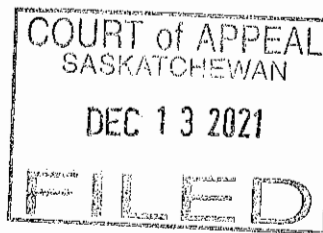


Court of Appeal for Saskatchewan
Docket: CACV3409



Date: 2021-12-13

Ituna Investment LP

Appellant/Respondent on Cross-
Appeal
(Applicant)

and

***Industrial Alliance Insurance and Financial
Services, Inc.***

Respondent/Appellant on Cross-
Appeal
(Respondent)

Before: Amy Groothuis, Registrar (on November 18, 2021)

Fiat

I. Introduction

[1] This taxation of costs arises from a series of appeals and cross-appeals brought from three separate Court of Queen's Bench Chambers applications, which were heard consecutively and resulted in three separate but related decisions. At the Court of Appeal, these matters were likewise heard consecutively, and resulted in one decision that addressed appeals and cross appeals in three court files: *Mosten Investments LP v The Manufacturers Life Insurance Company (Manulife Financial)*, 2021 SKCA 36.

[2] Two of the three court files resulted in no cost award to the parties; these are not at issue before me. In the matter of *Ituna Investment LP [Ituna] and Industrial Alliance Insurance and Financial Services Inc. [Industrial Alliance]* (docket CACV3409), the Court dismissed the appeal and allowed the cross-appeal in part. At paragraph 5 of the decision, the Court summarizes the bottom-line decision for each appeal and cross appeal. With respect to costs for CACV3409, the Court ordered at paragraph 5(f):

(f) [we] order Ituna to pay Industrial Alliance's costs in the Court of Queen's Bench and on the appeal and cross-appeal under CACV3409.

[3] Formal judgment was taken out and issued by the Court on August 19, 2021. On October 29, 2021, counsel for Industrial Alliance took out a Notice of Appointment for Taxation of Costs returnable before me on November 18, 2021, supported by a proposed bill of costs and an affidavit of disbursements.

II. Proposed Bill of Costs

[4] Industrial Alliance claims the following fees and disbursements under Column II of the Court of Appeal Tariff of Costs [Tariff]:

2.	Notice of Cross-Appeal	\$ 400.00
3.	Fee to Respondent on receipt of Notice of Appeal	\$ 125.00
6.	Agreement as to Contents of Appeal Book	\$ 200.00
7.	Preparation of Appeal Book	\$ 500.00
8.	Preparation of 3 Factums (Appeal, Cross-Appeal and Reply)	\$6,000.00
9.	All Other Preparation for Hearing of the Appeal and Cross-Appeal	\$1,500.00
10.	Appearance to Present Argument on Appeal and Cross-Appeal (three 1/2 days)	\$1,200.00
	Second counsel (three 1/2 days)	\$ 600.00
11.	Preparing Formal Judgment	\$ 200.00
12.	Correspondence	\$ 200.00
13.	Preparation of Bill of Costs	\$ 150.00

[5] The proposed fees total \$11,075.00. To this amount, Industrial Alliance claims HST on fees totalling \$1,439.75.

[6] With respect to the disbursements, Industrial Alliance claimed as follows:

Local agent fees	\$ 4,322.25
Printing, copying and binding	\$11,274.06
Courier	\$ 1,931.22
Data hosting and hyper-linking	\$ 1,424.89
Travel (airfare and taxis)	\$ 3,790.21

Travel (taxis)	\$ 91.93
Accommodation	\$ 4,335.71
Meals	\$ 761.66
Process Server fees	\$ 380.00
Telephone charges	\$ 57.77

[7] The proposed disbursements total \$28,369.70, plus taxes. The taxes are a mix of HST (13%) for those disbursements subject to Ontario taxes, and GST (5%) and PST (6%) for those disbursements subject to Saskatchewan taxes. These break down as \$2,451.56 for HST, \$467.58 for GST, and \$561.09 for PST.

