CLAIM NO. 251028
Date: Sept 30/05

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Bank of Montreal v. Binder, 2005 NSSM 2

BETWEEN:

Name	BANK OF MONTREAL	Applicant
Name	FABIAN LOWELL BINDER	Respondent

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on March 3, 2006. This decision replaces the previously distributed decision

D E C I S I O N

APPEARANCES:
Douglas Tupper, Q.C., and Peter Sullivan on behalf of the Applicant;
David Walker, agent, on behalf of the Respondent Fabian Lowell Binder.

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[1] This taxation of a party-and-party award of disbursements in an appeal came on before me on September 13, 2005. I heard the submissions of Mr David Walker, agent on behalf of Mr Binder; and the evidence of Mr Douglas Tupper, QC on behalf of the applicant, and the submissions of Mr Peter Sullivan on behalf of the applicant.

The Facts

[2] This taxation arises out of an action commenced by Mr Binder against, *inter alia*, the Bank of Montreal (the "BOM") and the Royal Bank (collectively, the "Banks"). After a somewhat complicated history that need not detain us here, the Banks made an application for, *inter alia*, summary judgment striking out the claim in 2003.

[3] The application came on before Mr Justice Moir, who eventually delivered reasons striking out Mr Binder's claim on August 18, 2003.

[4] Mr Binder issued his notice of appeal on the merits on August 28, 2003.

[5] At some point a hearing on the issue of costs was set. It took place December 8, 2003. Justice Moir delivered his decision in that matter on that day.

[6] Both the BOM and Mr Binder appealed the order on costs.

[7] All three appeals were heard September 24, 2004. In a decision dated June 16, 2005 Justice Oland for the Court:

a. dismissed Mr Binder's appeal on the merits with costs;

b. dismissed the BOM's appeal on the costs award without costs; and

c. dismissed Mr Binder's appeal on the costs award without costs.

[8] As reported in the Court of Appeal's decision, Justice Oland stated that Mr Binder's appeal on the merits "having been dismissed Binder shall pay each of the Banks costs of $1,500 together with disbursements. His appeal of the costs decision and the Banks' cross-appeals of that decision are dismissed without costs:" *Binder v. Royal Bank and the Bank of Montreal* 2005 NSCA 94, per Oland, JA at para.69. (I read this order as meaning that each bank–the Royal Bank and the BOM–were entitled to their own taxable disbursements.)

[9] On July 13, 2005 the BOM filed a Notice of Taxation with respect to its disbursements, in respect of the following amounts:

a.	copying	$2,024.80
b.	binding	$397.00
c.	delivery	$84.27
d.	fax	$868.00
e.	phone	$46.87
f.	postage	$4.50
g.	QL Research	$459.97
h.	Carswell Research	$400.97
i.	Prothonotary	$165.00
j.	Law Stamp	$50.00

k.	Sundry		$20.00
l.	Total		$4,520.88

[10] Mr Binder resisted the claim. He argues that some of the disbursements are not properly claimed because they related to the two costs appeals which were dismissed without costs. He argues as well that the rest are unreasonable or too high.

The Issues

[11] There are two principal issues in this taxation:

a. how many of the disbursements claimed are properly taxable under the terms of the Court of Appeal's order; and

b. of those, how many are properly allowable under Tariff D.

Issue 1: What Disbursements Fall Under the Terms of the Order?

[12] The BOM acknowledged at the commencement of the taxation that under the terms of the Court of Appeal's order it could claim only those disbursements incurred in respect of Mr Binder's appeal on the merits. It could not claim those disbursements incurred in respect of its own appeal of the costs award; or those incurred in respect of Mr Binder's appeal on costs.

[13] This acknowledgement created a problem for the BOM because its list of disbursements did not differentiate between those disbursements incurred in responding to Mr Binder's appeal on the merits, and those incurred in respect of the two costs appeals.

