Federal Court of Appeal  Cour d'appel fédérale

Date: 20210709

Docket: A-137-08

Citation: 2021 FCA 136

Present: **ORELIE DI MAVINDI, Assessment Officer**

BETWEEN:

DAVID L. BRACE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Assessment of costs without appearance of the parties.
Certificate of Assessment delivered at Toronto, Ontario, on July 9, 2021.

REASONS FOR ASSESSMENT BY: ORELIE DI MAVINDI, Assessment Officer

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REASONS FOR ASSESSMENT

ORELIE DI MAVINDI, Assessment Officer

I. Introduction

[1] This is an assessment of costs further to the Judgment of the Court dated April 11, 2011, (2011 FCA 131) ("the Judgment"), allowing the appeal with costs. This assessment of costs is also further to the Order of the Court dated February 25, 2009, dismissing the motion to add volumes to the appeal book, with costs in the cause.

II. Background

[2] On April 1, 2015, four years following the Judgment, the Appellant filed a motion under Rule 369 of the *Federal Courts Rules*, SOR/98-106 (the "*FCR*") seeking an order granting his Bill of Costs dated March 17, 2015. On May 7, 2015, the Court disposed of the matter and the following was ordered:

> Mr. Brace's motion in form 369 shall be considered as a request for an assessment of his bill of costs following a judgment from this Court that simply granted his appeal with costs. Incidentally, this conclusion accords with what was sought by Mr. Brace in his memorandum of fact and law dated December 14, 2008.
>
> As a result, Mr. Brace shall proceed under Rule 400 and following. This Court will not entertain his request for an order granting his bill of costs.

[3] Subsequent to the Court's Order, two signed memorandums appeared on the Court file from then assessment officer, Johanne Parent, the first dated June 22, 2015, read:

> Further to the Order signed by the Court on May 7, 2015 and the Appellant's Bill of Costs found in the Appellant's Motion Record filed April 1, 2015, Mr. Brace was called to inquire how he wished to proceed regarding the assessment of his Bill of Costs.
>
> During the conversation of June 22, Mr. Brace stated that he would look into that matter at the end of October 2015.

[4] The second memorandum from assessment officer Johanne Parent, dated March 23, 2017, read:

> Following the memorandum to file of June 22, 2015 and the numerous calls placed with the Appellant through 2016, the original file is sent back to Ottawa as I am yet to be informed on the manner Mr. Brace wishes his Bill of Costs to be entertained.

[5] On January 3, 2020, the Appellant filed a Bill of Costs accompanied by a letter seeking to renew the request for an assessment of costs. Accordingly, I issued Directions establishing

timelines for submissions on February 4, 2020. Due to COVID-19 pandemic related challenges, Directions were later issued amending the timelines on February 28, 2020, April 8, 2020, and July 27, 2020.

[6] On August 14, 2020, the Appellant filed the Affidavit of David Brace sworn on July 13, 2020, enclosing an Amended Bill of Costs with revised amounts at Exhibit A (the "Appellant's Affidavit"). On September 11, 2020, the Respondent filed responding costs material, enclosing the Affidavit of Wendy J. Thompson sworn on September 9, 2020, containing Exhibits A through BBB, written submissions and jurisprudence (the "Respondent's Costs Material"). Following a request for an extension of time on September 21, 2020, the Appellant filed the Reply Affidavit of David Brace sworn on October 5, 2020 (the "Appellant's Reply Affidavit"), enclosing further revised amounts in the body of the affidavit.

III. Preliminary Issue: Self-Represented Litigants and Entitlement to Assessable Services

[7] Before delving into the assessment of costs, a preliminary issue arose from both the Appellant and the Respondent's costs materials: absent a direction from the Court, does an award of costs to a successful self-represented litigant trigger an entitlement to claim Tariff B of the *FCR* assessable services as a recompense for the time spent advancing the proceeding?

A. *The Appellant's Position*

[8] In the January 3, 2020, Bill of Costs, the Appellant claimed fees under Tariff B, Column III, at a unit value of $30.00 for the "Primary" (the Appellant's fees) and a unit value of $15.00

for the “Assistant” (the Appellant’s wife’s fees). This was reflected in the notes at the bottom of the Appellant’s Bill of Costs where it read, “please note the number of units for Primary are for work done by myself and the number of units for Assistant are for the work done by my wife which I would have to do myself, or otherwise hire out”.

[9] In the Appellant’s Amended Bill of Costs contained within the Appellant’s Affidavit at Exhibit A, the claimed unit values were revised. The unit value for the Primary was increased to $50.00 and to $25.00 for the Assistant. At paragraph 2 of the Appellant’s Affidavit, the Appellant discussed that he was overly conservative in the original Bill of Costs and did not factor the time spent on the underlying appeal that took him away from gainful work activities where his compensation would have been greater. With respect to the $15.00 unit value initially sought for the Assistant, the Appellant argued that “[t]his is just a minimum wage rate. Her time is worth far more than this”. At paragraph 3 of the Appellant’s Affidavit, he outlined:

> 3. In retrospect and upon further analyzation I realize that in fairness to myself I have used a rate that is far too low. If I were to engage the services of a lawyer to do this work on my behalf instead of my wife and I doing the work ourselves our hourly cost would have been at minimum, $200 per hour and up to $400 per hour. That said I would ask that our unit values be increased from $30 per unit for myself and to $50 per unit and additionally, I would ask that the unit value for my wife’s time be increased from $15 per hour to $25 per hour.

