



CACV2921

Larry Ayers

APPELLANT
(PLAINTIFF)

- and -

Scott Summach, Timothy Tkachuk, Kenton Summach, Roger Magneson, Kelly Blanch, Bernie Sabiston, Ronald Miller, Clayton Barry, McDougall Gauley LLP, CPC Networks Corp. and Jack Adams

RESPONDENTS
(DEFENDANTS)

Larry Ayers the Appellant
Karen Prisciak, Q.C. for the Respondents Ronald Miller, Clayton Barry and McDougall Gauley LLP

**Taxation before Melanie A. Baldwin, Q.C.
Registrar, Court of Appeal for Saskatchewan
May 23, 2017**

Background

[1] On July 6, 2016 Mr. Ayers filed an application for an extension of time and for leave to appeal a decision of Mills J. dated June 13, 2016. On July 27, 2016, after hearing from Mr. Ayers and Mr. Adams, Justice Whitmore granted the extension and leave to appeal. On July 29, 2016 Mr. Ayers filed a Notice of Appeal.

[2] In the June 13, 2016 decision under appeal, Mills J. dismissed Mr. Ayers' application asking Mills J. to recuse himself as case management judge for a number of litigation files in the Court of Queen's Bench for Saskatchewan and ordered Mr. Ayers to pay costs to the Respondents represented by Ms. Prisciak in the amount of \$500.

[3] In his Notice of Appeal, Mr. Ayers indicates that he appeals the whole decision of Mills J. and asks the Court of Appeal for Saskatchewan to set aside the decision and to order the recusal of Mills J. The Notice of Appeal filed by Mr. Ayers does not list Ms. Prisciak's clients as respondents, although the draft Notice of Appeal which was before Justice Whitmore did list Ms. Prisciak's clients as respondents.

[4] On August 24, 2016 Ms. Prisciak contacted the registry office to indicate that, although her clients were not served with the Notice of Appeal, they intended to file a factum on the appeal. On August 26, 2016, I contacted Mr. Ayers by email indicating that Justice Whitmore's decision granting leave identified Ms. Prisciak's clients as respondents and that I had identified them as respondents on eCourt. Mr. Ayers took issue with this in emails and in a letter dated August 29, 2016.

[5] On September 21, 2016 Ms. Prisciak asked for a pre-hearing conference on the appeal. As contemplated by Rule 41 of *The Court of Appeal Rules*, I consulted with the Chief Justice and,

on September 27, 2017, advised the parties that "the most efficient way to deal with the appeal, including the role of Ms. Prisciak's clients in relation to it, appears to be to schedule the appeal for hearing as soon as possible so that the Court can hear from counsel and decide these matters." The appeal was scheduled for hearing on November 17, 2016.

[6] On November 2, 2016 Justice Mills wrote a Fiat recusing himself from acting any further as case management judge. On that same day Mr. Ayers abandoned his appeal of Justice Mills' decision not to recuse himself. This left only the issue of the \$500 costs award by Justice Mills in favour of Ms. Prisciak's clients. On November 7, 2016 on the direction of the Court, I wrote to Mr. Ayers and Ms. Prisciak to advise that "the only live issue that the panel is prepared to hear from counsel on is the \$500 cost award in the Court of Queen's Bench."

[7] The Court heard from Mr. Ayers and Ms. Prisciak on the remaining "live issue" on November 17, 2017. The Court dismissed Mr. Ayers' appeal of the \$500 cost award with costs of \$500 to Ms. Prisciak's clients. With respect to the matter of costs on the abandoned portion of the appeal, the Court indicated that this "will be governed by The Court of Appeal Rules. We decline to interfere with this process."

[8] A formal judgment was issued on January 13, 2017.

[9] Ms. Prisciak's clients took out an appointment for taxation returnable on May 23, 2017. The appointment and a proposed bill of costs were served on Mr. Ayers. The taxation hearing took place as scheduled with both Mr. Ayers and Ms. Prisciak appearing by telephone before me. This is my decision on the taxation hearing.

Proposed Bill of Costs

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

3	Fee to Respondent on receipt of Notice of Appeal	\$ 125
7	Preparation of Appeal Book (Supplemental)	\$ 500
8	Preparation of Factum	\$2000
9	All other preparation for hearing	\$ 750
10	Appearance to present argument on appeal before Court of Appeal	\$ 400
11	Preparing formal judgment or order	\$ 200
12	Correspondence	\$ 200
13	Preparation of Bill of Costs	\$ 150
14	Taxation of Bill of Costs	\$ 75

The fees claimed total \$4400. The proposed bill of costs also claims disbursements of \$35 composed of the \$20 fee for issuing the formal judgment and a \$15 fee for taxation.