[14] Mr Tupper was the solicitor who had principal carriage of the file on behalf of the BOM. He stated that he had looked at the disbursements. He could not tell which particular disbursement related to which appeal. However, bearing in mind the work that was done on the three appeals and when it was done, and the relative importance of each of the three appeals to each other, his best estimate was that approximately one-third of the disbursements related to the two costs appeals. The BOM's submission was accordingly that the total claim for disbursements ought to be reduced by one-third.

[15] Mr Walker submitted that the better approach was to analyse the disbursements in terms

of the stages of the proceedings following the trial decision. In his submission, I should disallow most if not all disbursements that fell between the date of the filing of the Notice of Appeal on the merits and the cost application, and indeed up until the filing of his factum. In his submission most if not all of the disbursements falling between those dates would be disbursements in respect of the costs application (or costs appeal), and hence not allowable under the Court of Appeal's Order.

[16] After having considered the matter carefully, I was satisfied that the BOM's approach on this issue is the better one.

[17] First, some disbursements would in ordinary course relate to both the cost and the merit appeals. In my opinion the order granting disbursements in respect of the merits would include disbursements that included both components.

[18] Second, I accept Mr Tupper's evidence that he commenced preparations for the merits appeal the moment the Notice of Appeal was filed. He did not wait until Mr Binder's factum was filed. Such preparation strikes me as entirely reasonable. In my experience the preparation of a response to an appeal (and hence the incurring of disbursements) starts with the filing of the Notice of Appeal, not with the receipt of the appellant's factum. A respondent who waited until then could easily be caught short.

[19] Accordingly, given the overlap, and given Mr Tupper's evidence, I am of the opinion that the only reasonable approach is to make a decision based on the overall balance between the three appeals. I accept Mr Tupper's evidence that the bulk of the work (and hence of the disbursements) related to the appeal on the merits, rather than to the costs applications or appeals. His evidence was that his "best guess" was that it amounted to two-thirds of the total. This figure appears reasonable to me. On that basis I will as an initial step reduce all the disbursements by one-third to allow for the fact that some of them pertained to the costs appeals in which no costs were awarded.

[20] I do not accept, however, the BOM's submission that the reduction should apply across the board to all the disbursements claimed. Two of the disbursements claimed–for the Prothonotary and the Law Stamp–clearly apply to only the BOM's appeal on costs. Since that appeal was dismissed without costs, the BOM is not entitled to claim them.

[21] The next issue concerns the reasonableness of the remaining two-thirds of the disbursements claimed on this taxation.

Issue 2: Individual Disbursements–Are They Reasonable?

[22] Mr Walker in his submissions focussed on the disbursements associated with photocopying and binding; faxes; and electronic legal research. I will discuss these items separately, after I set out what I understand to be the law in this area.

The Law

[23] As a general rule, a party claiming disbursements under Tariff D is only entitled, at a minimum, to "reasonable" disbursements: see, for e.g., Items 2(4), (5), (6) (7), (10), (12A).

[24] I also understand that as a general rule overhead costs, as opposed to expenses incurred in furtherance of an individual file, are not taxable: *Ormrod (Litigation Guardian of) v. Goodall* [2002] NSJ No. 487 (TD); *BOM v. Scotia Capital Inc* 2002 NSSC 274; *3664902 Canada Inc v. Hudson's Bay Company* (Ont SCJ) 22 CPC (5th) 102; *Kimberly-Clark Inc v. Julimar Lumber Co* 2004 NSSC 71 (TD) at para.15; *Day v. Day* 1994) 129 NSR (2d) 186 (TD) at para.32; and *Wyatt v. Franklin* (1993) 123 NSR (2d) 347 (TD) at para.19.

[25] Finally, it is my understanding that the burden of satisfying a taxation official of the reasonableness of a particular disbursement lies on the party making the claim. This makes sense. The party making the expenditure is in the best position to explain why it was necessary or reasonable.

Photocopying and Binding

[26] The original claim was $2,024.80 for photocopying and $397.00 for binding, for a total of $2,421.80. Two thirds of that amount can be claimed under the costs award, and works out to $1,614.53.

