
Lorne Hoedel

Appellant
(Plaintiff)

and

*WestJet Airline Ltd., WestJet Encore, Air Canada,
Air Canada Express, Air Canada Vacation, Air
Canada Rouge, and Air Canada Group*

Respondents
(Defendants)

Before: Amy Groothuis, Registrar (on February 7, 2024)

Fiat

I. Introduction

[1] On December 13, 2023, the Court of Appeal dismissed the appellant’s appeal: *Hoedel v WestJet Airlines Ltd.*, 2023 SKCA 135. In so doing, the Court ordered that WestJet Airline Ltd., WestJet Encore, Air Canada, Air Canada Express, Air Canada Vacation, Air Canada Rouge and Air Canada Group [the respondents] were to “have one set of costs, calculated in the usual way”.

[2] A formal judgement reflecting the appeal’s disposition has been issued. On behalf of all respondents, counsel for WestJet Airline Ltd. took out a notice of appointment for taxation of costs returnable on February 7, 2024, supported by a proposed bill of costs.

II. Proposed Bill of Costs

[3] The respondents filed a proposed bill of costs that relies on Column 4 of the Court of Appeal Tariff of Costs [Tariff], as follows:

1.	Motion for Leave to Appeal	\$2,500.00
3.	Fee to Respondent on receipt of Notice of Appeal	\$ 200.00
5.	Complex Motion (opposed)	\$2,500.00
7.	Preparation of Appeal Book	\$1,250.00

8.	Preparation of Factum	\$5,000.00
9.	All Other Preparation of Hearing	\$1,250.00
10.	Two ½ day Appearance to present argument on appeal	\$1,200.00
11.	Preparing formal order or judgment	\$ 400.00
12.	Correspondence	\$ 400.00
13.	Preparation of Bill of Costs	\$ 250.00

[4] The respondents claim a total of \$14,950.00 in fees; they did not claim any disbursements, filing fees or taxes.

III. Issues

[5] The Registrar's authority to tax costs is found at Rule 54 of *The Court of Appeal Rules* [Rules]. This Rule confirms that unless otherwise ordered, the costs of an appeal shall be taxed as between party and party in accordance with the fees set out in the appropriate column of the Tariff, and that where non-monetary relief is involved, Column 2 of the Tariff applies.

[6] One preliminary issue arose with respect to an affidavit submitted for filing by the respondents. The affidavit was provided to the Registry after 4:00 pm on February 6, 2024, and whether the affidavit is properly filed was addressed at the commencement of the taxation hearing.

[7] With respect to the proposed bill of costs, three primary issues arose:

- (a) Which Column of the Tariff applies to the within taxation?
- (b) Whether the amounts claimed both for Tariff item 1 (leave to appeal) and Tariff item 5 (complex application) may be claimed?
- (c) Whether the respondents are entitled to claim for Tariff item 7, which is the preparation of the appeal book?

IV. Analysis

A. Preliminary Issue – Affidavit sworn February 6, 2024

[8] Rule 54(7)(a) permits the registrar to take evidence by affidavit, as the registrar considers appropriate, when assessing costs. In the usual course, affidavit evidence of this sort relates to disbursements incurred during an appeal and it is served along with the proposed bill of costs, with those two documents then filed together. In the within matter, the affidavit was sworn by a legal assistant and the contents related to two Tariff items. First, the affiant averred that counsel for

WestJet sent an email to counsel for Mr. Hoedel, “attaching a letter and a draft Appeal Record prepared by Blakes [law firm]”. This information relates to the dispute over the inclusion of Tariff item 7 on the proposed bill of costs. Second, in response to a letter from the appellant’s legal counsel, the affiant avers that in response to “the letter requesting an adjournment, WestJet prepared a Brief of Argument”. This information relates to the amount claimed for Tariff item 5 (complex motion – opposed).

[9] Although he only received and reviewed the affidavit the morning of the taxation hearing, counsel for the appellant did not strenuously object to it being filed, as it organizes the material already on the court file. However, he took the position that it should not be relied upon to conclude that WestJet had prepared the appeal book, and he otherwise disputed that the respondents were entitled to claim for the two applications included on the proposed bill of costs.

[10] Notwithstanding its late service and filing, I am prepared to accept the affidavit sworn on February 6, 2024 for filing, though as further described below I place little weight on its contents, especially in light of concessions made by counsel during oral argument. These are set out below.

B. Appropriate Column

[11] Where an appeal involves non-monetary relief, Column 2 of the Tariff applies: Rule 54(1)(b). The general approach in determining the appropriate column has been to examine the relief sought in the notice of appeal and the appellant’s factum: see, for example, *Lloyd Hanna v Nancy Beckman*, CACV3053, April 8, 2019 (Baldwin) and *Janet Milburn v Jason Sansom*, CACV4025, May 12, 2023 (Groothuis).

[12] The within appeal was taken from a “sequencing” decision made by a judge of the Court of Queen’s Bench, as it then was, in the face of competing applications filed by the parties. Briefly, Mr. Hoedel had applied to amend his statement of claim, and the respondents had applied for summary judgment. The Chambers judge ordered that the summary judgment application proceed to a hearing first, and Mr. Hoedel sought and received leave to appeal that order. As such, the notice of appeal identifies the appellant as requesting that the order of the Chambers judge be set aside, and that the statement of claim be amended.

[13] Counsel for the respondents took the position that the underlying dispute between the parties had the potential to be worth more than \$300,000, which is the threshold at which Column 4 applies, given the scope of the proposed class action. In response, counsel for the appellant made two arguments. First, he submitted that the appeal sought non-monetary relief given that it arose out of the sequencing decision. However, in addition or in the alternative he argued that the proposed class had not yet been certified and no amount of damages are identified in the statement of claim; on this basis, given that Mr. Hoedel’s personal claim only relates to his out-of-pocket costs for his travel, on a strictly financial consideration, Column 1 would apply.

