Federal Court of Appeal Cour d'appel fédérale

Date: 20201016

Docket: A-68-19

Citation: 2020 FCA 173

Present: **GARNET MORGAN, Assessment Officer**

BETWEEN:

PAUL WILLIAMS, carrying on business under the firm name and style of IT ESSENTIALS

Appellant

and

CISCO SYSTEMS, INC., a body corporate

Respondent

Assessment of costs without appearance of the parties.
Certificate of Assessment delivered at Toronto, Ontario, on October 16, 2020.

REASONS FOR ASSESSMENT BY: GARNET MORGAN, Assessment Officer

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REASONS FOR ASSESSMENT

GARNET MORGAN, Assessment Officer

I. Introduction

[1] This is an assessment of costs pursuant to a Judgment of the Federal Court of Appeal dated November 25, 2019, wherein the Appellant's appeal of an Order of the Federal Court dated January 28, 2019 in file T-1304-17 was "dismissed with costs, including the costs of preparation of the appeal book."

[2] This assessment of costs is also pursuant to an Order of the Federal Court of Appeal dated May 2, 2019, wherein the Respondent was awarded its costs under Column III, in relation to the Appellant's motion for an order determining the contents of the Appeal Book and permission to file it electronically.

[3] Further to the Court's decisions, costs will be assessed in accordance with Rule 407 of the *Federal Courts Rules*, SOR/98-106 *(FCR)*, which states:

> 407. Unless the Court orders otherwise, party-and-party costs shall be assessed in accordance with column III of the table to Tariff B.

[4] On December 19, 2019, the Respondent filed a Bill of Costs, Affidavit of Nancy Gallinger, sworn on December 18, 2019 and written representations.

[5] On January 24, 2020, the following assessment of costs direction was issued to the parties:

> 1. The assessment of costs shall proceed in writing;
> 2. The Appellant may serve and file any reply materials by Friday, March 6, 2020;
> 3. The Respondent may serve and file any rebuttal materials by Friday, March 27, 2020.

[6] Further to the receipt of the Appellant's letter dated March 6, 2020, requesting an extension of time to file their reply materials, the following revised direction was issued to the parties on March 6, 2020:

1. The Appellant may serve and file any reply materials by Friday, March 27, 2020;
2. The Respondent may serve and file any rebuttal materials by Monday, April 27, 2020.

[7] Subsequent to the direction dated March 6, 2020, on March 27, 2020, the Appellant filed written submissions and an Affidavit of David A. Copp, sworn on March 27, 2020; and on April 24, 2020, the Respondent filed reply representations. A review of the court record indicates that no further material was received by the court registry and no additional request was made by either party to provide additional material after the filing of the Respondent's reply representations on April 24, 2020.

II. Assessable Services

[8] The Respondent has claimed $6,102.00 in assessable services, which includes HST.

[9] With the exception of Item 26 (Assessment of costs), the Appellant's costs material did not specifically address the individual claims for assessable services made by the Respondent. The Appellant's written submissions appeared to have two overall themes; the reasonableness of the Respondent's claims; and a request for a substantial reduction of the Respondent's quantum of costs pursuant to Rule 400(3)(h) of the *FCR*, as there was "substantial public interest in the determination of a legal issue".

[10] At paragraphs 7, 8 and 9 of the Appellant's written submissions it is submitted:

> 7. The submission of the Bill of Costs represents the higest [sic] amount that Cisco believes could be awarded as costs on the subject Appeal.

> 8. Based on the issue at bar, coupled with the observations of the hearing Judge as to the Counterclaim, which has not yet been adjudicated, it is respectfully submitted that Cisco should be entitled to costs at measure substantially less than that sought by the Respondent (Cisco).
>
> 9. The basic position submitted on behalf of Mr. Williams is that the conduct of Cisco throughout has tended to increase the magnitude of disbursements to be claimed herein and is both contrary to the interpretation and application of the Rules as directed by Rule 3:

[11] Further to the Appellant's submissions, Rule 3 of the *FCR* states the following:

> 1. General principle – These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

[12] At paragraph 11 of the Appellant's written submissions it is submitted:

> 11. It is respectfully submitted that rule 400(3)(h) permits a substantial reduction on the quantum of costs which might otherwise have been awarded by an assessment officer where there exists a substantial "public interest" in the determination of a legal issue. Here, the issue sould [sic] to be raise by the Appellant was whether the use by the Respondent of the purchase of key words from a major search engine service for services offered by the Resapondent [sic] in Canada could constitute infringement of the right to exclusive use if the mark in Canada afforded by the Appellant's registration of an identical mark under the *Trade-marks Act*. Although that issue was resolved against the Appellant, the public interest in the resolution of the issue is apparent.

