

MACKENZIE MALCOLM STELTER

APPELLANT

- and -

KATHLEEN CAROL STELTER

RESPONDENT

W. Timothy Stodalka for the Appellant
Peggy M. Benko and Mark H. Hawkins for the Respondent

**Taxation before Melanie A. Baldwin
Registrar, Court of Appeal
March 1, 2013**

Background

Mr. Stelter appealed a decision of Kraus J. relating to parenting, child support and family property, by filing a Notice of Appeal (CACV1987) on September 3, 2010. On March 2, 2011, Mr. Stelter filed another Notice of Appeal (CACV2061) in which he appealed a decision of Kraus J. relating to costs.

On September 2, 2011, Ms. Stelter filed an application in CACV1987 asking for an order dismissing the appeal on the basis that Mr. Stelter had failed to perfect it. The application was filed by the Court's registry office as an application to perfect the appeal. The application was heard in Chambers by Ottenbreit J.A. on September 14, 2011 and resulted in an Order issued on January 26, 2012 for the following relief:

- requiring Ms. Stelter to prepare and file the Queen's Bench judgment;
- requiring settlement of the contents of the Appeal Book by a certain date, failing which the matter could be brought back to Ottenbreit J.A.;
- setting timelines for the filing of the parties' factums; and
- ordering that costs would be "in the cause."

On February 1, 2012, Mr. Stelter filed an application in CACV1987 and CACV2061 asking for an order allowing the late filing of his factum, an order extending the time for service of his Notice of Appeal in CACV2061 *nunc pro tunc* and an order directing that CACV1987, CACV2061 and another appeal involving these parties (CACV2186) be heard concurrently.

On March 7, 2012, Ms. Stelter filed an application in CACV1987 asking for an order dismissing the appeal for want of prosecution or alternatively an order for security for costs and giving Ms. Stelter leave to file her factum within a specified time period and an order for costs. Also on March 7, 2012, Ms. Stelter filed an application in CACV2061 asking for similar relief as claimed in her application in CACV1987.

These applications came before Smith J.A. on March 14, 2012 and were referred by Smith J.A. to a full panel of the Court for consideration.

On April 27, 2012, a full panel of the Court heard from counsel for both parties and then rendered a decision which can be summarized as follows:

- Ms. Stelter's applications for an order disallowing the appeal and for security for costs were dismissed with each party to bear his/her own costs;
- Mr. Stelter's application for an order extending time to serve the Notice of Appeal in CACV2061 *nunc pro tunc* was granted with each party to bear his/her own costs;
- The appeal in CACV2061 would be heard concurrently with the hearing of the appeal in CACV1987;
- Both parties were given specific time periods for filing their factums;
- The Registrar was directed to schedule the matters for hearing during the last week in June 2012; and
- Ms. Stelter would have costs fixed at \$500 in total.

Mr. Stelter filed an Appeal Book and Factum in CACV1987 on May 4, 2012 and filed an Appeal Book and Factum in CACV2061 on May 7, 2012. Ms. Stelter filed a Factum in CACV1987 and a Factum in CACV2061 on June 13, 2012.

The appeals were heard by the Court on June 27, 2012 and written reasons dismissing the appeals were released by the Court on December 6, 2012. In its written reasons, the majority of the Court noted that the "appeal on the merits and the costs appeals" had been "heard simultaneously" and that Ms. Stelter had therefore accepted "the jurisdiction of this Court to hear this appeal respecting costs as a separate appeal." The Court then summarized its decision as follows:

Both the appeal on the merits of the case and on costs are dismissed with costs to the wife.

Counsel for Ms. Stelter filed a Notice of Appointment for Taxation on CACV1987 and CACV2061 returnable on February 15, 2013. The return date was subsequently adjourned by consent to March 1, 2013.

In advance of the taxation hearing, I asked counsel to be prepared to make verbal submissions on the issues of which column(s) of the tariff should apply and what tariff fee items could appropriately be claimed. I also asked counsel for Ms. Stelter to provide "proper vouchers" for the disbursements claimed in the proposed Bill of Costs. Mr. Stodalka, on behalf of Mr. Stelter, filed a Memorandum to the Registrar on February 28, 2013. Ms. Stelter, through Ms. Benko and Mr. Hawkins, filed an Affidavit of Disbursements on January 28, 2013 and a further Statutory Declaration relating to disbursements on February 28, 2013.