[10] Ultimately, the Appellant submitted that as the successful party, he was entitled to moderate compensation for the time and effort both he and his wife spent advancing the appeal before the Court, in so doing, incurring an opportunity cost by foregoing remunerative activity, such as “…gainful work activities where [the Appellant’s] compensation would have been much greater”, as described at paragraph 2 of the Appellant’s Affidavit.

B. *The Respondent's Position*

[11] It was the Respondent's position that the Appellant was not entitled to any amount for Tariff B counsel fees as a self-represented litigant. It was argued at paragraphs 43 and 44 of the Respondent's written submissions contained in volume 2 of the Respondent's Costs material that:

> 43. The Court has already exercised its discretionary power under Rule 400(1) to allow the Appellant's appeal with costs. However, the Judgment did not include specific directions for the assessment of costs. Absent specific directions or a lump sum award, the assessment officer's jurisdiction for the assessment of costs is limited.
>
> 44. Rule 407 provide that unless the Court orders otherwise, party-and-party costs shall be assessed in accordance with column III of the table to Tariff B – which are counsel fees for various steps in proceedings. The Appellant was a self-represented litigant throughout the appeal. Absent a formal retainer notice of counsel provided to the court and the Respondent, the Appellant does not qualify for reimbursement of units for services of counsel.

[12] The Respondent relied upon then assessment officer, Charles E. Stinson's articulation of the differing roles of the term "Court" as utilized in Rule 400 of the *FCR,* and that of an assessment officer, two separate entities, as discussed in *Scheuneman v. Canada (Minister of Human Resources Development)*, 2006 FC 1012 (*Scheuneman*) and *Marshall v. Canada*, 2006 FC 1017 (*Marshall*). The Respondent highlighted that the Court may exercise its discretion under Rule 400(1) of the *FCR* to award costs, however absent a direction from the Court, once the Rule 400(1) discretion is triggered, an assessment officer's jurisdiction is limited to the parameters set out in Rule 407 of the *FCR*. At paragraph 46 of their written submissions, the Respondent quoted *Marshall* paragraph 3(ii)(iii) as follows:

> [3] On May 30, 2006, I issued these directions:

> The Assessment Officer…has issued the following comments and directions:
>
> …
>
> (ii) A judge of the Federal Court exercised his jurisdiction under Rule 400(1) to award costs to the Defendant. An assessment officer carrying out an assessment of costs under the Rules and Tariff has no jurisdiction to vacate or vary that result. Rather, the role of the assessment officer is essentially to arrive at a dollar value for said award of costs within the parameters of the Rules and Tariff.
>
> (iii) Costs in litigation equal fees plus disbursements. Fees address work by the lawyer for the successful party … The Rules and Tariff … permit claims for only certain counsel fee items at each stage of the litigation, and as well limit the amount claimed for each regardless of how much was actually paid to one's lawyer for the particular service…
>
> Disbursements are payments to non-lawyers for a service or work necessary to advance the litigation…Unlike the provision for counsel fees, there is no listing of possible disbursements. Rather, Tariff B simply provides generally for disbursements if they are shown to meet a threshold of reasonable necessity.
>
> ...[49] [emphasis added]
>
> [Emphasis in original]

[13] The Respondent relied upon *Marshall* to highlight that an assessment officer cannot vary or vacate the Court's underlying decision to award costs, but rather, assess the allowable quantum of costs in view of the Judgment, any directions from the Court, the *FCR* and Tariff B. The Respondent equally relied upon *Stubicar v. Canada*, 2015 FC 722 (*Stubicar*), at paragraphs 48 and 49 of its written submissions to establish that the Appellant, as a self-represented litigant, was not entitled to counsel fees absent a direction or a special award from the Court. In *Stubicar*, the Court's Reasons referred to *Turner v. Canada*, 2003 FCA 173 (*Turner*), where the Court, on appeal, upheld the assessment officer's decision to deny any amount for a self-represented litigant's time on the assessment of costs, as there was no special award of costs to the self-

represented litigant. The Court at paragraph 12 of *Stubicar* found the award of costs in *Turner* identical – "simply a reference to an appeal being allowed with costs" with no special award of costs to the self-represented litigant. The Court in *Stubicar* referenced the following statement at paragraphs 5 to 8 of *Turner*:

