



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

Citation: *Cabana v. Newfoundland and Labrador et al.*, 2016 NLCA 75

Date: December 22, 2016

Docket: 201301H0063

BETWEEN:

BRAD CABANA

APPELLANT

AND:

HER MAJESTY THE QUEEN
IN RIGHT OF NEWFOUNDLAND

FIRST RESPONDENT

AND:

NALCOR ENERGY-OIL
AND GAS INC.

SECOND RESPONDENT

AND:

INNU NATION OF LABRADOR

THIRD RESPONDENT

Coram: Green C.J.N.L.

Court Appealed From: Supreme Court of Newfoundland,
General Division

Application Heard: May 20, 2015

Judgment Rendered: December 22, 2016

Reasons for Judgment By: Green C.J.N.L.

Counsel for the Appellant:	Self-Represented
Counsel for the First Respondent:	Rolf Pritchard Q.C. and Mark Sheppard
Counsel for the Second Respondent:	Not Represented
Counsel for the Third Respondent:	Not Represented

Green C.J.N.L.:

[1] This matter involves the taxation of a bill of party and party costs payable to Mr. Brad Cabana pursuant to a decision of this Court following an appeal in which the Court set aside rulings of a judge of the Trial Division relating to: (i) a refusal to recuse herself; and (ii) a refusal to grant an interim injunction application. (*Cabana v. Newfoundland and Labrador*, 2014 NLCA 34.)

[2] Mr. Cabana, a self-represented litigant, sued the provincial Crown, Nalcor Energy Inc. and the Innu Nation of Labrador seeking an injunction restraining development of the Muskrat Falls hydro-electric project in Labrador without first holding a provincial referendum. As an interim measure, he also sought an interim injunction against the Crown and Nalcor. By order of the Trial Division, this application was turned into an application for a declaration rather than an injunction because of the inability of the Crown to be subjected to an injunctive order. See *Proceedings Against the Crown Act*, RSNL 1990, c. P-26, s. 15.

[3] At the hearing of the application for a declaration, Mr. Cabana asked the presiding judge to recuse herself, citing a number of grounds. The judge rejected all grounds and continued to sit on the merits of the interim application, ultimately dismissing it.

[4] Mr. Cabana filed a notice seeking leave to appeal both the judge's failure to recuse herself and the dismissal of the declaration application. Leave was granted and the appeal was heard. The Innu Nation did not participate in the appeal.

[5] This Court rejected Mr. Cabana's grounds of appeal with respect to the judge's refusal to recuse herself but nevertheless concluded that certain other actions and statements by the judge during the course of the recusal hearing did raise a reasonable apprehension of bias. As a result, the appeal of the decision not to recuse was allowed on this ground and, as well, the

judge's subsequent decision on the merits of the declaration action was set aside.

[6] The costs order made by the Court was as follows:

[56] Mr. Cabana shall have his costs in this Court, including the decision regarding leave to appeal (2014 NLCA 1) and in the Court below, including the decisions regarding the recusal application (2013 NLTD(G) 36) and the interim injunction application (2013 NLTD(G) 115) as against the Crown and Nalcor. The Innu Nation of Labrador shall bear its own costs in both Courts.

[7] Mr. Cabana subsequently sought to have his costs taxed. He approached a number of taxing masters, who for various reasons declined to preside at the taxation. Asserting that he was unable to find any taxing master who is not in a conflict of interest or otherwise willing and able to conduct the taxation, Mr. Cabana applied to this Court to tax his costs pursuant to rule 57.23 of the *Rules of the Supreme Court, 1986*. That rule¹ provides:

57.23 (1) Subject to the jurisdiction, powers and authority conferred on the Court by the [Judicature Act] or any other statute the Court may

...

(c) make such order as to the costs of the proceeding or appeal as it deems fit;

...

(f) make any order which the appeal may require.

[8] Counsel for the Crown does not dispute Mr. Cabana's assertion that he is unable to access a taxing master. I therefore accept that position. That means that there must be another way found to ensure that Mr. Cabana is entitled to the taxation of the costs that are his due. A judge must fill the void.

[9] A taxing master is a delegate of the Court. The judge retains jurisdiction to deal with costs either by way of making a lump sum award (rule 55.02(1)(a)) or by taxing them him- or herself: rule 55.02(3). Rule 1.03(v) defines "taxing officer" as including "a judge of the Trial Division or

¹ Rule 57.23(1)(c) of the *Rules of the Supreme Court, 1986* was replaced as of October 17, 2016, by rule 58 of the *Court of Appeal Rules* with respect to matters of costs. Though expressed in slightly different language (the new rule says that "The Court may make such order as to costs as it considers appropriate..."), it essentially repeats the same broad power to deal with costs as does the former rule.

the Court of Appeal.” Thus, when rule 55.04(1) speaks of party-and-party costs being “determined by a taxing officer” and rule 55.25(1) refers to a party seeking taxation by appointment to a taxing officer, such a person can be a judge of this Court or the Trial Division.