Ms. Benko, Mr. Hawkins and Mr. Stodalka appeared before me on March 1, 2013 to make verbal submissions on these and other issues arising in connection with the taxation of the proposed bill of costs and this fiat represents my decision in relation thereto.

Authority for Taxation

Rule 54 of *The Court of Appeal Rules* provides for taxation of costs and indicates that Part Forty-Six of *The Queen's Bench Rules* applies, with any necessary modification, to a taxation of costs under Rule 54.

Proposed Bill of Costs

For CACV1987, the proposed Bill of Costs lists the following fees under Column 4 of the Court of Appeal Tariff of Costs:

3	Fee to Respondent	\$ 200
4	Simple Motion	\$ 625
6	Agreement as to Contents of Appeal Book	\$ 400
8	Preparation of Factum	\$5000
9	Preparation for Hearing	\$1250
10	Appearance	\$ 600
12	Correspondence	\$ 400
13	Preparation of Bill of Costs	\$ 250

For CACV2061, the proposed Bill of Costs lists the following fees under Column 1 of the Court of Appeal Tariff of Costs:

3	Fee to Respondent	\$ 100
4	Simple Motion	\$ 250
6	Agreement as to Contents of Appeal Book	\$ 100
8	Preparation of Factum	\$1000
9	Preparation for Hearing	\$ 500
12	Correspondence	\$ 100
13	Preparation of Bill of Costs	\$ 100

The fees claimed for CACV1987 total \$8725. The fees claimed for CACV2061 total \$2150. The total amount of fees claimed is \$10875.

The proposed Bill of Costs also claims disbursements amounting to \$1921.02 composed of a Notice of Appeal filing fee of \$125, \$85 for the Court's fees for filing Notices of Motion, \$40 for the Court's fees for issuing Orders, \$1323.70 for photocopies, \$213 for courier costs, \$93.10 for faxes, \$40 for service of documents and \$1.22 in postage.

Positions of the Parties

Appropriate Column

Both parties agreed that any costs assessed on CACV2061 should be assessed on Column 1 of the Court of Appeal Tariff of Costs.

On CACV1987, Ms. Benko and Mr. Hawkins, on behalf of Ms. Stelter, asked that costs of this proceeding be taxed on Column 4 of the Court of Appeal Tariff of Costs on the bases that the aggregate of the assets involved in the Court of Queen's Bench proceeding exceeded \$300,000 and that Mr. Stelter's Notice of Appeal appealed the entire Court of Queen's Bench judgment.

Mr. Stelter, through Mr. Stodalka, asked that costs of CACV1987 be taxed on Column 3 of the Court of Appeal Tariff of Costs. He based this argument on the bases that the monetary amount claimed in the Notice of Appeal was less than \$300,000 (in fact it was the amount required for equalization of family property based on his proposed valuation contained in his Factum) and that the non-monetary issues involved in the appeal such as parenting of the parties' children were a significant part of the appeal.

Appropriate Tariff Fee Items

Ms. Benko and Mr. Hawkins took the position that CACV1987 and 2061 were two separate appeals which happened to be heard by the Court on the same day. The Court specifically contemplated that this was the case when it spoke of *facta* (plural) in its decision of April 27, 2012. As such, Ms. Stelter is entitled to claim all appropriate tariff fee items on each appeal except for item 10 (Appearance to Present Argument on Appeal).

Mr. Stodalka argued that Mr. Stelter had raised the issue of costs in his Notice of Appeal in CACV1987 but later filed his Notice of Appeal in CACV2061 out of an abundance of caution and in light of the decision of Sherstobitoff J.A. in *Riley v. Riley*, 2010 SKCA 88, adding that the Court gave the parties no direction on the application of *Riley* in its decision of December 6, 2012. Mr. Stodalka took the position that the two appeals are intertwined and that the Court was mindful of this when it ordered that they be heard concurrently. Mr. Stodalka asked me to exercise my discretion to look at the totality of the proceeding and to assess only one set of costs for everything that took place after the Court ordered that the two appeals would be heard concurrently (April 27, 2012).

