

Attorney General of Canada on behalf of Her Majesty the Queen in  
Right of Canada

APPELLANT



- and -

Merchant Law Group LLP

RESPONDENT

Bruce Hughson for the Appellant  
E.F. Anthony Merchant QC for the Respondent

**Taxation before Melanie Baldwin QC**  
**Registrar, Court of Appeal for Saskatchewan**  
**March 27, 2019**

**Background:**

[1] The appellant's appeal was filed on February 26, 2016. It was heard by the Court on October 4, 2016 and on August 9, 2017 the Court allowed the appeal and ordered the respondent to pay the appellant "the costs of the within appeal assessed in the usual way." The appellant took out and served an appointment for taxation of costs returnable before me on March 26, 2019. The taxation hearing was subsequently adjourned to March 27, 2019.

[2] On March 27, 2019 I heard submissions from counsel for the appellant and the respondent both of whom appeared before me by telephone. This fiat is my decision on the taxation.

**Proposed Bill of Costs:**

[3] The appellant served and filed a proposed bill of costs. The proposed bill of costs lists the following fees under column 4 of the Court of Appeal Tariff of Costs:

2	Notice of appeal	\$ 600
7	Preparation of appeal book	\$1250
8	Preparation of factum	\$5000
9	All other preparation for hearing	\$1250

10	Appearance to present argument on appeal before Court of Appeal	\$1800
	<i>1 day at \$600 for each ½ day</i>	
	Second counsel	
	<i>1 day at \$300 for each ½ day</i>	
11	Preparing formal judgment	\$ 400
12	Correspondence	\$ 400
13	Preparation of Bill of Costs	\$ 250

The fees claimed total \$10,950. The appellant also claims GST (\$547.50) on fees.

[4] The proposed bill of costs also claims disbursements of \$2451.65 composed of court fees of \$245, courier charges of \$78.78, charges relating to copying and binding documents of \$2122.25 and a registered mail charge related to serving the taxation materials of \$5.62 (the last disbursement was added to the proposed bill of costs by the appellant at the taxation hearing and the respondent did not strenuously object to this addition).

**Issues:**

[5] During the taxation hearing the following contested issues were raised/addressed:

What is the appropriate column of the Tariff?

Is the appellant entitled to claim for a second counsel at the appeal hearing under item 10 of the Tariff?

Is the appellant entitled to claim disbursements for outsourced copying/binding services?

What costs, if any, should be awarded for the taxation hearing itself?

**Arguments:**

**Appropriate Column**

[6] The appellant argued that the amount at issue in the Court of Queen's Bench proceedings exceeds 15 million dollars and that, as such, costs should be taxed on column 4 as per the draft bill of costs. The respondent argued that what was at issue in this Court was an application to strike and that the default (non-monetary) column (which the respondent identified as column 3) should therefore apply.

### **Second Counsel Fee Item**

[7] The appellant noted that both parties had multiple gowned counsel at the appeal hearing and took the position that it was entitled to claim the Tariff item for a second counsel. The respondent argued that the Tariff contemplates that the Court will expressly allow a claim for second counsel and that, in the absence of express language to this effect, the appellant is only able to claim for one counsel hearing fee.

### **Disbursements for Outsourced Photocopying/Binding Charges**

[8] The appellant noted that it filed an affidavit of disbursements supporting its claim for these costs and that the respondent was served with the affidavit some time ago and did not raise any issue with these costs or seek to cross-examine the deponent of the affidavit. The appellant took the position that it incurred these out of pocket costs and proved them by affidavit and it is therefore entitled to be reimbursed for them.

[9] The respondent argued that the costs system in Saskatchewan is a tariff system not an indemnification system and that the appellant is not entitled to be reimbursed for these costs as they represent an outsourcing of tasks that would be done by staff within most law firms. The respondent drew an analogy with a firm outsourcing legal research to a contractor, arguing that that researcher's fees would not be recoverable as a disbursement on taxation. Further, the respondent notes that some of the costs are for making multiple working copies of documents for internal use by the appellant and these purely internal costs should be absorbed by the appellant.

