



EAGLE EYE INVESTMENTS INC.

APPELLANT

- and -

CPC NETWORKS CORP.

RESPONDENT

Bruce Wirth for the Appellant  
Clayton Barry for the Respondent

**Taxation before Melanie A. Baldwin  
Registrar, Court of Appeal  
January 8, 2013**

The appeal was dismissed with “costs in the usual way” (see written reasons of the Court dated December 6, 2012). The Respondent took out an appointment for taxation and served the appointment for taxation and a proposed bill of costs on the Appellant. The taxation hearing was conducted by telephone conference call with Mr. Wirth and Mr. Barry on January 8, 2013 and this fiat represents my decision in relation thereto.

#### Authority for Taxation

Rule 54 of *The Court of Appeal Rules* provides for taxation of costs and indicates that Part Forty-Six of *The Queen’s Bench Rules* applies, with any necessary modification, to a taxation of costs under Rule 54.

#### Proposed Bill of Costs

The proposed bill of costs lists the following fees under column 4 of the Court of Appeal Tariff of Costs:

3	Fee to Respondent on Notice of Appeal	\$ 200
4	Simple Motions	\$ 625
8	Preparation of Factum	\$5000
9	All Other Preparation for Hearing	\$1250
10	Appearance to Present Argument Before Court of Appeal	\$ 600
11	Preparing Formal Judgment or Order	\$ 400
12	Correspondence	\$ 400

13	Preparation of Bill of Costs	\$ 250
14	Taxation of Bill of Costs	\$ 250

The fees claimed total \$8975.

The proposed bill of costs also claims disbursements amounting to \$85 composed of \$25 for the Court's fee for filing an application for perfection of the appeal, \$40 for the Court's fees for issuing a formal order and a formal judgment (\$20 each) and \$20 for issuing the appointment for taxation. At the taxation, Mr. Barry noted that he was claiming an additional disbursement of \$20 for issuing the certificate of taxation. The disbursements claimed therefore total \$105.

#### Issues in Dispute

At the outset of the taxation hearing, counsel identified the following issues in dispute between the parties:

1. What is the appropriate column of the tariff under which the proposed bill of costs should be taxed?
2. Is the respondent entitled to claim a simple motion fee (tariff item 4) for its application for perfection of the appeal?
3. What is the appropriate amount of the taxation fee (tariff item 14) to which the respondent is entitled?

#### Arguments of Parties on Issues in Dispute

##### **1. What is the appropriate column of the tariff under which the proposed bill of costs should be taxed?**

The proposed bill of costs filed on behalf of the respondent seeks to have fees taxed under column 4 of the tariff of costs (monetary relief of \$300,000 or more) on the following bases enunciated by Mr. Barry:

- the notice of motion before Gabrielson J. in the Court of Queen's Bench sought monetary relief, including an order "determining the indebtedness outstanding" on a loan agreement between the respondent and a bank which was subsequently assigned by the bank to the appellant.
- both Gabrielson J. (paragraph 13 of judgment dated November 18, 2011) and the Court of Appeal (paragraph 15 of written reasons dated December 6, 2012) noted that the appellant had taken the position that the indebtedness outstanding on the loan agreement was an amount in excess of \$700,000.
- the relief granted by Gabrielson J. was monetary relief in that he determined indebtedness of \$52,500 plus interest and ordered that, upon payment of this amount by the respondent to the appellant, the loan agreement would be discharged.
- the issue before Gabrielson J. was therefore essentially whether the respondent owed the appellant the amount of secured debt under the loan agreement (\$52,500) or that amount plus the amount of unsecured debt owed by the respondent to the appellant (which the appellant calculated to be amount in excess of \$700,000). In this way, the proceeding was not unlike a debt enforcement application and involved monetary relief.

The appellant, through Mr. Wirth, takes the position that the fees should be taxed under column 2 of the tariff of costs (non-monetary relief) on the following bases:

- the parties are embroiled in a separate action in the Court of Queen's Bench relating to the unsecured debt referred to above. The amount of that debt has therefore not been finally determined.
- the issue before Gabrielson J. was whether the respondent's indebtedness under the loan agreement once it was assigned to the appellant included the unsecured debt or not. There was no issue about the amount of the secured debt or the fact that it was owing under the loan agreement.
- even if the appellant had convinced Gabrielson J. and/or the Court of Appeal that the unsecured debt was included in the respondent's loan agreement indebtedness, that would not have resulted in either court making an order determining the amount of the unsecured debt.
- the court decisions of *The Town of Claresholm v. Green*, 2004 ABQB 118 and *Smith v. Garbutt*, 1997 CanLII 4365 (BCSC) support the argument that the relief involved in the application before Gabrielson J. and in the appeal is non-monetary.