[13] In rebuttal, at paragraphs 2, 3, 4 and 5 of the Respondent's reply representations it is submitted:

> 2. Williams' submissions do not actually address the issue of assessing the quantum of the costs that were awarded to Cisco by the Federal Court of Appeal. The quantum of costs is the only question currently at issue.
>
> 3. Instead, Williams argues for a variance to the Court's Order. Such arguments are neither appropriate nor receivable at the assessment stage.

> 4. The Judgment of the Court by Justice Near dated November 25, 2019, dismissed the appeal and awarded costs to Cisco.[1] The *Federal Courts Rules* and associated jurisprudence are clear that, where costs are awarded by the Court without any qualifier, costs are to be assessed in accordance with Column III of Tariff B.[2] Such an award cannot be varied on assessment.[3]
>
> 5. Cisco previously submitted its Bill of Costs in accordance with Column III of Tariff B.[4] Williams does not dispute the items claimed therein or the units. Instead, Williams merely argues for an overall reduction of the costs award, which would be contrary to the Order already issued by the Court.

[14] Also at paragraphs 8(a) and (b) of the Respondent's reply representations it is submitted:

> (a) The matter of Cisco's counterclaim in the action below is irrelevant. Cisco's counterclaim is a separate and distinct claim.[7] That counterclaim was not at issue in the present appeal;
>
> (b) Williams' assertion of "public interest" is unsubstantiated and frivolous. Williams' claim was repeatedly held to be an attempt at a fishing expedition, and therefore an abuse of process.[8] In any event, any "public interest" consideration in the present appeal would have supported an increased costs award to discourage the type of vexatious litigation undertaken by Williams in this appeal, as summarized in Cisco submissions of December 18, 2019;

[15] With regards to the issue of public interest, the Court's Order dated October 22, 2018 and the Order and Reasons dated August 29, 2019 for file T-1304-17, which are the underlying decisions for this particular file and the Reasons for Judgment dated November 25, 2019 for this file (A-68-19), did not disclose that the Appellant's court proceeding involved an issue of "public interest" or that this was a factor that the Court considered in awarding costs. In *Gardner v. Canada*, 2008 FCA 67, at paragraph 8, the Assessment Officer states:

> 8. In *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2002] F.C.J. No. 1795 (A.O.), I considered the relevance of public interest for assessments of costs and concluded that the application of Rules 409 and 400(3) factors against the interest of successful litigants would require carefully considered discretion. That a judgment for costs does not accord the unsuccessful litigant special consideration relative to costs as a function of public interest does not preclude me from applying Rules 409 and 400(3)(h) to

> minimize assessed costs. I will not do so here. The Court's decision (para. 3) noted that the rental formula was not based on the actual accommodation assigned and that said fact was key to the Appellant's assertion of discrimination. The Appellant's submissions before me referenced paragraph 12 of the Court's decision in arguing that her litigation was beneficial to thousands of public servants. With respect, I do not think that the record necessarily supports that conclusion. Paragraph 12 refers to the letter dated March 11, 2002, referring to the Appellant's complaint and forwarding to the Commission a document outlining a new shelter costs formula. This covering letter specifically asserts that "the basic policy of basing rents on salary and family size, rather than on the specific accommodation occupied, has not been changed." The document itself refers to an established ongoing review of Foreign Service directives. I reject the Appellant's position, including her request for Rule 408(3) costs.

[16] Rule 400(3)(h) of the *FCR*, states the following:

> (3) Factors in awarding costs – In exercising its discretion under subsection (1), the Court may consider
>
> […]
>
> (h) whether the public interest in having the proceeding litigated justifies a particular award of costs;

[17] Rule 400(3)(h) refers to an “award of costs”, which is an important distinction between the authority of the Court and that of an Assessment Officer, as an Assessment Officer cannot award costs to a party. In *Marshall v. Canada*, 2006 FC 1017, at paragraph 3(ii), the Assessment Officer states:

> 3(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.