[14] Having reviewed the notice of appeal and the appellant’s factum, I am satisfied that the appeal only engaged questions of non-monetary relief. As such, Column 2 of the Tariff applies. This necessarily impacts all taxed items on the bill of costs.

C. Application for Leave to Appeal and Complex Application

[15] The only formal application considered on this appeal was the application for leave to appeal, filed by Mr. Hoedel and granted by Barrington-Foote J.A. The proposed bill of costs includes a Tariff item both for the application for leave to appeal as well as for a complex application (opposed).

[16] During the taxation hearing, it became clear that the complex application related to the adjournment request, which was made by the appellant. A review of the court file confirms that Mr. Hoedel's application for leave to appeal was scheduled to be heard on November 24, 2021. On November 3, 2021, counsel for Mr. Hoedel filed a letter requesting that the November 24 hearing date be adjourned *sine die*, returnable on 30 days notice to either party. The respondent parties filed a brief of law opposing the adjournment, which was heard by Barrington-Foote J.A. on November 16, 2021. The endorsement from that date reflects that the Chambers judge refused to adjourn the November 24 hearing date, and it is silent with respect to costs.

[17] The application for leave to appeal proceeded on November 24, 2021 and leave to appeal was granted by way of a fiat dated February 28, 2022. On the question of costs, the fiat issued by Barrington-Foote J.A. ordered at paragraph 41 that both parties bear their own costs of the application. This is determinative, and I conclude that the respondents are not entitled to claim Tariff item 1 for the leave application. I tax off that amount. Furthermore, on the basis that (a) no costs were awarded during the hearing of the adjournment request and (b) the fiat granting leave to appeal explicitly ordered that the parties bear their own costs, the amount claimed for Tariff item 5 is likewise taxed off the bill of costs.

D. Preparation of Appeal Book

[18] The Rules require that an appellant prepare, serve and file an appeal book at the same time as the appellant's factum is filed. For the within appeal, five volumes of appeal book were filed. All volumes were uploaded by the appellant's legal counsel, and each volume includes on its front cover the name and contact information of the appellant's legal counsel. Aside from the affidavit sworn on February 6, 2024, there is no indication on the court file that the respondents were responsible for preparing the appeal books.

[19] Both counsel appearing at the taxation hearing acknowledged that they were not directly involved with the preparation of the appeal book, and each had limited information that they could offer. Counsel for Mr. Hoedel conceded that the respondents had assisted in preparing a first draft of the contents of the appeal book, but submitted that as an expedited appeal, the Rules did not require the parties come to an agreement as to the contents of the appeal book. Counsel expressed his understanding that his office has prepared the physical versions of the appeal book volumes, and that it would be very unusual for the respondent to receive this Tariff item. Following this discussion, counsel for the respondents candidly acknowledged if the appellant's legal counsel had prepared the paper copies of the appeal book, then the respondents would not be entitled to that amount.

[20] I am struck that the February 6, 2024 affidavit did not depose that the respondents photocopied, collated and bound the three copies of the five volumes of the appeal book. Within the affidavit there is reference to an “Appeal Record”, but the Saskatchewan Rules do not include that term. While perhaps not determinative, I understand the reference to “Appeal Record” as being to the agreement as to the contents of the appeal book. However, I agree with counsel for the appellant that as an expedited appeal, Rule 43 does not require an agreement as to the contents of the appeal book. Finally, Tariff item 6 allows an amount for the agreement as to the contents of the appeal book, which is separate and distinct from Tariff item 7, for the actual preparation of the appeal book. Given that it is the appellant’s obligation pursuant to the Rules to prepare and file an appeal book, there must be a clear indication on the file to displace the presumption that the step has been taken by the appellants. As noted above, on its face the court file indicates that the appeal books were prepared and filed by the appellant. In short, in this instance I am not satisfied that the respondents prepared the appeal book and I therefore tax off this amount.

E. Other Tariff Items

[21] During the taxation hearing, I received submissions on Tariff item 9 (all other preparation for hearing) and Tariff item 10 (appearance to present argument on appeal). Ultimately, counsel for Mr. Hoedel conceded that these were properly claimed, as item #9 is a “catch-all” for hearing preparation, and item #10 is proper given that the appeal was argued from approximately 10:00 am until 2:40 pm (for two, half days). Each of these amounts are properly claimed by the respondents.

V. Decision

[22] As a result of the above, I tax the respondents’ cost on Column 2 of the Tariff:

3.	Fee to Respondent on receipt of Notice of Appeal	\$ 125.00
8.	Preparation of Factum	\$2,000.00
9.	All Other Preparation of Hearing	\$ 750.00
10.	Two ½ day Appearance to present argument on appeal	\$ 800.00
11.	Preparing formal order or judgment	\$ 200.00
12.	Correspondence	\$ 200.00
13.	Preparation of Bill of Costs	<u>\$ 150.00</u>
		\$4,225.00

[23] The proposed bill of costs is therefore taxed and allowed at \$4,225.00.

[24] The respondents are entitled to receive \$4,225.00 from Lorne Hoedel for the taxable costs related to dismissal of his appeal. For enforcement purposes, the respondents may wish to prepare and file a certificate of taxation of costs in Form 11d in the amount of \$4,225 for issuance.



Counsel: Evatt Merchant, K.C. for Lorne Hoedel
Casey Steimer, for WestJet Airline Ltd., WestJet Encore, Air Canada, Air Canada Express, Air Canada Vacation, Air Canada Rouge, and Air Canada Group