CACV2300

BETWEEN:

PAULSEN & SON EXCAVATING LTD.

APPELLANT

- and -

ROYAL BANK OF CANADA

RESPONDENT

Peter V. Abrametz for the Appellant
Mike Russell for the Respondent

Taxation before Melanie A. Baldwin
Registrar, Court of Appeal
August 15, 2013

Background

The Appellant's applications for leave to appeal and for extending the time for filing a notice of appeal were dismissed "both with costs in the usual way" by Richards J.A. (as he then was) on October 31, 2012. An Order was issued on November 30, 2012 at the behest of the Respondent requiring the Appellant to pay "the Respondent's costs of both applications as determined under column 2 of *The Court of Appeal Tariff of Costs*, restricted to one counsel." The Respondent did not comply with Rule 57.1(1) or (2). Notwithstanding this non-compliance, the Deputy Registrar issued the Order, thereby not complying with Rule 57.1(3).

The Respondent took out an appointment for taxation and served that appointment for taxation and a proposed bill of costs on the Appellant. A taxation hearing relating to the proposed bill of costs was held before me on August 15, 2013 with Mr. Abrametz and Mr. Russell in attendance, the former in person and the latter by telephone. This fiat represents my decision in relation thereto.

Proposed Bill of Costs

The proposed bill of costs lists the following fees under column 2 of the Court of Appeal Tariff of Costs:

4	Simple Motion (Leave to Appeal)	$ 375
4	Simple Motion (Extend Service)	$ 375
9	All Other Preparation for Hearing	$ 1500

10	Appearance to Present Argument on Appeal before Court of Appeal	$ 800
11	Preparing Formal Judgment or Order	$ 200
12	Correspondence	$ 100
13	Preparation of Bill of Costs	$ 150
14.	Taxation of Bill of Costs	$ 75

The fees claimed total $3575.

The proposed bill of costs does not claim disbursements.

Positions of the Parties

In relation to the non-compliance with Rule 57.1, the Respondent, through Mr. Russell, acknowledges that the proposed order was not served on the Appellant prior to its issuance but takes the position that the wording of the Order is not controversial, in particular the reference to column 2.

As for the bill of costs, the Respondent argues that it is entitled to two sets of costs under column 2 – one for each application that was dismissed by Richards J.A. The proposed bill of costs therefore contains two separate entries under item 4 (simple motion) and the entries under items 9 (all other preparation for hearing) and 10 (appearance to present argument on appeal) have been doubled. In response to my question about the application of items 9 and 10 to a Chambers hearing (as opposed to an appeal hearing before a panel of the Court), the Respondent takes the position that there is no reason why item 9 would not apply but acknowledges that the application of item 10 is unclear.

The Respondent also notes that the proposed bill of costs contains a typographical error in item 12 (correspondence). The amount claimed under that item should have been the column 2 amount of $200 rather than the $100 claimed. The Respondent seeks leave to amend the proposed bill of costs to correct this error.

Mr. Abrametz, for the Appellant, takes the position that, as Rule 57.1 was not complied with, the Respondent should not be permitted to tax its costs, citing case law where courts have denied costs due to procedural shortcomings. The Appellant acknowledges that column 2 is the column of *The Court of Appeal Tariff of Costs* which properly applies in the circumstances before me.

In relation to the bill of costs, the Appellant argues that the Respondent is effectively seeking double costs and notes that Richards J.A. ordered costs "in the usual way" but did not order double costs.

<u>Decision</u>

As noted above, neither the Respondent nor the Registrar complied with Rule 57.1 before the issuance of the formal Order on November 30, 2012. This is not acceptable practice and I extend my apologies to both Mr. Abrametz and his client for the oversight. Having said this, I am not convinced that the non-compliance with Rule 57.1 in this case merits the response urged upon me by the Appellant.

While the Court or a judge of the Court has the discretion to decline to award costs for procedural irregularities (as in the case law filed by Mr. Abrametz) or otherwise, once costs have been awarded by the Court or a judge (as in this case), it would presumably take another order of the Court or a judge to "undo" that award. A further order of this kind might be necessary or appropriate in a situation where the terms of the issued order do not represent what was actually ordered by the Court/judge. That is not the situation here. Richards J.A. dismissed the applications "both with costs in the usual way." The formal order simply adds a reference to column 2, which the Appellant agrees is the appropriate column under the circumstances.

It is therefore my intention to tax the proposed bill of costs at this time.

My understanding is that the motion items in *The Court of Appeal Tariff of Costs* are intended to be all inclusive. In other words, items 1 (motion for leave to appeal, including brief and argument), 4 (simple motions) and 5 (complex motions) are intended to include all steps taken to make or respond to the application, including drafting documents and preparing for and making oral submissions in Chambers. As such, I do not believe that items 9 and 10 are properly claimed in the context of anything less than the hearing of an appeal proper. This is buttressed by the placement of these items in the Tariff, below the appeal book and factum items, and by the specific complete wording of item 10 (appearance to present argument *on appeal before Court of Appeal*). The amounts claimed under these items will therefore be taxed off.

The amount claimed under item 12 (correspondence) will be amended to reflect what is provided for in column 2. I will therefore tax $100 on to item 12.

As for the amounts claimed under item 4 (simple motions), Richards J.A. dismissed the applications brought by the appellant "both with costs in the usual way." I am of the view that it is appropriate, given this direction, to assess costs for both of the dismissed applications. I do not agree that this approach amounts to double costs. Rather, it results in the "usual" costs for each dismissed application. My approach to assessing these costs will be somewhat different than that proposed by the Respondent, however.

As I indicated above, the motion items in the Tariff are intended to include all steps taken to make *or respond* to the application at issue, be it an application for leave, a simple application or a complex application. The Court, in crafting *The Court of Appeal Tariff of Costs* in 2006, singled out an application for leave to appeal for special treatment – it is the only application which has its own item and amount.

Just as either a successful applicant or respondent can claim the amount under item 4 (simple motions) or item 5 (complex motions), it is my view that a respondent to an application for leave should be entitled to claim under item 1 (motion for leave to appeal, including brief and argument). There is no logical reason why an applicant for leave would be entitled to claim $1500 (under column 2) for a successful outcome if a successful respondent to that same application is only entitled to claim $375. The stakes are similarly high and the preparation of materials and presentation of submissions require a comparable amount of effort.

In any event, even if I am wrong in this and a successful respondent on an application for leave must claim under a generic motion item, I would assess a contested application for leave as a complex opposed motion, rather than as a simple motion as claimed by the Respondent.
An application for leave is an all or nothing proposition. The stakes are very high for both parties. The drafters of the Tariff obviously characterized an application for leave in this way as the item 1 and item 5(a) amounts are the same in all columns.

I will therefore tax off the $375 item 4 amount for the application for leave to appeal and will tax on $1500 under either item 1 or item 5(a).

The proposed bill of costs will therefore be taxed as follows:

Taxed on:	$ 1600 ($1500 for the application for leave and $100 for correspondence)
Taxed off:	$ 2675 ($375 for the application for leave, $1500 for item 9 and $800 for item 10)

The proposed bill of costs is therefore taxed and allowed at $2500. Mr. Russell may prepare and file a Certificate of Taxation of Costs to this effect (in Form C) for issuance, if necessary.

DATED at Regina, Saskatchewan, this 26th day of August, 2013

REGISTRAR – COURT OF APPEAL