Federal Court of Appeal  Cour d'appel fédérale

Date: 20211025

Docket: A-85-19

Citation: 2021 FCA 207

Present: **GARNET MORGAN, Assessment Officer**

BETWEEN:

CHURCH OF ATHEISM OF CENTRAL CANADA

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Assessment of costs without appearance of the parties.
Certificate of Assessment delivered at Toronto, Ontario, on October 25, 2021.

REASONS FOR ASSESSMENT BY: GARNET MORGAN, Assessment Officer

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REASONS FOR ASSESSMENT

GARNET MORGAN, Assessment Officer

I. Background

[1] This is an assessment of costs pursuant to a Judgment of the Federal Court of Appeal ("the Court") dated November 29, 2019, wherein the Appellant's appeal proceeding was "dismissed with costs."

[2] Further to the Court's Judgment, 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 March 24, 2021, the Respondent filed Written Representations and an Affidavit of Disbursements of Danika Tondreau, affirmed on March 22, 2021, with the Respondent's Bill of Costs attached at Exhibit "B". The filing of these documents initiated the Respondent's request for an assessment of costs.

[4] On March 26, 2021, a direction was issued to the parties regarding the conduct and filing of documents for the assessment of costs. Subsequent to this direction, the following documents were filed by the parties, on May 28, 2021, the Appellant filed Representations on Costs and an Affidavit of Marie Eve Brule (no date); and on June 18, 2021, the Respondent filed an Amended Bill of Costs, Reply Submissions and a Supplementary Affidavit of Danika Tondreau, affirmed on June 18, 2021.

[5] The Respondent's Amended Bill of Costs, filed on June 18, 2021, will be used for this assessment of costs.

II. Preliminary Issues

A. *The Respondent's delay in requesting an assessment of costs.*

[6] At paragraph 3 of the Appellant's Representations on Costs, it was submitted that "there is no explanation as to why the respondent took over 1 year before putting together a bill of costs". The Appellant acknowledged at paragraph 6 of the Appellant's Representations on Costs that "the Federal Court Rules do not appear to have a time limit to seek assessment" but also suggested that the Supreme Court of Canada's 4-month deadline from the date of a decision to make a claim for costs would be a reasonable time frame to measure the Respondent's delay in seeking costs for this particular file. The Appellant also submitted at paragraphs 7 and 8 of the Appellant's Representations on Costs, that the Respondent "implicitly acquiesced to a non-cost disposition" due to the unreasonable delay in making a claim for costs.

[7] In reply, at paragraph 5 of the Respondent's Reply Submissions, it was submitted that:

> 5. The Respondent's Assessment Request is not unreasonably delayed. As noted by the Appellant, the *Federal Courts Rules* (the "Rules") do not specify a limitation period to seek an assessment of costs. Indeed, in *Gagné v Canada*, an Assessment Officer of this Court found that the limitation periods set out in the *Federal Courts Act*, RSC, 1985, c. F-7 and the *Crown Liability and Proceedings Act*, RSC 1983, c. C-50, s 32 do not apply to an assessment of the costs awarded in a judgment.

[8] At paragraph 6 of the Respondent's Reply Submissions, it was submitted that the Assessment Officer who assessed the costs in the *Gagné* matter only reduced the number of units that were allowed for the services performed for the assessment of costs (Item 26) "but assessed the remainder of the applicant's claim in accordance with the Rules and the Court record." To

explain the delay in requesting an assessment of costs, the Respondent submitted that the Appellant made an application to the Supreme Court of Canada for leave to appeal the Court's Judgment dated November 29, 2019, and that the Respondent delayed requesting an assessment of costs to limit the human and financial resources that would need to be expended, just in case the award of costs was reversed. At paragraphs 7 and 8 of the Respondent's Reply Submissions, it was noted that the Appellant's application to the Supreme Court of Canada was dismissed on October 29, 2020, and that the Respondent sought payment from the Appellant on December 22, 2020, and on January 27, 2021.

[9] I have considered the use of my discretion as an Assessment Officer, pursuant to Rule 409 and Rule 400(3) of the *FCR*, to reduce the Respondent's costs due to the delay in requesting an assessment of costs and I have found that an insufficient threshold has been met to warrant a reduction of costs for this particular file. The Respondent's delay with requesting an assessment of costs was not excessive, as there was a related legal proceeding initiated by the Appellant in the Supreme Court of Canada. The Respondent submitted that the related legal proceeding could have affected the Court's award of costs, which I have found to be a reasonable justification for delaying the Respondent's request for an assessment of costs. The Supreme Court of Canada's decision dated October 29, 2020, did not affect the Respondent's award of costs, and as shown at Exhibit "C" of the Supplementary Affidavit of Danika Tondreau, affirmed on June 18, 2021, the Respondent initially contacted the Appellant regarding the issue of costs by a letter dated December 22, 2020. In addition, at Exhibit "D" of the same affidavit, there is a copy of an e-mail correspondence dated January 27, 2021, from the Respondent to the Appellant following up on the Respondent's letter dated December 22, 2020. Subsequent to the Respondent's follow-up

