or at a lower level, where the particular circumstances of an item warrant (*League for Human Rights of B'nai Brith Canada v Canada*, 2012 FCA 61 at para 15). It is, in fact, settled law that each item listed under Tariff B has unique circumstances and

that it is not necessary to allocate the same level of units throughout a bill of costs (*Starlight v Canada*, 2001 FCT 999 at para 7; *Bujnowski v The Queen*, 2010 FCA 49 at para 9; *Greater Moncton International Airport Authority v Public Service Alliance of Canada*, 2009 FCA 72 at para 7). Given the absence of instructions from the Court as to costs in the Judgment, I will therefore determine the number of allowable units for each item claimed on an individual basis, within the full range of units available under Column III (*Hoffman-La Roche Limited v Apotex Inc*, 2013 FC 1265 at para 8).

[4] In doing so, I will remain mindful 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).

III. Assessable Services

A. *Item 2 – Preparation and filing of respondent's materials*

[5] In its Bill of Costs, Chloretec claims 6 units for the preparation of the « [m]émoire des faits et du droit et des documents de l'Intimé » [TRANSLATION] "memorandum of fact and law and the Respondent's documents" (Bill of Costs, p 1). Further to my review of the court file, I note the Respondent's Record filed on December 11, 2017, contains a memorandum of fact and law of 203 paragraphs, and a book of authorities with 25 tabs. Given the complexity of the issues discussed, I find reasonable to allow 5 units (section 409 and paragraph 403(c) of the Rules).

B. *Item 7 – Discovery of documents, including listing, affidavit and inspection*

[6] Chloretec claims 7 units for the discovery of documents, more specifically for the disclosure of the certified copy of the original trade-mark document, the joint list of authorities, the affidavit of Nathalie Lebreton and the written submissions on the motion to strike and affidavit of Sylvain Demers. In response, Clorox argues that the units sought cannot be allowed because the present assessment arose from an application for judicial review and not from an action.

[7] It is trite law that section 7 concerns the disclosure of documents referred to in sections 222 to 232 under *Part 4 – Actions* of the Rules (*Wax v Canada (Attorney General)*, 2007 FC 424 at para 4; *Turcotte v Canada*, 2011 FC 1090 at para 5; *Montréal (City) v Montreal Port Authority*, 2012 FC 221 [*Montréal*] at para 9; *McArthur v White Bear First Nation*, 2018 FC 168 (unreported, court file no. T-2130-14) at para 5). The units claimed under Item 7 cannot therefore be allowed because this particular application was filed pursuant to another Part of the Rules, *Part 5 – Applications*. Additionally, in the court record, there is no Order from the Court allowing discoveries and examinations to happen for this particular application. In these circumstances, Item 7 is not allowed.

C. *Item 13(a) – Counsel fee: Preparation for hearing*

[8] Chloretec claims 5 units for the « honoraires d'avocats pour la préparation de l'audience » [TRANSLATION] "counsel fees for the preparation for the hearing" of the application held on March 27, 2018. In response, Clorox submit that Chloretec provided no explanation for

"the increase from the middle of Column III" and that 3.5 units would be "more in line with the middle of Column III as the norm" (Written Submissions at p 2).

[9] I have reviewed the evidence attached to the Bill of Costs and I note the invoice dated April 6, 2018, details several services rendered in preparation of the hearing such as:

- Séance de travail pour la préparation de l'audience;
- Révision de certains éléments en vue de l'audience;
- Entretien téléphonique avec un confrère pour les détails de l'audience;
- Montage du cahier d'autorités;
- Révision du cahier d'autorités;
- etc.

[TRANSLATION]

- Working session to prepare for the hearing;
- Review of certain elements in preparation for the hearing;
- Phone conversation with a colleague to discuss the details of the hearing;
- Assembling of the book of authorities
- Review of the book of authorities
- etc.

[10] Moreover, the services rendered in preparation for a hearing provided in Item 13(a) include "correspondence, preparation of witnesses, issuance of subpoenas and other services not otherwise particularized in this Tariff" [emphasis added]. In my opinion, it is reasonable to consider the services listed above as other services not otherwise particularized in Tariff B.

[11] In light of the foregoing, and taking into account factors such as (a) the result of the proceeding in favour of Chloretec; and (g) the amount of work detailed above, I find the allowance of 5 units to be reasonable and representative of this litigation (section 409 and subsection 400(3) of the Rules).

D. *Item 14(a) – Counsel fee: Attendance per hour*

[12] Chloretec claims a total of 9 units as counsel fees for the attendance at the hearing of the application held on March 27, 2018 (3 units under Column III of Tariff B multiplied by 3 hours). Clorox argues that Item 14(a) should only be allowed a total 6 units given that the hearing lasted only 2.5 hours; i.e., 2.5 units under Column III of Tariff B multiplied by 2.5 hours (Written Submissions at p 2).