[10] In the circumstances of this case, however, I do not regard myself as a surrogate taxing officer under the foregoing rules. Mr. Cabana has asked that this Court settle the quantum of costs pursuant to rule 57.23(1). His application came before Rowe J.A. of this Court who was also a member of the panel which decided the appeal from which the costs order emanated. He indicated that I, another member of the same panel, was prepared to undertake the taxation. Subsequently, both Mr. Cabana and counsel for the Crown signified they were satisfied with this approach to the determination. Accordingly, I regard myself as acting for the Court of Appeal, sitting as a single judge, in determining the taxation issue under section 10 of the *Judicature Act*, the application being a matter “incidental” to the final determination of the appeal. Of course, if a party is dissatisfied with my determination, it remains open to him or her to seek a rehearing, with leave, by a panel of the Court pursuant to rule 31 of the new *Court of Appeal Rules*..

[11] I note in passing that this process also has the merit of reducing the number of possible appeals or reviews that might otherwise be available if the taxation were to take place before a judge sitting as a taxing officer. In that circumstance, there could be an appeal from that determination to another judge of the Trial Division and thereafter, with leave to the Court of Appeal. That would only prolong a process that has gone on long enough already.

[12] I conducted the taxation as a hearing before a single judge of the Court of Appeal. Mr. Cabana represented himself. The Crown was represented by counsel. Even though by the terms of the Court’s order mentioned previously, Nalcor is subject to any costs order that is to be made, Nalcor did not appear but signified its acknowledgement that it will be bound by any such determination.

THE BILL OF COSTS

[13] Mr. Cabana submitted a bill of costs totaling \$95,462.43. It is annexed to these reasons as Schedule “A”. Counsel for the Crown submits that Mr.

Cabana is only entitled to the sum of \$12,705.67. His position is also set out on an item by item basis on Schedule “A”.

[14] Prominent among the items in dispute are claims for (i) lost opportunity cost as a result of Mr. Cabana having to spend time on preparing for and making submissions as a self-represented litigant at the hearing in the Trial Division and the Court of Appeal, and the related claim that he should be entitled to amounts equivalent to counsel fees according to the relevant costs tariff; (ii) interest on money borrowed to finance the litigation; (iii) travel costs, including air fare, car rental and meals.

[15] I will not deal with other items except to say that they are taxed and allowed at the amounts claimed by Mr. Cabana.

BACKGROUND OF THE LITIGATION

[16] Before dealing with the items in dispute, however, it is necessary to review the background of the litigation to identify what was involved.

[17] The first thing to notice is that the Court did not limit Mr. Cabana’s recovery to costs directly related to the one issue on which he was successful in this Court (conduct of the hearing leading to a reasonable apprehension of bias); rather, the Court ruled that his success on that one issue entitled him to recover costs generally in relation to the appeal hearings and the recusal and declaration hearings in the Trial Division. The taxation must therefore be approached from that perspective.

[18] Mr. Cabana claims to have been a resident of Newfoundland and Labrador, with a residence at Hickman’s Harbour, since March of 2010, when he moved back to his ancestral home from Saskatchewan. On pension as a result of injuries suffered in military service, he had been operating a painting and decorating business in Saskatchewan before moving back to this province. He attempted to continue to operate his business in western Canada from Newfoundland but finding it logistically difficult to do so by long distance, he moved his family back to Saskatchewan in 2011 where he rented a home while, as he described it, “maintaining his principal residence in Newfoundland with the intent of operating a “flying in flying out type of business...” Preparation for (drafting and filing pleadings and briefs, etc.) and participation in the actual hearings (appearances, questioning witnesses, filing submissions, etc.) involved Mr. Cabana travelling to and from

Hickman's Harbour to St. John's by vehicle. Each round trip (of which Mr. Cabana claims there were 16) involved approximately 540 kilometers.

[19] The actual proceedings in the Trial Division involved a number of appearances and hearings, including an ex parte application and an inter partes hearing which resulted in a recusal application and then a continuation of the inter partes hearing. In this Court, there was a hearing dealing with Mr. Cabana's application for leave to appeal and ultimately the appeal itself.

LOST OPPORTUNITY COSTS AND COUNSEL FEES

[20] Mr. Cabana represented himself through the relevant portions of the litigation. He therefore did not incur any counsel fees against which a costs award would normally, at least partially, indemnify him. Mr. Cabana says, however, that if he had been able to engage counsel, he would have been able to continue to engage in his business interests and generate income therefrom. As a result of having to represent himself and attend at and participate in all the litigation hearings himself, he could not continue to generate that income. His loss in that regard is, he submits, a direct result of the various court applications and hearings related to the injunction and recusal applications.