[27] A party entitled to costs is entitled to recover from the opposite party the "[r]easonable costs of copies of documents or authorities prepared for the use of the court and supplied to the other party:" Tariff D, Item 2(7). Photocopies made for the client's benefit or for counsel's sole use would not fall under this item, but they could fall under Item 2(13), which allows "[a]ll other reasonable expenses necessarily incurred, when allowed by the taxing officer." It would appear then that such expenses, at a minimum,

a. must be reasonable;

b. must be necessarily incurred; and

c. must have been actually incurred: *Maxwell v. Durland, Gillis and Parker* (1991) 108

NSR (2d) 405 at paras. 12-13.

[28] Mr Walker submitted that there was no evidence that the photocopying charges had actually been disbursed, and, relying on *Maxwell, supra* suggested that the charges should therefore be disallowed. While I accept that disbursements must be incurred to be taxable, I do not agree that they must actually have been paid prior to the taxation. It is enough in my view that the client has a liability to pay them: see, for e.g., *Kimberly-Clark Inc v. Julimar Lumber Co* 2004 NSSC 71 (TD) at para.11. I am satisfied that the applicant in this case is at least liable to pay these charges to its law firm (Patterson Palmer Hunt Murphy). The real issue, it seems to me, is whether the charge was reasonable.

[29] The BOM's submission was that the full photocopying charge should be allowed on taxation. Mr Tupper stated that Patterson Palmer Hunt Murphy charges .25 cents a page for photocopying. The charge is reduced to .20 cents a page for runs over 100 pages. The charge is a service to the client, and does not represent recovery of profit on the part of the law firm. The per page charge is a "standard" rate charged by most if not all law firms in Halifax. He submitted that there was no evidence that there was a profit on the photocopying, and that in the absence of such evidence I should simply accept the charge.

[30] Mr Walker's submission on the other hand was that a charge of .25 cents or .20 cents a page was too high, given that commercial printing charges were much lower. He pointed out that he was charged approximately .05 cents a page by Staples (Office Depot) for photocopying **and** binding the factums and books of authority filed by him in the appeals. He also submitted that the charges in question must include a component of profit on the part of the law firm, and that such profit is not an expense (or disbursement) that is properly chargeable under a claim for disbursements.

[31] It appears that courts when assessing costs and disbursements have had and continue to have difficulty with both the reasonableness of charges associated with photocopying; and the question of how that reasonableness is to be established.

[32] There are some cases in which the court appears to have adopted the "standard practice" of charging .20 to .25 cents a page as reasonable. For example, In *Halifax Regional Municipality Pension Committee v. Nova Scotia (Superintendent of Pensions)* 2005 NSSC 228 (TD) Moir, J did not reduce a claim for photocopying that had been charged out at .28 cents a page. He distinguished *Bank of Montreal v. Scotia Capital Inc* 2002 NSSC 274 (TD) on the grounds that the photocopying there had been "excessive:" see para.10; and he distinguished *Boyne Clarke v. Steel* [2002] NSJ No. 186 (NS Small Cl. Ct.) on the grounds that the *amount* of photocopying was unreasonable. In Moir, J's opinion, the long standing practice of law firms of charging "twenty cents or more" for photocopying was to be accepted "[i]n the absence of evidence showing this common practice to be unreasonable

and in the absence of evidence that large bundles should have been sent to the printers:" *ibid*, at para.11. This position mirrors to some extent that of *Elliott v. Nicholson* (1998) 171 NSR (2d) 264 (TD), where Hall, J expressed the opinion at para.8 that .20 cents a page for photocopying was "a reasonable and appropriate amount to charge for photocopies in such circumstances and I would suggest that it be adopted as the standard amount to be allowed."

[33] There are however a larger number of decisions in which the courts have appeared reluctant to accept claims for photocopying without *some* evidence justifying both the number of copies and the charge per page. It is not enough simply to present a line item for photocopying; to do so is to leave the court to speculate "on the accuracy of such a charge and whether it is merely another profit generator:" *Kimberly-Clark Inc. v. Julimar Lumber Co* 2004 NSSC 71 (TD), per Gruchy, J at para.15. (In that case a charge of $402.25 that was not "justified in some fashion" was disallowed in its entirety.)