> **5** The Assessment Officer decided that the Court meant to award Mr. Turner party and party costs, and that, in the absence of any directions to the contrary, the award should be calculated pursuant to *Tariff B* of the *Federal Court Rules, 1998*. However, *Tariff B* only provides for the partial recovery of legal fees and the usual disbursements, but not the value of the time spent on litigation by parties, whether or not they are self-represented.
>
> **6** In my opinion, Mr. Stinson was correct in reaching this conclusion: *Munro v. Canada*, (1998), 163 D.L.R. (4th) 541 (F.C.A.). Further, the fact that *Tariff B* does not provide for a self-represented litigant's lost time does not violate Mr. Turner's right to equality guaranteed by section 15 of the Charter: *Rubin v. Canada (Attorney General)*, [1990] 3 F.C. 642 (T.D.); *Lavigne v. Canada (Human Resources Development)* (1998), 228 N.R. 124 (F.C.A.).
>
> **7** This is not to say that, in the exercise of the plenary discretion over costs granted by Rule 400(1), the Court may not make an award that provides a litigant with some compensation for items that fall neither within disbursements as normally understood, nor counsel fees: see, for example, *Entreprises A.B. Rimouski Inc. v. Canad*a, [2000] F.C.J. No. 501 (C.A.).
>
> **8** However, in the case before us, the Court made no such special award in favour of Mr. Turner in its judgment of June 27, 2000, even though it had been very critical of Revenue Canada's conduct. It was not within the jurisdiction of the Assessment Officer to amend the order made by the Court. Nor on an appeal from Nadon J.'s dismissal of Mr. Turner's motion under Rule 414 for a review of the Assessment Officer's decision may this Court amend the costs order made by another panel of this Court when it allowed Mr. Turner's appeal against his income tax assessment.

[14] *Stubicar* supports the Respondent's position that absent a special award of costs or directions from the Court to permit a self-represented litigant fees, the usual Tariff B 'partial recovery of legal fees and the usual disbursements would apply, but not the value of the time spent on litigation by parties, whether or not they are self-represented'.

C. *The Appellant's Reply*

[15] The Appellant objected to the Respondent's position that as a self-represented litigant he was not entitled to claim costs before an assessment officer during the conduct of an assessment of costs in the absence of a special award or direction from the Court permitting them. At paragraph 1 of the Appellant's Reply Affidavit, the Appellant submitted "…the Respondent has gone to a tremendous amount of work in an attempt to beat down the order of Costs awarded by Mr. Justice Marc Noel, Mr. Justice J. D. Denis Pelletier and Madam Justice Joanne Trudel [sic]. I am quite sure that the intent of these Justices was not to have their order nickel and dimed". The Appellant then provided a comprehensive background and outline of the merits of the appeal, the underlying Tax Court of Canada matter and various dealings with the Canada Revenue Agency.

[16] The Appellant set out the tremendous effort to pursue the underlying appeal successfully, and at paragraph 3 of the Appellant's Reply Affidavit, he restated that these efforts took both he and his wife away from gainful employment. At paragraph 7 of the Appellant's Reply Affidavit the Appellant reasoned that the time need not be characterized as legal fees, but as a due compensation for time and effort:

> 7. The Respondent goes to great lengths in paragraphs 41 to 49 inclusive with his main goal being to convince the reader that my wife and I are not entitled to anything at all for all of the work we did over the three year period that this Appeal spanned. I think this is wrong. I don't need it to be called counsel fees and for the sake of argument maybe you can just call it due compensation and I believe it is fair to say that if the panel of Judges only intended for me to have been paid $50 when they made reference to costs they probably would have said disbursements. My time and the time of my wife were very real costs. We've put in hundreds and hundreds and hundreds of hours into this yet we've only asked for compensation for 182 hours at a very nominal rate.

[17] The Appellant discussed the necessity of the efforts undertaken to pursue the appeal in order to avoid significant, yet purportedly erroneous penalties from the Canada Revenue Agency. At paragraph 4 of the Appellant's Reply Affidavit, it read:

> 4. With respect to paragraph 2 and paragraphs 41 to 49 of the Respondent's submissions the Appellants [*sic*] states he is entitled to compensation from the Respondent for having done all of the work on this appeal by himself together with the constant assistance of Gail Curl, wife of the Appellant. I am not necessarily going to call this compensation "counsel fees" as I [am] not a lawyer but it is the work that needed to be done by someone in order to prevent any further harassment and bulling by the Respondent and their agents. If my wife and I did not do this work to protect ourselves we would have had to pay whatever the Respondent alleged we owed, when in fact we owed nothing.
>
> […]
>
> Now they have the audacity to try and nickel and dime me on the costs that I was awarded for this appeal. I have not been extravagant with respect to my bill of costs nor have I been greedy. In fact, I have handed myself the short end of the stick specifically so that it cannot be said that I have not been fair.
>
> […]
>
> The Respondents actions in conjunction with the presiding Tax Court Judge gave rise for yet another Appeal. At **Exhibit B** I am attaching the Memorandum of Fact and Law for the second appeal which was also granted.
>
> […]

[18] To support the claim for fees under Tariff B as a recompense for the time spent advancing the proceeding, absent a direction from the Court, the Appellant relied upon jurisprudence outlining the various functions of costs. At paragraph 7 of the Appellant's Reply Affidavit, the Appellant cited paragraphs 44 through 53 of *Sherman v. Canada (Minister of National Revenue)*, 2003 FCA 202 (*Sherman*), for this purpose. Paragraph 46 of *Sherman*, stated the following with respect to the various functions of costs:

> **46** It is now generally accepted that an award of costs may perform more than one function. Costs under modern rules may serve to regulate, indemnify and

> deter. They regulate by promoting early settlements and restraint. They deter impetuous, frivolous and abusive behaviour and litigation. They seek to compensate, at least in part, the successful party who has incurred, sometimes, large expenses to vindicate its rights. These three legitimate purposes are compromised by a stern rule that self-represented litigants are not entitled to costs. A claimant is not adequately compensated for the time and effort devoted to prepare for the conduct of his litigation. Nor is he compensated for the cost of soliciting a lawyer's advice at the early stage or during the course of the proceedings. His opponent is not inclined to settle since he not only incurs no costs in case of a loss or a refusal of a reasonable settlement, but he recovers his full costs if he is successful. Rule 420 of our Rules, to take one example, then fails to achieve the very purpose for which it was enacted, namely an early settlement of cases through an award of deterrent costs. Conversely, the self-represented litigant obtains no costs if he wins, but experiences the full wrath of the costs rules if he loses.

[19] At paragraph 52 of *Sherman*, the Court determined that it was proper to award a self-represented appellant "a moderate allowance for the time and effort devoted to preparing and presenting the case before both the Trial and the Appeal Divisions on proof that the appellant, in so doing, incurred an opportunity cost by forgoing remunerative activity".

[20] At paragraph 11 of the Appellant's Reply Affidavit, the Appellant relied upon *Sherman* to establish that the Respondent's position that a self-represented litigant is not entitled to any amount for Tariff B counsel fees was unfair and contrary to the purpose of costs.

D. *Determination*

[21] While I am sympathetic to the Appellant's circumstances, I do not find that under the Judgment, the Tariff, the *FCR* or the jurisprudence provided by parties that I have the jurisdiction to award a self-represented litigant assessable services.

[22] In *Sherman* as relied upon by the Appellant, the Court does find it proper to award a self-represented litigant "a moderate allowance for the time and effort devoted to preparing and presenting the case before both the Trial and the Appeal Divisions on proof that the appellant, in so doing, incurred an opportunity cost by forgoing remunerative activity". However, the operative word here is the term *award*. As outlined in *Scheuneman* and *Marshall*, as relied upon by the Respondent, only the Court has the full discretionary powers under Rule 400(1) of the *FCR* to *award* costs. An assessment officer is not a member of the Court as described in Rule 400(1) of the *FCR*, the roles are different and they are separate entities. The Judgment of the Court dated April 11, 2011, awarding costs in this matter was silent on the matter of opportunity costs and did not issue a special award or directions to the assessment officer permitting assessable services under Tariff B. In the subsequent Order of the Court regarding the Appellant's motion seeking an order granting his bill of costs dated March 17, 2015, the Court did not entertain the Appellant's request. The Court ordered that the Appellant should proceed under Rule 400 and that "Mr. Brace's motion in form 369 shall be considered as a request for an assessment of his bill of costs following a judgment from this Court that simply granted his appeal with costs". The March 17, 2015, Order was silent on the matter of opportunity costs or assessable services and instructed that the matter proceed on assessment as initially awarded. Absent a direction permitting a self-represented litigant assessable services or a special award from the Court for the time and effort devoted to preparing and presenting the case, an assessment officer is unable to permit them subsequently. An assessment officer is to arrive at a dollar figure for the award costs within the parameters of the Judgment, the *FCR* and Tariff B. Rule 407 of the *FCR* states "unless the Court orders otherwise, party-and-party costs shall be assessed in accordance with column III of the table to Tariff B". Assessable services and

opportunity costs for a self-represented litigant are not contemplated in the parameters of column III of the table to Tariff B, to which I am restricted under Rule 407 of the *FCR*. Thus, without directions or a special award from the Court as discussed in *Sherman* to provide a moderate allowance for the time and effort devoted to preparing and presenting the case, in so doing, incurring an opportunity cost, any allowance of assessable services or fees in this matter would be outside my jurisdiction as an assessment officer. Accordingly, the Appellant's claim for assessable services under Tariff B or alternatively, fees as a recompense for the time spent advancing the proceeding and forgoing remunerative activity, cannot be allowed.

IV. Assessment of Costs

[23] This is an assessment of the Appellant's Amended Bill of Costs contained within the Appellant's Affidavit, sworn on July 13, 2020, and filed on August 14, 2020. This assessment is also further to the Reply Affidavit of David Brace, sworn on October 5, 2020, enclosing further revised amounts, to be outlined below as applicable.

A. *Assessable Services*

[24] The Appellant claimed $7,225.00 in total assessable services under column III to Tariff B of the *FCR*. As aforementioned, as an assessment officer, without a special award or directions from the Court in this matter, I am without the jurisdiction to allow the Appellant any assessable services, as fees for self-represented litigants are not contemplated in the *FCR* and Tariff B. Thus, no amount will be allocated.