with the Appellant on January 27, 2021, a request for an assessment of costs was filed with the court registry on March 24, 2021. I have found the timeline of events between the Court's Judgment dated November 29, 2019, and the filing of the Respondent's request for an assessment of costs on March 24, 2021, to be reasonable in relation to the facts for this particular file. Further to my review of the parties' submissions, the court record, and Part 11 of the *FCR*, I have determined that the Respondent's request for an assessment of costs was submitted in accordance with the Court's Judgment dated November 29, 2019 and the *FCR*, and that the issue of delay is not a factor that will adversely impact my assessment of the Respondent's costs.

B. *The Appellant's financial circumstances.*

[10] At paragraphs 4 and 5 of the Appellant's Representations on Costs, it was submitted that the COVID-19 pandemic has affected the Appellant's finances, which "have been relocated to help people affected by COVID-19." The Appellant submitted that costs are "inherently and historically a matter of equity and, therefore, equitable defences apply to the cost claim" and that the Court did not explicitly state in the Judgment dated November 29, 2019, that the Appellant had to pay the Respondent's costs. At paragraphs 30 and 31 of the Appellant's Representations on Costs, it was submitted that assessment of costs should be fair and equitable and that "[t]he court should also consider the financial capacity of the respective parties" and that "[i]f the parties cannot find an amicable agreement and if the court does not reduce the assessment, the appellant is likely to shut down and dissolve."

[11] In reply, at paragraph 4 of the Respondent's Reply Submissions, it was acknowledged that the Courts Judgment "did not designate which party was the payor and which party was the recipient of the costs award." The Respondent submitted that "the general rule with respect to costs awards is that costs are based on the principles of indemnity such that costs follow the cause" and also submitted that the Appellant provided "no evidence or legal argument to support its implied assertion that the Respondent is not entitled to her costs." In addition, at paragraph 20 of the Respondent's Reply Submissions, it was submitted that the jurisprudence is clear that a party's "inability to pay costs is not a factor to be considered by an assessment officer."

[12] The parties' submissions have highlighted that the Court's Judgment dated November 29, 2019, did not explicitly state that the costs awarded were payable by the Appellant to the Respondent. At paragraph 4 of the Respondent's Reply Submissions, the jurisprudence *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, at paragraph 34, was cited, wherein the Supreme Court of Canada stated the following regarding rewards of costs:

> 34. In essence, Okanagan was an evolutionary step, but not a revolution, in the exercise of the courts' discretion regarding costs. As was explained in that case, the idea that costs awards can be used as a powerful tool for ensuring that the justice system functions fairly and efficiently was not a novel one. Policy goals, like discouraging -- and thus sanctioning -- misconduct by a litigant, are often reflected in costs awards: see M. M. Orkin, The Law of Costs (2nd ed. (loose-leaf)), vol. I, at s. 205.2(2). Nevertheless, the general rule based on principles of indemnity, i.e., that costs follow the cause, has not been displaced. This suggests that policy and indemnity rationales can co-exist as principles underlying appropriate costs awards, even if "[t]he principle that a successful party is entitled to his or her costs is of long standing, and should not be departed from except for very good reasons": Orkin, at p. 2-39. This framework has been adopted in the law of British Columbia by establishing the "costs follow the cause" rule as a default proposition, while leaving judges room to exercise their discretion by ordering otherwise: see r. 57(9) of the Supreme Court of British Columbia Rules of Court, B.C. Reg. 221/90.

[13] In addition, in *Thibodeau v. Air Canada*, 2007 FCA 115, at paragraph 21, the Court stated the following regarding awards of costs:

> 21. The purpose of awarding costs is limited to providing the party receiving them with partial compensation: *Sherman v. The Minister of National Revenue*, 2004 FCA 29, at paragraph 8. Under Rule 407 of the *Federal Courts Rules*, they are assessed in accordance with Column III of the table in Tariff B. Tariff B is a compromise between awarding full compensation to the successful party and imposing a crushing burden on the unsuccessful party. Column III concerns cases of average or usual complexity: *ibidem*, paragraphs 8 and 9.

