

MICHAEL HOGAN

APPELLANT

- and -

JENNIFER HOGAN

RESPONDENT

Gerald B. Heinrichs for the Appellant
Joanne C. Moser for the Respondent

**Taxation before Melanie A. Baldwin
Registrar, Court of Appeal
February 25, 2013**

Background

Mr. Hogan appealed an order of McMurtry J., making an interim distribution of family property of \$250,000 to Ms. Hogan, by filing a Notice of Appeal on April 3, 2012. Ms. Hogan applied to lift the stay triggered by the appeal and, on April 25, 2013, Gerwing J.A. declined to lift the stay, ordered that the appeal be heard during the week of September 24, 2012, imposed timelines for the filing of materials prior to the appeal hearing and ordered that costs would be determined by the panel hearing the appeal.

Ms. Hogan's factum was not filed within the time period specified by Gerwing J.A. and, as a result, Ms. Hogan brought an application for late filing of her factum which was resolved by way of a consent order issued on September 7, 2012. Ms. Hogan also brought an application to strike or quash the appeal on the basis that leave was required and had not been sought or granted. In response, Mr. Hogan brought an application for leave to appeal *nunc pro tunc*. Those applications were heard on September 25, 2013, the return date for the appeal proper.

On September 25, 2012, the Court heard from counsel for both parties and then delivered an oral decision as follows:

Leave to appeal is required in this case. The grounds for leave to appeal *nunc pro tunc* have not been established and that application is dismissed. The application to quash the appeal is granted and the appeal is quashed. Costs to the Respondent for 1 motion and for the appeal proper based on the relevant tariff.

Counsel for Ms. Hogan served and filed a Notice of Appointment for Taxation returnable on February 25, 2013. In advance of the taxation hearing, I asked counsel to be prepared to make verbal submissions on the issues of which column of the tariff should apply and what application fee items could appropriately be claimed. Ms. Moser and Mr. Heinrichs appeared before me on February 25, 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.

On the application to lift the stay, Justice Gerwing ordered that costs would be determined by the panel hearing the appeal. The consent order permitting late filing of Ms. Hogan's factum is silent on costs. The Court's final decision awarded Ms. Hogan "costs for 1 motion and for the appeal proper based on the relevant tariff."

Proposed Bill of Costs

The proposed Bill of Costs lists the following fees under Column 3 of the Court of Appeal Tariff of Costs:

3	Fee to Respondent	\$ 150
4	Simple Motion (File Ms. Hogan's Factum)	\$ 500
5(a)	Complex Motions (opposed):	
	Motion – Lift Stay	\$2000
	Motion – Strike the Appeal	\$2000
8	Preparation of Factum	\$3500
9	Preparation for Hearing	\$1000
10	Appearance	\$ 500
11	Preparation of Order	\$ 300
12	Correspondence	\$ 300
13	Preparation of Bill of Costs	\$ 200
14	Taxation of Bill of Costs	\$ 100

The fees claimed total \$10,550. The proposed Bill of Costs also claims PST and GST on the fee items claimed of 10 per cent or \$1055.

The proposed Bill of Costs also claims disbursements amounting to \$110 composed of \$25 for the Court's fee for filing the application to lift the stay, \$25 for the Court's fee for filing the application to strike the appeal, \$20 for the Court's fee for issuing the order permitting Ms. Hogan to file her factum and \$40 for the Court's fees for filing the Notice of Appointment for Taxation (\$20) and issuing the Certificate of Taxation (\$20).

Positions of the Parties

Appropriate Column

Ms. Moser, on behalf of Ms. Hogan, asked that the proposed bill of costs be taxed on column 3 of the tariff on the basis that the appeal related to a specific monetary amount of \$250,000. Mr. Hogan's appeal related to the decision of McMurtry J. ordering him to pay this specific amount to Ms. Hogan.

Mr. Hogan, through Mr. Heinrichs, took the position that he sought no monetary relief in the appeal but simply asked the Court to overturn the interim order of McMurtry J. on the basis that it should not have been made. As the appeal involved non-monetary relief, the proposed bill of costs should be taxed on column 2, the default column pursuant to Rule 54(1)(b) of *The Court of Appeal Rules*.

Tariff Fee Items for Applications

Ms. Moser argued that the Court had two applications before it on September 25, 2013 – Ms. Hogan's application to strike or quash the appeal and Mr. Hogan's application for leave to appeal *nunc pro tunc*. When the Court awarded costs for 1 motion only, it meant to deal only with the motions before it and was not foreclosing the possibility of costs being assessed on the earlier applications (the application to lift the stay and the application for late filing of Ms. Hogan's factum). Ms. Moser indicated that the issue of costs of the application to lift the stay was not raised before the Court on September 25, 2013.