B. *Disbursements*

[25] The Appellant's claimed disbursements have varied across the initial Bill of Costs, the Amended Bill of Costs contained within the Appellant's Affidavit and the further amendments contained in the body of the Appellant's Reply Affidavit. The most recent iteration of the claimed disbursements totals $5,997.89, and is described in detail at paragraph 35 of the Appellant's Reply Affidavit:

> 35. With respect to the Bill of costs and in light of the new Intel provided by Mr. Omisade I would like to make the following changes [*sic*]. Number 3 under the heading printing volumes 1 through 9 contain approximately 2392 pages. These were all printed 7 times for a total of 16,744 pages. Additionally, there are pages I omitted: 1) pages for notice of motion to extend time to file (8 pages x 4) 32 pages. 2) pages for notice of motion to vary contents of Appeal Book (23 pages x 4) 92 pages. 3) pages for the memorandum of Fact and Law (30 pages x 7) 210 pages. 4) pages for requisition for hearing (3 pages x 4) 12 pages. These additional ones I omitted total 330 pages. The total of the transcript plus the ones I omitted equals 17,074 pages. Using the tariff provided by the Respondent this would equate to $4,268.50. As a result I would like to change the amount that I have asked for printing which was $2,209.00 to $4,268.50. Number 4 under the heading Transcript I will agree to reduce to zero. Number 5 pertaining to the 11 trips made to St. John's from Bay Roberts and based on the tariff and referred to in paragraph 54 I would like to change the amount that I've asked for from $330 to $1,004.19. With respect to number 6 regarding my overnight trip to Edmonton for the hearing of the Appeal and in light of the Respondent's paragraph 54 I would like to change what I asked for which was $230.00 made up of $170 in fuel and $68.00 for one hotel stay. Please change this amount to reflect the Treasury Board Secretariat Kilometric rate. The Respondent agrees to pay $469.20 for the Kilometers I was forced to drive. In addition to this there is the $68.00 for my hotel stay. Total expenses for my trip to the Hearing of the Appeal are $537.20. As a result of these changes number 1 under the description in my Bill of Costs stays unchanged at 50.00. Number 2 stays unchanged at $88.00. Number 3 is changed to $4,268.50. Number 4 is changed to $0.00. Number 5 is changed to $1004.19. Number 6 is changed to $537.20. Number 7 is unchanged and is $50.00. The amount of disbursement are now $5997.89.

(1) Notice of Appeal

[26] The Appellant's claim of $50.00 for the filing of the Notice of Appeal was uncontested by the Respondent, sufficiently substantiated by the Appellant's costs material, 1(1)(e) of Tariff A of the *FCR* and the Court Record; the amount is allowed as claimed.

(2) Transcript

[27] Due to a pre-existing agreement outlined at Exhibits P to W to the Affidavit of Wendy J. Thompson, at paragraph 54 of the Respondent's costs submissions, and at paragraphs 25 and 35 of the Appellant's Reply Affidavit, the Appellant agreed to withdraw the claim of $3,672.00 for the photocopying of the transcript. Accordingly, the matter is considered resolved and no quantum will be allocated to the Appellant for the photocopying of the transcript.

(3) Motions

[28] The Appellant has claimed disbursements for the photocopying of two motions: the motion to extend time to file, filed on June 27, 2008, and the motion to vary the contents of the appeal book, filed on February 3, 2009. In order for costs to be allowed for a motion, pursuant to Rule 401 of the *FCR*, it must be explicitly ordered by the Court. As discussed by the Court in *Exeter v. Canada (Attorney General)*, 2013 FCA 134 (*Exeter*), at paragraph 14:

> **14** A judge's decision whether or not to award costs on a motion cannot later be overridden by the judge deciding the underlying action or application: *Merck & Co. v. Apotex Inc.*, 2006 FCA 324, 55 C.P.R. (4th) 81 at para. 15; *Polish National Union of Canada Inc.-Mutual Benefit Society v. Palais Royale Ltd.* (1988), 163 D.L.R. (4th) 56 (Ont. C.A.). For this purpose, an order on an interlocutory motion that is silent on costs is treated as an award of no costs: *Janssen-Ortho Inc. v. Novopharm Ltd.*, 2006 FC 1333, 57 C.P.R. (4th) 58 at para. 13; Delrina Corp. (c.o.b. Carolian Systems) v. *Triolet Systems Inc.* (2002), 22 C.P.R. (4th) 332 (Ont. C.A.) at para. 36.
>
> [Emphasis added]

[29] Thus, the Appellant's claim for disbursements arising from the photocopying of 4 copies at 23 pages of the motion to vary contents of appeal book to add volumes 5 to 9, is allowed as costs were awarded in the cause in the Order of the Court dated February 25, 2009; accordingly, $23.00 is allowed. As the Order of the Court disposing of the motion to extend time to file, dated July 3, 2008, was silent on the matter of costs, in accordance with the *FCR* and using *Exeter* as a guideline, the claim for photocopies relating to this matter will be treated as an award of no costs and cannot be allowed.

