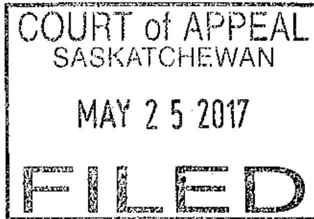

CACV3000

Colin Chatfield

PROSPECTIVE APPELLANT
(PLAINTIFF)

- and -

Bell Mobility Inc., Bell Aliant Regional Communications, Limited Partnership, MTS Inc., Rogers Communications Partnership, Saskatchewan Telecommunications, Saskatchewan Telecommunications Holding Corporation, TELE-MOBILE Company, TELUS Communications Inc., TELUS Corporation, TELUS Communications Company, Saskatchewan Telecommunications and Saskatchewan Telecommunications Holding Corporations

PROSPECTIVE RESPONDENTS
(DEFENDANTS)

E.F. Anthony Merchant, Q.C. for Colin Chatfield
Robert J.C. Deane for the Bell prospective respondents and for MTS Inc. (by telephone)
Jason Mohrbutter for the SaskTel prospective respondents
Philip J. Gallet for the TELUS prospective respondents
Keith D. Kilback for Rogers Communications Partnership

Taxation before Melanie A. Baldwin, Q.C.
Registrar, Court of Appeal for Saskatchewan
May 17, 2017

Background

[1] On November 21, 2016, Mr. Chatfield filed an application for leave to appeal a judgment of Elson J. dated November 4, 2016 (dismissing Mr. Chatfield's application to file a new reply in a certified class action). The application for leave to appeal was made returnable on Wednesday, January 11, 2017. At the same time as he filed the application for leave to appeal, Mr. Chatfield notified the Court and the prospective respondents that he was seeking to have the application for leave adjourned *sine die* to await further developments in the Court of Queen's Bench for Saskatchewan that could render the proposed appeal moot. Finally and also on November 21, 2016, Mr. Chatfield filed an application to adjourn the application for leave to appeal.

[2] By way of a letter dated November 23, 2016, the parties were advised by the Court's registry office that the application for leave to appeal was scheduled for hearing on January 11, 2017.

[3] On January 9, 2017, the parties were advised by the Court's registry office that Chief Justice Richards -- who had previously heard and reserved his decision on an earlier application for leave to appeal made by Bell Mobility in the same class action (CACV2459) -- had determined that the application for leave to appeal would not be heard in chambers on January 11, 2017 but that he would hear from counsel by teleconference on another date.

[4] The teleconference took place on January 19, 2017 and resulted in a decision dated February 2, 2017 (*Bell Mobility Inc. v. Chatfield*, 2017 SKCA 10).

[5] In his decision dated February 2, 2017, Chief Justice Richards:

- reviewed the history of the class action,
- dismissed Bell Mobility's application for leave to appeal in CACV2459 (without costs), and
- ordered Mr. Chatfield to serve and file a memorandum in connection with his application for leave to appeal and a notice of motion and appropriate supporting material in connection with his application for an adjournment on or before February 15, 2017.

Chief Justice Richards also directed that an early date be set for oral submissions, with counsel being prepared on that date to deal with both the application to adjourn and, if necessary, the application for leave to appeal.

[6] On February 12, 2017, Mr. Chatfield served and filed a Notice of Abandonment relating to both the application for leave to appeal and the adjournment application.

[7] By way of correspondence dated March 6, 2017, the prospective respondents sought leave from Chief Justice Richards to address the matter of thrown away costs. On March 7, 2017, Mr. Chatfield, through counsel, responded by saying that nothing had been done by any of the prospective respondents that would allow for the payment of costs and noting that lengthy submissions related to costs in class actions generally would be necessary, if the matter of costs was to be considered. I responded to counsel by email, suggesting that they consider the application, if any, of Rule 45 of *The Court of Appeal Rules* to the situation.

[8] The prospective respondents then served and filed notices of appointment for taxation together with proposed bills of costs. Counsel filed written submissions and subsequently appeared before me on May 17, 2017 to make oral submissions on the taxation of the proposed bills of costs. This fiat is my taxation decision.