Mr. Hawkins replied that "concurrently" does not mean "as one" but rather must describe more than one matter. He added that the Court exercised its discretion to treat the two appeals as separate appeals and that I should follow the Court's decision rather than exercising discretion as urged by Mr. Stodalka.

In terms of specific tariff fee items, I raised the amounts claimed under item 4 – simple motions. Counsel for both parties agreed that the costs that could be claimed for all applications considered by the Court on April 27, 2012 were limited to the \$500 fixed costs awarded by the Court to Ms. Stelter that day.

Disbursements

The Court's file discloses that Ms. Stelter paid filing fees associated with three notices of motion. The cost of filing a notice of motion is \$25, therefore the maximum disbursement that can be claimed under this heading is \$75, not \$85. Ms. Benko and Mr. Hawkins took no issue

with this. In addition, the Court's file only shows one Order being issued at Ms. Stelter's cost. The cost of issuing an Order is \$20. However, the Appointment for Taxation cost \$20 to issue. I suggested that the \$40 claimed under "Issue Order" could comprise these two \$20 charges. Ms. Benko and Mr. Hawkins did not take exception to my suggestion. Finally, Ms. Stelter did not incur a \$125 Notice of Appeal filing fee in connection with either CACV1987 or CACV2061 as she was the Respondent on each appeal. Ms. Benko and Mr. Hawkins agreed to the removal of that amount.

As noted above, Ms. Stelter claims disbursements relating to photocopying, faxing, service of documents, courier fees and postage.

Mr. Stelter, through Mr. Stodalka, takes issue with the photocopying, faxing, service and courier charges. He argues that the amounts claimed are not properly supported and that the per page cost for photocopying and faxing is excessive.

Ms. Benko and Mr. Hawkins replied that the amounts claimed were all incurred on these two matters and that the per page cost is the cost charged to Ms. Stelter by their firm and therefore should be the cost awarded to Ms. Stelter.

Decision

Appropriate Column

As noted above, Rule 54 of *The Court of Appeal Rules* provides that Part Forty-Six of *The Queen's Bench Rules* applies, with any necessary modification, to a taxation of costs under *The Court of Appeal Rules*.

Rule 564(1) and (2) of *The Queen's Bench Rules* provide as follows:

- 564 (1) The assessment of fees pursuant to clause 563(1)(a):
- (a) shall be in the discretion of the assessment officer; and
 - (b) shall be assessed according to the appropriate column of the applicable table of Tariff Schedule I, depending on the amount involved.
- (2) The amount involved shall be determined:
- (a) as against the plaintiff, by the amount claimed; or
 - (b) as against the defendant, by the amount of the judgment.

Ms. Stelter, the respondent, was awarded costs against Mr. Stelter, the appellant. Applying Rule 564(2) after modifying it to replace "plaintiff" with "appellant," the amount involved in this appeal (CACV1987) should therefore be determined by the amount claimed by Mr. Stelter in the appeal.

Although the decision under appeal in CACV1987 involved a global amount exceeding \$300,000, the monetary relief claimed by Mr. Stelter in his Notice of Appeal was "an order dividing the family property in the manner particularized in his Factum." In his Factum, Mr. Stelter valued the family property in his possession at approximately -\$133,000 and the family property in Ms. Stelter's possession at approximately \$231,000. He also claimed certain adjustments amounting to approximately \$23,000 and sought an order from the Court dividing

the family property in accordance with these valuations. As noted by Mr. Stodalka before me, if Mr. Stelter had been successful and had this relief been granted, it would have amounted to less than \$300,000 but more than \$100,000. I therefore conclude that the amount claimed by Mr. Stelter in CACV1987 falls under Column 3 of the Court of Appeal Tariff of Costs and costs of the appeal should be assessed accordingly.

