

BETWEEN:

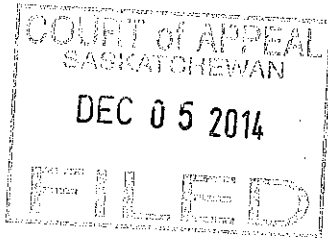
Denise Theresa Fehr

APPELLANT

- and -

Julius Andrew Turta

RESPONDENT



Cara Haaf for the Appellant  
Bonnie Reddekopp for the Respondent

**Taxation before Melanie A. Baldwin  
Registrar, Court of Appeal  
November 20, 2014**

**Background:**

On July 30, 2014, Justice Brown, of the Court of Queen's Bench, ordered exclusive possession of the family home to Mr. Turta. Ms. Fehr filed a Notice of Appeal relating to this order on August 8, 2014. Mr. Turta filed an application to lift the stay of execution on August 11, 2014. Justice Whitmore heard and reserved his decision on the application to lift the stay on August 21, 2014. On August 26, 2014, Justice Whitmore lifted the stay of execution and ordered Ms. Fehr to vacate the family home by September 5, 2014 with costs in the cause. A formal order to this effect was issued on September 4, 2014.

The appeal was subsequently abandoned by Ms. Fehr on October 2, 2014. On November 4, 2014, Mr. Turta took out an appointment for taxation returnable on November 20, 2014 and served and filed a proposed bill of costs. A taxation hearing was held by telephone conference call on November 20, 2014. On my request, both counsel filed written submissions after the hearing – those written submissions were received by me on December 1, 2014. This fiat represents my decision in relation to this taxation.

**Authority for Taxation:**

Rule 45 of *The Court of Appeal Rules* provides that, on abandonment of an appeal by the appellant, the respondent is entitled to its taxable costs without order. Rule 54 of *The Court of Appeal Rules* provides for taxation of 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
5(a)	Complex Motions (Opposed)	\$ 1500
11	Preparing Formal Order	\$ 200
12	Correspondence	\$ 200
13	Preparation of Bill of Costs	\$ 200

The fees claimed total \$2225.

The proposed bill of costs also claims disbursements amounting to \$71.20 composed of \$25 for the Court's fee for filing the application to lift the stay, \$20 for the Court's fee for issuing the Formal Order and \$26.20 for fax, photocopying and postage charges.

**Positions of the Parties:**

Ms. Fehr, through her counsel, argues that Mr. Turta is not entitled to any costs as a result of refusing an offer to settle made by Ms. Fehr that would have seen her leave the family home earlier than September 5, 2014 as ordered by Justice Whitmore.

In the event that I determine that Mr. Turta is entitled to costs, Ms. Fehr says that the fee claimed for the application to lift the stay under item 5(a) of the Tariff is not appropriate as:

- costs were to be in the cause and only a judge can determine whether costs should have been payable; or
- success on the application was divided so no costs should be awarded; or
- this was a simple motion, not a complex opposed motion.

Ms. Fehr also takes issue with the fee claimed under item 12 on the basis that it is excessive and notes that the Tariff amount for item 13 is \$150 not \$200.

Mr. Turta, through his counsel, takes issue with Ms. Fehr's reliance on the offer to settle on the basis that it was without prejudice communications rather than a formal Offer to Settle and that, in any event, it was made before the Notice of Appeal was filed so cannot be said to have been made for the purpose of settling the appeal or the application to lift the stay. Mr. Turta says that he is entitled to the costs claimed in the proposed bill of costs. In addition, he claims costs for the taxation.

## **Decision:**

### The Impact of Settlement Discussions

Ms. Fehr urges me to deny costs altogether as a result of settlement discussions between the parties and her position that Mr. Turta would have been better off had he accepted an offer of settlement she made before she filed the notice of appeal. Mr. Turta says that the settlement discussions should not be used as evidence, did not constitute a formal Offer to Settle and did not represent an attempt to settle the appeal.

*The Queen's Bench Rules* provide for a process whereby a party, who makes a valid formal offer to settle an action and later obtains a judgment or order equal or better for that party than the formal offer, is entitled to double costs. That process requires a certain amount of formality which is lacking in this case such as a formal Offer to Settle that meets the requirements of *The Queen's Bench Rules*. As I understand it, that process also requires the court to make the determination of whether and when double costs should be awarded, not the assessment officer.