Issue

[11] At issue on the taxation is whether Rule 45 of *The Court of Appeal Rules* applies to the situation before me and, if it does, what costs Ms. Prisciak's clients are entitled to as a result.

Arguments

[12] Ms. Prisciak argued that the Court expressly said at the hearing of the appeal that the matter of costs on the abandoned portion of the appeal would be governed by *The Court of Appeal Rules* and that Rule 45 would apply to the costs of her clients relating to the abandoned portion of the appeal. She relied upon the proposed bill of costs as filed, arguing as follows:

- column 2 was the appropriate column as the appeal involved non-monetary relief (Rule 54(1)(b) of *The Court of Appeal Rules*).
- as an officer of the Court, it was necessary for her to file the supplemental appeal book to ensure that the Court had complete information before it on the appeal.
- the respondent factum was appropriately filed on the basis that her clients had an interest in the appeal.
- her clients are entitled to their thrown away costs which include the fee item for preparation for the appeal hearing from the time she started to prepare until the abandonment and the fee item for appearance to present argument.
- all tariff items allowed should be allowed under column 2.

[13] Mr. Ayers filed written submissions which I have reviewed. In those submissions, he takes the position that, because Ms. Prisciak's clients were never made parties to the appeal, they are not entitled to the costs contemplated in Rule 45 of *The Court of Appeal Rules*.

[14] I asked Mr. Ayers to make oral submissions on the proposed bill of costs in the event that I disagree with him about the application of Rule 45. He argued that the appropriate column was column 1 not column 2 because the only amount at issue was the \$500 in costs. With respect to the fee items claimed in the proposed bill of costs, Mr. Ayers argued as follows:

- no tariff fee item should be allowed for the supplementary appeal book as the appeal book contained all documents relevant to the appeal.
- no tariff fee item should be allowed for the respondent factum as it addressed the recusal issue which was an issue that Ms. Prisciak's clients had no right to address as they were never made parties to the appeal.
- no tariff fee item should be allowed for preparation for hearing or for appearance to present argument as these are subsumed by the Court's fixed cost award made at the hearing.
- all other tariff fee items (preparing formal judgment, correspondence, preparation of bill of costs and taxation of bill of costs), if allowed, should be allowed under column 1 and not column 2.

Decision

[15] Rule 45 of *The Court of Appeal Rules* says:

45 A party intending to abandon an appeal, cross-appeal or application shall serve on all other parties a copy of the notice of abandonment and file the original with proof of service. The other parties shall be entitled to their taxable costs without order.

[16] Ms. Prisciak takes the position that her clients are "other parties" who are entitled to their taxable costs without further order. Mr. Ayers says that Ms. Prisciak's clients were never made parties to the appeal so they are not entitled to costs under Rule 45.

[17] It is true that the Court never expressly said that Ms. Prisciak's clients were parties to the appeal. The Court also did not expressly say that Ms. Prisciak's clients were not parties to the appeal. I conclude that they are parties who are entitled to claim costs under Rule 45 of *The Court of Appeal Rules*. I base this conclusion on the following factors:

- when Justice Whitmore granted an extension and leave to appeal, he did so on the basis of the materials that were filed by Mr. Ayers and on Mr. Ayers' oral submissions. With the exception of the draft order where Ms. Prisciak's clients are crossed out by hand in the style of cause, the materials filed by Mr. Ayers, notably including the application and the draft notice of appeal, all name Ms. Prisciak's clients as respondents.
- Justice Whitmore's decision granting an extension and leave to appeal lists Ms. Prisciak's clients as respondents.
- the Court treated Ms. Prisciak's clients as parties when it heard from Ms. Prisciak at the appeal hearing and awarded her clients costs of the hearing.
- while the Court was not willing to hear arguments relating to the abandoned portion of the appeal from Ms. Prisciak, I do not understand this to be as a result of the Court questioning Ms. Prisciak's clients' *status* to make those arguments. Rather, the Court was simply not interested in hearing arguments that did not relate to what it had previously identified as the one "live issue" remaining on the appeal.
- in its brief oral decision delivered at the appeal hearing (where only Mr. Ayers and Ms. Prisciak appeared), the Court expressly noted that costs relating to the abandoned portion of the appeal would be determined under *The Court of Appeal Rules* – in other words under Rule 45 of *The Court of Appeal Rules*. I do not believe that the Court would invoke Rule 45 as it did if it did not consider that Ms. Prisciak's clients were parties who are entitled to costs pursuant to Rule 45.

[18] I have concluded that Ms. Prisciak's clients are parties who are entitled to costs under Rule 45 of *The Court of Appeal Rules*. I must now proceed to tax those costs.