[14] The Supreme Court of Canada's *Little Sisters and Art Emporium* decision and the Federal Court of Appeal's *Thibodeau* decision have provided clarification that the principle of indemnification in court proceedings is that a successful party is entitled to costs. For this particular file, the Court's Judgment dated November 29, 2019, stated that: "The appeal is dismissed with costs." The Appellant instituted the appeal proceeding, which was dismissed by the Court and is therefore the unsuccessful party. As the Appellant is the unsuccessful party, the Respondent is the successful party for this particular appeal proceeding and is therefore entitled to costs within the limits prescribed by the *FCR*. As a result, any costs allowed for the Respondent's assessment of costs will be payable by the Appellant to the Respondent pursuant the Court's Judgment dated November 29, 2019.

[15] Further to the parties' submissions regarding the Appellant's financial circumstances and the payment of costs, in *Leuthold v. Canadian Broadcasting Corp*., 2014 FCA 174, at paragraph 12, the Court stated the following:

> 12. 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.

[16] In *Latham v. Canada*, 2007 FCA 179, at paragraph 8, the Assessment Officer stated the following regarding the issue of financial hardship:

> 8. 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.

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

> 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.

[18] Utilizing the *Leuthold* and *Latham* decisions as guidelines, they have provided clarification that Assessment Officers cannot consider the impecuniosity of a party in an assessment of costs. The changes in the Appellant's financial circumstances that have occurred since the COVID-19 pandemic is not an issue that I am able to consider as an Assessment Officer. In addition, I am unable to consider the Appellant's request that the costs payable to the Respondent be reduced as an alternative to the parties' inability to reach an amicable agreement. Any possible reduction in the Respondent's costs will be based on the facts pertaining to each assessable service and disbursement that has been claimed and will not be based on the Appellant's possible incapacity to pay those costs. Utilizing the *Carlile* decision as a guideline, the assessment of the Respondent's costs will be conducted in such a manner as to not penalize the Respondent by the "denial of indemnification when it is apparent that real costs were indeed incurred" but will also ensure that the Appellant is "not burdened with unnecessary or unreasonable costs".

C. *Irregularities with the parties' assessment of costs documents.*

(1) The Respondent's assessment of costs documents.

[19] The Appellant identified some irregularities with the Respondent's Bill of Costs and the Affidavit of Disbursements of Danika Tondreau, affirmed on March 22, 2021. Concerning the Respondent's Bill of Costs, at paragraph 14 of the Appellant's Representations on Costs, it was submitted that "[t]he information provided in the "Item No." on respondent's bill is not intelligible." In addition, at paragraph 16 of the Appellant's Representations on Costs, it was submitted that it was "not clear how the respondent arrived at the number of hours claimed for each fee item." The Respondent did not provide any reply submissions that addressed these particular issues but at paragraphs 2 and 3 of the Respondent's Written Submissions, it was submitted that the Respondent's Bill of Costs was prepared in accordance with the *FCR* and that an average number of units were selected "from column III of Tariff B in the calculation of fees."

[20] Further to the parties' submissions, my review of the Respondent's Bill of Costs also found that the specific column being used in Tariff B was not clearly identified in the document. In the column named "Item No." in the Respondent's Bill of Costs there is a "(III)" before all of the Item numbers listed in that column, which appears to indicate the specific column in Tariff B that each Item has been claimed under. My review of the Respondent's Bill of Costs in conjunction with Tariff B found that the number of units claimed for each of the assessable services fell within the parameters of column III and that the remaining details in the Bill of Costs, such as the Item numbers, descriptions of the assessable services performed, and the fee

totals were all satisfactory. Considering all of the aforementioned facts, I have determined that the Respondent's Bill of Costs was submitted in accordance with the *FCR* and is not an issue that will require further consideration in this assessment of costs.

[21] Concerning the Affidavit of Disbursements of Danika Tondreau, affirmed on March 22, 2021, at paragraph 9 of the Appellant's Representations on Costs, it was submitted that "[t]he affiant, Ms. Tondreau, failed to state in her affidavit whether she has personal knowledge of the matters deposed to therein, or how she acquired knowledge of the matters deposed to therein and whether she believes them to be true." The Appellant submitted at paragraphs 9 and 10 of the Appellant's Representations on Costs, that the affidavit has inadmissible hearsay and that "[t]here is little value in that affidavit, and it should not be admitted as evidence." In reply, at paragraph 22 of the Respondent's Reply Submissions, it was submitted that:

> 22. As noted by the Appellant, the Respondent's Affidavit of Disbursements contains two deficiencies. The Affidavit of Disbursements was not entirely drafted in the first person as required by Rule 80. The Affidavit of Disbursements is also missing an attestation statement. However, the Appellant's additional complaint that the affiant does not "tell us whether any of the expenses were justified or reasonable" is misguided. An affidavit in support of disbursements should satisfy the court that the disbursements were actually incurred, but need not speak to the reasonableness of the disbursements, as the reasonableness of a disbursement is to be determined by the court pursuant to Rule 1(4) of Tariff B. In any event, the Supplementary Affidavit should relieve the Appellant's concerns.