[21] Mr. Cabana submits that this loss of income resulting from his efforts to vindicate his legal rights is effectively, for a self-represented litigant, the equivalent of the cost of hiring a lawyer for the legally-represented litigant. He should therefore, he says, be equally entitled to be compensated in costs for this loss. He claims \$57,893 in that regard. He also says that, additionally, he should be entitled to the equivalent of the counsel fee allowed to a successful litigant, calculated according to Column 3 of the Scale of Costs appended to the rules of court. He calculates this amount at \$16,250.

[22] In support of his submissions, Mr. Cabana adds another argument based on fairness. He points out that if an unrepresented litigant loses, he or she will have to face the prospect of paying the other side's costs, including counsel fees, but if he wins, the other side will not, unless he can be made subject to an equivalent order for lost opportunity cost, face the same consequences. This situation upsets the normal balance between the effects of litigation costs and access to justice. A represented party (especially, as here, a government party with effectively unlimited funds) facing an unrepresented litigant will not have the same incentive to consider carefully

the legal costs of proceeding with or settling the litigation but may be more encouraged to proceed even in a weak case in the hope of taking advantage of the other side's impecuniosity and "starve him out". Such a situation would work against access to justice for unrepresented litigants and would weaken the objectives of costs awards which include, in addition to indemnification, deterrence of frivolous and abusive litigation and promoting early settlement.

[23] Mr. Cabana further submits, again stressing fairness, that given the finding of the Court that "the reasonable and right-minded person sitting at the back of the courtroom" would reasonably apprehend bias on the part of the judge (paragraphs 49-51), the other counsel in the room should equally have come to the same conclusion and, as officers of the court, should have spoken up in support of Mr. Cabana's recusal application. If they had done so, much time and cost might have been prevented. Their failure to do so "compounded and prolonged legal, financial and personal costs" to him. Having been successful on appeal, fairness dictates, he says, that he receive compensation in costs.

[24] The law on whether a successful self-represented litigant should be compensated for some or all of his lost opportunity costs or for equivalent counsel fees as part of a costs award has been evolving. The traditional view was that inasmuch as the self-represented litigant has not expended any money to engage counsel, then the entitlement to an allowance for counsel as a partial indemnity does not exist. This traditional view is reflected in this Court's decision in *Franey v. Franey* (1997), 148 Nfld. & P.E.I.R. 181 (Nfld. C.A.). Marshall J.A. stated:

[64] Mrs. Franey is entitled to party and party costs with respect to the appeal itself. These costs will not include an award for counsel fee, however. This is because she acted for herself. ... [H]er lack of representation by counsel must preclude inclusion of a counsel fee in the calculation of her party and party costs.

[65] This disallowance of a counsel fee is made with some reluctance [I]t would appear that the common law practice of denying counsel fees to litigants appearing in person should be continued. However, Mrs. Franey is entitled to other party and party costs.

[25] Subsequently, in *Petten et al v. E.Y.E. Marine Consultants et al* (1998), 180 Nfld. & P.E.I.R. 1, "with some reluctance" (paragraph 16) I felt bound to follow *Franey* in denying costs in the nature of counsel fees to successful unrepresented litigants while commenting:

[12] It must be recognized, however, that a party who represents himself and who would not otherwise have to be present throughout the trial, particularly in a lengthy trial such as the current case, nevertheless faces a lost opportunity of not being able to earn income during the time of his participation in the trial. As Mr. Petten noted at several times during the trial, if he had been financially able to be represented by counsel, he would not have had to be present during the presentation of the defendants' cases. His participation in the trial effectively precluded him from seeking and maintaining employment. There was therefore a considerable opportunity cost to him.

[26] The rationale accepted in *Petten* for denying costs to self-represented litigants was expressed to be based on the view that the purpose of costs was one of indemnification and that "[i]f the party has not had to incur the costs of employing counsel, there is nothing to be indemnified against." (paragraph 11). Today, however, it is accepted that the purposes of costs include compensation (something greater in scope than strict indemnification), deterrence and encouragement of settlement and facilitating access to the courts. See *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371 at paragraphs 19-26; *Fong v. Chan* (1999), 46 O.R. (3d) 330 at paragraph 22; *Hope v. Pylypow et al*, 2015 SKCA 26 at paragraph 56.

[27] In other provinces, there is a trend to movement away from the traditional idea of denying any compensation, or equivalent counsel fees, to successful unrepresented litigants. In *Fong*, a case involving self-represented solicitors as litigants, Sharpe J.A. for the Ontario Court of Appeal observed:

[21] ... the preponderance of modern authority supports the contention that both self-represented lawyers and self-represented lay litigants may be awarded costs and that such costs may include counsel fees...

