CACV3268

Veolia Water Technologies, Inc. successor by merger to HPD, LLC

APPELLANT

- and -

K+S Potash Canada General Partnership

RESPONDENT

Terry Zakreski, QC for the Appellant
Janelle Souter for the Respondent

Taxation before Melanie Baldwin, QC
Registrar, Court of Appeal for Saskatchewan
June 18, 2020

Background

[1] The appellant appealed an order from the Court of Queen's Bench dismissing its application for an injunction aimed at preventing the respondent from drawing on certain letters of credit. The notice of appeal was filed on July 4, 2018. After the notice of appeal was filed, the appellant sought an interlocutory injunction pending the Court's determination of the appeal. On August 7, 2018 Justice Ottenbreit granted this relief ordering that "costs of this application shall be reserved to the panel hearing the appeal."

[2] The appeal was heard by the Court on November 23, 2018 and the Court released its decision on March 19, 2019, dismissing the appeal "with costs to [the respondent]." The appellant sought leave to appeal to the Supreme Court of Canada and applied in chambers for another temporary injunction pending the decision of that court. On April 18, 2019 Justice Ottenbreit granted a temporary injunction and ordered that "each party shall bear its own costs" of the application. The respondent sought to have this decision of Justice Ottenbreit vacated by the Court pursuant to s. 20(3) of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1 and s. 65.1(3) of the *Supreme Court Act*, RSC 1985, c S-26. On July 31, 2019, the Court concluded that neither of these provisions was applicable and dismissed the respondent's application, adding that "Veolia is entitled to costs."

[3] Both parties took out appointments for taxation returnable before me on June 18, 2020. The appointments for taxation were served and filed together with draft bills of costs and affidavits of disbursements. The taxation hearing took place on June 18, 2020 with counsel for the appellant and counsel for the respondent both appearing by telephone. This fiat is my decision on the taxation.

Proposed Bill of Costs - Respondent

[4] The proposed bill of costs filed by the respondent lists the following fees under column 4 of the Court of Appeal Tariff of Costs (the "Tariff"):

3	Fee to respondent on receipt of Notice of Appeal	$ 200
5(a)	Complex Motion – opposed – interim injunction (August 2018)	$ 2500
5(a)	Complex Motion – opposed – application to vacate order (May 2019)	($2500)
8	Preparation of Factum	$ 5000
9	All Other Preparation for Hearing	$ 1250
10	Appearing to Present Argument on Appeal before Court of Appeal	$ 600
	Second Counsel	$ 300
11	Preparing Formal Judgment or Order	$ 400
12	Correspondence	$ 400
13	Preparation of Bill of Costs	$ 250

The fees claimed total $8400. The respondent also claims disbursements totaling $1021.85 (photocopying, court fee and travel expenses). The disbursements claimed are supported by an affidavit of disbursements and the court fee disbursement is supported by the court file. The respondent also claims GST on fees of $420 and PST on fees and disbursements of $513.

Proposed Bill of Costs - Appellant

[5] The proposed bill of costs filed by the appellant lists the following fees under column 4 of the Tariff:

5(a)	Complex Motions – opposed	$ 2500
8	Preparation of Factum	$ 5000
9	All Other Preparation for Hearing	$ 1250
10	Appearing to Present Argument on Appeal before Court of Appeal	$ 600
11	Preparing Formal Judgment or Order	$ 400
12	Correspondence	$ 400
13	Preparation of Bill of Costs	$ 250

The fees claimed total $10,400. The appellant also claims disbursements totaling $1826.89 (online research and travel expenses). The disbursements claimed are supported by an affidavit of disbursements. The appellant also claims GST on fees and disbursements of $611.35 and PST on fees of $624.

[6] At the taxation hearing, both parties added a claim for $125 under fee item 14 of the Tariff. The respondent also sought costs of the taxation.

Issues

[7] Prior to and during the taxation hearing, the following issues were identified:

Is the appellant entitled to claim fee items 9 through 12?

Is the respondent entitled to claim fee item 5(a) for its application for an interlocutory injunction decided in August of 2018?

Is either party entitled to a disbursement for travel costs?

Is the appellant entitled to a disbursement for online research costs?

Should costs be awarded for the taxation?