[8] In total, the amounts claimed by Industrial Alliance are as follows:

Fees	\$11,075.00
HST on Fees	\$ 1,439.75
Disbursements	\$28,369.70
HST on Disbursements	\$ 2,451.56
GST on Disbursements	\$ 467.58
PST on Disbursements	<u>\$ 561.09</u>
Total Fees, Disbursements and Taxes:	\$44,364.68

III. Issues

[9] In advance of the taxation hearing, both counsel filed written submissions outlining their position. Counsel for Ituna takes issue with the inclusion of items 8 (preparation of factum), 9 (all other preparation for the hearing), 16 (disbursements) as well as the "HST on fees". These objections were expanded upon during the hearing.

[10] No issue was taken with the use of Column II of the Tariff, which is appropriate where non-monetary relief is involved.

IV. Analysis

[11] A primary undercurrent for Ituna's objections was the decision by Industrial Alliance to retain out-of-province legal counsel. I understand the argument to be that if Saskatchewan legal

counsel argued this appeal, many of the disbursements would not have been incurred, and as such the unsuccessful party should not be liable to pay the “extra” costs. This is addressed below.

A. Item #8 – Preparation of Three (3) Factums

[12] Industrial Alliance claims \$6,000.00, for the three factums it filed: the factum filed in response to the appeal; the factum filed in support of the cross-appeal, and the reply factum on the cross-appeal. The proposed bill of costs seeks the Tariff amount for three factums “as ordered by the Court”.

[13] Under Column II, a party entitled to costs may claim \$2,000 for “Preparation of Factum”. Relying on the exact wording of the Tariff, Ituna takes the position that Industrial Alliance should only be entitled to claim \$2,000, for one factum.

[14] Respectfully, both parties take too narrow a position. First, Industrial Alliance incorrectly characterizes the filing of three factums as being “ordered by the Court”. The endorsement of Richards C.J.S., following a July 18, 2019 pre-hearing conference confirms filing deadlines for all materials on all three appeals (and related cross-appeals), and explicitly references “reply factums, if any”. It is not accurate to say that Industrial Alliance was ordered to file a reply factum.

[15] However, with that said, *The Court of Appeal Rules (Civil)* [Rules] govern the filing of factums (including reply factum). In a standard appeal that involves two parties (an appellant and a respondent), each party is entitled to file one (1) factum. The Tariff then assigns a fee payable to the successful party. Here, there is both an appeal and a cross appeal, and the Court’s decision clearly awards costs to Industrial Alliance on both the appeal and the cross-appeal. I have no difficulty in confirming that Industrial Alliance is entitled to receive one set of costs (\$2,000) for each of the factums filed as respondent and as appellant on the cross appeal.

[16] That leaves the question of the reply factum. Appellants have no automatic right to file a reply factum; Rule 33.1 governs, and provides a strict and narrow test for when a reply factum is permitted. The fact that the endorsement of Richards C.J.S. allowed for the possibility of a reply factum is not determinative – the question is whether the proposed reply, when filed, met the requirements of Rule 33.1.

[17] The court file shows that when Industrial Alliance submitted its reply factum on December 16, 2019, counsel for Ituna immediately objected. This led to an exchange of correspondence from counsel on whether the reply factum met the Rule 33.1 requirements and could be accepted for filing. In response, Registrar Baldwin (as she then was) wrote to counsel on January 7, 2020, saying:

I have received your recent correspondence about factums in reply and have provided it to the Court. All factums have been accepted for filing by the registry office and will be before the Court. If you wish to advance arguments about whether certain factums comply with Rule 33.1, you may raise those arguments to the Court at an appropriate time during the hearings next week.

[18] As such, the reply factum was accepted for filing, but the Court had the opportunity to order it removed from the file if the panel considered it was improperly filed. Neither the clerk's endorsement nor the Court's written decision reflect an order that the reply factum filed by Industrial Alliance be removed from the court file. I am therefore satisfied that the reply factum was not ordered removed from the Court file, and as such Industrial Alliance has properly claimed the Tariff fee. I make no changes to item #8.

B. Item #9 – All other Preparation for Hearing

[19] Industrial Alliance claims \$1,500.00; the Tariff allows for \$750.00 for this item. Industrial Alliance takes the position that it is entitled to \$750.00 for each of the appeal and the cross-appeal. During the taxation hearing, counsel for Industrial Alliance confirmed that of the two counsel who argued on behalf of Industrial Alliance, one focused on the appeal and the other focused on the cross-appeal. Counsel for Ituna simply submits that Industrial Alliance ought to be limited to the amount as identified on the Tariff.