Appropriate Tariff Fee Items

The issue between the parties on what tariff fee items are appropriately assessed against Mr. Stelter can be characterized as a dispute about whether Ms. Stelter is entitled to one or two sets of costs. Mr. Stelter argues that, after April 27, 2013, the appeals were to be heard concurrently so only one set of costs should be assessed. Ms. Stelter counters that, although the appeals were heard on the same day, in all other ways they were separate and separate costs should be assessed on each.

I can see merit in both arguments but I conclude that two sets of costs (with certain exceptions) are appropriate in this case. There were two Notices of Appeal, two Agreements as to Contents of Appeal Book, two Appeal Books, two Factums from each party and two separate court files. As such, Ms. Stelter is entitled to separate costs for the respondent fee items corresponding to this material including: Item 3 – Fee to Respondent, Item 6 – Agreement as to Contents of Appeal Book, Item 8 – Preparation of Factum and Item 12 - Correspondence.

The appeals were heard on one hearing day. I am therefore not prepared to award two sets of costs under Item 9 – Preparation for Hearing or Item 10 – Appearance (Ms. Stelter only claimed one fee under this item). I am also not prepared to assess two sets of costs for Item 13 – Preparation of Bill of Costs. Although the proposed Bill of Costs does contain two columns – one for each appeal file – it is essentially one document.

One further particular fee item that must be mentioned is the fee item for applications (Item 4). As noted above, the parties agree that the only application fee item that can be assessed for the applications disposed of on April 27, 2013 is the \$500 fixed amount awarded to Ms. Stelter. This leaves for consideration Ms. Stelter's application to perfect where Ottenbreit J.A. ordered "costs in the cause."

Ms. Stelter was successful in "the cause," as both appeals proper were dismissed. She is therefore entitled to claim costs for her application to perfect of \$500 under Column 3, Item 4 in addition to the \$500 fixed costs awarded by the Court on April 27, 2013.

Disbursements

Court filing/issuing fees are disbursements that have always been recoverable on taxation. As noted above, Ms. Stelter erroneously claimed a \$125 disbursement for the Court's fee for filing a Notice of Appeal which will be taxed off the proposed Bill of Costs. She has claimed and is entitled to \$40 for issuing an order on her application to perfect (\$20) and for issuing the Appointment for Taxation (\$20). Finally, Ms. Stelter has claimed \$75 (not the \$85 indicated in the proposed Bill of Costs) for filing fees for three applications. As two of those applications resulted in and are subsumed by the specific costs award of April 27, 2012, she is only entitled to claim the filing fee for the application to perfect amounting to \$25.

Historically, out of pocket expenses such as photocopying, fax charges and courier fees were not considered to be proper disbursements in the same way that Court filing fees were.

However, Registrars' approach to disbursements has been gradually changing over the past number of years.

In a fiat in *Knudson v. Knudson*, CA 1461 dated November 12, 2008, Registrar Schwann, as she then was, said the following:

Typically, disbursements embrace things such as the cost of faxes, photocopying courier fees, court filing.

So these kinds of out-of-pocket expenses can be claimed as long as they are supported by "proper vouchers." I will consider each category of disbursement claimed to determine whether the necessary support has been filed.

Ms. Stelter claims \$1323.70 for photocopies. This claim is supported by a statutory declaration by the office manager of Ms. Benko's and Mr. Hawkins' firm that states as follows:

- the firm uses a manual system for counting photocopies.
- the exact date of a photocopy is not recorded, just the number of photocopies made.
- the photocopies claimed were all made on behalf of Ms. Stelter with respect to Appeal matters.
- the claim is for 3782 photocopies at 35 cents per page.

I am not prepared to award the amount claimed on the basis of this evidence. In my estimation, the support provided falls short of the requirement for a proper voucher for the amount claimed. A proper voucher should at least identify when copies were made and what was being copied.

Further, although photocopying disbursements have been allowed in the recent past, there is a practice of considering what has been photocopied and the per copy cost in each case. In particular, I note that it does not appear that a per copy cost exceeding 25 cents has ever been allowed.