**2. Is the respondent entitled to claim a simple motion fee (tariff item 4) for its application for perfection of the appeal?**

The respondent claims a simple motion fee (tariff item 4) for its application for perfection of the appeal.

The appellant, through Mr. Wirth, takes the position that the respondent is not entitled to the simple motion fee on the following bases:

- the application for perfection of the appeal was heard at the same time and by the same Chambers judge as an application for removal of counsel.
- the order of the Chambers judge on the application for perfection of the appeal is silent on the issue of costs.
- the Chambers judge did, however, order significant costs on the application for removal of counsel.
- it should therefore be inferred that the Chambers judge did not intend for there to be any award of costs for the application for perfection of the appeal.

Mr. Barry, on behalf of the respondent replies that the Chambers judge heard and decided the two applications before him separately – in fact, the application for perfection of the appeal was decided from the bench while the decision on the application for removal of counsel was reserved and delivered one week after the Chambers hearing date. There is therefore no reason to infer or assume that the costs awarded on the application for removal of counsel were intended in any way to relate to the application for perfection of the appeal.

**3. What is the appropriate amount of the taxation fee (tariff item 14) to which the respondent is entitled?**

The respondent claims a taxation fee (tariff item 14) of \$250. The tariff item allows for a fee of \$125 per hour under column 4. The respondent takes the position that, while the taxation hearing itself was not likely to be two hours long, its counsel had spent time preparing for the taxation hearing which should be taken into account when fixing the appropriate amount of the fee under this item.

The appellant asks that the taxation fee be prorated to accord with the actual length of the taxation hearing.

Analysis and Decision

**1. What is the appropriate column of the tariff under which the proposed bill of costs should be taxed?**

I have considered the arguments of the parties and the case law cited by Mr. Wirth relating to this issue. In the end, however, I think that a complete answer to this question is found in the relevant provisions of *The Court of Appeal Rules* and *The Queen's Bench Rules*. Based on my review of those provisions and of the appellant's notice of appeal, I have concluded that the appeal involved non-monetary relief and that the bill of costs should therefore be taxed under column 2 of the tariff of costs.

As noted above, Rule 54 of *The Court of Appeal Rules* provides that Part Forty-Six of *The Queen's Bench Rules* applies, with any necessary modification, to a taxation of costs under *The Court of Appeal Rules*.

Rule 564(1) and (2) of *The Queen's Bench Rules* provide as follows:

- 564 (1) The assessment of fees pursuant to clause 563(1)(a):
- (a) shall be in the discretion of the assessment officer; and
  - (b) shall be assessed according to the appropriate column of the applicable table of Tariff Schedule I, depending on the amount involved.
- (2) The amount involved shall be determined:
- (a) as against the plaintiff, by the amount claimed; or
  - (b) as against the defendant, by the amount of the judgment.

The appeal was dismissed with costs "in the usual way." There is no dispute that, in the usual way, where an appeal is dismissed, costs are payable by an unsuccessful appellant to a successful respondent. The amount involved in this appeal should therefore be determined by the amount claimed by the appellant in the appeal.

The appellant does not claim any monetary relief in its notice of appeal. Rather, it asks for declarations relating to whether the loan agreement indebtedness should include unsecured debt and under what circumstances the security granted by the loan agreement should be discharged. On this basis, there is no "amount involved" in this appeal.

Rule 54(1)(b) of *The Court of Appeal Rules* provides that column 2 of the tariff applies to the taxation of costs where non-monetary relief is involved. The proposed bill of costs will therefore be taxed under column 2 rather than under column 4 of the tariff.

**2. Is the respondent entitled to claim a simple motion fee (tariff item 4) for its application for perfection of the appeal?**

The respondent filed a draft order with its application for perfection of the appeal. The draft order included a provision granting the respondent "costs of this application on a solicitor-client basis, payable forthwith." This relief was also claimed in the application for perfection.