[22] Quite apart from authority and as a matter of principle, it seems to me difficult to justify a categorical rule denying recovery of costs by self-represented litigants. ...[M]odern cost rules are designed to foster three fundamental purposes: (i) to indemnify successful litigants for the cost of litigation; (2) to encourage settlements; and (3) to discourage and sanction inappropriate behavior by litigants. It seems to me that all these purposes are fostered by allowing the trial judge a discretion to award costs to self-represented litigants.

[23] ...[I]t has been accepted that self-represented lawyers are entitled to indemnity on the "time is money" or opportunity cost rationale. It is difficult to see why the opportunity cost rationale should not be more generally applicable to self-represented litigants ...

[28] Sharpe J.A. went on to emphasize, however, that that did not mean that a self-represented litigant had an automatic right to recover such costs. The matter remained within the discretion of the trial judge. Further, he suggested that self-represented litigants' costs should not necessarily be calculated on the same basis as the litigant who retains counsel. He explained:

[26] ...[A]ll litigants suffer a loss of time through their involvement in the legal process. The self-represented litigant should not recover costs for the time and effort that any lay litigant would have to devote to the case. Costs should only be awarded to those lay litigants who can demonstrate that they devoted time and effort to do the work ordinarily done by a lawyer retained to conduct the litigation and that, as a result, they incurred an opportunity cost by foregoing remunerative activity. ... [A] self-represented lay litigant should receive only a "moderate" or "reasonable" allowance for the loss of time devoted to preparing and presenting the case. This excludes routine awards on a per diem basis to litigants who would ordinarily be in attendance at court in any event....

[29] More recently, in the *Hope* decision, a case involving self-represented lay litigants who prepared and argued their cases themselves, a similar approach is evident. Richards C.J., writing for the Court, reviewed the developments in the thinking in the case law and concluded that the restrictive approach, which up to that time had governed in Saskatchewan, should be reconsidered. Amongst other criticisms of the traditional approach, he emphasized that it created inequities. In his words:

[57] ... as is self-evident, it puts an individual who does not have counsel in the difficult position of being unable to take advantage of the costs features of the Rules [of court] while leaving the same individual liable to pay costs if his or her claim is ultimately unsuccessful. On the other hand, the existing regime effectively inoculates a litigant facing a self-represented party against any risk of an unfavourable costs award. The two-sided dynamic serves to skew the cost-benefit equation that all litigants must consider when contemplating litigation or when evaluating a settlement opportunity...

[30] However, Richards C.J. disagreed with the limitation expressed in *Fong* to the effect that a self-represented litigant should only recover costs where he or she could demonstrate that they incurred "an opportunity cost by foregoing remunerative activity" (paragraph 26). He explained:

[60] ... In my view, opportunity cost (in the form of foregoing remunerative activity) should not be a condition precedent to an award of costs above out-of-pocket expenses. The approach reflected in *Fong* effectively takes off the table any work that a self-represented litigant might do at night or on weekends or

holidays to avoid having such work interfere with a job or business. I see no justice in that.

[31] In recent years in this jurisdiction, trial judges and masters have recognized that the *Franey* approach is no longer consonant with the trend in most other jurisdictions in Canada nor with the purposes of making costs awards. Nevertheless, they have felt bound by the authority of that decision. See *Brace v. Canada (Customs and Revenue Agency)* 2007 NLTD 149, 270 Nfld. & P.E.I.R. 307 at paragraph 25.

[32] In *Williams v. Babb* (2003), 4 C.P.C. (6th) 12, Master Sinclair in a very thorough decision which canvassed the current position in most Canadian jurisdictions as well as in England, observed:

[106] The abandonment or re-interpretation of the principle of partial indemnity as being the basis for awarding a litigant an amount as counsel fees merits further consideration in this jurisdiction, The trend towards self-representation is not abating, nor with it challenges for effective and equitable administration of the judicial function.

[107] A represented litigant ought not to acquire a preferential position when opposed by an unrepresented litigant who cannot enforce costs if successful.

[108] Providing appropriate opportunities to enable lay litigants to avail of reasonable access to justice through self-representation justifies re-assessment of their disentitlement to costs, where such self-representation relates to lost economic opportunities.

[33] Notwithstanding these cogent and persuasive words, Master Sinclair felt bound to follow *Franey*, commenting:

[135] The present determination is reached only with much reluctance, given the development of the common law elsewhere in Canada and the equities involved, but recognizing the constraints on a Master's ability to act in this situation in light of *stare decisis*.

