

RACHEL RESCH

APPELLANT

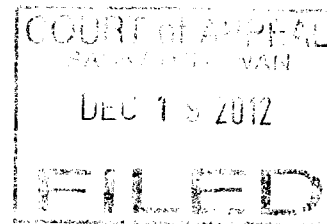
- and -

SEAN DUFOUR

RESPONDENT

James J. Vogel for the Appellant
Mary E. Neufeld for the Respondent

**Taxation before Melanie A. Baldwin
Registrar, Court of Appeal
December 18, 2012**



Background

Ms. Resch's application for leave to appeal was served on Ms. Neufeld and was delivered to the Court by Mr. Barth, Ms. Resch's former counsel, through the eCourt portal on September 14, 2012. The application was rejected on the basis that it was not filed within the time period required by *The Court of Appeal Rules*.

Mr. Barth subsequently served Ms. Resch's Notice of Appeal on Ms. Neufeld and filed the Notice of Appeal on September 29, 2012. The Notice of Appeal related to a Fiat of Scherman J. dated August 28, 2012 expanding Mr. Dufour's interim access to the parties' child and restraining Ms. Resch from permanently removing the child from Regina.

On September 26, 2012, Ms. Neufeld filed an application to lift the stay of execution pursuant to Rule 15 of *The Court of Appeal Rules*. The application was returnable on October 10, 2012 and was made by way of Notice of Motion, supported by an affidavit of Mr. Dufour, both of which were served on Mr. Barth on September 25, 2012. On October 5, 2012, Ms. Neufeld filed a Memorandum of Law and Draft Order in support of the application to lift the stay. These latter documents were served on Mr. Barth on October 4, 2012.

The matter was heard by Ottenbreit J.A. in Chambers on October 10, 2012. At that time, Mr. Barth advised Ms. Neufeld and the Court that Mr. Vogel would be acting for Ms. Resch and that he (Mr. Barth) had no instructions. Ms. Neufeld advised the Court that she wished to proceed and asked for costs. Ottenbreit J.A. adjourned the application to October 24, 2012, lifted the stay until October 24, 2012 and ordered costs of the day payable to Mr. Dufour.

On October 11, 2012, Ms. Neufeld served a proposed Order in the terms specified by Ottenbreit J.A. on Mr. Barth and Mr. Vogel. That Order, which was issued on November 2, 2012, contains the following on costs:

4. The Respondent shall receive costs of the day payable by the Appellant forthwith and to be taxed.

On October 16, 2012, Mr. Barth filed a Notice of Withdrawal of Lawyer with proof of service on Ms. Neufeld. On October 22, 2012, Mr. Vogel filed a Notice of Abandonment of Appeal and on October 23, 2012, Mr. Vogel filed a Notice of Change of Solicitors both of which were served on Ms. Neufeld.

On November 28, 2012, Ms. Neufeld filed a Notice of Appointment for Taxation returnable on December 18, 2012 as well as a proposed Bill of Costs, an affidavit of correspondence and the decision of Lane J.A. in *Adsit v. Villeneuve*, 2012 SKCA 31. All of these documents were served on Mr. Vogel.

Ms. Neufeld and Mr. Vogel appeared before me on December 18, 2012 for the taxation of the proposed Bill of Costs and this fiat represents my decision in relation thereto.

Authority for Taxation

The Order of Ottenbreit J.A. directs that Mr. Dufour's "costs of the day" for October 10, 2012 be taxed. In addition, Rule 45 of *The Court of Appeal Rules* provides that, where a party abandons an appeal, the other parties "shall be entitled to their taxable costs without order."

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. Rules 563 and 564 in Division 3 of Part Forty-Six of *The Queen's Bench Rules* deal specifically with assessment of party and party costs.

Proposed Bill of Costs

The proposed Bill of Costs lists the following fees under Column 2 of the Court of Appeal Tariff of Costs:

3	Fee to Respondent on Notice of Appeal	\$ 125
4	Simple Motion (re adjournment and costs of the day)	\$ 375
5(a)	Complex Motion (opposed): Motion – Lift Stay with Affidavit and Brief	\$1,500
12	Correspondence	\$ 200
13	Preparation of Bill of Costs	\$ 150
14	Taxation of Bill of Costs	\$ 75

The fees claimed total \$2425 (the proposed Bill of Costs indicates that the total fees claimed amount to \$2325 – this is an error in calculation).

The proposed Bill of Costs also claims disbursements amounting to \$45 composed of \$25 for the Court's fee for filing the application to lift the stay and \$20 for the Court's fee for issuing the order of Justice Ottenbreit. At the taxation, Ms. Neufeld noted that she was claiming an

additional disbursement of \$20 for issuing the Notice of Appointment for Taxation of Costs. The disbursements claimed therefore total \$65.

Positions of the Parties

There does not appear to be any dispute between the parties in relation to the tariff fee items 3 (Fee to Respondent on Notice of Appeal) and 4 (costs of the day) or in relation to the disbursements claimed.

With respect to tariff fee item 5(a), Ms. Neufeld characterizes the application to lift the stay as a complex, opposed application and seeks the tariff amount of \$1,500.

While Mr. Vogel seems to acknowledge that it would be appropriate to assess some amount over and above the "costs of the day" mentioned above, he takes the position that the application to lift the stay was a simple "garden variety" motion rather than a complex one and that even the simple motion tariff amount should be prorated as no material was filed by the appellant on the application and the appeal was abandoned before the motion was argued.