[19] As I indicated during the taxation hearing, my usual manner of determining the appropriate column under which tariff items should be assessed against an appellant has been to look at the relief claimed by the appellant in the notice of appeal. In this case, the notice of appeal asks the Court to set aside the order of Mills J. and to order the recusal of Mills J. The portion of the appeal relating to recusal is what was abandoned by Mr. Ayers. The relief claimed in connection with that portion of the appeal is non-monetary. As such, I conclude that the appropriate column of the tariff is column 2.

[20] As for the tariff fee items claimed in the proposed bill of costs, I have considered the arguments made by the parties and I conclude as follows:

- Item 2 – Ms. Prisciak’s clients are entitled to this full amount.
- Item 7 – Ms. Prisciak’s clients are entitled to a portion of this amount. Rule 23 of *The Court of Appeal Rules* says that an appeal book must contain the pleadings. While the appeal book filed by Mr. Ayers contains the application before Mills J., the affidavit evidence in support of that application, the decision of Mills J. and the notice of appeal, the supplemental appeal book contains pleadings which also appear to be relevant and necessary to the determination of the appeal. Having said this, in light of the fact that an appeal book was filed by Mr. Ayers, the full tariff amount is not warranted. I will allow Ms. Prisciak’s clients \$300 for this tariff item.
- Item 8 – Ms. Prisciak’s clients are entitled to this full amount. The factum was filed before Mr. Ayers abandoned the portion of the appeal relating to recusal.
- Item 9 – Ms. Prisciak’s clients are entitled to a portion of this amount. The parties were told on September 27, 2016 that the appeal would be heard on November 17, 2016. The abandonment was not filed until November 2, 2016 and it was not made clear to the parties what the appeal hearing would be limited to until November 7, 2016. I am satisfied that some preparation would have been done for the appeal hearing between September 27, 2016 and November 7, 2016. Any preparation done after that time would be subsumed by the fixed amount of costs ordered by the Court at the appeal hearing. I will allow Ms. Prisciak’s clients \$300 for this tariff item.
- Items 10 and 11 - Ms. Prisciak’s clients are not entitled to claim any amount for these tariff items. The Court advised the parties in advance that the only live issue that it was prepared to hear from the parties on was the the cost award in the Court of Queen’s Bench. The Court heard from the parties on this issue and then ordered a fixed amount of costs. That fixed amount must be taken to include both the appearance before the Court and the preparation of the formal judgment (no judgment or order is required for Rule 45 costs).
- Items 12, 13 and 14 – Ms. Prisciak’s clients are entitled to these full amounts.

[21] The costs are therefore taxed as follows:

3	Fee to Respondent on receipt of Notice of Appeal	\$ 125
7	Preparation of Appeal Book (Supplemental)	\$ 300
8	Preparation of Factum	\$2000
9	All other preparation for hearing	\$ 300
10	Appearance to present argument on appeal before Court of Appeal	\$ nil
11	Preparing formal judgment or order	\$ nil

12	Correspondence	\$ 200
13	Preparation of Bill of Costs	\$ 150
14	Taxation of Bill of Costs	\$ 75

The total fees claimed were \$4400. The total fees allowed are \$3150.

[22] As for disbursements, the amount claimed was \$35, which includes the court fees for issuing the formal judgment and the appointment for taxation. The \$20 disbursement relating to the issuance of the formal judgment is subsumed by the Court's fixed cost award made at the hearing of the appeal as a formal judgment is not required as a basis for Rule 45 costs. The amount claimed in the proposed bill of costs for the appointment for taxation is \$15. The actual court fee for issuing an appointment for taxation is \$20. This disbursement is properly claimed and is allowed.

[23] The final issue raised in relation to the proposed bill of costs is whether GST and PST are payable. Ms. Prisciak filed the necessary affidavit in support of the claim for GST and PST. While Mr. Ayers takes issue with the averments made in the affidavit, they have been made by an officer of the Court and I accept them as such. GST and PST are therefore properly claimed on the fees allowed.

[24] The proposed Bill of Costs is therefore taxed and allowed at **\$3485** (\$3150 in fees + \$157.50 GST + \$157.50 PST + \$20 in disbursements). Ms. Prisciak may prepare and file a Certificate of Taxation of Costs to this effect (in Form 11d) for issuance if necessary.

[25] While there is no appeal of this decision, there is potentially a review by a judge of the Court. Rule 54.1 of *The Court of Appeal Rules* says:

54.1 (1) A person with a pecuniary interest in the result of a taxation of costs who is dissatisfied with the taxation may apply to a judge for a review of the taxation of costs.

(2) An application pursuant to Subrule (1) must be made within 14 days after the date of the certificate as to taxation of costs.

(3) A review of the taxation of costs must be limited to items that have been objected to before the registrar and may include items with respect to which the registrar exercised discretion.

DATED at Regina, Saskatchewan, this 25th day of May, 2017


REGISTRAR – COURT OF APPEAL