[34] I have decided that it is time to break free from the shackles of the past. Balancing the policy of certainty and predictability which underlies the principle of *stare decisis* against the need to keep the law up-to-date and fair in its application, I would opt for the latter in this case. Whether one regards this case as engaging vertical or horizontal *stare decisis* (it is in fact a bit of a hybrid – although it involves the same court reconsidering one of its previous decisions, it also involves a single judge reconsidering a full panel decision), I believe that the justifications for departing from previous

decisions in either *Carter v. Canada (Attorney General)*, 2015 SCC 5 (dealing with vertical *stare decisis*) or *R. v. Bernard*, [1982] 2 S.C.R. 833 (dealing with horizontal *stare decisis*) are satisfied.

[35] The fairness and efficacy of the no-indemnity rule is undermined by the recognition that costs awards serve other purposes and that a rigid insistence on denying costs to self-represented litigants may have the effect of upsetting litigation dynamics, thereby potentially creating unfairness in the process. Such a creation of unfairness discourages access to justice. Furthermore, there has been a marked change in circumstances of the development of the law in other Canadian jurisdictions that requires this Court to re-examine its previous approach; *Franey* is nearly two decades old and has been overtaken by subsequent jurisprudence in other jurisdictions. If *Franey* is affirmed yet again this jurisdiction will remain an outlier on this point in the Canadian justice system.

[36] Accordingly, I hold that in principle a successful self-represented litigant may claim, as part of taxed costs, an amount representing at least a portion of the time and effort he or she put into the case in the place of that which otherwise would have been expended on the case by a lawyer had one been retained.

[37] The question next becomes: how should the court or taxing officer approach the calculation of the amount to which the self-represented litigant should be entitled in that regard?

[38] Richards C.J. in *Hope* set out a framework of analysis for dealing with claims by self-represented litigants over and above out-of-pocket expenses as follows:

- (a) The decision to award costs to a successful lay litigant is discretionary in nature. There are no automatic entitlements in this regard.
- (b) In assessing the appropriateness or amount of a costs award, a judge must appreciate the basic purposes of costs: indemnification, encouraging settlement, discouraging and sanctioning inappropriate conduct and, to some extent, access to justice.
- (c) A self-represented litigant should not be compensated in relation to time and effort expended on a case which flow from the simple fact of being a litigant. I refer here to things like preparing to give evidence or appearing as a witness. All litigants, self-represented or not, must deal with such demands.

- (d) If they are awarded, costs given to a self-represented litigant should relate to work done by the litigant himself or herself that would otherwise have been done by a lawyer; drafting pleadings, or arguments, conducting a hearing, preparing and delivering an argument, and so forth.
- (e) Costs should not awarded reflexively on the basis of the Tariff of costs. The full Tariff amount might be a reasonable amount in some situations but this will likely be unusual. It is obviously not appropriate to, in effect, over-compensate a lay litigant for his or her work and judges must remember that party and party costs do not fully indemnify represented litigants for their legal expenses. A measure of caution and considerable flexibility will be required in this regard.
- (f) The amount of the costs award must be based on the particular circumstances of the case. Those circumstances include, but may not be limited to: the complexity of the proceeding, the amount and quality of the work done by the self-represented litigant; the significance, monetary or otherwise, of the proceeding; the reasonableness of the self-represented litigant's position and conduct; and the other specific considerations referred to in Rule 11-1(4) of the *Queen's Bench Rules*.
- (g) Judges should guard against complex sub-proceedings aimed at determining precisely how much work, and how much time, a self-represented litigant invested in the proceedings. There will necessarily be an element of rough and ready justice to the award of costs in this context. Experience will no doubt reveal something of the best procedural way to approach this issue.

[39] Mr. Cabana claims that he should be entitled to the estimated loss of income resulting from his inability to work in and operate his business in Saskatchewan. To do so would give primacy to the notion of full compensation as the basis of the cost award. It also does not differentiate between time spent on preparing and presenting the case and other time which would necessarily have been lost in any event by the simple fact that he was a litigant and potential witness. Furthermore, such an approach fails to recognize that even with respect to the represented litigant, full indemnity for legal costs is not given in an award of party and party costs. Regardless of the actual counsel bill, costs are awarded on the basis of a tariff which in itself is to some extent arbitrary. While the tariff has some flexibility built into it, the calculation (i.e. the choice of one of five graduated columns) is not directly related to the amount actually charged to the client.

[40] Provided the self-represented litigant can demonstrate that he or she expended time and effort of the type that legal counsel would have done, the

litigant should as a general rule be entitled to receive an amount also calculated according to the tariff. This has the merit of exposing the represented litigant on the other side to a similar level of financial risk as that to which the self-represented litigant would be exposed. I am also mindful of Richard C.J.'s admonition in *Hope* that judges should guard against creating overly complex sub-proceedings aimed at determining precisely how much work and how much time a self-represented litigant invested in the proceeding and that there will inevitably be "an element of rough and ready justice" to the award of costs. Reference to the tariff as a basis for this calculation is one way of achieving this. The focus should in the end be on what lawyer-like advocacy and case presentation was undertaken rather than on what income was actually lost.