[20] As noted above, Industrial Alliance was awarded its costs for both the appeal and the cross-appeal. The proposed bill of costs filed in support of the taxation is identified as being filed by "the respondent / appellant on cross-appeal". Certainly, there are some Tariff items that are only properly claimed once, such as item #2 (notice of cross-appeal) and item #6 (agreement as to contents of the appeal book), but I accept that for others the Tariff fee is properly claimed on both the appeal and the cross-appeal. I am satisfied that had Industrial Alliance prepared and served a separate, proposed bill of costs for each of the appeal and the cross-appeal, taken together those would total the same amount of fees as claimed in the one proposed bill of costs currently before me.

[21] Industrial Alliance is entitled to claim a total of \$1,500.00 for the appeal and the cross-appeal, on item #9. I make no change to this item.

C. Item #16 – All necessary disbursements for which there are proper vouchers

[22] Industrial Alliance claims a total of \$31,849.93 for disbursements and taxes. I have approached my review and analysis by first examining the disbursements, and then considering the appropriate taxes for the legal fees and allowable disbursements. As further explained below, I tax off a number of disbursements and conclude that taxes are calculated in an appropriate manner by Industrial Alliance.

(i) Disbursements Claimed

[23] During the taxation hearing, counsel for Industrial Alliance conceded that some of the disbursements claimed had been calculated in a manner that does not align with the Court of Appeal's general approach and accepted the Registrar's usual practice in calculating these disbursements.

1. “Printing, Copying and Binding”

[24] The Registrar’s general practice for printing and copying has been to allow a \$0.25 charge for each page, for the total number of pages of material filed with the Court and provided to the other parties. See, for example, *Primeau and Primeau v Kuhn and Kuhn* (CACV3001, January 8, 2020 Registrar Baldwin) at para 13-14. That is, counsel’s “prep materials” do not generally fall within the amount awarded under this disbursement heading, nor has the Registrar generally awarded any amounts for the cost of binding materials.

[25] To his credit, counsel conceded that Industrial Alliance was only entitled to claim printing costs for six copies of materials (three for the panel of judges, one for the court file, one for opposing counsel, and one for Industrial Alliance’s counsel), and not for any working copies or any pages not associated with a court filing. This concession resulted in a decrease in the number of pages claimed. Counsel calculated the number of pages in the volumes of appeal book that Industrial Alliance was responsible for preparing; the three factums; and the related books of authorities it filed, at 5,876 pages. Multiplied by 6, this results in a total of 35,256 pages and at \$0.25 each, this results in a charge of \$8,814.00.

[26] Counsel for Ituna generally agreed that this is the proper approach but submitted that Industrial Alliance was only entitled to claim printing costs for 4 copies of materials (for the judges and court file), not 6 copies, and argued that as Industrial Alliance submitted no invoice or breakdown for these costs, they should be limited to claiming \$5,876.00 (5,876 pages at 4 copies, and \$0.25 per page). In support, counsel for Ituna relies upon *Attorney General of Canada on behalf of Her Majesty the Queen in Right of Canada v Merchant Law Group LLP* (CACV2860, March 27, 2019, Registrar Baldwin) [*Merchant Law Group*] at paragraphs 20 – 22.

[27] Paragraph 21 of *Merchant Law Group* provides an overview of the gradual change in approach towards allowing a per-page charge for photocopying, and notes these “limits relate to the per copy charge...and to the number of copies [which] must correspond with the length of the documents filed with the Court by the party claiming the disbursement.” I do not read this as expressly limiting the number of *copies* to that which was filed with the Court, but rather limiting the number of *pages* with what was filed with the Court. Additionally, other taxation decisions demonstrate the usual practice of allowing a copy for both counsel as well as for the appellant himself: *John Den Hollander v Tiger Courier Inc.* (CACV2225, October 8, 2015, Registrar Baldwin).