Proposed Bill of Costs

[9] With the exception of Rogers Communications Partnership, the prospective respondents filed proposed bills of costs listing the following fees under column 2 of the Court of Appeal Tariff of Costs:

1	Motion for Leave to Appeal	$1500
12	Correspondence	$ 200
13	Preparation of Bill of Costs	$ 150
14	Taxation of Bill of Costs	$ 75 (per hour)

[10] Rogers Communications Partnership filed a proposed bill of costs listing the following fees under column 2 of the Court of Appeal Tariff of Costs:

1	Motion for Leave to Appeal	$1500
13	Preparation of Bill of Costs	$ 150
14	Taxation of Bill of Costs	$ 75 (per hour)

The fees claimed by Rogers Communications Partnership total $1725. The fees claimed by the other prospective respondents total $1925.

[11] The proposed bills of costs also claim the disbursements of taxation. I take that to mean, for each prospective respondent, the $20 court fee for issuing the notice of appointment for taxation.

Issue

[12] As I indicated to counsel at the outset of the taxation hearing, my role is to tax or assess costs. I do not have authority to award or order costs (except in connection with the taxation hearing itself). Keeping this in mind, the 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 the prospective respondents are entitled to as a result.

Arguments

[13] Prior to the taxation hearing, I asked counsel for brief written submissions on the application of Rule 45 of *The Court of Appeal Rules* and/or s. 40 of *The Class Actions Act* to the abandoned application for leave to appeal. I received written submissions from each of them. Those written submissions were supplemented by oral argument at the taxation hearing itself. At the taxation hearing, I also asked counsel to make oral submissions on the tariff items on the proposed bills of costs.

[14] The written and oral submissions can be summarized as follows:

The SaskTel prospective respondents:

- Rule 45 of *The Court of Appeal Rules* dictates that the prospective respondents shall have their taxable costs. The application for leave is a motion that falls within the definition of application found in *The Court of Appeal Rules* and is an application contemplated by Rule 45. Rule 45 does not give the registrar any discretion about whether or not to tax costs – the only discretion that the registrar has if Rule 45 applies relates to the amount allowed under the tariff. Costs never automatically follow in an application heard and determined by a judge – a judge always has overriding discretion relating to costs. In this way, a litigant who abandons an application is "worse off" as a result of Rule 45 than a litigant whose application is heard and dismissed without costs by a judge.

- SaskTel took steps in relation to the abandoned application for leave to appeal and the application for an adjournment that resulted in thrown away costs and SaskTel should be compensated for this under the tariff.

- Section 40 of *The Class Actions Act* does not circumvent the automatic effect of Rule 45 or the application of the tariff.

The Telus prospective respondents:

- *The Class Actions Act* has been amended and contemplates that costs may be ordered. Nothing in s. 40 of *The Class Actions Act* prohibits the registrar from following Rule 45 and assessing costs. An application for leave has to be an application contemplated by Rule 45.

- There is no basis for not awarding the prospective respondents costs based on the tariff.

- Telus did a significant amount of work on a brief of law on the assumption that the application for leave would be heard as scheduled on January 11, 2017.Telus does not claim any tariff amount relating to the application for an adjournment. The tariff amounts relating to the application for leave will not come close to covering the actual costs incurred.

Rogers Communications Partnership:

- Adopts and relies upon the written submissions made by the SaskTel prospective respondents.

- The abandoned application for leave is obviously an application contemplated by Rule 45 of *The Court of Appeal Rules*. The tariff of costs refers to a motion for leave to appeal and an application is defined in *The Court of Appeal Rules* as including a motion. In *Civil Appeals in Saskatchewan*, Justice Cameron notes that, under Rule 45, costs are recoverable without an order and the notice of abandonment suffices as a basis for those costs. For this reason, there is no decision to be made about whether an order on costs is appropriate – that decision has been made by Rule 45.

- Section 40 of *The Class Actions Act* does not bar costs. There is no authority that says that Rule 45 does not apply – *The Class Actions Act* does not say this, *The Court of Appeal Act, 2000* does not say this, *The Court of Appeal Rules* do not say this and case law does not say this.

- Rule 45 contemplates that an application will be abandoned before being heard and says that the other parties are entitled to taxable costs under these circumstances. For this reason, the prospective respondents are entitled to the full tariff item amounts, whether or not briefs were filed.

The Bell prospective respondents and MTS Inc.:

- Adopt the written submissions made by SaskTel and Telus and the oral submissions made by SaskTel, Telus and Rogers.