[41] Having said that, I would emphasize that the award of costs is in the end a discretionary exercise and that there may well be circumstances that would justify making an award in favour of a self-represented litigant in an amount lower or greater than by sole reference to the tariff. Circumstances such as the complexity of the proceeding or lack thereof, the amount and quality of the work done by the self-represented litigant, the significance of the case and the role that the litigant played would all be relevant considerations.

[42] Applying this analysis to Mr. Cabana's case, I note that he prepared and conducted the whole case himself. It is evident from the material submitted and relied on by him, that he undertook considerable research into and study of legal materials that he deemed relevant to the case. It was evident from his appearance on the hearing of this matter that he acted in a serious, respectful and thoughtful manner and made intelligent arguments on the law and facts. He acted as his own counsel, in the true sense of the word. His participation in the preparation for and conduct of the hearings can be said to be equivalent to the type of work that legal counsel would have been expected to undertake if he had been represented.

[43] In these circumstances, I am prepared to allow Mr. Cabana an amount calculated on the Scale of Costs using Column 2 as a general guide. I chose column 2 to recognize that the effort was competent and significant, while at the same time recognizing that the nature of the work, as informed and carefully presented as it was, does not reach the level of a professionally-trained lawyer. Applying Column 2 to the items listed by Mr. Cabana in Tab 2 attached to his affidavit filed in support of his application (instead of Column 3 which he claimed) and making certain adjustments for certain

disallowed items such as travel which is dealt with elsewhere in his claim, I calculate the amount to which he should be entitled in this regard to be \$10,825.00.

INTEREST ON BORROWED MONEY

[44] Mr. Cabana claims that he should also be allowed credit card interest on money borrowed to finance his litigation. He claims an amount of \$3,067.71. The debt in respect of which the interest charges were incurred related to matters such as the purchase of airline tickets, hotel rooms, gas and meals associated with his travel to and from Saskatchewan and to and from Mr. Cabana's Newfoundland residence in Hickman's Harbour to the Court. Mr. Cabana conceded that none of the costs were directly related to facilitating the court process itself, for example, printing of pleadings, briefs or other documents filed in court.

[45] Nevertheless, Mr. Cabana submits that lines of credit are a fact of modern life and that all litigants but the very rich or those with large savings will have to borrow money to finance the high cost of litigation. To deny recovery of the cost of borrowing such money would, in at least some cases, deny access to the court because many would otherwise not be able to afford to litigate. This is especially so, he argues, when the litigation is between the state, with effectively limitless resources, and the cash-strapped citizen. He submits that it is necessary to compensate the citizen for the interest incurred on his borrowed money in order to "level the playing field."

[46] This argument has a superficial attractiveness and is supported by the New Brunswick Court of Appeal decision in *LeBlanc v. Doucet*, 2012 NBCA 88. The Court in that case emphasized the importance of facilitating access to justice and concluded that reasonable interest costs incurred to enable the self-represented litigant to finance the litigation could be recovered within the applicable rule which allowed "all other reasonable expenses necessarily incurred." The Court in that case had made a finding of fact that "[w]ithout financial assistance from a third party, Mr. LeBlanc would not have been able to enforce his rights in the courts" (paragraph 35).

[47] The case stands for the proposition that interest on a litigation loan is recoverable where, as a matter of fact, the loan was necessary to continue the litigation and the plaintiff did not otherwise have the means to pursue the action. I would also note that the decision in *LeBlanc* was made in the context of litigation where the plaintiff was successful on the merits

following trial. In such a situation, it is relatively easy to have sympathy for a litigant who has been found to have had a good case but who would not have been able to obtain the fruits of that case without being able to afford the cost of borrowing to finance the litigation. By contrast, in this case, Mr. Cabana's award of costs was not made following success on the merits following trial but as a result of success on a procedural issue which led to setting aside all steps taken in the litigation to that date. Mr. Cabana's case therefore does not fall within the strict application of the *LeBlanc* principle.

[48] There are in any event, conflicting decisions in Canada as to whether this type of expense can be included in an award of costs. There has been an expressed reluctance to follow the implications of *LeBlanc* in other trial level cases: *Warsh v. Warsh*, 2013 ONSC 1886 at paragraph 34; *Poile v. Collins*, 2015 ONSC 916 at paragraph 21.