[34] A similar concern regarding the need for some indication "of the actual cost per page" of photocopying was expressed in *Rhyno Demolition Inc v. Nova Scotia (Attorney General)* 2005 NSSC 147 (TD) at p.10. There a charge of $1,591.50 was reduced by 50% to $795.75. In *Bank of Montreal v. Scotia Capital Inc/Scotia Capitaux Inc* 2002 NSSC 274 (TD) at para.13 the court held that the reasonableness of photocopying had to be established; and reduced a photocopy charge of approximately $410.00 by 50%.

[35] There also appears to have been a fairly general reluctance to accept the "standard charge" of .20 or .25 cents a page as reasonable. In *Balder's Estate v. Halifax (County) Registrar of Probate* (1999) 181 NSR (2d) 201 (TD) the court was of the view that a claim of $903.75 for 3,600 copies at .25 cents a page in respect of a Chambers application was "astounding," and reduced the charge by 50%: per Saunders, J at para.27. In *Hudgins v. Danka Business Systems Ltd* [1998] NSJ No. 293 (TD) the photocopying charge was reduced to 60%: see para.14. In *Inrich Business Development Centre v. LeBlanc* (1997) 161 NSR (2d) 140 (TD) the court allowed a little less than 50% of the photocopying charge (which had been billed at .25 cents a page): see para.22. In *Newman (Guardian ad litem of) v. LaMarche* (1994) 131 NSR (2d) 165 (TD) photocopying charges were reduced by 25%: see para.105; see also *Day v. Day* (1994) 129 NSR (2d) 186 (TD) where photocopying charges were reduced by 25%. In *Osborne v. Osborne* (1994) 130 NSR (2d) 283 (TD) a photocopy charge of .50 cents a page was considered to be an "unreasonable" rate; .25 cents a page was considered to be "more reasonable," but even at that rate would be subject to a further 25% reduction: see para.46.

[36] In short, it appears to me that while the courts recognize that photocopying is a reasonable and necessary part of the handling of a legal file and the provision of legal services, they also recognize that "there has to be some limitation and some control over it:" *Knox v.*

Interprovincial Engineering Ltd (1993) 120 NSR (2d) 288 (TD), per Goodfellow, J at para.105. There must also be some evidence establishing the reasonableness of the charges for that service.

[37] In this case the BOM did not present any evidence to establish what the actual paper and binding costs of the law firm were. The respondent, on the other hand, did provide some evidence of what commercial printers charge.

[38] I believe that I can assume that commercial printers intend to, and do, make a profit on their services. Accordingly, if a commercial printer can recover its costs and make a profit on copying and binding for .05 cents a page, then it seems reasonable to infer that when a law firm charges .25 or .20 cents a page it will recover significantly more than its costs in performing that service.

[39] I accept that overall there may be some justification for a rate per page that is somewhat higher than the commercial rate. The law firm may require quick copies; or it may require some copies to be made in confidence; and both may come at a higher "cost" than that associated only with the paper used. As well, a law firm may not be able to match the economies of scale of a commercial printer, and so may have higher actual paper and binding costs.

[40] But even granting that a law firm's (and hence a client's) actual costs are higher that those of a commercial printer, it is difficult to accept, *without evidence*, that those costs would be 400% or 500% higher.

[41] How then do I determine what the reasonable charge for the disbursements should be? Mr Walker says I should use the commercial rate. I do not think that would be reasonable, for the reasons set out above. On the other hand, in the absence of evidence as to what those costs are I am not prepared to accept the BOM's submission that I simply use the "standard" rate of .25 cents a page. Much of the photocopying appears to have been taken up by copies of factums or the case books, documents which could easily have been sent to a commercial printer without any concerns of confidentiality. Accordingly, given that I am not satisfied that the applicant has met the burden of establishing the reasonableness of a charge of .25 cents a page; but given that I am also satisfied on the evidence that a charge of somewhat more than .05 cents a page would be reasonable; and given the case law on the point, I find that the most appropriate approach is to reduce the claim for photocopying and binding charges by 50%.