(4) Appeal Book

[30] The Appellant claimed 7 copies of the appeal book, volumes 1 to 9. Volumes 5 to 9 of the appeal book were the subject of the motion to vary the contents of the appeal book, and refused for filing by the Court. At paragraphs 10 to 15 of the February 25, 2009 Order, it reads:

> **10** In this context, I do not see the usefulness of including in the appeal book the submissions to the Tax Court.
>
> **12** It has been decided by this Court "that inclusion in the appeal book of the submissions made in the court below is the exception rather than the rule" (*Burns Lake Native Development Corporation v. Canada (Commissioner of Competition*) 2005 FCA 256, *Montana Band v. Canada*, 2001 FCA 176).
>
> **13** In this present case, the appellant has not convinced me that his request is exceptional.
>
> **14** Therefore, the appellant's motion to vary the contents of the appeal book is dismissed.
>
> **15** Costs of this motion shall be in the cause.
>
> [There is no paragraph 11 in the original text]

[31] In light of the Court's comments above and as articulated by the Court in *Pelletier v. Canada (Attorney General)*, 2006 FCA 418 (*Pelletier*) at paragraph 7, "…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". While the Order of the Court allowed costs in the cause for the motion to amend the appeal book, volumes 5 to 9 of the appeal book themselves, enclosing the submissions to the Tax Court of Canada, were not found to be useful. In my view, allowing disbursements for the photocopying of the rejected volumes 5 to 9 of the appeal book would contradict this outcome. Further, I am not satisfied that documents found not to be useful by the Court, in these circumstances, meet the standard of proof of being necessary to the conduct of this proceeding; no quantum will be allocated for the photocopying of volumes 5 to 9 of the appeal book.

[32] Concerning volumes 1 through 4 of the Appeal Book, accepted by the Court for filing, from a review of the Court file, the Appellant's Appeal Book volumes 1 through 4 total approximately 900 pages. The Respondent does not oppose this claim; it is sufficiently substantiated by the Appellant's costs materials, the *FCR* and the Court file. I find this claim reasonable and necessary to advance the proceeding, $1,575.00 is allowed for 7 photocopies of the appeal book.

(5) Memorandum of Fact and Law/Requisition for Hearing

[33] The Appellant's claim for photocopies relating to 7 copies of the 30-page memorandum of fact and law and 4 copies of the 3-page requisition for hearing are not opposed to by the Respondent and sufficiently substantiated by the Appellant's costs materials, the *FCR* and the

Court file. I find this claim reasonable and necessary, $55.50 is allowed for the photocopying of the memorandum of fact and law and the requisition for hearing.

(6) Service and Preparation of Documents

[34] The Respondent objected to the Appellant's claimed disbursements titled "Service of Documents (Appeal Book, Memorandum of Fact and Law, Motion, etc.)" at $88.00, "Miscellaneous: Appeal Book Covers, Memorandum Covers, binding etc, etc" at $50.00, and a hotel stay at $68.00 for the hearing of the appeal in this matter. At paragraph 55 of the Respondent's written costs submissions it reads, "[a]bsent third party invoices to support the claimed service of documents, hotel and miscellaneous, the Respondent submits that these three disbursement items should be disallowed on assessment of costs". At paragraph 8 of the Appellant's Affidavit, it is sworn by the Appellant that he is unable to provide receipts for much of the claimed disbursements due to irreparable damage caused in the warehouse where they were stored. The relevant portions of the Appellant's Affidavit at paragraph 8 read:

> **8** With respect to my Disbursements found on page 2 of my original Bill of Costs I am unable to provide receipt at this time. Much of my documentation was stored at a warehouse located at 50 Bishops Road in Bay Roberts, Newfoundland where the owner, my older brother, Noel Brace refused to allow me entry in an attempt to force me to discontinue an action I commenced against him in the Supreme Court of Newfoundland and Labrador. My wife and I had all our property, for the most part, stored in my brother's warehouse when we moved from Newfoundland to Alberta.
>
> […]
>
> It was not until after the trial of the matter that my brother Noel allowed us access to the warehouse that we were able to go back into the warehouse where are [*sic*] property was stored. For a period of more than four (4) years we were denied access to our property. Most of our property, along with a large percentage of our documentation in storage at this warehouse suffered irreparable damage as a result of the deteriorating condition of the building and in particular the deteriorating condition of the building's roof.

> […]

[35] Subsequently, at paragraphs 23 and 26 of the Appellant's Reply Affidavit, it is sworn by the Appellant that they do not have access to documentation relating to the appeal book, travel and hotel accommodation, as they are located in a warehouse in Newfoundland, which they are restricted from accessing due to Covid-19 pandemic restrictions.

[36] Section 1(4) of Tariff B in the *FCR* states the following with regards to the necessary evidence to establish disbursements:

> Evidence of disbursements
>
> (4) No disbursement, other than fees paid to the Registry, shall be assessed or allowed under this Tariff unless it is reasonable and it is established by affidavit or by the solicitor appearing on the assessment that the disbursement was made or is payable by the party.