The endorsement on the court file from the day of the Chambers hearing does not mention an award of costs. It reads as follows:

Order that Both Appeals (CACV2207 and 2180) would be perfected by way of Serving and filing the Appeal Book and Factum on or before March 21, 2012.

The formal order filed by the respondent and subsequently issued by me simply directs the appellant to perfect the appeal by serving and filing an appeal book and factum on or before March 21, 2012. It does not mention costs.

I am therefore faced with a situation where both the endorsement and the issued order are silent on costs notwithstanding the fact that the application claimed solicitor-client costs. Can the respondent now claim party and party costs for the application as part of the costs of the appeal awarded by the Court?

According to Orkin on *The Law of Costs*, 2<sup>nd</sup> ed. at paragraph 105.7, the general rule under these circumstances appears to be that "when a matter is disposed of on a motion or at trial with no mention of costs, it is as though the judge had said that he "saw fit to make no order as to costs.'" However, Orkin also notes that this general rule can be displaced by a specific rule or rules to the contrary.

Rule 551 of *The Queen's Bench Rules* includes the following:

551. Any express provision in the rules of court respecting costs, including rules 552 to 554, shall apply unless the court orders otherwise in the exercise of its discretion . . . .

Rule 553(1) of *The Queen's Bench Rules* provides:

553. (1) The costs of any interlocutory motion or application:

- (a) shall follow the outcome of the motion or application;
- (b) shall be assessed on the same scale as the general costs of the action or proceeding; and
- (c) are not payable until final determination of the action or proceeding.

I understand Rules 551 and 553 as creating a default position different from the general rule described above – in Saskatchewan, where the court or a judge has not ordered otherwise, costs of an interlocutory application shall follow the outcome of the application and shall be assessed on the same scale as the costs of the action or proceeding.

In this case, neither the Chambers judge nor the Court ordered that there would be no award of costs – both were silent. The respondent was successful on the application for perfection of the appeal. In light of these facts and given the express direction found in Rule 553, it is my opinion

that the respondent is entitled to costs of its application for perfection of the appeal assessed under item 4 of column 2 of the tariff.

I should also note that I do not consider the fact that the same Chambers judge heard another application involving these parties on the same hearing date and ordered costs on that application to be relevant to this inquiry. These were two separate applications and the Chambers judge dealt with them in separate decisions. Absent some specific indication from the Chambers judge that the costs award was intended to apply to both applications, there is no basis upon which this could be inferred.

**3. What is the appropriate amount of the taxation fee (tariff item 14) to which the respondent is entitled?**

The taxation hearing was approximately 40 minutes long. I agree with the appellant's position that the per-hour fee in tariff item 14 relates to the actual taxation hearing and not to preparation for the hearing. In fact, the tariff contemplates preparation time in item 13 which provides for a fee for preparation of a bill of costs.

The appellant asks me to prorate the taxation hourly fee in light of the fact that the hearing was less than one hour long. While this is permitted by Rule 564(4) of *The Queen's Bench Rules* and it might be appropriate in some circumstances to do so – where the hearing was extremely brief, for example – I will not exercise my discretion to do so in this case. I base this decision in this case on the fact that the taxation hearing was not extremely brief, the main issue involved was somewhat complex and the fee for an hour under column 2 is minimal (\$75).

Conclusion

The proposed Bill of Costs will therefore be taxed as follows:

**Taxed on:**

Issuing Certificate of Costs (disbursement)                      \$ 20

**Taxed off:**

3	Fee to Respondent on Notice of Appeal	\$ 75
4	Simple Motions	\$ 250
8	Preparation of Factum	\$3000
9	All Other Preparation for Hearing	\$ 500
10	Appearance to Present Argument Before Court of Appeal	\$ 200
11	Preparing Formal Judgment or Order	\$ 200
12	Correspondence	\$ 200
13	Preparation of Bill of Costs	\$ 100

14 Taxation of Bill of Costs

\$ 175

The proposed Bill of Costs is therefore taxed and allowed at \$4380 (\$4275 in fees, \$105 for disbursements). Mr. Barry should prepare and file a Certificate of Taxation of Costs to this effect (in Form C) for issuance.

DATED at Regina, Saskatchewan, this 9<sup>th</sup> day of January, 2013.



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REGISTRAR – COURT OF APPEAL