

BETWEEN:

Leonard Borowski

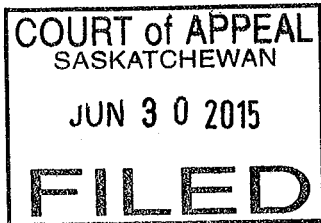
APPELLANT

- and -

Douglas Ukrainetz

carrying on business under the name and style of
Ukrainetz Auctioneering

RESPONDENT



Leonard Borowski appearing on his own behalf
Shane Wagner for the respondent

**Taxation before Melanie A. Baldwin
Registrar, Court of Appeal
June 29, 2015**

Background

The appellant's application for leave to appeal was dismissed "with costs in the usual manner" by Lane J.A. on April 24, 2015.

The respondent took out an appointment for taxation on May 15, 2015 returnable on May 29, 2015. Respondent counsel subsequently filed an affidavit of service indicating that, on May 15, 2015, his assistant served the appellant with the notice of appointment, bill of costs, affidavit of disbursements and certificate of taxation by electronic transmission to the email address included as part of the appellant's address for service provided to the Court in this matter. The email message to the appellant and a "delivery complete" notification are exhibits to the affidavit of service.

The court file then discloses the following chronology of events:

May 27, 2015

- 10:45 a.m. - an email was sent by me to the appellant and counsel for the respondent to ascertain whether they intended to appear at the taxation hearing on May 29, 2015 in person or by telephone.
- 10:46 a.m. - counsel for the respondent responded to advise that he intended to appear in person.

May 29, 2015

- 7:53 a.m. - I received an email from the appellant responding to my email of May 27, 2015. The appellant indicated that he had no notice of the hearing, he wished to consult a lawyer and he could not take time at the last minute for a hearing that he was not properly notified about.
- 8:15 a.m. - I emailed the appellant indicating that counsel for the respondent had filed proof of service and asking if the appellant would be available to appear by telephone at 9:00 a.m. to either argue the taxation or ask for an adjournment.
- 9:00 a.m. - counsel for the respondent attended at the registry office and unsuccessful attempts were made to reach the appellant at the two telephone numbers included as part of his address for service. The appellant's email was treated as an adjournment request. Counsel for the respondent did not oppose an adjournment and the taxation hearing was adjourned peremptorily to June 12, 2015 at 9:00 a.m.
- 9:19 a.m. - I emailed the appellant to advise him of the peremptory adjournment and, as a courtesy, to forward (as attachments to the email) copies of the notice of appointment, proposed bill of costs, draft certificate, the proof of service filed by counsel for the respondent and a copy of *The Court of Appeal Tariff of Costs*.
- 9:21 a.m. I forwarded a copy of the affidavit of disbursements to the appellant as an attachment to an email.

June 9, 2015

- 4:58 p.m. - I emailed the applicant and counsel for the respondent to ask whether they intended to appear in person or by telephone on June 12, 2015.
- 5:14 p.m. - counsel for the respondent responded to advise that he intended to appear by telephone.

June 10, 2015

- 1:26 p.m. - the appellant faxed a letter to me indicating that he had not been served with the material for the taxation, that he was unable to open the attachments to my emails and raising the issue of whether I was impartial.
- 2:22 p.m. - I emailed the appellant addressing proof of service, advising that copies of the material could be faxed to him if he wished (and if he provided a fax number for this purpose) and asking him to indicate whether he intended to appear at the taxation hearing in person or by telephone.

The appellant subsequently advised a deputy registrar that he intended to appear at the hearing by telephone and provided a telephone number for that purpose.

On June 12, 2015 at 9:00 a.m. the appellant and counsel for the respondent appeared before me by telephone. The appellant raised the preliminary issues of whether the material was properly served on him and whether I should recuse myself from the taxation hearing on the basis of a lack of impartiality. Counsel for the respondent offered to send the material to the appellant by registered mail and to set another return date for the hearing. The appellant undertook to pick up the registered mail.

The matter was adjourned to June 29, 2015 at 11:00 a.m. with both parties having an opportunity on the next return date to make further representations on the preliminary issues as well as on the taxation hearing itself. I told the parties that, as the Court's taxation officer, it was my intention to conduct the June 29, 2015 hearing and that, following that hearing, I would issue a written fiat addressing all of the issues raised by them.