[49] In *MacKenzie v. Rogalasky*, 2014 BCCA 446; leave to appeal to SCC refused, [2015] S.C.C.A. No. 24 the British Columbia Court of Appeal, applying a rule of court that allowed disbursements which had been "necessarily or properly incurred in the conduct of the proceeding", held that recoverable disbursements were limited to

[79] ... those expenses that arise inherently and directly from the issues in the case which relate ... to the direction, management, or control of litigation and which pay for materials and services used to prove a claim or defence. These expenses arise directly from the nature and conduct of the allegations in a proceeding. By contrast, interest expenses do not arise from the nature of the allegations or the conduct of the proceedings, they arise from unrelated causes including the financial circumstances of a party. In my view, as such, they do not fall within the meaning of the word "disbursements" in the context of a costs rule.

[50] The Court in *MacKenzie*, while recognizing and citing *LeBlanc*, refused to follow it, drawing a distinction between

[7] ... whether an out-of-pocket expense is a recoverable disbursement only if it was incurred because of the necessities arising directly from the legal and factual issues inherent in the particular litigation, rather than from the circumstances of the litigant (for example, a litigant's lack of financial means), or whether any reasonable out-of-pocket expense incurred by a litigant because of the litigation is recoverable as a disbursement, provided it was necessarily or properly incurred.

(Emphasis added.)

[51] Harris J.A., writing for the Court, opted for the former – and narrower – formulation. The Court in *MacKenzie* was aided in its conclusion that

recoverable disbursements should be limited to those arising out of the factual and legal issues inherent in the proceeding by the fact that the operative provision in British Columbia contained the words “incurred in the conduct of the proceeding”. Similar limiting words do not appear in the equivalent provision in this jurisdiction which merely refers to “other reasonable disbursements”(former rule 55, Appendix, VIII.1(j); new rule 58, Appendix, Other Costs, 1(h)). Nevertheless, when considered in the context of the preceding list of identified expenses, it is clear that all such expenses are of a type that relate to the conduct of the proceeding itself rather than those that merely arise out of the general financial circumstances of the party. I would therefore interpret the phrase “other reasonable disbursements” in the same way as was done by the Court in *MacKenzie*.

[52] Of greater significance to me, however, is the concern that allowing general recovery of interest as a disbursement will, depending on the financial circumstances of the parties, have the potential result of making costs awards for similar types and length of litigation widely variable and will introduce considerable uncertainty in the ability of a litigant being able to predict in advance the financial costs-risks he or she may be facing if the litigation is proceeded with. As noted above, costs rules are designed to achieve several objectives, only one of which is partial indemnity.

[53] In *Walker v. Ritchie*, 2006 SCC 45, [2006] 2 S.C.R. 428 (which dealt with a different issue, whether a “risk premium” could be recovered as part of costs), Rothstein J., emphasizing the role of costs in facilitating settlement, deterring unmeritorious litigation and facilitating access to justice, commented on the importance of predictability in the manner of calculating potential costs awards:

[27] Parties to litigation have knowledge about the nature of the case and control their own conduct in the litigation. Therefore, the parties are capable of predicting, generally, how such factors would affect a costs award against them, and may thereby be guided as to whether or not to settle or proceed. By contrast, a risk premium is a financial arrangement between the plaintiffs and their counsel. It is not a matter about which the defendant would normally have knowledge, nor is it a matter about which the defendant is entitled to know. ...

[28] ... Unsuccessful defendants should expect to pay similar amounts by way of costs across similar pieces of litigation involving similar conduct and counsel, regardless of what arrangements the particular plaintiff may have concluded with counsel.

[54] A similar observation could be made in respect of awarding interest on money borrowed to finance the litigation. The existence and extent of interest incurred would vary widely and the other party will have little ability to predict in advance what his or her exposure may be in the event of loss. This point also resonated with the Court in *MacKenzie* in deciding against general interest recovery:

[82] ... [C]osts awards should be predictable and consistent across similar cases. Only if this is the case can parties accurately assess the risks of engaging in litigation and make rational decisions about settling or prosecuting the case. Recognizing interest expenses as recoverable disbursements is inconsistent with this objective because exposure to costs and disbursements would not depend on the nature of the case itself, but on the particular circumstances of a party.

[55] Furthermore, recovery of such interest would create an imbalance between such a litigant and one who was able to finance the litigation out of his or her own resources, because a self-financing litigant also effectively loses something that is not recoverable – the loss of the use of one's own money while it is tied up in the litigation pending receipt of a favourable judgment. See *MacKenzie*, paragraph 74.

[56] I am persuaded that the approach set out in *MacKenzie* is the approach to be followed in this jurisdiction. Because interest expense arises not from the legal and factual issues inherent in the particular litigation, but from the general financial circumstances of the litigant, interest on debt incurred to assist in financing the litigation is not recoverable under the rules of Court as they presently exist.