[28] Moreover, the Rules require that each party serve and file a factum (see, Rule 27 and Rule 32). As Industrial Alliance was required to serve a copy of its factums on counsel for Ituna, it is only appropriate that it be allowed to claim the disbursement for that copy. Further, I see no principled reason why a party should not be entitled to claim the disbursement associated with the printing cost of the factum it filed and relied upon during the hearing. This is a necessary disbursement that is directly related to the appeal, and as noted above accords with the standard approach in past taxation hearings. As such, I conclude that Industrial Alliance is entitled to claim its disbursement costs for 6 copies of its materials filed with the Court.

[29] I have reviewed the court file and am satisfied that Industrial Alliance has appropriately calculated the number of pages, and is therefore entitled to claim \$8,814.00 for printing costs. I therefore reduce the amount claimed from \$11,274.06, and tax off \$2,460.06.

2. "Local Agent Fees"

[30] Industrial Alliance submits four invoices from the McKercher LLP law firm, which includes amounts claimed both for fees and disbursements. Of the total amount billed, half was assigned to Industrial Alliance and half was assigned one of the other parties involved with the three related appeals. Industrial Alliance only claims its half-share and takes the position that it is not unusual for out of province counsel to retain local counsel to assist in understanding that jurisdiction's practice and procedure. While that may be the practice, it does not automatically lead to the result that those fees can be then charged as a disbursement under the Tariff.

[31] Work normally done by a solicitor (or their staff) cannot be taxed as a disbursement when such work is done by a person or agency outside the law firm: *Noble v. Wong*, [1983] B.C.J. No. 2098, 148 D.L.R. (3d) 740 (BCCA). Saskatchewan is not a full indemnity costs jurisdiction, and as such the legal fees that result from advancing an appeal to hearing are limited to the Tariff amounts. To allow a disbursement for other legal fees is contrary to the purpose and intent of the Tariff, and I therefore tax off the \$4,322.25 claimed by Industrial Alliance, with one caveat: a review of the McKercher LLP invoices indicates that law firm paid the \$80.00 fee to file a cross-appeal (non-taxable), which Industrial Alliance is entitled to claim. I tax on that amount, as well as \$20.00 (non-taxable) for the fee to take out the Notice of Appointment for Taxation of Costs.

3. "Data Hosting and hyperlinking" and "Telephone Charges"

[32] Industrial Alliance claims \$1,424.89 for costs associated with data-hosting and hyperlinking documents, and \$57.77 for telephone charges. The affidavit of disbursements sworn and filed in advance of the taxation hearing indicates that the appeal book volumes and factums were electronically prepared and hyperlinked for efficiency, and for the Court's benefit; this work was handled by staff internally at Torys LLP.

[33] Counsel for Ituna submits that this disbursement clearly falls within the category of law firm overhead, and like online research should not be recoverable: see, *Merchant Law Group* at paragraph 20.

[34] I appreciate that this was a complex and document heavy matter, but the Registry requires most parties, and certainly those parties represented by legal counsel, to file an electronic version of their factum, appeal book, and authorities.

[35] The fact that the data-hosting and hyperlinking was all completed internally is indicative that it is properly considered a general expense that falls within a law firm's general overhead, and I tax off the amount of \$1,424.89.

[36] Similarly, I tax off the \$57.77 claimed for telephone charges. The affidavit of disbursements did not provide any details on this amount, though the McKercher invoices show some amounts claimed for telephone charges and there were some cell phone invoices excerpted, showing data charges for the time spent in Regina. Whether this amount was incurred and claimed

by Torys LLP or McKercher LLP, it forms part of the law firm's general overhead and may not be claimed as a disbursement.

4. Travel and Accommodations

[37] I have grouped together four disbursement items under this item #16 subheading: (e) travel, including airfare and taxis - \$3,790.21; (f) travel, including taxis - \$91.93; (g) accommodation - \$4,335.71; and, (h) meals - \$761.66. Together, these four items total \$8,979.51.

[38] Counsel for Ituna relies on *Veolia Water Technologies, Inc. successor by merger to HPD, LLC v K+S Potash Canada General Partnership* (CACV3268, June 18, 2020, Registrar Baldwin), where disbursements for travel costs between Regina and Saskatoon, with an accompanying overnight hotel stay, were claimed. Registrar Baldwin, as she then was, noted that the historical practice in Saskatchewan is to treat counsel's travel expenses as part of the general cost of overhead, and therefore covered by the applicable tariff fee items and stated:

[31] ...With respect, I do not think that the issue of whether travel by counsel is reasonable or not answers the inquiry – in my estimation, it would be a rare situation where counsel incurred travel expenses that were not reasonable in the circumstances of the particular appeal. The issue is the proper delineation between fees (overhead) and disbursements, not whether the cost was reasonably incurred.