[22] Further to the parties' submissions, the Respondent has acknowledged that some portions of the Affidavit of Disbursements of Danika Tondreau, affirmed on March 22, 2021, are not in the first person and that an attestation statement is missing from the affidavit. While I have found the chronology of events contained in the Affidavit of Disbursements of Danika Tondreau, affirmed on March 22, 2021, to be useful, I have determined that limited weight will be given to

the affidavit because it is missing an attestation statement from the affiant and because some statements in the affidavit are not in the first person. Further to this determination, I have found that the attachment of invoices to the Affidavit of Disbursements of Danika Tondreau have met the evidence requirement specified at section 1(4) of Tariff B, and that they will be considered in the assessment of the Respondent's costs. I have also taken note that the Respondent has filed a Supplementary Affidavit of Danika Tondreau, affirmed on June 18, 2021, which has resolved the irregularities that were found in the Affidavit of Disbursements of Danika Tondreau, affirmed on March 22, 2021.

(2) The Appellant's assessment of costs documents.

[23] The Respondent identified some irregularities with the Appellant's Representations on Costs and the Affidavit of Marie Eve Brule, filed on May 28, 2021. Concerning the Appellant's Representations on Costs, at paragraph 23 of the Respondent's Reply Submissions, it was submitted that the Representations on Costs was not signed by the solicitor or the party that filed it pursuant to Rule 66 of the *FCR*. Further to the Respondent's submissions, I reviewed Rule 66 and the Federal Court of Appeal's Notice to the Parties and the Profession, dated June 15, 2020, which specified some of the filing requirements for documents during the COVID-19 pandemic. The Notice dated June 15, 2020, specified that "[a]ll documents that are required to be signed must contain either an original scanned signature or an electronic signature."

[24] In *Summerbell v. Canada (Correctional Servic*e*)*, 2001 FCT 1268, the Court stated the following regarding the requirement for signatures on court documents:

> 12. Dealing with the question of unsigned documents, the document which is required to be signed is the document which is filed. A copy has been served on the Plaintiff and there is no requirement that, that copy be signed. The Rules indicate that a non-originating document shall be served before it is filed. It is patent that the same piece of paper cannot be both served and filed. The original filed with the Court is signed. A copy only is served. […]

[25] Utilizing the *Summerbell* decision as a guideline, I have found that the Appellant's Representations on Costs that was served on the Respondent met the requirements for Rule 66 of the *FCR*. For the copy of the Representations on Costs that was filed with the court registry, my review of the court record found that it did not have a scanned or electronic signature of the person representing the Appellant. This being noted, the Representations on Costs did include the date that the document was prepared, the name and address of the Appellant, and the Appellant's e-mail address. Other than the absence of an electronic or scanned signature, I did not find anything else to be procedurally irregular with the Appellant's Representations on Costs. While it was the responsibility of the Appellant to ensure that the Representations on Costs that was filed with the court registry had a scanned or electronic signature of the person representing the Appellant; I have found that it would be procedurally unfair to not consider the Appellant's Representations on Costs for the assessment of costs solely based on the absence of a scanned or electronic signature. Therefore, I have determined that the Appellant's Representations on Costs will be considered in the assessment of the Respondent's costs.

[26] Concerning the Appellant's Affidavit of Marie Eve Brule, filed on May 28, 2021, at paragraphs 23 and 24 of the Respondent's Reply Submissions, it was submitted that the affidavit did not meet the requirements of the Federal Court of Appeal's Notice to the Parties and the Profession, dated May 12, 2020, which specified some of the filing requirements for documents

during the COVID-19 pandemic. The Respondent submitted that the Notice dated May 12, 2020, allows parties to file affidavits that have been "sworn or affirmed remotely during the suspension period using methods deemed acceptable in any Superior Court of any province" and that the Appellant did not provide the authority within the Ontario court system that allows for the filing of an undated affidavit. In addition, the Respondent submitted that the Affidavit of Marie Eve Brule seems to be in support of the Appellant's submissions regarding its financial circumstances and that the Respondent would not be taking a position regarding the admissibility of the Appellant's affidavit.