[13] Item 14(a) has an available range of 2 to 3 units under Column III of Tariff B. I have reviewed the court file together with factors such as (a) the result of the proceeding was in favour of Chloretec; and (c) the importance and complexity of the issues discussed during the hearing, and I determine it is reasonable to allow 3 units (section 409 and subsection 400(3) of the Rules).

[14] Turning to the duration of the hearing, the Abstract of Hearing, a court document which provides several details regarding a court hearing, shows that the total duration of the hearing of the application held on March 27, 2018, was 2 hours and 31 minutes. Since the abstract of hearing is a reliable source of information prepared by a registry officer of this Court, and considering that Item 14 includes some time before the scheduled start of the hearing, the 3 hours are allowed as claimed (*Guest Tek Interactive Entertainment Ltd v Nomadix, Inc*, 2021 FC 848 at para 51).

[15] In light of the foregoing, I allow 9 units for Item 14(a) as claimed by Chloretec. This was calculated by multiplying the 3 units allowed under Column III by 3 hours.

E. *Item 25 – Services after judgment not otherwise specified*

[16] Chloretec claims 1 unit for Item 25 in its Bill of Costs. Clorox objects to this claim as no explanation was provided to specify the services rendered after the Judgment. It is common practice for assessment officers to allow Item 25 when it is reasonable to expect that a lawyer has reviewed the judgment and explained its contents to their clients (*Halford v Seed Hawk Inc*, 2006 FC 422 at para 131). In the documentation attached to the Bill of Costs, I note the entry « Lecture du jugement JAVELO » [TRANSLATION] "Reading of the JAVELO judgment" dated April 2018 (invoice dated June 8, 2018 at p 2). In these circumstances, I find reasonable to allow 1 unit.

F. *Item 26 – Assessment of costs*

[17] Chloretec claims 6 units for the assessment of costs in its Bill of Costs. Item 26 has an available range of 2 to 6 units under Column III of Tariff B. I note from the record that, although it filed the Bill of Costs and attached documents in its support, it did not submit any written submissions nor did it reply to Clorox's written submissions in response. In the particular circumstances of this assessment, I allow 3 units for Item 26.

IV. Disbursements

A. *Photocopies and printing*

[18] The amount of $4,658.86 is claimed for in-house « [p]hotocopies et impression des dossiers » [TRANSLATION] "photocopies and printing of files" (Bill of Costs, p 2). In support of

its Bill of Costs, Chloretec attached a document called « Liste des débours (par date) » [TRANSLATION] "List of Disbursements (per date)" [List of Disbursements]. In response, Clorox submits that no details of the photocopies related to the proceeding were provided, and that the amount claimed seems excessive considering "the standard assessment is $0.25 per page." It would mean 18,000 copies were made.

[19] In the List of Disbursements, Chloretec does not provide any information as to the number of pages nor the rate per page charged to their client. Concerning the amount to be charged when an in-house service is used, the oft-cited decision *Diversified Products Corp v Tye-Sil Corp*, [1990] FCJ No 1056 (QL) [*Diversified Products*] states:

> …The $0.25 charge by the office of Plaintiffs' counsel is an arbitrary charge and does not reflect the actual cost of the photocopy. A law office is not in the business of making a profit on its photocopy equipment. It must charge the actual cost and the party claiming such disbursements has the burden to satisfy the Taxing Officer as to the actual cost of the essential photocopies.

[20] In the decades following *Diversified Products*, there has been conflicting case law on whether the rate of $0.25/page represents the actual cost of photocopies. However, in the recent years, the Court has awarded the rate of $0.25/per page on several occasions (*Leo Pharma inc v Teva Canada Limited*, 2016 FC 107 at para 44; *Eli Lilly Canada Inc v Apotex Inc*, 2018 FC 736 at para 139; *Energizer Brands, LLC v The Gillette Company*, 2018 FC 1003 at p 51). As a result, I find reasonable to use the rate of $0.25/page to determine the amount allowable as disbursements for photocopies.

[21] Turning to the number of photocopies to be allowed, as like any other disbursement, the fundamental principle remains that a successful party is entitled to disbursements that are both "reasonable and necessary to the conduct of the proceeding" [emphasis added] (*Merck & Co Inc v Apotex Inc*, 2006 FC 631 at para 3 [*Merck*]). Again, Chloretec has provided no submissions detailing the photocopies necessary to the conduct of the litigation. When there is "limited material available to assessment officers, determining what expenses are "reasonable" is often likely to do no more than rough justice between the parties and inevitably involves the exercise of a substantial degree of discretion on the part of assessment officers" (*Apotex Inc v Merck & Co Inc*, 2008 FCA 371 at para 14). In the absence of fulsome submissions detailing the essential photocopies, I will allow a lump sum reflecting the materials filed in the court record, including the associated copies filed to satisfy the requirements of the Rules.