[32] I am not inclined to deviate from the historical approach to treat counsel's travel expenses as part of the general cost of overhead and therefore as covered by the applicable fee items in the Tariff. I will tax off the travel disbursements claimed by both parties.

[39] See also, for example, *Kirk v Kirk* (CACV3022, December 12, 2017, Registrar Baldwin) at paragraph 41.

[40] In response, counsel for Industrial Alliance relies on *Waters v. Daimlerchrysler Financial Services Canada Inc.*, 2009 SKQB 263, where the Court awarded travel costs to an out-of-province lawyer. While it is accurate that travel costs were awarded, that case involved exceptional circumstances, with the Chambers judge writing:

[25] Plaintiffs' counsel's conduct has caused costs to be incurred to DaimlerChrysler, without reasonable cause. Plaintiff's counsel's conduct wasted court time, resulted in unnecessary expense to the parties, risked prejudice to the defendants, frustrated all concerned, and resulted in the adjournment. I am satisfied that there are exceptional circumstances here and that it is appropriate to award costs against Merchant Law Group. Merchant Law Group must pay costs personally to reimburse the defendants for costs which they incurred as a result of Merchant Law Group's conduct. The object is to reimburse the defendant litigants, not to punish the solicitor.

[26] I award the sum of \$2,500.00 to be paid by Merchant Law Group to the defendant, DaimlerChrysler, to be paid forthwith. In addition I award costs equal to covering the expenses of Barry Glaspell for his travel to the City of Regina for the hearing. Those costs include airfare, accommodation and other related expenses. These costs too are payable forthwith. In the event that counsel are unable to agree on travel expenses, I am prepared to

hear their submissions. In any event the payment of \$2,500.00 cost is not dependant on or to be delayed for agreement of the travel expenses to be reached.

[41] I do not consider that the exceptional situation described above necessarily leads to the conclusion that travel expenses for out-of-province counsel are regularly awarded. Moreover, it will always be open to a judge to make a specific order as to costs and disbursements. The question before me as Registrar remains whether the amount claimed is a necessary disbursement pursuant to the Tariff. Clearly, the general approach to claims for travel and accommodation expenses for in-province counsel has been to treat them as forming part of office overhead. The question is whether this same type of expenses should be treated any differently for out-of-province counsel.

[42] I have given this question close consideration and can see no policy basis or legal principle that would lead me to depart from the longstanding practice of disallowing travel and accommodation amounts, even where counsel is out-of-province. I accept and adopt the rationale of Currie J. who said the following in a cost decision following trial:

83 Crescent Point has claimed reimbursement for travel expenses (including air, cab, accommodation and meals) for counsel. The action proceeded in Saskatoon, but Crescent Point counsel reside in Calgary. Crescent Point is not entitled to recover this expense. A party, of course, may choose whichever counsel it wishes. The additional expense associated with choosing out-of-town counsel is not to be borne, however, by the party opposite as a matter of party and party costs: *Delta-T Canada Corp. v. EllisDon Design Build Inc.*, 2013 SKQB 281, 426 Sask. R. 145 (Sask. Q.B.), at para 12; *Reid v. Babchouk*, 2004 SKQB 128, 246 Sask. R. 155 (Sask. Q.B.), at para 14; *Gokavi v. Hanterman* (1986), 49 Sask. R. 199 (Sask. Q.B.), at para 9.

Northrock Resources, a Partnership v. ExxonMobil Canada Energy,
2018 SKQB 19, [2018] 3 W.W.R. 827

[43] I therefore tax off the amounts claimed for travel, accommodation and meals, which total \$8,979.51.

5. Courier and Process Server Fees

[44] Industrial Alliance claims \$1,931.22 for courier fees, and \$380.00 for process server fees.