### **Costs of the Taxation Hearing**

[10] The appellant noted that it was forced by the respondent's inaction to take out the appointment for taxation and to attend and make submissions at the taxation hearing and that the original return date for the taxation hearing had to be adjourned and rescheduled due to the respondent's failure to appear on the original return date. The appellant therefore sought costs of the taxation hearing.

[11] The respondent argued that, if costs are awarded for a taxation hearing, they should be awarded to the successful party. The respondent indicated that it was not seeking costs of the taxation hearing in the event that it is the successful party on the taxation.

### **Analysis:**

#### **Appropriate Column**

[12] In its decision of August 9, 2017, the Court directed me to assess costs in the usual manner. My usual manner of determining the appropriate column under which Tariff items should be assessed has been to look at the amount involved in the appeal, not the amount involved in the proceeding in the Court of Queen's Bench. I determine the amount involved in the appeal by reviewing the notice of appeal and appellant factum to see what relief is claimed. This was also the approach followed by Richards, J.A. (as he then was) in *Farmers of North America Incorporated v Bushell*, 2013 SKCA 65.

[13] In its notice of appeal, the appellant asked the Court to set aside the lower court's decision and to make the decision that ought to have been made in the lower court. In the appellant factum, the appellant asked the Court to set aside the motion judgment, reinstate its statement of claim (granting leave to amend the statement of claim if necessary) and dismiss the respondent's application to strike the statement of claim. The appellant succeeded in obtaining the relief that it sought – the Court set aside the decision of the Court of Queen's Bench judge striking its statement of claim.

[14] While there is a substantial amount of money at issue in the proceeding in the Court of Queen's Bench, that amount of money was not at issue in this appeal. The relief sought and granted was non-monetary. Pursuant to Rule 54(1)(b) of *The Court of Appeal Rules*, column 2 applies to the taxation of costs where non-monetary relief is involved. I will therefore tax the appellant's costs on column 2.

### **Second Counsel Fee Item**

[15] There were four gowned counsel present for the appellant and two for the respondent at the hearing of the appeal. All four appellant counsel are identified in the Court's endorsement as appearing on behalf of the appellant. The endorsement confirms that two of the listed appellant counsel made oral submissions to the Court. The Court did not, as it sometimes does, indicate in its decision that only one counsel fee could be claimed on the appeal. Under these circumstances, I am inclined to accept the appellant's claim for a second counsel fee for the appeal hearing under item 10 of the Tariff.

### **Disbursements for Outsourced Photocopying/Binding Charges**

[16] During the taxation hearing, I identified the underlying issue here as being the proper delineation of the boundary between fees and disbursements claimable under the Tariff. Fees are reimbursed only up to the fee item amounts found in the Tariff. All necessary disbursements for which there are proper vouchers are reimbursed in full.

[17] When assessing party and party costs in Saskatchewan (as in this case), if an amount claimed is considered to be part of a law firm's office overhead, it falls under and is addressed through the fee items in the Tariff and it does not constitute a disbursement. For example, the cost of online legal research for a factum is part of a law office's overhead which falls under and is addressed by the Tariff fee item for a factum (item 8) – the same Tariff fee item that applies to the legal work that the lawyer (for whom the research was done) put into the factum. This would be the case whether the legal research was done by an employee of the law firm or by a contractor.

[18] This approach to online legal research charges was described by Registrar Schwann, as she then was, in her November 12, 2008 taxation decision in *Knudson v Knudson*, CA1461 (unreported):

. . . the cases are divided on whether computer assisted research is a proper disbursement cost. [Orkin, 219.6(9); *Denzler v. Aull*, (1994) O.R. (3d) 507] In one case, the costs were limited to those cases ultimately presented in court. [*Sandu v. ICBC* (1999), 45 C.P.C. (4<sup>th</sup>) 266] The other line of thought – for which there appears ample authority – is to disallow this cost on the footing that legal research is effectively part of the fees taxed by legal counsel or as part of the general cost of overhead. [*Sidorsky v. CFCN Communications Ltd.* (1995), 35