In this Court, the registrar's powers on taxation are set out in Rule 54 of *The Court of Appeal Rules*. Unless otherwise ordered, I am to tax the costs of an appeal as between party and party in accordance with the fees set out in the Tariff (Rule 54(1)(a)). There is no "otherwise order" in this appeal. In fact, there is no order relating to the costs of this appeal as the appeal was abandoned. Had a judge or the Court been asked to award double costs or to deny costs on the basis of settlement discussions and done so, I would clearly be able to tax costs or decline to tax costs on that basis. Without such an order, however, I conclude that *The Court of Appeal Rules* do not give me the discretion that Ms. Fehr urges me to exercise.

### The Application to Lift the Stay

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." Ms. Fehr says that Mr. Turta is not entitled to costs for the application to lift the stay because the successful party in the cause (on the appeal) can only be ascertained by a judge or the Court and, because the appeal was abandoned, that determination will never be made.

Rule 45 of *The Court of Appeal Rules* provides that the respondent is entitled to its taxable costs without order when the appellant abandons an appeal. I take this to mean that, on abandonment of an appeal, the respondent is deemed to be the successful party in the cause. I conclude that to find otherwise would inappropriately limit the scope of the taxable costs contemplated by Rule 45.

There is also a dispute between the parties as to whether Mr. Turta was wholly or only partially successful on the application to lift the stay of proceedings as his argument that leave to appeal was required was rejected by Justice Whitmore. Although Mr. Turta was wrong on this point, he made the point only in support of his claim for the relief of a lifting of the stay. This relief was granted by Justice Whitmore. Clearly, Mr. Turta was the successful party on the application to lift the stay of proceedings.

Finally, Ms. Fehr submits that the application to lift the stay should be characterized as a simple motion while Mr. Turta maintains it was complex. In my December 18, 2012 fiat in *Resch v. Dufour*, CACV2324, I said the following about this type of application:

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.

I conclude that Mr. Turta is entitled to costs for the application to lift the stay on the basis that it was a simple application.

#### Correspondence

The amount for correspondence (item 12) is also at issue. Ms. Fehr says that it is excessive and submits that no amount should be allowed under this item. Mr. Turta claims the full amount allowed by the Tariff. I am not inclined to prorate or disallow this item. While it might rarely be appropriate to do so, I am satisfied that the amount of correspondence exchanged between counsel and the Court during the short life of this appeal proceeding warrants the full tariff amount.

#### Preparation of Bill of Costs

With respect to item 13, Ms. Fehr is correct in saying that the Tariff provides for \$150 rather than the \$200 claimed. Mr. Turta, through his counsel, did not object to this change at the hearing of this taxation.

#### Taxation of Bill of Costs

Finally, Mr. Turta claims costs in relation to the taxation itself. It is normal practice, where a taxation hearing is necessary, to allow the Tariff amount for this using item 14. On column 2, the Tariff provides for \$75 per hour. While the hearing itself took less than one hour, the position advanced by Ms. Fehr at the hearing relating to the impact of the settlement discussions resulted in my request for both counsel to provide briefs. As such, I will allow \$150 for this item to account for the time spent by counsel for Mr. Turta at the hearing and preparing her brief.

#### Disbursements

As for disbursements, given my decision on fees, all disbursements claimed are appropriate. In addition, I will allow \$20 for the court cost associated with issuing the appointment for taxation.

**Conclusion:**

The proposed bill of costs will be taxed as follows:

Taxed on:                 \$ 170 (\$150 in fees for item 14 and \$20 in disbursements for the notice of appointment)

Taxed off:                \$ 1175 (\$1125 in fees from item 4/5(a) and \$50 in fees from item 13)

The proposed bill of costs is therefore taxed and allowed at \$1291.20 (\$1200 in fees and \$91.20 in disbursements). Ms. Reddekopp may prepare and file a Certificate of Taxation of Costs to this effect (in Form 11d) for issuance if necessary.

DATED at Regina, Saskatchewan, this 5<sup>th</sup> day of December, 2014



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REGISTRAR – COURT OF APPEAL