[18] Further to the *Marshall* decision, the *Gardner* decision clarifies that subsequent to an award of costs from the Court, an Assessment Officer may consider the quantum of costs to

allow to a successful party in relation to the issue of public interest to minimize the costs payable for an unsuccessful litigant. In *Gordon v. Canada*, [2019] F.C.J. No.1351, at paragraph 3, the Court made reference to the conditions for public interest costs relief, as follows:

> 3. More importantly, the Plaintiffs' cases do not meet the conditions required for public-interest costs relief. In Mcewing v Canada (Attorney General), 2013 FC 953, [2013] F.C.J. No. 976 [Mcewing], my colleague Justice Richard Mosley identified the conditions that are required for an award of special costs in the context of public interest litigation. Those conditions, found at para 13 of Mcewing, are:
>
> a) The proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved.
>
> b) The person has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically.
>
> c) The issues have not been previously determined by a court in a proceeding against the same defendant.
>
> d) The defendant has a clearly superior capacity to bear the costs of the proceeding.
>
> e) The plaintiff has not engaged in vexatious, frivolous or abusive conduct.

[19] As noted earlier in these Reasons, my review of the Court’s Order dated November 25, 2019, did not disclose that the Appellant’s court proceeding involved an issue of public interest or that this was a factor that the Court considered when costs were awarded to the Respondent. As is stated in the *Gardner* decision, “the application of Rules 409 and 400(3) factors against the interest of successful litigants” requires carefully considered discretion. Upon my thorough review of the Court’s decisions, the parties cost material, Part 11 of the *FCR* and the related jurisprudence, I have determined that the Appellant has not sufficiently met the conditions for a costs variance related to the issue of public interest as noted in the *Gordon* decision. As this issue

has been determined as a preliminary issue, it will not require further consideration in this assessment of costs.

[20] With regards to the reasonableness of the Respondent's claims for assessable services, the Appellant's overall submission is that the Respondent's Bill of Costs is calculated at the highest amounts that can be allowed and that the Respondent "should be entitled to costs at measure substantially less" than what is being sought. The Appellant's submissions were made in response to the Respondent's written representations, wherein it states at paragraph 24:

> 24. The Defendant submits that the Assessment Officer assessing the costs for this matter should exercise his or her discretion to calculate the value for fees based on the top of Column III, fixed in the amount of $8,067.85 in accordance with its Bill of Costs, found at Appendix B to the December 18 Letter and substantiated by the affidavit of Nancy Gallinger.[22]

[21] Further to the Respondent's request for costs to be allowed at the "top of Column III", it is also requested at paragraph 23 of the Respondent's written representations, that various factors under Rule 400 of the *FCR* be considered, such as "the result of the proceeding; any written offer to settle; any conduct of a party that tended to unnecessarily lengthen the duration of the proceeding; whether any step in the proceeding was improper, vexatious, or unnecessary."

[22] In addition, in rebuttal to the Appellant's reasonableness submissions, the Respondent replied that the Appellant's request for a variance of the quantum of costs awarded by the Court should not be entertained in this assessment of costs. The Respondent also submitted that an award of costs cannot be varied during an assessment of costs and that the Court's award of costs was made without "any qualifier" as to the range of costs that could be claimed by the Respondent under Column III of Tariff B.

[23] Further to the parties' submissions on the issue of reasonableness, the absence of specific submissions and/or evidence from the Appellant challenging each of the Respondent's claims for assessable services has left these claims substantially unopposed. In the case *Dahl v. Canada*, 2007 FC 192, at paragraph 2, the Assessment Officer states:

> 2. Effectively, the absence of any relevant representations by the Plaintiff, which could assist me in identifying issues and making a decision, leaves the bill of costs unopposed. My view, often expressed in comparable circumstances, is that the *Federal Courts Rules* do not contemplate a litigant benefiting by an assessment officer stepping away from a position of neutrality to act as the litigant's advocate in challenging given items in a bill of costs. However, the assessment officer cannot certify unlawful items, i.e. those outside the authority of the judgment and the Tariff. I examined each item claimed in the bill of costs and the supporting materials within those parameters. Certain items warrant my intervention as a function of my expressed parameters above and given what I perceive as general opposition to the bill of costs.

[24] Further to the decision in *Dahl*, in *Carlile v. Canada*, [1997] F.C.J. No. 885, at paragraph 26, the Assessment Officer states:

> 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.

[25] The decisions in *Dahl* and *Carlile* indicate that although there may be an absence of specific submissions and/or evidence from the Appellant challenging the individual assessable services claimed by the Respondent for this particular assessment of costs, as an Assessment Officer, I have an obligation to ensure that any claims that are allowed are not "unnecessary or unreasonable". The Court's decisions; the court record; the *FCR*; and any related jurisprudence will be utilized to accomplish this task.

[26] Regarding the Respondent's submissions requesting that factors (i) and (k) under Rule 400(3) of the *FCR* be considered to allow the assessable services to be claimed at the "top of Column III", my review of the Court's decisions in the Federal Court of Appeal and the court record, did not disclose that the Appellant had unnecessarily lengthened the proceeding in the Federal Court of Appeal nor did I find that the Appellant's actions were deemed to be improper, vexatious, or unnecessary by the Court.