C.P.C. (3<sup>rd</sup>) 239; see also *Harach v. Schubert*, [1999] 12 W.W.R. 273 (Sask. Q.B.) where Quicklaw costs were denied in Saskatchewan]

[19] In my March 16, 2012 taxation decision in *Jensen v Agricultural Credit Corporation of Saskatchewan*, CACV2080 (unreported), I referred to Registrar Schwann's decision in *Knudson* and added the following:

In her fiat in *Knudson*, Registrar Schwann also referred to the decision of Ryan-Froslic J. in *Reid v. Babchouk* (2004), 246 Sask. R. 155 as authority for the proposition that allowing disbursements for items such as legal research has the effect of awarding solicitor/client costs rather than party-and-party costs. Registrar Schwann ultimately taxed off the item claimed for legal research in that case.

[20] Since my decision in *Jensen*, I have continued to take this approach to claims relating to online legal research charges – these charges are not legitimately characterized as disbursements as contemplated in the Tariff. The approach should be the same for other costs that are more properly seen as part of office overhead rather than as disbursements, such as word processing, proofreading and editing, conversion to electronic/digital format, etc.

[21] There are, however, costs incurred by law firms that are properly characterized as disbursements and not as part of office overhead. One of these costs is the cost of in-firm photocopying. While, historically, in-firm photocopying charges were not considered to be proper disbursements, a review of registrar's fiats on taxations reveals a gradual change in this area. Since 2008, in-firm photocopying charges have been allowed as disbursements with certain limits. Those limits relate to the per copy charge -- which has not been allowed at more than \$0.25 per copy -- 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.

[22] In what category do the amounts described in the appellant's affidavit of disbursements for printing/photocopying and binding documents fall? In my opinion, the amounts claimed for printing/photocopying and binding "working copies" of court documents for use by appellant counsel fall in the first category and are not properly categorized as disbursements. Like word processing, proofreading, editing and online research needed to prepare a factum (which are covered by Tariff item 8), these amounts represent a component of the preparations that the appellant has determined are necessary for the appeal hearing. Tariff fee item 9 is intended to reimburse the appellant for hearing preparation – the appellant has made a claim under Tariff fee item 9 and will be awarded the entire item amount.

[23] In my view, the only printing/photocopying cost mentioned in the affidavit of disbursements which properly falls under the category of disbursement is the cost shown in exhibit "J" to the affidavit. The affidavit establishes that this cost was for making copies of the appellant's book of authorities which were then shipped to the Court for filing. This is analogous to the kind of in-firm photocopying cost that is now routinely granted as a disbursement on taxation. I will allow the appellant's claim for this disbursement in the amount of \$752.72.

### **Costs of the Taxation Hearing**

[24] Costs are rarely awarded for a taxation hearing but I agree with the respondent that, as with costs of an appeal, they will usually be awarded to the successful party. I think that it is fair to characterize the result of the taxation hearing as being one of mixed success. I will therefore not award either party costs associated with the taxation hearing.

**Decision:**

[25] The appellant is entitled to the following Tariff fee items under column 2:

2	Notice of appeal	\$ 400
7	Preparation of appeal book	\$ 500
8	Preparation of factum	\$2000
9	All other preparation for hearing	\$ 750
10	Appearance to present argument on appeal before Court of Appeal	\$1200
	<i>1 day at \$400 for each ½ day</i>	
	Second counsel	
	<i>1 day at \$200 for each ½ day</i>	
11	Preparing formal judgment	\$ 200
12	Correspondence	\$ 200
13	Preparation of Bill of Costs	\$ 150

The fees allowed total \$5400 plus GST of \$270.

[26] As for disbursements, the appellant is entitled to be reimbursed for court fees of \$245, courier charges of \$78.78, registered mail charge of \$5.62 and photocopying charge of \$752.72. The disbursements allowed total \$1082.12.

[27] The proposed bill of costs is therefore taxed and allowed at **\$6752.12**. The appellant may wish, for enforcement purposes, to prepare and file a certificate of taxation of costs in Form 11d in this amount for issuance.

DATED at Regina, Saskatchewan, this 28th day of March, 2019.

  
\_\_\_\_\_  
REGISTRAR – COURT OF APPEAL