[57] In the current case, Mr. Cabana conceded that none of the interest charges were directly related to facilitating the court process itself, such as preparation of pleadings and material. Furthermore, for the reasons given earlier, *LeBlanc* does not apply directly to the circumstance of this case. Consequently, I must deny recovery of the amounts claimed by him.

TRAVEL COSTS

[58] Mr. Cabana claims travel costs of \$ 2,574.79 for airfare, \$2,795.99 for hotels, \$255 for taxis, \$227.16 for car rental, \$4, 147.20 for mileage for travel to and from Hickman's Harbour and \$1,122.00 for meals. The Crown concedes the claims for hotels, taxis and mileage but opposes the ones for airfare, car rental and meals.

[59] The relevant provision in our rules allows disbursements for “reasonable travel expenses of counsel, including meals and lodging, where counsel fee is allowed...” (rule 55, Appendix, VIII.1(i)). The limit of the expenses being “of counsel” must be read in light of the previous ruling that Mr. Cabana is entitled to an amount that is equivalent to counsel fee if he had been able to engage one. It would be anomalous not to allow him the sorts of expenses that would normally be allowed as part of counsel’s activities if counsel had been retained.

[60] That said, it is not apparent on the material supplied by Mr. Cabana that all of the airfare, car rental and meals were related to Mr. Cabana’s work on counsel-like activities pertaining to the case and not in relation to his participation as litigant and potential witness, though it can reasonably be presumed that some of the expense was related to preparation and presentation of the case.

[61] With respect to airfare, counsel for the Crown’s main objection is that it is not clear as to whether in the relevant time period Mr. Cabana was a resident of Newfoundland and Labrador (Hickman’s Harbour) or Saskatchewan. If he was resident locally, he should not be able to claim travel from out of province. If he was resident in Saskatchewan, the question would be whether it would be reasonable for him to claim that as a litigation expense. If out of province counsel had been engaged it would not necessarily follow that all such travel expenses would be recoverable; that would depend on the reason and necessity for engagement of out-of-province counsel rather than local counsel and the reasonableness of the claim in the particular case.

[62] Counsel also points out that travel to and from Saskatchewan and travel to and from Hickman’s Harbour (which the Crown does not oppose) are inconsistent and that only one set of travel expenses should be allowed. I do not think that this is necessarily so. Mr. Cabana has explained the dilemma he was facing and about his trying to split his time between both locations. I accept this; however, I am not satisfied that on the record Mr. Cabana has established that the travel from Saskatchewan was directly connected to the litigation as opposed to being a business requirement necessitated by his residential circumstances or related to his role as litigant rather than as advocate. I would disallow this item.

[63] With respect to car rental, Crown counsel relies on *Jack v. Gowling*, 2011 ONSC 2474 for the proposition that car rental expense is not

recoverable. In that case, however, no reasons were given for the disallowance, which was made in the context of a general exercise of discretion, not according to any expressed principle. The case does not stand for disallowance in all cases. Car rental is a form of travel. The question in each case is whether the incurring of the expense was reasonable in the circumstances. Since counsel did not suggest that the small amount here was unreasonable either in amount or in nature, I would allow this item.

[64] With respect to meals, counsel submits, relying on *Sam's Auto Wrecking and Lombard General Insurance*, 2012 ONSC 497 at paragraph 17 that “the losing party is not obliged to feed the victors.” He points out that meals would have to be consumed by Mr. Cabana whether or not he was connected with the case. I agree, Thus unlike a situation where counsel is claiming meals as part of disbursements while “on the job” – where there would be another meal charge over and above the litigant’s – there is no additional cost incurred by Mr. Cabana here.

DECISION ON TAXATION

[65] The amounts awarded to Mr. Cabana, or disallowed as the case may be, in respect each of the heads of claim in his submitted Bill of Costs are set out on Schedule “A” annexed to these reasons. His claim is taxed and allowed in total in the amount of \$25,360.94.

COSTS ON TAXATION

[66] Both parties were successful on aspects of this taxation. The original amount claimed by Mr. Cabana has been substantially reduced. However, the most significant aspect of this case – and the one that has taken the most time and was opposed most vigorously by the Crown – is the one related to whether a self-represented litigant is entitled to an award of costs in the nature of counsel fees. On the point of principle, Mr. Cabana was successful in convincing the court to proceed in a new direction on that issue. In light of that I am prepared to award him costs on a party and party basis in respect of this hearing. To avoid further delay and yet a further hearing I am prepared, taking into account the length of the hearing and estimating the amount of material that Mr. Cabana prepared and submitted to the Court, to fix those costs at \$2,000.

[67] The total amount recoverable for the taxed amounts as well as the costs on this taxation is therefore \$27,360.94. Mr. Cabana shall have an order for payment of this amount.

J.D. Green C.J.N.L.