Mr. Heinrichs took the position that no costs should be awarded for the application for late filing of Ms. Hogan's factum. In relation to the application to lift the stay, Mr. Heinrichs noted that Gerwing J.A. had left costs to the Court, costs of that application were not addressed before the Court and, as such, no costs could now be claimed for that application. In any event, the Court indicated that Ms. Hogan was entitled to costs of 1 motion and therefore only one tariff fee item for an application can appropriately be assessed.

Mr. Heinrichs also argued that the application to strike or quash the appeal should be assessed as a simple application. The Court did not specifically identify it as being complex and was able to deal with it in a brief oral decision.

In response, Ms. Moser took the position that the application to quash or strike the appeal was a complex application which involved a great deal of research and for which there is no standard form provided by the Court.

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

Although the order under appeal was clearly one which granted monetary relief in a specific amount -- Mr. Hogan was ordered to pay Ms. Hogan \$250,000 -- Mr. Hogan did not claim any amount of money in his notice of appeal. He asked the Court to set aside the order of McMurtry J.

Had Mr. Hogan been successful on appeal, this would have resulted in him not having to pay Ms. Hogan \$250,000 but it cannot fairly be said that he was claiming that amount from her. Rather, he was resisting having to pay that amount to her. On this basis, it is my conclusion that there is no “amount involved” in this appeal.

Rule 54(1)(b) of *The Court of Appeal Rules* provides that column 2 of the tariff applies to the taxation of costs where non-monetary relief is involved. The proposed bill of costs will therefore be taxed under column 2 rather than under column 3 of the tariff.

Tariff Fee Items for Applications

Ms. Hogan claims a fee item for a simple application (item 4) for her application to file her factum. The fee item for preparing an order (item 11) is also linked to this application as no other order or judgment was issued on this appeal. The consent order issued in connection with this application is silent on costs.

Rule 551 of *The Queen’s Bench Rules* includes the following:

551. Any express provision in the rules of court respecting costs, including rules 552 to 554, shall apply unless the court orders otherwise in the exercise of its discretion

Rule 553(1) of *The Queen’s Bench Rules* provides:

553. (1) The costs of any interlocutory motion or application:

- (a) shall follow the outcome of the motion or application;
- (b) shall be assessed on the same scale as the general costs of the action or proceeding; and
- (c) are not payable until final determination of the action or proceeding.

Pursuant to Rules 551 and 553, generally speaking, where the court or a judge has not ordered otherwise, costs of an interlocutory application shall follow the outcome of the application and shall be assessed on the same scale as the costs of the action or proceeding.

I conclude that it is not appropriate to assess costs for this application, even if the Court's reference to 1 motion in its decision does not amount to the Court ordering otherwise as contemplated by Rule 551. This application became necessary because Ms. Hogan's factum was not filed within the time period ordered by Gerwing J.A. The consent order permitted Ms. Hogan to file her factum despite the fact that the deadline was missed. I would not characterize the fact that the order was granted as a successful outcome for Ms. Hogan that costs would follow under Rule 553(1).

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.

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.

The only tariff fee item allowed for an application will therefore be the tariff fee item which is appropriately assessed for the application to strike or quash the appeal. Mr. Hogan, through Mr. Heinrichs, argues that this was a simple application. Ms. Moser, for Ms. Hogan, takes the position that this was a complex application.

The issue on this application to strike or quash the appeal was whether leave was necessary. The tariff specifically recognizes that an application for leave is a complex application by providing for the same amount under Item 1 as is allowed under Item 5(a) in each column of the tariff. On this basis, I conclude that this application to strike or quash the appeal was a complex opposed application.

Assessment

The proposed bill of costs will be taxed as follows:

Taxed on:		\$ nil
Taxed off:		
3	Fee to Respondent	\$ 25
4	Simple Motion (File Ms. Hogan's Factum)	\$ 500
5(a)	Complex Motions (opposed):	
	Motion – Lift Stay	\$2000
	Motion – Strike the Appeal	\$ 500

8	Preparation of Factum	\$1500
9	Preparation for Hearing	\$ 250
10	Appearance	\$ 100
11	Preparation of Order	\$ 300
12	Correspondence	\$ 100
13	Preparation of Bill of Costs	\$ 50
14	Taxation of Bill of Costs	\$ 25
16	Disbursement for Issuing Order	\$ 20*

*this disbursement was not actually incurred according to Court records

The proposed Bill of Costs is therefore taxed and allowed at \$5810 (\$5200 in fees, \$90 for disbursements, \$520.00 PST/GST on fees). Ms. Moser should prepare and file a Certificate of Taxation of Costs to this effect (in Form C) for issuance.

DATED at Regina, Saskatchewan, this 25th day of February, 2013



REGISTRAR – COURT OF APPEAL