[27] I have reviewed the Notice to the Parties and the Profession, dated May 12, 2020, in conjunction with the Appellant's Affidavit of Marie Eve Brule, filed on May 28, 2021, and I have also found that the court record's copy of the affidavit is undated. I also found that there was no indication in the affidavit as to whether the affiant's statements were sworn or affirmed at all, and if so, who the commissioner of oaths was. As submitted by the Respondent, the balance of the Affidavit of Marie Eve Brule does appear to be in support of the Appellant's submissions regarding its financial circumstances. As noted earlier in these Reasons, I have determined that as an Assessment Officer, I am unable to consider the financial circumstances of a party in an assessment of costs. This being stated, I have taken note that paragraphs 7 and 8 of the Affidavit of Marie Eve Brule contain statements regarding the quantum of costs claimed by the Respondent. These statements are similar to some of the submissions contained in the Appellant's Representations on Costs. Therefore, as the satisfactory statements from the Affidavit of Marie Eve Brule can be found elsewhere in the Appellant's costs documents, I have

determined that the Affidavit of Marie Eve Brule, filed on May 28, 2021, will not need to be considered in the assessment of the Respondent's costs.

III. Assessable Services

[28] The Respondent has claimed 15.5 units for assessable services.

A. *Item 18 – Preparation of appeal book.*

[29] In the Respondent's Amended Bill of Costs, filed on June 18, 2021, 1 unit was claimed for Item 18, for the preparation of the Appeal Book, which was filed by the Respondent on May 8, 2019. My review of the Respondent's Bill of Costs, filed on March 24, 2021, shows that Item 18 was not claimed in this document. The Amended Bill of Costs that was filed on June 18, 2021, was served on the Appellant, but it was part of the Respondent's reply costs documents and there was no opportunity for the Appellant to respond to the new claim for Item 18. In *Kawasaki Kisen Kaisha Ltd. v. Philipp Brothers Far East Inc.*, [1987] F.C.J. No. 379, the Assessment Officer stated the following regarding Amended Bills of Costs:

> Although it would have been more appropriate for the Respondent's solicitor to have submitted a complete Bill of Costs in the first place, his request for an adjournment was granted.
>
> Technically speaking, a Bill of Costs is not taxed nor filed on record until each item has been spoken to and adjudicated upon by the Taxing Officer. In my opinion, a request from a taxing party to amend his Bill of Costs or to seek an adjournment in order to amend it may be allowed if the opposing party is given the opportunity to defend against any changes made.

[30] Utilizing the *Kawasaki Kisen Kaisha Ltd.* decision as a guideline, I have found that it would be procedurally unfair to the Appellant to consider the Respondent's new claim for Item 18. The Respondent did not seek instructions from the Assessment Officer regarding the filing of an Amended Bill of Costs that included new claims, at the reply stage of this assessment of costs. If this had been done by the Respondent, a new direction could have been issued to the parties to allow for responding and reply submissions to be filed by the parties regarding any new claims. As a result, I have determined that Item 18 must be disallowed, as it pertains to the facts for this particular file.

B. *Item 19 – Memorandum of fact and law.*

[31] The Respondent has claimed 5 units for the preparation and filing of the Respondent's Memorandum of Fact and Law, filed on July 23, 2019. At paragraph 17 of the Appellant's Representations on Costs, it was submitted that 5 units is a reasonable amount for the Respondent to claim for Item 19. I am in agreement with the Appellant that the Respondent's claim for 5 units for the preparation and filing of the Respondent's Memorandum of Fact and Law is reasonable. The preparation and filing of the Memorandum of Fact and Law was a necessary service for the Respondent to perform for the appeal proceeding and therefore, the Respondent's claim for Item 19 is allowed as claimed at 5 units.

C. *Item 22(a) – Counsel fee on hearing of appeal: (a) to first counsel, per hour.*

[32] The Respondent has claimed 4.5 units for Item 22(a) for counsel's attendance at the appeal hearing on November 12, 2019. At paragraph 18 of the Appellant's Representations on Costs, it was submitted that the Respondent's claim is "excessive and would exceed full indemnity / solicitor-and-client costs for private counsel". The Appellant submitted at paragraph 19 of the Appellant's Representations on Costs, that the Respondent's claim for Item 22(a) should be reduced to 1 hour and multiplied by 2 units instead of 3 units "based on the fact that the respondent simply read a 15-minute statement in court, a task that is very low complex and could have been performed by an Ontario Works participant at minimum wage." In reply, at paragraph 13 of the Respondent's Reply Submissions, it was submitted that the "claim for assessable counsel fees for 1.5 hours on hearing with respect to item 22 of Tariff B is supported by the Court record."