[27] With regards to the factor (e) under Rule 400(3) of the *FCR*, I have the reviewed the parties' offers to settle, which are attached as Exhibit 4 to the Affidavit of David A. Copp, sworn on March 27, 2020. The letters attached to Exhibit 4 show that the parties attempted to settle the court proceeding and that the initial offer to settle was made by the Appellant. The parties could not agree on the terms of the offers to settle and the litigation continued through to the appeal hearing. Neither party was obligated to accept the other party's offer to settle but the record does show that the Respondent made a counter-offer to the Appellant and there is no evidence indicating that the Respondent rescinded this offer. I therefore find that factors (a) and (e) under Rule 400(3) of the *FCR* have been met. The court record shows that an offer to settle was made by the Respondent and that the Respondent was the successful party at the appeal hearing. As a result, there are sufficient grounds to support the allowance of costs for the Respondent's assessable services at the high-end of Column III of Tariff B of the *FCR*.

A. *Item 18 (Preparation of appeal book); Item 20 (Requisition for hearing); Item 21(a) (Counsel fee: (a) on a motion, including preparation, service and written representations or memorandum of fact and law); and Item 22(a) (Counsel fee on hearing of appeal: (a) to first counsel, per hour)*

[28] Further to previous paragraph, upon my review of the Respondent's costs material, I found the Respondent's claims for Item 18, Item 20, Item 21(a) and Item 22(a) to be reasonable and that the Court's decisions; the court record; the *FCR* and any relevant jurisprudence support them. Therefore, the Respondent's claims for Item 18, Item 20, Item 21(a) and Item 22(a) are allowed as claimed. Specifically, 1 unit is allowed for Item 18; 1 unit is allowed for Item 20; 3 units are allowed for Item 21(a); and 6 units are allowed for Item 22(a).

[29] The remaining claims for Item 17, Item 19, Item 22(b), Item 25 and Item 26 have some issues to look into and as a result, they will be individually reviewed below.

B. *Item 17 (Preparation, filing and service of notice of appeal)*

[30] The Respondent has claimed 1 unit for Item 17 for the preparation, filing and service of a Notice of Appearance. Item 17 in Tariff B of the *FCR* is for the "preparation, filing and service of notice of appeal." [Underline added for emphasis] In *Mitchell v. Canada*, 2003 FCA 386, at paragraph 12, the Court states:

> 12. The Appellants are correct that the wording for item 27 does not generally fetter discretion. However, that discretion, as for other items in bills of costs, is still fettered by reasonable necessity and the limits of an award of costs. Consistent with Rule 3, and with my sentiment in *Feherguard Products Ltd. v. Rocky's of B.C. Leisure Ltd.*, [1994] F.C.J. No. 2012 (A.O.), at para. 10 that the "best way to administer the scheme of costs in litigation is to choose positive applications of its provisions as opposed to narrower and negative ones", application of discretion should be part of a reasoned process to achieve a result on assessment which is equitable for both sides. Item 27 addresses the professional services of counsel not already addressed by items 1 - 26. Its wording, "such other services", is clearly plural and I understand that to permit assessment of discrete services, as opposed to a restriction to a bundling of several services, not already addressed by items 1 - 26, within a single item 27 claim. That is, item 27 may be claimed more than once.

[31] Utilizing the *Mitchell* decision as a guideline, I have determined that assessing the Respondent’s claim for the Notice of Appearance under Item 27 is an acceptable alternative to Item 17 and will allow for a positive application of the costs provisions instead of a narrower one. Further to my review of the court record, I have verified that the Respondent performed the service claimed and that it was necessary. Therefore, I will allow 1 unit under Item 27 for the Respondent’s claim for the Notice of Appearance, which was initially submitted under Item 17.

C. *Item 19 (Memorandum of fact and law)*

[32] The Respondent has claimed 14 units for Item 19, which is for the Memorandum of Fact and Law. The Respondent’s Bill of Costs requests 7 units for the Respondent’s Memorandum of Fact of Law and an additional 7 units for the review of the Appellant’s Memorandum of Fact and Law. Item 19 in Tariff B of the *FCR*, simply states “Memorandum of fact and law” and does not include the words “preparation and filing of” similar to Item 2 in Tariff B, which is used for responding materials for judicial review proceedings in the Federal Court of Appeal. Item 2 of Tariff B of the *FCR* states:

> Item 2. Preparation and filing of all defences, replies, counterclaims or respondent’ records and materials.