[22] After careful examination of the materials filed by Chloretec, their size and number of copies, and following my calculations, I find reasonable to allow a lump sum of $1,500.00, including taxes, to cover the disbursements related to the photocopies and the printing.

B. *Process server*

[23] Chloretec claims $277.98 for courier services and for the service of documents. As Clorox did not dispute those fees, I have reviewed the exhibits filed in support of the Bill of Costs to determine their necessity and reasonableness. On page 9 of the List of Disbursements, I note two entries named « Signification (Paquette: 821589: AVIS » [TRANSLATION] "Service (Paquette: 821589: Notice)" on May 25, 2018. I reviewed the court record and I have not been

able to find any affidavit of service or any information to explain or confirm these fees. As a result, they are not allowed.

C. *Travel*

[24] Chloretec claims a total of $1,533.92 as travel expenses. As Clorox did not dispute these costs, I have reviewed the List of Disbursements filed in support of the Bill of Costs to determine their necessity and reasonableness. At page 8 of that list, there are amounts of $804 entered for Via Rail on March 23, 2018, and $729.92 entered for accommodation on April 3, 2018.

[25] After thorough review of the court record, it is clear these expenses were necessary to the conduct of the litigation since Chloretec's Montréal-based counsel had to incur expenses to attend the in-person hearing held in Toronto on March 27, 2018. Although Chloretec did not provide invoices or written submissions detailing these expenses, the fact remains that I cannot refuse to allow such disbursements because it is apparent that expenses were indeed incurred (*Carlile v Canada (Minister of National Revenue*), [1997] FCJ No 885 at para 26). Moreover, I do not need absolute proof but rather satisfactory proof to trigger my discretion to determine what is reasonable and necessary (*Lundbeck Canada Inc v Canada (Health)*, 2014 FC 1049 at para 10). Finally, as I concluded travel expenses were necessary to attend the hearing, a result of zero dollars at assessment would be absurd (*Abbott Laboratories v Canada (Health)*, 2008 FC 693 at para 71). In these circumstances, I find reasonable to allow the amount of $1,533.92 as claimed.

D. *GST and QST*

[26] In its Bill of Costs, Chloretec claims $4,245.09 for service taxes (GST) and $8,468.95 for sales taxes (QST) paid on legal fees. It provided 12 invoices « pour services professionnels rendus » [TRANSLATION] “for professional services rendered” to support its claim. With regard to taxes, Tariff B reads as follows:

Disbursements	**Débours**
(3) A bill of costs shall include disbursements, including	**(3)** Le mémoire de frais comprend les débours, notamment :
[…]	[…]
(b) any service, sales, use or consumption taxes paid or payable on counsel fees or disbursements allowed under this Tariff.	**(b)** les taxes sur les services, les taxes de vente, les taxes d’utilisation ou de consommation payées ou à payer sur les honoraires d’avocat et sur les débours acceptés selon le présent tarif.
[emphasis added.]	[non souligné dans l’original.]

[27] In response, Clorox rightly pointed out that Chloretec cannot claim these amounts because the taxes referred to in paragraph 1(3)(b) of Tariff B relate to counsel fees allowed under Tariff B, and not to legal fees charged by a counsel to their client to represent them (*Montréal* at paras 19–20). Furthermore, allowing the taxes as claimed would amount to a duplication of costs because Chloretec, in the context of the present assessment of costs, is entitled to GST and QST on the units allowed above for the assessable services. As a result, the taxes claimed as disbursements are not allowed.

V. Conclusion

[28] For all of the above reasons, Chloretec's costs are assessed and allowed in the amount of $7,000.56. A Certificate of Assessment will be issued accordingly, payable by the Applicant, the Clorox Company of Canada, Ltd., to the Respondent, Chloretec S.E.C.

"Stéphanie St-Pierre Babin"
Assessment Officer

Ottawa, Ontario
February 8, 2023

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-712-16
STYLE OF CAUSE:	THE CLOROX COMPANY OF CANADA, LTD. v CHLORETEC S.E.C.

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

REASONS FOR ASSESSMENT:	STÉPHANIE ST-PIERRE BABIN, Assessment Officer
DATED:	FEBRUARY 8, 2023

WRITTEN SUBMISSIONS BY:

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