[33] Further to the parties' submissions, I reviewed the details for the appeal hearing that are on the court record. The court record showed that the Court Registrar that was assigned to the hearing recorded in the Abstract of Hearing, which is a computer entry that provides the details for a hearing, that the appeal hearing was from 9:30 am to 11:05 am, which was a duration of 1 hour and 35 minutes. In *Apotex Inc. v. Merck & Co.*, 2002 FCA 478, at paragraph 4, the Assessment Officer expanded on the usefulness of Abstracts of Hearing in assessing claims for Item 22:

> 4. […] An appearance at a hearing necessarily includes some time in the courtroom identifying oneself with the Court Registrar and waiting for the call of the case, none of which is preparation time addressed by other items. Therefore, the abstract of hearing is a useful, but not absolute, guide for attendance at

> hearing. The record satisfies me that the claim of 8 1/2 hours at 3 units per hour is reasonable for item 22 in these circumstances. […]

[34] Concerning the Appellant's submissions that the hearing duration should be reduced to 1 hour because the Respondent "read a 15-minute statement in court", the Appellant did not provide any jurisprudence to support this proposal. My review of the Court's Judgment dated November 29, 2019, did not reveal that Respondent's costs for the attendance at the appeal hearing should be reduced due to the duration of the Respondent's oral arguments. Utilizing the *Apotex Inc.* decision as a guideline, I have found that the Respondent's claim for 1.5 hours for the appeal hearing is supported by the Abstract of Hearing that is on the court record. In the absence of any jurisprudence stating that claims for Item 22(a) should be limited to the duration of a party's oral arguments only, I have found that the Respondent was entitled to claim the entire duration of their attendance at the appeal hearing and not just for the time that the Respondent spoke at the hearing.

[35] Item 22(a) has a range of 2 – 3 units under column III of Tariff B, and further to my review of the court record, I have found the Appellant's appeal proceeding to be of medium complexity and the Respondent's selection of 3 units under column III to be reasonable. Having considered all of the aforementioned facts, I have determined that the Respondent's counsel's attendance at the appeal hearing was necessary and that it is reasonable to allow the Respondent's claim for Item 22(a) at 4.5 units.

D. *Item 25 - Services after judgment.*

[36] The Respondent has claimed 1 unit for Item 25 for services performed after judgment. At paragraph 20 of the Appellant's Representations on Costs, it was submitted that the services performed by the Respondent are unknown and therefore Item 25 should not be allowed. In reply, at paragraph 14 of the Respondent's Reply Submissions, it was submitted that the services performed by the Respondent were "the preparation of a client reporting letter and paper, electronic recordkeeping, preparation of the Bill of Costs, and file closing." In *Halford v. Seed Hawk Inc.*, 2006 FC 422, at paragraph 131, the Assessment Officer stated the following regarding services provided after judgment:

> 131. […] I routinely allow item 25, notwithstanding the absence of evidence, unless I think that responsible counsel did not, in fact, review the judgment and explain associated implications to the client. […]

[37] Further to the parties' submissions and utilizing the *Halford* decision as a guideline, I have determined that the services performed by the Respondent were necessary and that it is reasonable to allow 1 unit for the Respondent's services performed after the final judgment was rendered by the Court.

E. *Item 26 - Assessment of costs.*

[38] In the Respondent's Amended Bill of Costs, filed on June 18, 2021, 4 units were claimed for Item 26 for the services performed for the assessment of costs. My review of the Respondent's Bill of Costs that was filed on March 24, 2021, shows that only 3 units were claimed for Item 26. The Amended Bill of Costs that was filed on June 18, 2021, was served on

the Appellant, but it was part of the Respondent's reply cost documents and there was no opportunity for the Appellant to respond to the increased amount of units for Item 26. In reply, at paragraph 15 of the Respondent's Reply Submissions, it was submitted that "[t]he Respondent has amended its Bill of Costs to increase the number of units from three to six, calculated using the mid-range value, to reflect the Respondents' time to amend its Bill of Costs and prepare these reply submissions." I have taken note that paragraph 15 of the Respondent's Reply Submissions has a clerical error, the Respondent's Amended Bill of Costs filed on June 18, 2021, has 4 units claimed for Item 26 and not 6 units, as stated in the Respondent's Reply Submissions.

[39] Utilizing the *Kawasaki Kisen Kaisha Ltd.* (supra) decision as a guideline, and similar to my assessment for Item 18, I have found that it would be procedurally unfair to the Appellant to consider the Respondent's claim for Item 26 at 4 units, as the Appellant did not have an opportunity to the respond to the increased amount of units for Item 26. Therefore, Item 26 will be considered at 3 units.