Ms. Neufeld notes that she was prepared to argue the motion whether or not material was filed by the appellant, that she believed that the motion would be argued on October 10, 2012 and only learned of the change in counsel that day and that she filed extensive material, including a lengthy affidavit and a comprehensive memorandum of law. She takes the position that any application to lift the stay which relates to an order of this kind engages a consideration of the best interests of the child as well as the usual legal tests for lifting a stay and, as such, cannot be characterized as anything other than complex. She adds that a motion can be contested and complex whether or not the responding party files any material and that this motion was both.

Ms. Neufeld points out that, in the *Adsit* decision cited above, Lane J.A., when confronted with a similar factual situation, ordered costs of \$2000. She argues that, while there was no assessment or taxation process in *Adsit*, the amount ordered represents a judge's determination of an appropriate amount of costs under these circumstances and is close to the amount claimed in the proposed Bill of Costs.

Mr. Vogel argues that the *Adsit* case differed factually from this case and cannot be used as authority or support for the position taken by Ms. Neufeld.

With respect to tariff item 12, Ms. Neufeld claims the full tariff amount for correspondence and notes that, despite the short life of the appeal, there were, in fact, numerous items of correspondence required, as set out in the affidavit of correspondence.

Mr. Vogel takes the position that the tariff amount for correspondence should be prorated in this case as the tariff amount is intended to be used for all correspondence relating to an appeal that proceeds from beginning to end. This appeal was abandoned very soon after being filed, therefore the full tariff amount for correspondence is not appropriate.

With respect to tariff items 13 and 14, Ms. Neufeld claims the full tariff amounts on the bases that she did prepare a Bill of Costs and that the taxation has proceeded. She notes that the tariff amounts are minimal and argues that it is not appropriate to prorate them.

Mr. Vogel takes the position that these amounts should also be prorated on the bases that the Bill of Costs relates to only part of an appeal (as the appeal was abandoned soon after being filed) and the taxation was only 15 minutes long.

Decision

As there is no dispute between the parties in relation to tariff fee items 3 and 4 and the disbursements claimed, these amounts will be allowed as claimed.

With respect to tariff item 5(a), I am not persuaded that an application to lift the stay should be characterized as a complex application. It has not been singled out for special treatment under the tariff like an application for leave to appeal (item 1). It is specifically contemplated by *The Court of Appeal Rules* in Rule 15. Forms are provided (Forms 5a and 5b) which are referenced right in the *Rules*. There is an established body of case law as to the tests to be satisfied on an application of this kind. It seems to me that this is the kind of application that must be characterized as a simple application. As a result, I will tax off the complex opposed motion tariff amount and tax on the simple motion tariff amount.

I will not, however, prorate the simple motion tariff amount on the bases put forward by Mr. Vogel. Ms. Neufeld was ready, willing and able to argue the application – she had done all of the work that she needed to do in order to do so. Under the circumstances, her client is entitled to the full tariff amount for the application.

As for the *Adsit* decision, it is likely distinguishable on its facts as argued by Mr. Vogel. The appellant in that case was herself a lawyer who was engaged in a “deliberate flaunting” of an order of the Court of Queen’s Bench in the estimation of Lane J.A. Even if the *Adsit* decision was not distinguishable on its facts, however, I would not rely upon it as authority for the proposition that an application to lift the stay is complex. A judge of the Court has the discretion to fix a global amount for costs in proceedings in Chambers – Lane J.A. did so in the *Adsit* case and Ottenbreit J.A. could have done so in this case. Ottenbreit J.A. did not fix costs, however, so it falls to me to assess the Bill of Costs on an item by item basis.

With respect to tariff item 12, I am not inclined to prorate it in this case. While there may be rare circumstances where proration would be appropriate, I note that the affidavit of correspondence filed by Ms. Neufeld confirms that the quantity of correspondence exchanged on this short-lived appeal was not insignificant. Given the quantity of correspondence exchanged, I have no difficulty concluding that the \$200 correspondence amount is warranted.

As I indicated to counsel during the taxation hearing, I am also not inclined to prorate the tariff amounts claimed under items 13 and 14. The proposed Bill of Costs filed by Ms. Neufeld contains a comparable number of items as might be claimed by a respondent on a full expedited appeal which proceeded to hearing without any interlocutory proceedings. While the taxation itself only took 15 minutes, the full tariff amount is so minimal that proration is not appropriate.

There is one final issue which I have identified and will address in this fiat. As noted above, following the aborted Chambers hearing, Ms. Neufeld prepared a formal Order for issuance. Her client is therefore entitled to the amount specified in item 11 of the tariff and I will tax this amount on to the proposed Bill of Costs.

The proposed Bill of Costs will therefore be taxed as follows:

Taxed on:	\$ 375	Simple Motion (fee)
	\$ 200	Preparing Formal Order (fee)
	\$ 20	Issuing Appointment for Taxation (disbursement)
Taxed off:	\$1500	Complex Opposed Motion (fee)

The proposed Bill of Costs is therefore taxed and allowed at \$1565 (\$1500 in fees, \$65 for disbursements). Ms. Neufeld may prepare and file a Certificate of Taxation of Costs to this effect (in Form C) for issuance, if necessary.

DATED at Regina, Saskatchewan, this 19th day of December, 2012

A handwritten signature in black ink, consisting of a large, stylized 'M' with a vertical stroke extending downwards from the center.

REGISTRAR – COURT OF APPEAL