[33] Utilizing Item 2 as a guideline for my assessment of the Respondent’s claim under Item 19, it indicates that although Item 19 does not include the words “preparation and filing of”, it may have a similar application to Item 2, as the range of units under Column III is the same for both Items. In *Kern v. Canada*, 2007 FCA 54, at paragraph 5, the Assessment Officer provides some clarification regarding Item 2 and Item 19 as follows:

> 5. Before I continue, I must draw to the parties' attention that, in this case the matter before the Federal Court of Appeal was a Judicial Review and not an Appeal. It is for that reason that the four units claimed in regard to item 19 -- memorandum of fact and law should in fact be claimed under item 2 - preparation and filing of all defences, replies, counterclaims or respondents' records (*emphasis mine*) and materials. I allow the four units as requested.

[34] As well, in *O-Pipon-Na-Piwin Cree Nation v. Manitoba*, 2010 FCA 187, at paragraph 5, the Assessment Officer starts:

> 5. As a preliminary matter, it is noted that the Respondent, in preparing its Bill of Costs has mistakenly referenced the incorrect Items for some assessable services. Although this judicial review was heard in Federal Court of Appeal, the items related to an appeal to the Federal Court of Appeal should not be utilized as this is a Judicial Review Application. Therefore, Item 19 (Memorandum of Fact and Law) is properly claimed under Item 2 (Preparation and filing of all defences, replies counterclaims or respondents' records and materials). Further Item 21(a) and 21(b) relating to motions should have been claimed under Item 13(a) and 14(a) respectively.

[35] The decisions in *Kern* and *O-Pipon-Na-Piwin Cree Nation*, illuminate that Item 2 and Item 19 are sometimes interchanged depending on a party’s familiarity with costs matters under Tariff B of the *FCR* and have been corrected by an Assessment Officer. An inference can be drawn from these decisions that Item 19 subsumes the preparation and filing of a Memorandum of Fact and Law even though there is no explicit wording to that effect, like for Item 2. An additional illuminator pertaining to the parallel application of Item 2 and Item 19 is that both Items have same range of units (4 to 7 units) under Column III of Tariff B. Therefore, upon my review of Tariff B of the *FCR* and the aforementioned jurisprudence, I find that as an Assessment Officer, I do not have the authority to allow multiple claims under Item 19 for the preparation and filing of the same Memorandum of Fact and Law. Further to my review of the

Respondent's costs material in conjunction with the court record, I have determined that 7 units is a reasonable amount to allow for Item 19.

D. *Item 22(b) (Counsel fee on hearing of appeal: (b) to second counsel, where Court directs, 50% of the amount calculated under paragraph (a))*

[36] The Respondent has claimed second counsel fees under Item 22(b) for the appeal hearing. My review of the Court's Reasons for Judgment, dated November 25, 2019, did not indicate that the Court awarded second counsel fees. Item 22 in Tariff B of the *FCR* states:

> 22. Counsel fee on hearing of appeal:
>
> (a) to first counsel, per hour; and
>
> (b) to second counsel, <u>where Court directs</u>, 50% of the amount calculated under paragraph (a).
>
> [Underline added for emphasis]

[37] Upon my review of the Reasons for Judgment dated November 25, 2019 and the court record, there does not appear to be a Court direction allowing second counsel fees to be assessed under Item 22(b). In *Coca-Cola Ltd v. Pardhan*, 2006 FC 45, the Assessment Officer addressed this issue at paragraph 20:

> 20. In my opinion, the key phrase in Item 22 (b) of Tariff B of the Federal Courts Rules is "...where the Court directs..." I have reviewed the material in the Court record and have determined that no such direction exist, therefore, this assessable service is disallowed for each of the appeal proceedings.

[38] Absent a Court direction allowing Item 22(b) to be claimed, the second counsel fee of $450.00 is disallowed.

E. *Item 25 (Services after judgment not otherwise specified)*

[39] The Respondent has claimed 1 unit under Item 25 for the preparation of the Respondent's Bill of Costs. Item 25 in Tariff B of the *FCR* states the following:

> 25. Services after judgment not otherwise specified.

[40] In *Bujnowski v. Queen*, 2010 FCA 49, at paragraphs 24, 25 and 26, the Assessment Officer stated:

> 24. The Respondent has claimed 1 unit under Item 25, services after judgment. In response the Appellant submitted that no explanation and no support were provided for this assessment of costs.
>
> 25. In her rebuttal the Respondent contends:
>
> > Counsel for the Respondent has had to render services after judgment. The services have included requests for the costs of the Appellant and attempts to settle costs amounts. Costs consequences are reasonably expected to follow from unsuccessful steps in the course of an Appeal.
>
> 26. Although I agree with counsel for the Respondent that costs consequences are reasonably expected after judgment, the services after judgment claimed by the Respondent relate to costs for which a claim has been made under Item 26. Although I am sure justifiable services were rendered by counsel for the Respondent, none have been claimed. For the above reasons, Item 25 is not allowed.