On June 24, 2015, the appellant signed and filed an acknowledgement of service relating to the notice of appointment, bill of costs, affidavit of disbursements and certificate of taxation. On the Acknowledgement of Service the appellant added the following handwritten statement:

Missing – Purported “Proof of Service” document filed with The Registrar dated May 15, 2015. L.B. Please provide “Full Disclosure” ASAP. L.B.

The appellant and counsel for the respondent appeared before me by telephone on June 29, 2015 at 11:00 a.m. The appellant confirmed that he had received the material identified on the acknowledgement of service.

Preliminary Issue

The appellant, in his letter of June 10, 2015 and during the June 12, 2015 and June 29, 2015 hearings raised a preliminary issue about a lack of impartiality or a conflict of interest on my part. His concerns can be summarized as follows:

- In my email of May 29, 2015, I indicated that respondent counsel had filed proof of service relating to the taxation documents when, in fact, the appellant's position is that the documents had not been properly served on the appellant.
- The appellant had previously made a complaint about my actions on another appeal file in which he was involved.

Positions of the Parties

The appellant relied on his letter of June 10, 2015 and argued that I should recuse myself from hearing the taxation on the basis that I have a conflict of interest and/or lack impartiality. He argued that the registrar is not the only person who can conduct a taxation hearing in the Court and asked that, under the circumstances, I recuse myself from hearing the taxation.

Respondent counsel took the position that there was no conflict of interest as alleged by the appellant and asked me to proceed to conduct the taxation hearing.

At the hearing on June 29, 2015, I advised both parties that I would reserve my decision and render a written decision. If I conclude that there is a reasonable apprehension of bias as argued by Mr. Borowski, I will not proceed to tax the bill of costs. If, however, I conclude that there is no reasonable apprehension of bias, I will proceed with and complete the taxation.

Decision

The Test for Reasonable Apprehension of Bias

The test for reasonable apprehension of bias was set out by de Grandpre J., writing in dissent, in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at p. 394:

. . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . [T]hat test is “what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”

The “Required Information”

On the issue of proof of service, when the appellant indicated on May 29, 2015 that he had no notice of the taxation hearing, I responded that respondent counsel had filed proof of service. When the appellant filed his application for leave, he included an address for service. As part of that address for service, he included an email address. Respondent counsel filed an affidavit of service sworn by his assistant indicating that she had served the taxation documents on the appellant on May 15, 2015 by emailing them to the email address identified in his address for service.

As for the appellant’s second basis for concern, in October 2014 the appellant wrote to the Court with complaints about procedural matters on another appeal file in which the appellant was involved. The Court’s Executive Officer responded to that correspondence on behalf of the Chief Justice, concluding as follows:

We are confident that the Registrar and staff in the registry office have given you unbiased and sound administrative advice in accordance with *The Court of Appeal Rules*.

That appeal subsequently proceeded to hearing and the appellant was largely successful in the result.

Having obtained this information and thought the matter through, would a person viewing the matter realistically and practically conclude that it is more likely than not that I would not decide the taxation fairly?

The Context and Function of the Registrar on Taxation

Before I answer this question, I must also consider the following factor mentioned by L’Heureux-Dube J. in *Baker v. Canada*, [1999] 2 S.C.R. 817 at 850:

It has been held that the standards for reasonable apprehension of bias may vary, like other aspects of procedural fairness, depending on the context and the type of function performed by the administrative decision-maker involved.

My function here is to assess costs. There is no question that the appellant must pay costs to the respondent – that decision was made by Lane J.A. The issue is the amount of those costs.

This is a leave application which falls under the lowest column of *The Court of Appeal Tariff of Costs* and for which the lion's share of the costs are specifically prescribed.

Conclusion

In light of all of the foregoing, I conclude that an informed member of the community would not perceive bias on my part. My indication that respondent counsel had filed proof of service was based on an objective examination of the court file. In any event, I subsequently forwarded the documents to the appellant myself and then adjourned the taxation hearing so that the appellant could receive the documents in a manner of his choosing – by registered mail. While the appellant had previously expressed concern about procedural matters on another appeal file, his concerns were investigated and answered and he carried on with that appeal to a successful conclusion. Finally, I am performing a function that, at least in this case, involves very little discretion on my part and will result in a relatively small award of costs at the end of the day.

I therefore decline to recuse myself and will proceed with and complete the taxation.