[8] In the course of my review of the court file subsequent to the taxation hearing, I identified the following issue:

Is the appellant entitled to disbursements for court fees?

Arguments

Is the appellant entitled to claim fee items 9 through 12?

[9] The appellant characterizes the proceeding for which it was awarded costs as more akin to an appeal than to an application and it claims fee items 9 through 12 on this basis. The appellant buttresses this argument by referring to the Court's decision of July 31, 2019 including the Court's description of the proceeding as "effectively ask[ing] the Court to entertain an appeal from the decision of the Chambers judge." The appellant also notes the Court's characterization of the proceeding as not involving a decision "incidental to a pending appeal in this Court" but rather involving a decision "in relation to an appeal that had already been decided and in respect of which this Court was functus."

[10] The appellant relies on the facts that counsel were gowned for the proceeding, the hearing was lengthy and the parties filed comprehensive written submissions as support for a characterization of the proceeding as an attempted appeal of Justice Ottenbreit's decision of April 18, 2019 rather than as an application.

[11] Even if the proceeding is characterized as an application and fee items 9 and 10 are disallowed, the appellant persists in its claim for fee items 11 and 12.

[12] The respondent notes that, while it was the overall "winner" of the litigation between the parties, the appellant's proposed bill of costs relating to the proceeding for which it was granted costs would result in the appellant receiving more costs than the respondent. The respondent

argues that whether a proceeding is characterized as an appeal or an application does not depend upon what is argued, whether it is argued before a panel or a single judge or such factors as whether counsel were gowned or the hearing was lengthy. The respondent takes the position that it filed and pursued its application to vacate Justice Ottenbreit's order following Rule 48 of *The Court of Appeal Rules* and pursuant to s. 20(3) of *The Court of Appeal Act, 2000* and s. 65.1(3) of the *Supreme Court Act*, all of which contemplate an application (and not an appeal) and that the proceeding did not result in a new court file being created and did not require an appeal book.

[13] In support of its arguments, the respondent cites the decision in *Melnick v Tapp*, CACV3262 (unreported) as authority for the proposition that "motion items are intended to be all inclusive . . . to include all of the steps taken to make or respond to an application, including preparing for chambers or court." The respondent says that this case authority disposes of the appellant's claim for fee items 8, 9 and 10. As for fee item 12, the respondent argues that a claim for correspondence should only be available when the costs being taxed relate to an appeal and not an application.

[14] The respondent takes the position that the only fee item amount that the appellant can appropriately claim for the proceeding for which the appellant was awarded costs is fee item 5(a).

Is the respondent entitled to claim fee item 5(a) for its application for an interlocutory injunction decided in August of 2018?

[15] As noted above, on August 8, 2018 Justice Ottenbreit granted an interlocutory injunction to the appellant pending the Court's determination of the appeal. His order included an indication that "costs of this application shall be reserved to the panel hearing the appeal." The panel hearing the appeal awarded costs to the respondent without specifically mentioning the costs of the application. It is not clear from the endorsement whether the costs of the application were addressed before the panel hearing the appeal.

[16] The respondent argues that it is entitled to claim costs for the application on the basis that it was the successful party on the appeal, noting that the relief sought and granted on an interlocutory basis on the application was the same relief that the appellant unsuccessfully sought from the Court on the appeal proper. The respondent takes the position that costs for the application should follow the cause. Counsel for the appellant leaves the determination of the issue to my discretion, simply noting that Justice Ottenbreit left the issue of costs to the panel hearing the appeal and that the panel hearing the appeal apparently did not deal with the issue.

Is either party entitled to a disbursement for travel costs?

[17] Both parties claim disbursements for counsel's travel costs. Both parties also acknowledge taxation case law such as *Kirk v Kirk Estate*, CACV3022 (unreported) which establishes a historical and ongoing general practice of denying compensation for disbursements for travel by counsel.

[18] The respondent argues that the appellant chose to bring this action in Regina when another significant action between the parties was already ongoing in Saskatoon. As a result of this choice, the appeal hearing was held in Regina. It was reasonable for the respondent to continue to use its Saskatoon counsel for the appeal and it was reasonable for Saskatoon counsel to travel to Regina for the appeal hearing and to stay overnight given the time of year and the

potential vagaries of winter travel. The respondent took the position that, in this limited situation, the existing practice should be modified to allow its claim for a disbursement for travel.