Having said this, I am prepared to allow the photocopying cost associated with producing the respondent's application to perfect materials, factums and materials for the taxation at a per page cost of 25 cents. I calculate this as follows:

Application to Perfect Materials: 21 pages x 4 (firm, client, appellant, court) = 84

Factums: 215 pages x 6 (firm, client, appellant, court (3)) = 1290

Taxation Materials: 22 pages x 4 (firm, client, appellant, court) = 88

1462 copies at 25 cents per page = \$365.50

Ms. Stelter claims \$199 in courier charges (not the \$213 specified in the proposed Bill of Costs). This claim is supported by the statutory declaration by the office manager of Ms. Benko's and Mr. Hawkins' firm that attaches courier invoices totaling \$199. The courier invoices are dated and show pick up at AB (Ms. Benko's and Mr. Hawkins' firm) or at the court house and delivery to QB, Court of Appeal, AB and/or Mr. Stodalka's firm. They do not indicate what was delivered.

I am not prepared to allow the amount claimed on the basis of this evidence. Once again, I think that the support provided falls short of the requirement for a proper voucher for the amount claimed.

I reviewed both of the Court's files and could match up only the following invoices with documents received by the Court:

- invoices 286052 and 286053 totalling \$19 – formal Order on application to perfect.
- invoices 288106 and 287669 totalling \$14 – materials on respondent's applications determined on April 27, 2012.
- invoices 301871 and 298734 totalling \$29 – respondent's factums.

I calculate the allowed courier costs at \$48 as the \$14 relating to the applications determined on April 27, 2012 is subsumed in the specific costs award made by the Court that day.

Ms. Stelter claims \$93.10 for faxes. This claim is supported by the statutory declaration by the office manager of Ms. Benko's and Mr. Hawkins' firm that states as follows:

- the firm uses a manual system for counting faxes.
- the faxes were all incurred with respect to Appeal matters.
- the claim is for 266 pages at 35 cents per page.

This support also falls short of the requirement for a proper voucher for the amount claimed. A proper voucher should at least identify when faxes were sent and what was being faxed.

I reviewed both of the Court's files and have identified a total of 61 faxed pages from Ms. Benko's and Mr. Hawkins' firm to either the Court or to Mr. Stodalka. Of these 61 pages, 29 relate to the applications determined on April 27, 2012. I therefore allow fax costs of \$8 (32 pages at 25 cents per page).

Ms. Stelter claims \$40 for service of documents. This claim is supported by the statutory declaration by the office manager of Ms. Benko's and Mr. Hawkins' firm that attaches an invoice dated September 6, 2011 for \$40 relating to "service on Mac Stelter" from one May Gillis. The only documents filed by Ms. Stelter in the Court during this timeframe were the materials relating to her application to perfect. The proof of service for these materials is an affidavit of fax service on Mr. Stodalka. The \$40 claimed for service will be taxed off.

Ms. Stelter claims \$1.22 for postage. Mr. Stodalka did not object to this amount. I will allow it.

Assessment

The proposed bill of costs will be taxed as follows:

For CACV1987:

Taxed on:

4	Simple Motion (Specified Costs)	\$500
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Taxed off:

3	Fee to Respondent	\$ 50
4	Simple Motion Application to perfect	\$ 125
6	Agreement as to Contents of Appeal Book	\$ 100
8	Preparation of Factum	\$1500
9	Preparation for Hearing	\$ 250
10	Appearance	\$ 100
12	Correspondence	\$ 100
13	Preparation of Bill of Costs	\$ 50

For CACV2061:

Taxed on:

Nil

Taxed off:

4	Simple Motion	\$ 250
9	Preparation for Hearing	\$ 500
13	Preparation of Bill of Costs	\$ 100

Disbursements:

Taxed on:

Nil

Taxed off: \$125 Notice of Appeal filing fee, \$60 applications filing fee, \$958.20 photocopies, \$165 courier, \$85.10 faxes, \$40 service.

The proposed Bill of Costs is therefore taxed and allowed at \$8737.72 (\$6950 in fees for CACV1987 plus \$1300 in fees for CACV2061 plus \$487.72 for disbursements). Ms. Benko/Mr. Hawkins may prepare and file a Certificate of Taxation of Costs to this effect (in Form C) for issuance if they wish.

DATED at Regina, Saskatchewan, this 4th day of March, 2013



REGISTRAR – COURT OF APPEAL