- Rule 45 of *The Court of Appeal Rules* does not contemplate an order for costs. All that is before the registrar is an assessment of costs flowing from the plain language of Rule 45. *The Class Actions Act* does not say otherwise.

- A brief for the Bell prospective respondents was substantially complete when the application for leave was abandoned.

Mr. Chatfield:

- An application for leave to appeal is not an application contemplated by Rule 45 of *The Court of Appeal Rules*. If Rule 45 was intended to apply to an application for leave to appeal, an application for leave to appeal would be specifically listed in Rule 45.

- Under the new s. 40 of *The Class Actions Act*, Saskatchewan is a "usually no-costs" or "costs sometimes" jurisdiction but not a "costs by default" or "costs as in an ordinary action" jurisdiction. Rule 45 only applies if costs are to be paid in the first place and, because of the new s. 40, this is not the case in an appeal relating to a class action. Under the old s. 40 of *The Class Actions Act*, there were no costs. There have been four decisions of the Court in class actions appeals since the new s. 40 of *The Class Actions Act* came into effect and costs were not ordered in any of them.

- It is incongruous that Mr. Chatfield is "worse off" vis a vis costs after abandoning an application for leave to appeal than Bell Mobility was after losing an application for leave to appeal relating to the same class action. Abandonment should be encouraged not discouraged. The registrar should follow the Chief Justice's lead – the Chief Justice heard and dismissed Bell Mobility's application for leave to appeal and did not order costs. This is a certified class action that was commenced before the changes to s. 40 of *The Class Actions Act*. The registrar should consider fairness when approaching what is at issue in this taxation.

- The tariff amounts are disproportionately high in relation to the real work done by the prospective respondents. In addition, the tariff item for an application for leave to appeal is all-inclusive – there is no ability to claim an item for correspondence, for example, in addition to the item for an application for leave to appeal. In relation to the adjournment application, that application was decided by the Chief Justice who did not order costs so no claim can be made for costs relating to that application.

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] Mr. Chatfield takes issue with whether an application for leave to appeal falls within the term "application" found in Rule 45. His position is that, if Rule 45 was intended to apply to an abandoned application for leave to appeal, the rule would specifically list an application for leave to appeal in addition to an application. The prospective respondents say that an application for leave to appeal is obviously both a motion (which is included in the definition of application in Rule 2) and an application contemplated by Rule 45.

[17] I agree with the prospective respondents on this issue. It defies reason and common sense that Rule 45 would apply to other applications but not to an application for leave to appeal which is one of the most complex and important applications, if not the most complex and important application, considered by judges of the Court. Because of the relative complexity and

importance of an application for leave to appeal, there will presumably tend to be more "thrown away" costs relating to an abandoned application for leave to appeal than to most, if not all, other abandoned applications. I conclude that an application for leave to appeal is an application within the meaning of Rule 45 of *The Court of Appeal Rules*.

[18] Mr. Chatfield served a Notice of Abandonment in connection with his application for leave to appeal. Thus, by automatic application of Rule 45, the prospective respondents (the other parties) are entitled to their taxable costs without order. The words and intent of Rule 45 are clear. Having said this, even a perfectly clear rule of court cannot supersede a specific statutory provision which is in conflict with it.

[19] It may be that the old s. 40 of *The Class Actions Act* was in conflict with Rule 45 but that issue is not before me on this taxation. What is before me is the new s. 40 of *The Class Actions Act* and I find that it does not conflict with or contradict Rule 45. I therefore conclude that I need not, indeed I likely may not, consider s. 40 of *The Class Actions Act* on this taxation. Rather, I need to follow the Court's uncontradicted direction to me in Rule 45 of *The Court of Appeal Rules* and proceed to tax the prospective respondents' thrown away costs.

[20] Counsel appear to agree that I have some discretion when it comes to the tariff item fee amounts claimed in the proposed bills of costs. Counsel for the prospective respondents argue that I should exercise that discretion to grant the full amounts claimed in the proposed bills of costs.