[19] As for the appellant's travel disbursement claim, the respondent argues that, after choosing Regina for the action and therefore for the appeal, the appellant chose to change to out of province counsel thereby creating the situation itself where counsel had to travel to Regina. The respondent therefore takes the position that the appellant's travel disbursement claim should be denied.

[20] The appellant takes the position that both claims should be treated the same – either both parties should be allowed to claim a travel disbursement or both claims should be denied. The appellant points out the valid reasons why the action was commenced in Regina including the facts that the local agent for its counsel was in Regina when the action was commenced and that Regina is closer to the potash mine at the heart of the dispute.

Is the appellant entitled to a disbursement for online research costs?

[21] Counsel for the appellant notes taxation case law such as *Cameron v Saskatchewan Institute of Agrologists*, CACV3151 (unreported). In light of this case law, the appellant does not strenuously pursue this claim.

Should costs be awarded for the taxation?

[22] The respondent asks for the costs of the taxation noting that, while costs are not generally awarded for taxation hearings, the appellant's unique position on the characterization of the application to vacate made the hearing necessary. The appellant objects to this argument, taking the position that the respondent decided to try to appeal a decision of a judge of the Court to the Court and that this decision led to the cost award in favour of the appellant which made the hearing necessary.

Analysis

Is the appellant entitled to claim fee items 9 through 12?

[23] Appellant counsel ably advances an argument that the proceeding for which the appellant received a costs award should be treated as an appeal rather than as an application for the purposes of taxation. Certain factors, such as the length of the hearing (a review of the endorsements reveals that the hearing was longer than the hearing of the appeal proper) and the relief sought seem to militate in favour of treating the proceeding as something "more" or "different" from the complex opposed application mentioned in fee item 5(a) of the Tariff. In order to resolve this issue, it is necessary to return to basic principles.

[24] The Court is a statutory court. It obtains its powers from *The Court of Appeal Act, 2000*. Pursuant to s. 7 of the *Act*, an appeal lies to the court from two kinds of decisions:

- a decision of the Court of Queen's Bench or a judge of that court; and
- a decision of any other court or tribunal where a right of appeal to the court is conferred by an enactment.

The decision made by Justice Ottenbreit, sitting in chambers, does not fall under either of these categories.

[25] For the purposes of taxation, there are two types of proceedings in the Court – an appeal and an application. As counsel for the respondent noted during the taxation hearing, there is no hybrid contemplated in the Tariff. If the matter decided by the Court on July 31, 2019 was not an appeal within the meaning of the *Act*, it must therefore have been an application. It was a complex, lengthy and unusual application which the Court determined was not well founded but it was an application nonetheless.

[26] As the proceeding was an application, the appellant is entitled to claim fee item 5(a) but is not entitled to claim fee items 8, 9 and 10. This is clear from the *Melnick* decision cited above and the decision in *Borowski v Ukrainetz*, CACV2690 (unreported) The principle from *Melnick* – that the motion items in the Tariff are intended to include all of the steps taken to make or respond to an application, including preparing for a hearing in chambers or court – has been described in *Borowski* as also subsuming the making of oral submissions in chambers. I will tax off the amounts claimed under fee items 8 through 10.

[27] Fee items 11 and 12 have been treated differently in taxation case law than fee items 8 through 10. The formal order described in fee item 11 can only result from an application, not from an appeal. It is therefore my opinion that this fee item amount can be properly claimed where the successful party to an application takes out a formal order. As for item 12, it is routinely allowed on taxations of the costs of applications although case law so far does not permit a successful party to both an appeal and an application to claim this fee item more than once in one taxation hearing. I will allow the appellant's claims under fee items 11 and 12.

Is the respondent entitled to claim fee item 5(a) for its application for an interlocutory injunction decided in August of 2018?