[40] At paragraphs 26, 27 and 28 of the Appellant's Representations on Costs, it was submitted that Respondent's services for the assessment of costs "would not reasonably have required more than 2 hours" and that only 2 units should be allowed for Item 26. Further to my review of the parties' submissions for Item 26, and my review of all of the Respondent's assessment of costs documents, I have determined that the Respondent's services were necessary and that it is reasonable to allow 3 units for the Respondent's claim for Item 26.

F. *Total amount allowed for assessable services.*

[41] A total of 13.5 units have been allowed for the Respondent's assessable services for a total dollar amount of $2,025.00.

IV. Disbursements

[42] The Respondent has claimed $1,665.73 for disbursements.

A. *In-house photocopying.*

[43] The Respondent has claimed $432.00 for the in-house photocopying of 6 copies of the Appeal Book, filed on May 8, 2019, and for 6 copies of the Respondent's Memorandum of Fact and Law, filed on July 23, 2019. Concerning the Appeal Book, at paragraph 22 of the Appellant's Representations on Costs, it was submitted that "the respondent cannot claim disbursements for the appeal book because Rule 343(4) states that the appeal book is the responsibility of the appellant." The Appellant also submitted that there was "no written agreement between the parties for the reimbursement of any printing costs for this item." In reply, at paragraph 11 of the Respondent's Reply Submissions, it was submitted that "[t]he Appellant's representative encountered difficulties with respect to the Court's filing requirements and agreed to have the Respondent prepare and file the appeal book on its behalf."

[44] The Appellant has submitted that there was no written agreement between the parties for the Respondent to be reimbursed for the photocopying costs of the Appeal Book. Conversely, my review of the e-mail exchange between the parties regarding the preparation of the Appeal Book, found at Exhibit “J” of the Supplementary Affidavit of Danika Tondreau, affirmed on June 18, 2021, and my review of the court record found that there was also no written agreement between the parties that the Respondent would not be reimbursed for the photocopying costs of the Appeal Book. In addition, my review of the court record showed that the Respondent filed the Appeal Book on May 8, 2019, and there was no indication on the court record that the Respondent prepared and filed the Appeal Book without the approval of the Appellant. Further to my review of the parties’ costs documents and the court record, I have determined that in the absence of any evidence regarding the reimbursement of the photocopying costs for the Appeal Book that it was reasonable for the Respondent to include this claim in the Bill of Costs.

[45] Concerning the amount that was claimed by the Respondent for in-house photocopies of the Appeal Book and the Respondent’s Memorandum of Fact and Law, in *Inverhuron & District Ratepayers Assn. v. Canada*, 2001 FCT 410, at paragraphs 60 and 61, the Assessment Officer stated the following:

> 60. The Respondents submitted claims for in-house photocopies. The evidence produced in support of these claims is thin. It does not provide any information as to how they arrived at the amount of $0.25/page. At the hearing, it was suggested that this was the "normal standard for the Court". This rate has generally been accepted by Federal Court assessment officers, but I am not prepared to concede that this is what it really costs law firms for in-house photocopies.
>
> 61. The following excerpt from Justice Teitelbaum's decision in *Diversified Products Corp. et al* v. *Tye-Sil Corp.*, 34 C.P.R. (3d) 267 supports my thinking on the actual cost for photocopies;

> The Item of photocopies is an allowable disbursement only if it is essential to the conduct of the action. Therefore, this is not intended to reimburse a party for the actual out-of-pocket cost of the photocopy. The 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.

[46] In addition, in *Merck & Co. v. Apotex*, 2008 FCA 371, at paragraph 14, the Court stated the following regarding Assessment Officers 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.

[47] Utilizing the *Inverhuron & District Ratepayers Assn.* decision as a guideline, it indicates that the onus was on the Respondent to provide details related to the actual cost of the in-house photocopying, such as a client invoice showing how much was charged for photocopying. Similar to the *Inverhuron* decision, I have found that the Respondent's "evidence produced in support of" this claim to be thin, as "[i]t does not provide any information as to how they arrived at the amount of $0.25/page." Utilizing the *Merck* decision as a guideline, I reviewed the court record to try to determine a reasonable quantum of costs to allow for in-house photocopying. My review took into consideration the size and the number of documents that needed to be prepared for the court registry and the parties and if the documents were electronically served between the parties and/or electronically filed with the court registry. My review of the court record found that the Appeal Book and the Respondent's Memorandum of Fact and Law were both electronically served on the Appellant. There were 5 hard copies of each document filed with the

court registry and the Respondent was entitled to photocopy 1 copy for its own use, for a total of 6 copies for each document, which was the number of copies claimed by the Respondent. Therefore, I have found that it was reasonable for the Respondent to submit claims for 6 copies of each document.