[37] The Court at paragraph 14 of *Apotex Inc. v. Merck & Co. Inc*., 2008 FCA 371 (*Apotex*), at paragraph 14 discusses the following regarding assessment officers determining reasonableness while having limited material available:

> **14** In view of the 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. Like officers in other recent cases, the Assessment Officer in this complex case, involving very large sums of money, gave full reasons on the basis of a careful consideration of the evidence before him and the general principles of the applicable law.
>
> [Emphasis added]

[38] In *Abbott Laboratories v. Canada*, 2008 FC 693 (*Abbott Laboratories*), at paragraph 71, the assessment officer stated the following regarding assessments with limited supporting documentation for disbursements:

> **71** However, that is not to suggest that litigants can get by without any evidence by relying on the discretion and experience of the assessment officer. The proof here was less than absolute, but I think there is sufficient material in the respective records of the Federal Court and the Federal Court of Appeal for me to gauge the effort and associated costs required to reasonably and adequately litigate Apotex's position. A lack of details makes it difficult to confirm whether the most efficient approach was indeed used or that there were no errors in instructions, as for example occurred in Halford, requiring remedial work. A paucity of evidence for the circumstances underlying each expenditure make it difficult for the respondent on the assessment of costs and the assessment officer to be satisfied that each expenditure was incurred further to reasonable necessity. The less that evidence is available, the more that the assessing party is bound up in the assessment officer's discretion, the exercise of which should be conservative, with a view to the sense of austerity which should pervade costs, to preclude prejudice to the payer of costs. However, real expenditures are needed to advance litigation: a result of zero dollars at assessment would be absurd.

[39] Finally, in *Carlile v. Canada*, [1997] F.C.J. No. 885 (*Carlile*), at paragraph 26, the assessment officer outlines the following:

> **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. I concluded that, for certain items i.e. facsimiles and, photocopies, an amount less than presented, but more than zero dollars, captured the indemnification appropriate in these circumstances.

[40] Utilizing the decisions in *Apotex*, *Abbott Laboratories and Carlile* as a guideline, in these circumstances, I will not penalize the Appellant for being unable to provide receipts as sworn in the Appellant's Affidavit and the Appellant's Reply Affidavit, when it is evident from the Court file that real expenses were incurred (*Figueroa v. Canada (Public Safety and Emergency Preparedness)*, 2019 FCA 269). With respect to the appropriate level of indemnification, from a review of the Court file, $88.00 for the service and $50.00 for the preparation of filed documents, including covers as required by Rules 344(1.1) and 346(4)(a) of the *FCR* and binding, appear to be reasonable and necessary claims. The $88.00 claimed for the "Service of Documents (Appeal Book, Memorandum of Fact and Law, Motion, etc.)" and the $50.00 claimed for "Miscellaneous: Appeal Book Covers, Memorandum Covers, binding etc, etc", by the Appellant are allowed.

(7) Hotel

[41] With respect to the $68.00 claimed for hotel, the Appellant stated the following at paragraph 26 of the Appellant's Reply Affidavit:

> **26** My wife and I did stay in a low-end Hotel /Motel the night before the appeal and we did pay $68 for this nights stay. The amount did include tax. I acknowledge not having a receipt accessible for this but it is a 10 hour return trip from Grand Prairie to Edmonton and I did have to be there and ready for 10 a.m. . [*sic*] No one could argue that some place to lay my head down for a few hours was not necessary. Further with respect to the receipt for this night's accommodation please see exhibit G which is Huet v. Lynch case. At paragraph 48 it shows that necessary expenses are still compensated for, even without

> receipts. If this Court takes the position that receipts are mandatory then I formally ask at this time that the matter be postponed. Covid-19 has shut down access to Newfoundland to all but essential travel.

[42] Although it would have been useful for a receipt to be provided, the Appellant's address in Grand Prairie is approximately 460 kilometers from the location of the hearing in Edmonton, Alberta. The hearing of the appeal was set down for 9:30 a.m. on March 10, 2011. The abstract of hearing reflects that the hearing began at 9:05 a.m. Once again, considering *Apotex*, *Abbott Laboratories and Carlile* as a guideline in the absence of a receipt in these circumstances, given the distance and the start time of the hearing, it is reasonable that an overnight stay would be necessary for the Appellant to attend the hearing; the $68.00 is allowed as claimed.