[28] In his decision of August 8, 2018, Justice Ottenbreit ordered that "costs of this application shall be reserved to the panel hearing the appeal." It does not appear that the issue of these specific costs was argued in front of the panel hearing the appeal and their decision does not specifically address these costs. The *Kirk* taxation decision cited above dealt, in part, with a similar fact pattern. The portion of the decision in *Kirk* that relates to this issue follows:

> [28] The Chambers judge indicated that costs of this application would be reserved to the panel hearing the appeal. The panel hearing the appeal made no specific order as to costs for this application. The appellants maintain that this means that, as the successful parties on the appeal, they are entitled to costs for this application. The respondents maintain that this means that the appellants are not entitled to costs for this application.
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> [29] I believe that a distinction must be made between an order for costs in the cause and an order that costs be left to the panel hearing the appeal and I have made this distinction in previous taxation decisions.
>
> [30] Where costs of an application are in the cause, the successful party on the appeal is entitled to costs for the application, regardless of whether the panel of the Court that hears the appeal specifically orders this. In my December 5, 2014 taxation decision in *Fehr v Turta*, CACV2578 (unreported), I made the following point about costs in the cause:
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> > Justice Whitmore ordered that costs of the application to lift the stay should be "in the cause." According to Mark Orkin, *The Law of Costs*, loose-leaf (Rel 48, November 2014) 2d ed, vol 1 (Toronto: Canada Law Book, 2014) at paragraph 105, "costs in the cause" is "a convenient

> manner of referring to the costs of proceedings before the successful party has been ascertained."

In *Fehr v Turta*, I went on to allow the successful party on the appeal to claim costs for the application for which the costs in the cause order was made.

[31] The order made by the Chambers judge in this case was not for costs in the cause. Rather, he reserved the matter of costs to the panel hearing the appeal. The panel hearing the appeal specifically ordered costs for the appeal proper and for the appellants' applications to quash the cross-appeal. No specific order for costs was made in relation to the application to perfect. In my February 25, 2013 taxation decision in *Hogan v. Hogan*, CACV2251 (unreported), I dealt with a similar situation as follows:

> Ms. Hogan also claims tariff fee items for complex opposed applications (Item 5(a)) for the application to lift the stay and for the application to strike or quash the appeal. As noted above, Gerwing J.A. specifically referred the matter of the costs of the application to lift the stay to the panel of the Court which heard the application to strike or quash the appeal. The matter of the costs of the application to lift the stay was apparently not addressed by either party before the Court. The Court specifically awarded costs for 1 motion only.
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> I can only conclude that either the panel was alive to the matter of costs for the application to lift the stay and determined that it was not appropriate to award costs for that application in addition to costs for the application to strike or quash the appeal or that the panel was not alive to the matter of costs for the application to lift the stay because it was not raised. In either event, it is not appropriate for me to assess costs for the application to lift the stay.

[32] I therefore conclude that the appellants are not entitled to costs for the application to perfect.

[29] I cannot accede to the respondent's argument that the costs order made by Justice Ottenbreit should be treated essentially as a "costs in the cause" order. As in *Hogan*, I can only conclude that either the panel of the Court hearing the appeal was alive to the matter of the costs of the application decided by Justice Ottenbreit in August of 2018 and determined not to award costs for it in addition to the costs of the appeal or that the panel was not alive to the matter of costs of the application because it was not raised by counsel. I will tax off the amount claimed by the respondent for item 5(a) of the Tariff.

Is either party entitled to a disbursement for travel costs?

[30] I summarized taxation practice relating to disbursements for travel costs in Saskatchewan as follows in the *Kirk* decision:

> [41] . . . The historical practice in Saskatchewan is to treat counsel's travel expenses as part of the general cost of overhead and therefore as covered by the applicable tariff fee items. In *Delta-T Canada Corp v. Ellisdon Design Build Inc.*, 2013 SKQB 281, Laing J. said the following about counsel's travel disbursement at paragraph 12:

> Travel costs are disbursements, and counsel's disbursements for travel in attending court proceedings are not taxable.

[42] In my June 30, 2015 taxation decision in *Borowski v Ukrainetz*, CACV2690 (unreported), I made the following statement:

> As for disbursements, respondent counsel claims travel costs of $168.30 for his travel to and from the chambers hearing for the application for leave to appeal. I am not inclined to allow this. Travel expenses have not traditionally been permitted as disbursements at least by registrars in this Court.