[21] Mr. Chatfield, through Mr. Merchant, argues that I have the discretion to assess nothing under some or all of the fee items on the basis that, in the circumstances before me (including the fact that this a certified class action and the fact that Chief Justice Richards did not award costs on the Bell Mobility application for leave) it would be unfair for me to assess anything. In the alternative, Mr. Chatfield argues that I have the discretion to prorate some or all of the fee items on the basis that the amounts set out in the tariff and claimed by the prospective respondents are based on completed steps not the partial steps actually taken by the prospective respondents.

[22] I do not believe that my discretion goes as far as Mr. Chatfield urges in his first argument. That type of discretion is exercised by the Court or a judge when deciding whether to award or order costs. Once costs are awarded or ordered or, as in this case, an entitlement to costs arises by application of the rules of court, it is my view that my discretion is limited to determining which tariff items are appropriately claimed, either in full or in part.

[23] Under Rule 54(1)(b) of *The Court of Appeal Rules*, column 2 of the tariff applies to the taxation of costs where non-monetary relief is involved. The prospective respondents have all submitted proposed bills of costs based on column 2. There was no objection to this from Mr. Chatfield. I will therefore tax the costs based on column 2 of the tariff.

[24] As for the specific tariff fee items claimed in the proposed bills of costs and discussed at the taxation hearing, I have considered the arguments made by the parties and I conclude as follows:

- Item 1 – The prospective respondents are each entitled to a portion of this amount. There will undoubtedly be situations where the full tariff amount is warranted, such as when the application for leave is abandoned on the eve of its hearing after briefs have been filed and hearing preparation is close to complete but, in my opinion, the situation before me falls short of this. Having said this, I have no doubt that research was being

done, briefs were being drafted and hearing preparation was underway for each of the prospective respondents. I will allow each of the prospective respondents $1000 for this tariff item.

- Item 4 – The SaskTel prospective respondents are entitled to a portion of this amount. They filed a brief in response to the application for an adjournment filed by Mr. Chatfield. Contrary to the position taken by Mr. Chatfield at the taxation hearing, it is clear from the decision of Chief Justice Richards that the adjournment application was not finally determined by him (with no order for costs). Rather, that application was to be set down for hearing before Chief Justice Richards on "an early date" at which time counsel were to be prepared to deal with both applications, if necessary. As such, the SaskTel prospective respondents are entitled to some thrown away costs associated with this simple application. I will allow the SaskTel prospective respondents $200 for this tariff item.

- Item 12 – The prospective respondents who claimed this tariff item are each entitled to the full tariff item amount. I do not agree with Mr. Chatfield that the application for leave to appeal tariff item already includes an amount for correspondence (although I agree that it does include preparation for hearing of the application and chambers appearance(s) on the application). Past Rule 45 taxation practice in the Court has allowed claims for this tariff item in addition to the appropriate application or motion tariff item. While this appeal file was short lived, there was correspondence exchanged and filed by counsel.

- Item 13 – The prospective respondents are each entitled to the full tariff item amount.

- Item 14 – The prospective respondents are each entitled to the full tariff item amount. The taxation hearing took approximately one hour.

[25] The costs of the SaskTel prospective respondents are therefore taxed as follows:

1	Motion for Leave to Appeal (including brief and argument)	$1000
4	Simple Motion (adjournment application)	$ 200
12	Correspondence	$ 200
13	Preparation of Bill of Costs	$ 150
14	Taxation of Bill of Costs	$ 75

The total fees allowed are $1625. For disbursements, the $20 court fee for issuing an appointment for taxation is properly claimed for a grand total of $1645.

[26] The costs of the Telus prospective respondents, the Bell prospective respondents and MTS Inc. are taxed as follows:

1	Motion for Leave to Appeal (including brief and argument)	$1000

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

The total fees allowed are $1425. For disbursements, the $20 court fee for issuing an appointment for taxation is properly claimed for a grand total of $1445.

[27] The costs of Rogers Communications Partnership are taxed as follows:

1	Motion for Leave to Appeal (including brief and argument)	$1000
13	Preparation of Bill of Costs	$ 150
14	Taxation of Bill of Costs	$ 75

The total fees allowed are $1225. For disbursements, the $20 court fee for issuing an appointment for taxation is properly claimed for a grand total of $1245.

[28] The prospective respondents may prepare and file Certificates of Taxation of Costs in these amounts (in Form 11d) for issuance if necessary.

[29] I decline to award any costs for the taxation hearing itself.

[30] 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