[48] Further to my review of the Respondent's costs documents in conjunction with the court record and the aforementioned jurisprudence, I have determined that the Respondent's claim for in-house photocopying was necessary and that it is reasonable to allow $261.00 for these disbursements.

B. *Out-sourced printing.*

[49] The Respondent has claimed $1,225.38 for the out-sourced printing of 3 copies of the Certified Tribunal Record, filed on March 11 2019, and 6 copies of the parties' Joint Book of Authorities, filed on July 23, 2019. At paragraphs 23, 24 and 25 of the Appellant's Representations on Costs, it was submitted that the aforementioned documents could have been served electronically and that the out-sourced printing invoices "appear to be excessive" and lack adequate details. In reply, at paragraph 17 of the Respondent's Reply Submissions, it was submitted that "the consents to electronic service do not bind the parties to also file paper copies of these documents with the Court." The Respondent did not provide any submissions regarding the absence of details in the invoices.

[50] My review of the Respondent's invoices from Bradda Printing Services Inc., at Exhibits "G" and "H" of the Supplementary Affidavit of Danika Tondreau, affirmed on June 18, 2021, did show an absence of detail regarding the printing price charged per page. This being noted, the invoices did provide details regarding the number of volumes contained in each document, the number of documents that were printed, and details regarding the various specifications for the documents, such as cover pages and tabbing. I have found that with the size of the Certified Tribunal Record, being one volume, and the size of the Joint Book of Authorities, being 3 volumes, that it was reasonable for these documents to be out-sourced for printing.

[51] Concerning the parties' Consent to Electronic Service, filed on March 25, 2019, my review of Rule 141 of the *FCR* did not reveal that if parties consent to electronic service that it means that all documents must be served in that manner. Incidentally, my review of the court record showed that the Certified Tribunal Record that was filed on March 11 2019, was served on the Appellant before the parties' Consent to Electronic Service was filed with the court registry on March 25, 2019. Considering all of the aforementioned facts, I have found that it was open to the Respondent to serve and file hard copies of the Certified Tribunal Record and the Joint Book of Authorities, and that there was no imperative requirement to serve and file these documents electronically because the parties had consented to electronic service. The filing of a Consent to Electronic Service, provides a party with an additional option for the service of documents but a party is not compelled to serve all of their documents electronically because a Consent to Electronic Service has been filed on the court record.

[52] My review of the court record in conjunction with the Respondent's costs documents found that for the Certified Tribunal Record, 1 hard copy was filed with the court registry, 1 hard copy was for the Appellant, and 1 hard copy was for the Respondent, for a total of 3 copies. For the Joint Book of Authorities, 5 hard copies were filed with the court registry, and the Respondent was entitled to print 1 copy for its own use, for a total of 6 copies. I have determined that Respondent's claims for out-sourced printing of the Certified Tribunal Record and Joint Book of Authorities were necessary and that when the invoice amounts are divided by the number of pages and copies of each document that were required by the court registry and the parties, that the out-sourced printing amounts are reasonable. Therefore, the Respondent's out-sourced printing disbursements for $1,225.38 is allowed as claimed.

C. *Courier fees.*

[53] The Respondent has claimed $5.35 for the courier service of the Certified Tribunal Record on the Appellant. Attached to the Supplementary Affidavit of Danika Tondreau, affirmed on June 18, 2021, at Exhibit "I", is a copy of an invoice from Purolator, showing that a delivery was made to the Appellant on March 8, 2019. The service date on the invoice corresponds with the filing of the Certified Tribunal Record on March 11, 2019, with the court registry. I have found that the fee charged for the service of Certified Tribunal Record on the Appellant was reasonable and that it was necessary for the Appellant to receive a copy of this document, as it provided pertinent information for the appeal proceeding. Therefore, I have determined that the Respondent's claim for $5.35 for the courier service disbursement is allowed as claimed.

D. *Total amount allowed for disbursements.*

[54] The total amount allowed for disbursements is $1,491.73.

V. Conclusion

[55] For the above Reasons, the Respondent's Amended Bill of Costs, filed on June 18, 2021, is assessed and allowed in the total amount of $3,516.73, payable by the Appellant to the Respondent. A Certificate of Assessment will also be issued.

"Garnet Morgan"
Assessment Officer

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-85-19
STYLE OF CAUSE:	CHURCH OF ATHEISM OF CENTRAL CANADA v. MINISTER OF NATIONAL REVENUE

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

REASONS FOR ASSESSMENT BY:	GARNET MORGAN, Assessment Officer
DATED:	OCTOBER 25, 2021

WRITTEN SUBMISSIONS BY:

Christopher Bernier	REPRESENTATIVE FOR THE APPELLANT
Linsey Rains	FOR THE RESPONDENT

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