[41] Utilizing *Bujnowski* as a guideline, as the Respondent has claimed costs under Item 26 for the assessment of costs, Item 25 is disallowed, as this is not a service "after judgment not otherwise specified" in Tariff B of the *FCR*, as there is a specific Item for assessments of costs.

F. *Item 26 (Assessment of costs)*

[42] The Respondent has claimed 6 units for the assessment of costs. As noted earlier in these Reasons, the Appellant made specific submissions challenging the Respondent's claim for Item 26. At paragraph 6 of the Appellant's written submissions it is submitted:

> 6. The Bill of Costs submitted by the Respondent (Cisco) in the present case, is $8,067.85. Also significantly, the materials submitted by Cisco this taxation are, with the greatest of deference, very prolix, consisting of a comb-bound volume of some 3/4" thickness, with some 14 tabs, and including full reprints of four caselaw authorities, notwithstanding all such authorities are readily available on-line[1].

[43] The Respondent did not provide any specific submissions in response to the Appellant's submissions regarding Item 26. This being noted, my review of the Respondent's costs material did not highlight anything irregular with material that was filed with the court registry for the assessment of costs. I found the volume of the Respondent's costs material, including the replication of jurisprudence, to be relevant and consistent with the costs material received in similar assessment of costs proceedings. A party that has been awarded costs by the Court has an onus to ensure that the material provided to the Assessment Officer, including the jurisprudence, satisfactorily supports their claims. Upon my review of the Respondent's costs material, I have determined that the allowance of 6 units is supported by the costs material provided by the Respondent and that it is reasonable allow this amount for Item 26.

[44] A total of 25 units have been allowed for the assessable services for a total amount of $4,237.50, which includes HST.

III. Disbursements

[45] The Respondent has claimed $1,965.85 in disbursements, which includes HST.

A. *Preliminary Issue*

[46] Before I assess the individual disbursements claimed by the Respondent, the Appellant's costs material raised a blanket issue that the Respondent's disbursements are not adequately particularized, which I will address as a preliminary issue. At paragraph 10 of the Appellant's written submissions it is submitted:

> 10. In the present case, the affidavit of Nancy Gallinger dated 18 December 2019, upon which the claim of Cisco for taxation of costs is supported does not aver:
>
> > 1. that any of the claimed disbursements have been actually paid by Cisco;
> >
> > 2. that any of the claimed disbursements were nescessarily incurred in the defence of the claim by Mr. Williams or were in any event, "reasonable disbursements".

[47] At paragraphs 6 and 7 of the Respondent's reply representations it is submitted:

> 6. With respect to disbursements, Williams' suggestion that disbursements have not actually been paid by Cisco is wrong and irrelevant. The affidavit of Nancy Gallinger submitted by Cisco on December 18, 2019, clearly states that the disbursement were billed to Cisco.[5] Disbursement only need to be payable by a party to be awarded as costs; they do not need to have been actually paid before costs are quantified.[6] In any event, the costs of disbursements were actually paid by Cisco.
>
> 7. The disbursements incurred are detailed in the affidavit submitted by Cisco. As can be seen from that affidavit, all disbursements were reasonably incurred in accordance with normal practice for intellectual property matters before the Federal Court of Appeal.

[48] Further to the parties' costs submissions, my review of the Affidavit of Nancy Gallinger, sworn on December 18, 2019, referred to at paragraph 7 of the Respondent's reply representations, did not particularize all of the disbursements claimed by the Respondent. The

affidavit has provided details regarding the disbursements for process serving and the purchase of USB sticks but does not particularize the disbursements for photocopying charges and courier services. In *Teledyne Industries v Lido Industries,* (1981) 56 C.P.R. (2d) 93, at paragraph 23, the Court stated:

> 23. In the taxation of a party-and-party bill of costs acceptance without inquiry of the propriety of a disbursement is wrong in principle and should be reviewed: vide *IBM v. Xerox, supra* at p. 186. Of course, all disbursements, even when properly expended, should be proved to the satisfaction of the Taxing Officer. But it does not follow that all items of expenditure should rigorously be supported by a receipt from the payee. There are other ways to prove that a bill has been paid. In my view, the prothonotary was perfectly right in allowing those costs as they were obviously incurred, and properly so, in connection with the various examinations for discovery. The entire amount is therefore taxable.