(8) Travel

[43] With respect to the claimed travel, the Appellant and Respondent are in agreement that $469.20 should be allowed for one round trip to and from the hearing of the appeal, using the Treasury Board Secretariat kilometric rate for March 2011, being .51¢/km multiplied by 920 kilometres for a roundtrip. The Appellant claimed 11 additional trips for travel between Bay Roberts and St. Johns for the filing of Court documents, for photocopying at Staples and for assistance from Geoff Budden for the preparation of the memorandum of fact and law. The Respondent objected to these claimed travel disbursements at paragraph 54 of Respondent's costs submissions, submitting "…no particulars were provided detailing the kilometric calculations for these trips nor specifics of the dates and purpose of the travel". In response, in the Appellant's Reply Affidavit at paragraph 28, the Appellant provided the following specifics concerning the 11 trips between Bay Roberts and St. John's:

> **28** With respect to my trips to St John's to file documents at the Supreme Court registry on Duckworth Street as well as my trips to Staples in St John's, which is the closest Staples to Bay Roberts and my trips to St. John's to Mr. Budden's residence located on the Quidi Vidi Lake area of the city to get help with memorandum of fact and law, I did make a minimum of these 11 trips. I do recognize that I could have included a Google map. I did include approximate kilometers and driving time. At **exhibit J** I have attached a Google map which pegs the one-way distance of 89.5 KM. A round-trip is 179 km. Using the same scale that the Respondent used at paragraph 54 of his submissions, 179 kilometers at $0.51 each equates to $91.29 per trip. For 11 trips this would be $1,004.19 for my trips to St. Johns [*sic*]. The occurrence of these trips are either indisputable or can be confirmed. It is indisputable that I made a number of trips to the Federal Court Registry located in the Supreme Court building on Duckworth Street. All the documents got filed. Similarly, I did travel to Staples. All the photocopying and appeal book assembling got done and they were served. I did go to Geoff Budden's house on two occasions so he could help with the memorandum of fact and law. If you doubt this you can call him at 709 685 1766.

[44] Ultimately, I will base my approach concerning the 11 remaining trips between Bay Roberts and St. John's on my colleagues findings in *Figueroa v. Canada (Public Safety and Emergency Preparedness)*, 2019 FCA 269 (*Figueroa*) (A.O.) at paragraphs 49 and 50:

> **49** In *McLaughlin v. Canada*, 2010 FCA 114, at paragraphs 18 and 19, the Assessment Officer states:
>
> > 18 The Applicant has claimed three round trips of 320 kilometres for travel to the Federal Court. I have been able to confirm that this is a reasonable claim for a round trip from Markdale to Toronto. Although the Respondent has submitted that the trips to file documents are not reasonable, when dealing with decisions concerning the conduct of a proceeding I must be mindful of the decision in *Carlile v. Canada (Minister of National Revenue - M.N.R.)*, [1997] F.C.J. No. 885 at paragraph 5, which held:
> >
> > Ultimately, the Federal Court of Appeal was not unanimous in disposing of the issues but the measure for this and any item is not applied in hindsight but rather as the gauge of the effort required at the time for prudent representation of the client. (Emphasis added.)
> >
> > 19 In applying this decision one must ask if travelling to Toronto to file documents was prudent. I am of the opinion that, as a self-represented litigant, it would provide a level of assurance to deliver documents to the Court in person to ensure they were properly

> filed. This does not negate the other options available to the Applicant; however, in the circumstance of this file, the Applicant being self-represented, this was a prudent action for the Applicant to take.
>
> **50** Upon my review of the parties' cost submissions and utilizing McLaughlin as a guideline, I have cross-referenced the travel expenses listed in Annexed "A" with the appeal documents filed with the court registry and I have determined that it is reasonable to reimburse the Appellant for a portion of the travel expenses claimed. I have taken into consideration the distance that the Appellant had to travel to the court registry to file the appeal documents and to attend the appeal hearing and have determined that the expenses listed for gas and parking are reasonable and were necessary. The Appellant's travel expenses will be allowed in the amount of $166.00. As costs were not awarded for the motion to determine the contents of the appeal book, these trips were excluded from my calculation.
>
> [Emphasis added in original]

[45] Relying upon *Apotex, Abbott Laboratories, Carlile and Figueroa*, I have cross-referenced the travel expenses claimed in relation to the filing of the documents by the Appellant with the Court Registry, finding that 9 of the trips claimed for filing and photocopying correspond and are reasonable and necessary to advance the proceeding in these circumstances. The remaining trips to Geoff Budden's house on two occasions to get help with the memorandum of fact and law are not permitted, as it is unclear in what capacity Geoff Budden provided advice for the proceeding. Further, there is no solicitor of record on file and I have been provided with no jurisprudence, argument or reference to the *FCR* permitting a claim for travel to seek advice. Utilizing the calculations provided in the Appellant's Reply Affidavit at paragraph 28 and Exhibit J for the 179 km roundtrips from Bay Roberts and St. John's, $91.29 will be allowed for 9 trips totaling $821.61.

V. Conclusion

[46] For the above Reasons, the Appellant's Bill of Costs is assessed and allowed at $3,200.31. A Certificate of Assessment will be issued.

"Orelie Di Mavindi"
Assessment Officer

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-137-08
STYLE OF CAUSE:	DAVID L. BRACE v. HER MAJESTY THE QUEEN

PLACE OF HEARING HELD BY TELECONFERENCE

REASONS FOR ASSESSMENT BY:	ORELIE DI MAVINDI, Assessment Officer
DATED:	JULY 9, 2021

WRITTEN SUBMISSIONS BY:

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