Proposed Bill of Costs

The proposed bill of costs lists the following fees under column 1 of *The Court of Appeal Tariff of Costs*:

1	Motion for Leave to Appeal	\$1000
3	Fee to Respondent on receipt of Notice of Appeal	\$ 100
9	All Other Preparation for Hearing	\$ 500
10	Appearance to Present Argument on Appeal before Court of Appeal	\$ 300
12	Correspondence	\$ 100
13	Preparation of Bill of Costs	\$ 100
14.	Taxation of Bill of Costs	\$ 50

The fees claimed total \$2150.

The proposed bill of costs claims disbursements of \$190.65 comprising \$168.30 for travel, \$17.85 for photocopying and \$4.50 for scanning.

Positions of the Parties

The appellant declined to make any submissions on the proposed bill of costs or the taxation of it.

Respondent counsel asked me to tax the proposed bill of costs as submitted.

Decision

I will review the proposed bill of costs on an item by item basis, first looking at the fees claimed and then at the disbursements.

Respondent counsel has drafted the fees portion of the proposed bill of costs under column 1 of *The Court of Appeal Tariff of Costs*. The amount at issue on the appeal clearly does not exceed \$50,000. As such, column 1 (the lowest column) is appropriately used to determine fees.

As for the specific fee amounts claimed under column 1, my understanding is that the motion items in *The Court of Appeal Tariff of Costs* are intended to be all inclusive. In other words, item 1 (motion for leave to appeal, including brief and argument), is intended to include all steps taken to make or respond to the application, including drafting documents and preparing for and making oral submissions in chambers.

I do not believe that items 9 and 10 are properly claimed in the context of anything less than the hearing of an appeal proper. This is buttressed by the placement of these items in the tariff, below the appeal book and factum items, and by the specific complete wording of item 10 (appearance to present argument *on appeal before Court of Appeal*). The amounts claimed under these items will be taxed off.

The amount claimed under item 3 (fee to respondent on receipt of notice of appeal) will also be taxed off. While the respondent received a draft notice of appeal as part of the application for leave, leave was not granted so no notice of appeal was or could have been filed.

The amounts claimed under items 12, 13 and 14 are properly claimed. The fee for taxation is calculated on a per hour basis. While there were three return dates for the taxation hearing, the entire hearing took less than one hour so the \$50 claimed is appropriate.

As for disbursements, respondent counsel claims travel costs of \$168.30 for his travel to and from the chambers hearing for the application for leave to appeal. I am not inclined to allow this. Travel expenses have not traditionally been permitted as disbursements at least by registrars in this Court. Further, as this was a chambers application, counsel could have appeared by telephone if he wished to do so thereby avoiding the travel cost.

The photocopying and scanning charges are appropriate in terms of the number of copies made or scanned and are properly supported by the affidavit of disbursements. Having said this, I will reduce the per copy charge from 35 cents to 25 cents. While copying charges are commonly allowed as disbursements on taxation, the highest approved per copy cost to date has been 25 cents.

Finally, the court file shows that respondent counsel paid a disbursement of \$20 to issue the notice of appointment. This court cost disbursement can and should be recovered by the respondent.

Conclusion

The proposed bill of costs will therefore be taxed as follows:

Taxed on: \$ 20 (for the court fee to issue the appointment for taxation)

Taxed off: \$1073.40 (\$100 for item 3, \$500 for item 9, \$300 for item 10, \$168.30 for travel expenses and \$5.10 for photocopying)

The proposed bill of costs is therefore taxed and allowed at \$1287.25. A certificate of taxation in this amount will issue on payment by respondent counsel of the requisite \$20 fee.

There is one final matter that I agreed to address in my written decision – the process for “appealing” my decision. While there is no appeal, there is potentially a review by a judge of the Court. Rule 54.1 of *The Court of Appeal Rules* says:

54.1 (1) A person with a pecuniary interest in the result of a taxation of costs who is dissatisfied with the taxation may apply to a judge for a review of the taxation of costs.

(2) An application pursuant to Subrule (1) must be made within 14 days after the date of the certificate as to taxation of costs.

(3) A review of the taxation of costs must be limited to items that have been objected to before the registrar and may include items with respect to which the registrar exercised discretion.

DATED at Regina, Saskatchewan, this 30th day of June, 2015.



REGISTRAR – COURT OF APPEAL