[49] Tariff B of the *FCR* states the following regarding disbursements:

> Disbursements
>
> (3) A bill of costs shall include disbursements, including
>
> (a) payments to witnesses under Tariff A; and
>
> (b) any service, sales, use or consumption taxes paid or payable on counsel fees or disbursements allowed under this Tariff.
>
> 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.

[50] Further to the portion of Tariff B detailing disbursements, as this assessment of costs was conducted in writing, “the solicitor appearing on the assessment“ provided their submissions in written form. This being noted, and further to the decision in *Teledyne*, my review of the Respondent’s costs material, including the Affidavit of Nancy Gallinger, did not illuminate any

details for the disbursements for photocopying charges and courier services, such as an itemized listing of the services requisitioned with the requisition date, document name and applicable fee. Although this information has not been provided, as is stated in *Carlile*, from my review of the court record "it is apparent that real costs were indeed incurred." Therefore, the Respondent is entitled to some indemnification for the photocopying charges and possibly for the courier services. In *Abbott Laboratories v. Canada,* 2008 FC 693*,* at paragraph 71, the Assessment Officer stated the following regarding situations like this:

> 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.

[51] As well, in *F-C Research Institute Limited v. Her Majesty The Queen*, 95 DTC 5583, the Taxing Officer stated the following:

> In my opinion, the simple delineation of expenditures generally described in a Bill and supported only by the scant statement that they were reasonable and necessary fails to provide sufficient information upon which a taxing officer can discharge the responsibility of being satisfied that the costs claimed were essential to the conduct of the proceedings, that they were prudently incurred, or that the quantity or rate applied, as the case may be, was reasonable in the circumstances. In arriving at that conclusion, I am guided as well by the principles established by this Court in *Alladin Industries Inc. v. Canadian Thermos Products Ltd.* F.C. 942, 12 C.P.R. (2d) 24 (T.D.); *Red Owl Foods (Alta.) Ltd. v. Red Owl Stores Inc.* (1971) C.P.R. (2d) 266 (Fed. T.D.); *Teledyne Industries v. Lido Industries* (1981)

> 56 C.P.R. (2d) 93; and *Diversified Products Corporation v. Tye-Sil Corporation Limited*, Court file no. T-1565-85, unreported, November 22, 1990, the Honourable Mr. Justice Teitelbaum, from which decisions I derive that, firstly, it would be improper not to question disbursements, even, I would add, in the absence of any apparent opposition on the part of other interested parties. Secondly, disbursements must be supported by evidence which satisfactorily demonstrates that the costs claimed meet the twofold test of reasonableness and necessity. The Defendants have fallen well short of that challenge in the present taxation and the disbursements claimed under Tariff B 3 must therefore be disallowed.

[52] Utilizing the decisions in *Abbott Laboratories* and *F-C Research* as guidelines, I will review the parties' costs material in conjunction with the court record in an attempt to determine a reasonable amount to indemnify the Respondent for the photocopying charges and possibly for the courier services, as "a result of zero dollars at assessment would be absurd." Lastly, I do find that the Respondent's explanation that the solicitor of record for Cisco Systems, Inc., requisitioned services on behalf its client and that they were subsequently billed for those services to be a reasonable explanation but the absence of adequate particularization from the Respondent for the photocopying charges and courier services will make the assessment of these disbursements a challenging task.

B. *Courier*

[53] The Respondent has claimed $145.01 for courier services. At paragraph 35 of the Respondent's written submissions it is submitted:

> 35. Cisco's disbursements incurred in this proceeding are reasonable. These reasonable disbursements include disbursements related to routine charges such as photocopying, courier charges, and process servers.[35] All of these disbursements incurred throughout the proceeding should be allowed.

[54] At paragraph 12 of the Appellant's written submissions it is submitted:

> 12. With respect to the use of the services of Stewart McKelvey and couriers to accomplish service on the office of undersigned, the reference in the Gallinger affidavit is very favourable to Cisco at best, and completely disingenuous to the true facts at worst[2]. That is, although Prothonotary Tabib may have believed at all material times the [sic] there would be a reasonable agreement between the parties, such was not the case. It is respectfully submitted that an offer which would require an electronic copy of a document served to be sent to three e-mail addresses and as well be received in paper copy in a timely manner is not "reasonable". Rather it is submitted that Cisco has chosen the most expensive form of service which would also have the advantage of leaving to Cisco the maximum time for preparation of documentation and that such claims should be rejected.