[42] I accordingly allow the BOM's claim for photocopying and binding at 50% of $1,614.53, or $807.27.

Facsimiles (Faxes)

[43] The BOM claimed $868.00 for faxes which, if reduced by one third, amounts to $578.67.

[44] Mr Sullivan submitted on behalf of the applicant that faxes were almost a necessity in today's practice, and that the reasonable cost of faxes was a taxable disbursement under Tariff D: see *Knox v. Interprovincial Engineering Ltd* (1993) 120 NSR NSR (2d) 288 (TD). He indicated that the law firm charges a flat rate of $1.00 per page for a fax; and that he believed (although he wasn't sure) that there was a maximum charge of $10.00 in respect of any one fax. In this I think he was mistaken, inasmuch as the list of disbursements include fax charges in the amount of $11.00, $14.00, $17.00 and even $20.00 per fax.

[45] Mr Walker submitted that the cost of a fax today was negligible; and that a charge of $1.00 a page was unreasonable. I agree. There was no evidence as to how the figure of $1.00 per page was arrived at; or how much it actually cost the firm to send a fax. I also note that a number of times there would appear to be multiple charges for the same fax. For example, on November 25, 2003 faxes were sent to each of Richard Bureau, W. L. Ryan and Bruce Outhouse, each for $11.00 (for a total of $33.00). Similarly, on October 24, 2003 faxes were sent to each of Keith Perrett, W. L. Ryan and Bruce Outhouse, each for $17.00 (for a total of $51.00). I assume that these charges were in respect of the same letter that was being copied at the same time to a number of different recipients. Sending such faxes takes little time beyond placing the fax on a machine and punching in several fax numbers. The cost of long distance telephone charges is negligible, and at least some of the faxes were sent to local recipients. A total charge of $51.00 to send one letter, albeit to multiple recipients, is in my view unreasonable.

[46] How do I determine what is reasonable in this case? Some of cost of the faxes is presumably being recovered in the claim for phone charges (of $46.87). A large number of the faxes appear to constitute the same document sent to multiple recipients. In *Boyne Clarke v. Steel* [2002] NSJ No. 186 (SCCA) a claim for faxes was disallowed where there was a long-distance surcharge. In *Knox, supra* at para.104 Goodfellow, J accepted that faxes "were almost demanded in today's practice" but nevertheless added that "*a reasonable measure* of coverage should be provided" (emphasis added). He was also concerned about faxes that were sent to the client rather than to the other party (the former of which are normally not taxable). His Lordship allowed a charge of $70.00 in that case, apparently on the grounds that the actual amount being claimed ($70.00) was reasonable in the context of the entire proceeding.

[47] In this case, given that there is a phone surcharge being claimed; given the advances in fax technology and speed since 1993; given that some of the faxes were to the client; given the lack of evidence of the actual cost of faxes; but given that some allowance would appear

to be reasonable given the number of parties involved and the compressed time frames involved in appeals, I conclude that a charge of $70.00 in respect of faxes is reasonable.

Charge for Electronic Research

[48] The total claim is $860.94. Reducing that charge by one third results in a charge of $573.96.

[49] Mr Walker relies on *Elliott v. Richardson* (1999) 179 NSR (2d) 264 (TD) and *BOM v. Scotia Capital Inc* 2002 NSSC 274, where legal electronic research was disallowed as overhead; see also *Kimberly-Clark Inc v. Julimar Lumber Co* 2004 NSSC 71 (TD) at para.11. Such charges were considered part of office overhead and so not chargeable, since overhead is not generally considered to be a taxable disbursement.

[50] Mr Sullivan on the other hand relies on *Keddy v. Western Regional Health Board* [1999] NSJ No. 464 (TD), where some (*but not all*) electronic research was allowed as a reasonable disbursement.