[43] After the taxation hearing, I consulted with the Local Registrars of the Court of Queen's Bench in Regina and Saskatoon and confirmed that they continue to follow the historical practice described above. I am not persuaded that I should abandon the historical approach in this case.

[31] The respondent asks me to consider the reasons for and rationale behind its counsel's travel from Saskatoon to attend the appeal hearing in Regina with a view to carving out an exemption from or making an expansion to the historical approach. The appellant counters by providing its own reasons and rationale. With respect, I do not think that the issue of whether travel by counsel is reasonable or not answers the inquiry – in my estimation, it would be a rare situation where counsel incurred travel expenses that were not reasonable in the circumstances of the particular appeal. The issue is the proper delineation between fees (overhead) and disbursements, not whether the cost was reasonably incurred.

[32] I am not inclined to deviate from the historical approach to treat counsel's travel expenses as part of the general cost of overhead and therefore as covered by the applicable fee items in the Tariff. I will tax off the travel disbursements claimed by both parties.

Is the appellant entitled to a disbursement for online research costs?

[33] Taxation case law on this topic is summarized in the *Cameron* decision cited above. That case law establishes that online legal research charges are addressed by the fee items in the Tariff and are not properly categorized as disbursements. The appellant does not strenuously pursue this claim. This disbursement will be taxed off the appellant's proposed bill of costs.

Should costs be awarded for the taxation?

[34] The parties are aware that costs are not generally awarded for taxation hearings. This is largely due to the fact that taxation hearings tend to either be essentially uncontested, in which case no significant preparation is required and hearings are extremely short or, when they are contested, taxations tend to result in mixed success. On the basis of the foregoing analysis, I find that the latter situation exists here. Given the mixed success of the parties, they should each bear their own costs for the taxation hearing.

[35] At the outset of the taxation hearing, each party advanced a claim under fee item 14 of the Tariff. In light of their mixed success on the taxation and the fact that these two claims would cancel each other out, I decline to allow them.

Is the appellant entitled to disbursements for court fees?

[36] This issue arose subsequent to the taxation hearing when I was reviewing the court file. It seems uncontroversial so I will deal with it despite the fact that the parties were not able to make submissions on it. The court file reveals two court fees paid by the appellant - $20 for taking out the formal order in connection with the application for which it was granted costs and $20 for taking out the appointment for taxation. I will allow the appellant to recoup these disbursements and will tax them on to the appellant's proposed bill of costs.

Decision

[37] The fees items to which the respondent is entitled are taxed and allowed as follows:

3	Fee to respondent on receipt of Notice of Appeal	$ 200
8	Preparation of Factum	$ 5000
9	All Other Preparation for Hearing	$ 1250
10	Appearing to Present Argument on Appeal before Court of Appeal	$ 600
	Second Counsel	$ 300
11	Preparing Formal Judgment or Order	$ 400
12	Correspondence	$ 400
13	Preparation of Bill of Costs	$ 250

The total fees allowed for the respondent are $8400.

[38] In addition, the respondent is entitled to disbursements amounting to $170 (photocopying and court fee for taking out the appointment for taxation).

[39] GST on fees of $8400 amounts to $420. PST on fees of $8400 amounts to $504.

[40] The respondent's costs are therefore taxed and allowed at **$9494** (fees of $8400 plus disbursements of $170 plus GST of $420 plus PST of $504).

[41] The fee items to which the appellant is entitled are taxed and allowed as follows:

5(a)	Complex Motions – opposed	$ 2500
11	Preparing Formal Judgment or Order	$ 400
12	Correspondence	$ 400
13	Preparation of Bill of Costs	$ 250

The total fees allowed for the appellant are $3550.

[42] The appellant is also entitled to $40 for court fees for issuing the formal order and for taking out the appointment for taxation.

[43] GST on fees of $3550 amounts to $177.50. PST on fees of $3550 amounts to $213.

[44] The appellant's costs are therefore taxed and allowed at **$3980.50** (fees of $3550 plus disbursements of $40, plus GST of $177.50 plus PST of $213).

[45] Setting off the amounts allowed results in a net amount of **$5513.50** payable by the appellant to the respondent. The respondent 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 19th day of June, 2020.

REGISTRAR – COURT OF APPEAL