[45] The process server fees are supported by invoices detailing filing the factum, book of authorities, appeal book volumes, and reply factum. This is a standard charge and a necessary disbursement.

[46] The courier charges are likewise supported by invoices appended to the affidavit of disbursements. Those charges associated with serving the materials identified in paragraph 45 on opposing counsel are proper disbursements, but those related to sending counsel's materials to and from Regina for the hearing are not. On my review, the cost to serve materials on opposing counsel total \$267.75, which is properly claimed. As such, I tax off \$1,663.47, the amount charged to transport counsel's working copies to Regina for the hearing and then back to Toronto.

[47] Industrial Allowance is entitled to claim \$267.75 for courier costs associated with serving its materials on counsel for Ituna.

Summary on Disbursements

[48] Industrial Alliance is therefore entitled to the following disbursements:

- | | | |
|-----|--------------------|------------|
| (a) | Printing: | \$8,814.00 |
| (b) | Court filing fees: | \$ 100.00 |
| (c) | Process server: | \$ 380.00 |
| (d) | Courier: | \$ 267.75 |

(ii) Appropriate Taxes

[49] This leaves the final issue, which is the appropriate rate of tax on the legal fees and the allowable disbursements.

[50] The Court filing fees are non-taxable, and are not at issue. During the hearing, considerable time was spent on whether disbursements were properly charged HST (13%) or GST (5%) and PST (6%). Taxable disbursements routinely have the appropriate amount of tax added on the basis of the jurisdiction in which the cost of the disbursement was paid and I see no reason why that should be any different in this situation. Similarly, in this situation the legal fees were incurred in Ontario and were thus subject to that province's sales tax. To look at it another way, the HST has already been charged to Industrial Alliance for the legal fees it has paid, and it is now in a position to recover some portion of the fees and related sales tax.

[51] Of the taxable disbursements that are allowed, all appear to originate and were charged in Ontario. It is therefore appropriate to add HST. The taxes charged to and paid by Industrial Alliance form part of the "necessary disbursement" and are recoverable.

V. Decision

[52] On the basis of the above, the fees are therefore taxed and allowed as follows:

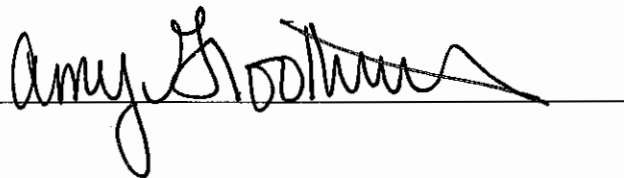
- | | | |
|----|---|------------|
| 2. | Notice of Cross-Appeal | \$ 400.00 |
| 3. | Fee to Respondent on receipt of Notice of Appeal | \$ 125.00 |
| 6. | Agreement as to Contents of Appeal Book | \$ 200.00 |
| 7. | Preparation of Appeal Book | \$ 500.00 |
| 8. | Preparation of 3 Factums (Appeal, Cross-Appeal and Reply) | \$6,000.00 |

9.	All Other Preparation for Hearing of the Appeal and Cross-Appeal	\$1,500.00
10.	Appearance to Present Argument on Appeal and Cross-Appeal (three 1/2 days)	\$1,200.00
	Second counsel (three 1/2 days)	\$ 600.00
11.	Preparing Formal Judgment	\$ 200.00
12.	Correspondence	\$ 200.00
13.	Preparation of Bill of Costs	<u>\$ 150.00</u>
		\$11,075.00

[53] The proposed bill of costs is therefore taxed and allowed at \$11,075.00, plus HST in the amount of \$1,439.75, for a total of \$12,514.75.

[54] Non-taxable disbursements are allowed in the amount of \$100.00, and taxable disbursements are allowed in the amount of \$9,461.75, plus HST in the amount of \$1,230.03. Taken together, disbursements and tax total \$10,791.78

[55] For enforcement purposes, Industrial Alliance may wish to prepare and file a certificate of taxation of costs in Form 11d in the amount of \$23,306.53 for issuance. I thank counsel for their assistance, and in particular for their written submissions which were greatly helpful.



Counsel: Cristina Senese for Ituna Investment LP
Shalom Cumbo-Steinmetz for Industrial Alliance Insurance and Financial Services, Inc.