[51] The BOM also submitted that electronic research was more efficient because it was quicker and easier to perform than the “old” way of doing research in a library. This submission is impossible to verify, especially since I have no evidence comparing the cost associated with performing research the “old way” with that of electronic research. It is certainly true that individual cases, once found, can be noted up more quickly via electronic means. But the question of the reasonableness of such noting up remains an issue, especially in respect of an appeal (since most of the law will presumably already have been noted up).

[52] In my view part of the uncertainty in this area stems from the changing nature of electronic research and the cost of its provision over the years.

[53] A decade or more ago electronic databases such as QuickLaw would charge users for each actual use of their service. Each minute of online research time was billed. It was accordingly easier to say that electronic research represented a discreet disbursement (though the question of its reasonableness remained). More recently, the proliferation of alternate types of electronic research (including CR-ROMs, and the free web sites of many courts) have pushed the commercial services into different fee structures. Now many commercial services negotiate flat rates with users on an annual basis. The actual monthly rate in such cases is thus set; it does not vary with the amount of actual online usage. The “bills” that the online research companies issue to the law firms in respect of legal research conducted for any particular file are thus illusory. They would not represent an actual charge or cost; they are simply a “service” provided to the user to assist the latter in assessing a charge to the client for the research being conducted.

[54] What this means is that while there may be a “cost” to the law firm in using the online electronic service, it may not be a cost that relates in any direct way to any particular file or any particular research project. In ordinary course such a flat monthly charge would be overhead borne by the entire firm rather than a disbursement in respect of a particular file or client. Such an expense would be akin to that associated with having a law library, and such expenses have traditionally been seen as overhead and hence not normally a taxable disbursement.

[55] This is not to say that there was any evidence that this is the way the law firm in the case at bar incurs the expense of electronic research. It is to say, however, that I do not have any evidence one way or the other as to how the cost is incurred; and in particular, whether it incurs that cost on an actual file by file basis, or as a monthly or annual flat rate.

[56] Having said that, I can accept that even in the absence of such evidence one might make an argument that some charge would be reasonable in some cases. For example, searches made in respect of legal materials that would not normally be found in a law firm’s library could constitute a reasonable disbursement: see, for e.g., *Coleman Fraser Whittone & Parcells v. Canada (Dept of Justice)* [2003] NSJ No. 272 (SCCA); see also *Parsons v. Canada Safeway Lotd* (1995) 57 ACWS (3d) 716 (BCSC), where such searches were allowed in respect of otherwise unreported decisions. However, the facts in the case at bar would not support such an approach. I have reviewed the appeal factum of the BOM, and note that most if not all of the cases referred to are Nova Scotia cases found in the NSRs; and that the rest are Supreme Court of Canada and one or two Federal Court cases. All of these could be expected to be found in a major law firm’s library. As well, given that this was an appeal, most if not all of the cases had already been briefed in the application before Justice Moir.

[57] In the absence of any evidence as to the actual cost of the electronic research in question; or any evidence as to how the applicant’s law firm pays for its access to electronic databases; and in the absence of much if any case law that would be outside the normal collection of a law firm’s library; I am of the view that the applicant has not established that the electronic research in this matter was a reasonable disbursement, as opposed to part of its general overhead. I disallow it in its entirety.

Conclusion

[58] For the reasons set out above, I allow the following disbursements as reasonable. All the amounts claimed have been initially reduced by one-third (save the Prothonotary and law stamp charges, which were disallowed in their entirety). The charges were then either allowed as reasonable, or further reduced or disallowed (as discussed above).

Disbursement	Claimed	Allowed
copying and binding (combined)	$2,421.80	$807.27
delivery	$84.27	$56.18
fax	$868.00	$70.00
phone	$46.87	$35.25
postage	$4.50	$3.00
QL Research	$459.97	$0.00
Carswell Research	$400.97	$0.00
Prothonotary	$165.00	$0.00
Law Stamp	$50.00	$0.00
Sundry	$20.00	$13.33
Total	$4,520.88	$985.03

Dated at Halifax)
this day of September, 2005)
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ADJUDICATOR
W. Augustus Richardson

Original Court File
Copy Claimant(s)
Copy Defendant(s)

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