[55] At paragraphs 8(c) and (d) of the Respondent's reply representations it is submitted:

> (c) Williams' assertion that Cisco's conduct increased disbursements is baseless and false. As summarized in Cisco's submissions of December 18, 2019, Cisco made offers which would have reduced the disbursements for both sides. Williams also does not offer any support for his assertion;
>
> (d) Williams' complaints about the service of documents by Cisco are with respect to the action below, not in the context of the present appeal, and are therefore irrelevant. In any event, services was made in accordance to the *Federal Courts Rules*, and the costs of service at issue in the present assessment are low compared to other cases. Further, those disbursements already form parts of the cost Orders made by the Court, and Williams' arguments are for variances of those Orders, which cannot be done on assessment;

[56] Further to my review of the parties' costs submissions, I concur with the Respondent that the Appellant's submissions are pertaining to an assessment of costs for file T-1304-17 in the Federal Court. The Appellant's reference to the "Defendant Materials, Tab C, par. 15" at paragraph 12 of the Appellant's written submissions is actually found in the Respondent's assessment of costs material for file T-1304-17. In addition, Exhibit 3 of the Appellant's Affidavit of David A. Copp, sworn on March 27, 2020, is a copy of an e-mail exchange between the parties regarding the issue of service for file T-1304-17. File number T-1304-17 is noted in

the subject line of the e-mail exchange attached to the Affidavit of David A. Copp. This being noted, I took into consideration the Appellant’s concern regarding the overall expense for this disbursement and I did not find the courier expenses of $145.01 for this file (A-68-19) to be an excessive amount in relation to the activity on the court record. As noted earlier in these Reasons though, there is an absence of adequate particularization for the Respondent’s claims for courier services. In an attempt to determine if any reimbursement should be provided to the Respondent for courier services, I conducted a review of the court record. My review of the court record did indicate that the Respondent requisitioned couriers to serve some of its court documents. In addition, these courier services are distinct from Respondent’s claims for “process servers” which have been adequately particularized. In the absence of specificity from the Respondent for the courier services claimed, I have determined that $110.00 is a reasonable amount to allow for this disbursement.

C. *Process Servers*

[57] The Respondent has claimed $60.00 for process servers. Further to my review of the two invoices attached as Exhibit B to the Affidavit of Nancy Gallinger, sworn on December 18, 2019, in conjunction with the court record, I found that the court record supports these expenses. As a result, I find the disbursement for process servers to be reasonable and it is allowed as claimed for $60.00.

D. *USBs required by Court*

[58] The Respondent has claimed $51.98 for USBs sticks. Further to my review of the invoice attached as Exhibit C to the Affidavit of Nancy Gallinger, sworn on December 18, 2019, in conjunction with the court record, I found that the court record supports this expense. As a result, I find the disbursement for USB sticks to be reasonable and it is allowed as claimed for $51.98.

E. *Photocopying Charges*

[59] The Respondent has claimed $1,482.70 for photocopy charges.

[60] As noted earlier in these Reasons, there is an absence of adequate particularization regarding the Respondent's claims for the photocopying charges. In *Merck & Co. v. Apotex*, 2008 FCA 371, at paragraph 14, the Court states:

> 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.

[61] Utilizing *Merck* as a guideline, I reviewed the court record to try to determine a reasonable quantum of costs to allow. My review took into consideration the size and the number of documents that needed to be prepared for the court registry and the parties. This being noted, determining the quantum of costs was challenging as the Respondent's material did not indicate if the photocopies were prepared in-house or if they were requisitioned through a third party company, as the amount per page can vary depending on this factor. As noted earlier in these Reasons, the Respondent is entitled to some indemnification for the photocopying charges, as "a result of zero dollars at assessment would be absurd." Utilizing the aforementioned *Abbott*

Laboratories decision as a guideline, I have determined that $1,100.00 is a reasonable amount to allow for the Respondent's photocopying charges.

[62] The total amount allowed for disbursements is $1,493.84, which includes HST.

IV. Conclusion

[63] For the above reasons, the Respondent's Bill of Costs has been assessed and allowed in the amount of $5,731.34. A Certificate of Assessment will be issued for $5,731.34, payable by the Appellant to the Respondent.

"Garnet Morgan"
Assessment Officer

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-68-19
STYLE OF CAUSE:	PAUL WILLIAMS, carrying on business under the firm name and style of IT ESSENTIALS v. CISCO SYSTEMS, INC., a body corporate

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

REASONS FOR ASSESSMENT BY:	GARNET MORGAN, Assessment Officer
DATED:	OCTOBER 16, 2020

WRITTEN SUBMISSIONS BY:

David A. Copp	FOR THE APPELLANT
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