
Jerame Michael Stack

Appellant
(Respondent)

and

Darlene Kimberly Stack

Respondent
(Petitioner)

Before: Amy Groothuis, Registrar (on March 16, 2022)

Fiat

I. Introduction

[1] On October 21, 2021, Mr. Jerame Stack [appellant] filed a notice of appeal of an interim family law order issued by a Court of Queen's Bench judge sitting in Chambers. As further set out below, Mr. Stack's appeal was ultimately abandoned. Pursuant to Rule 45 of *The Court of Appeal Rules* [Rules], Ms. Stack [respondent] is thereby entitled to her taxable costs without order.

[2] As further set out below, determining the taxable costs to which Ms. Stack is entitled requires a more thorough examination of the Court record than occurs in most taxation hearings.

[3] As noted, this was an appeal of an interim family law order made in Queen's Bench Chambers. Thus, it was an expedited appeal as that term is defined and applied by Rule 43. As an expedited appeal, the expectation is that the parties move swiftly towards perfecting the appeal and having it scheduled for hearing. On December 3, 2021 the appellant filed his factum and appeal book. As at that date, all that was required in order to set the appeal down for hearing was for the respondent to file her factum.

[4] In January, 2022, two applications were filed, one by each party. The first application, filed by the appellant on January 7, 2022, requested an order pursuant to Rule 34(2) requiring that the respondent file her factum promptly. The draft order filed in support of the appellant's application included the following language:

THAT the Respondent shall file her Factum within 15 days of being served with a copy of this Order. If she does not, the Registrar shall set a hearing date and the appeal shall proceed without a Respondent's factum.

[5] The second application, filed by the respondent on January 10, requested an order that, *inter alia*, certain portions of the appeal book be struck; that the Chambers judge's written reasons

be added to the appeal book; that the existing appeal book be removed from the Court record; that portions of the appellant's factum referring to the impugned documents in the appeal book be struck; and, an order directing that the appeal be set down to be heard on the earliest available date.

[6] In support of her application concerning the appeal book, Ms. Stack swore an affidavit that was served and filed along with her notice of motion. The affidavit, sworn on January 10, 2022, includes exhibits detailing exchanges of correspondence between counsel concerning the appeal book and factums. More particularly, Exhibit "B" to Ms. Stack's affidavit includes emails sent from her legal counsel to Mr. Stack's legal counsel dated December 21, 2021 that states, in part:

... We have completed our factum and will be serving the same shortly. We wish to provide notice that we will be applying to the Court to have the October 8, 2021 affidavit of your client excluded from the Appeal Book. We will also be asking to have the paragraphs referring to it struck from the Factum you have filed. ...

[7] The two applications were heard by Ottenbreit J.A. on January 17, 2022. The endorsement reflects a question from the Chambers judge to counsel for Ms. Stack on when the respondent's factum can be filed, and the resulting answer of "within three days". Ultimately, Ottenbreit J.A. endorsed the Court file as follows:

It is an application to settle the contents of the appeal book and it is done really before the matter has been set down for hearing. It is appropriate to determine what the contents would be. There is no indication that the affidavit that is in issue was even considered by the Chamber judge. There is just no evidence of it, it was filed, leave was sought to file it, the decision came out in the interim and there it sat. On that basis, I am going to order that the affidavit be struck from the appeal book, that you take the appeal books back and you take it out. Rather than redoing the whole appeal book, you can do it by taking it out of the appeal book and on the table of contents strike out that affidavit. The factum will be returned and you are to delete those references to the affidavit be deleted. The reasons for the decision shall form part of the appeal book and should be added. Upon Mr. Burlingham's client filing the revised appeal book and factum, the respondent shall have 3 court days to file their factum. There will be no order for costs.

[8] Notably, while no deadline was imposed on the appellant to modify and then refile the appeal book and factum, once that step was completed the respondent only had three days to file her factum. Neither party took out a formal order reflecting the terms imposed by Ottenbreit J.A. in Chambers.

[9] Next, on February 3, 2022 the respondent filed another application, which was returnable in Chambers on February 8, 2022. This notice of motion requested an order that the appellant serve and file the amended appeal book and amended factum on or before February 11, 2022, failing which the appeal would be dismissed. The application was supported by an affidavit sworn by Ms. Stack on January 28, 2022 in which she attests to correspondence being sent on January 20, January 25, and January 26 from her counsel to counsel for Mr. Stack requesting either the filing of the amended factum and appeal book, or a date by which that would be completed.

[10] On February 4, 2002, before the third application was heard, counsel for Mr. Stack issued and served a notice of abandonment, which was subsequently filed with the Registry on February

7, 2022. As such, the February 8, 2022 Chambers hearing did not proceed and the file was closed as abandoned.

[11] The appellant's notice of abandonment was quickly followed by a notice of appointment for taxation of costs, supported by a proposed bill of costs and affidavit sworn on February 15, 2022 by Ms. Stack [February 15 Affidavit], which was ultimately heard on March 16, 2022.

II. Proposed Bill of Costs

[12] Ms. Stack claims the following fees under Column II of the Court of Appeal Tariff of Costs [Tariff]:

3.	Fee to Respondent on receipt of Notice of Appeal	\$ 125.00
4.	Simple Motion (Settle Contents of Appeal Book, January 10, 2022)	\$ 375.00
4.	Simple Motion (Perfect Appeal, February 3, 2022)	\$ 375.00
8.	Preparation of Factum	\$2,000.00
12.	Correspondence	\$ 200.00
13.	Preparation of Bill of Costs	\$ 150.00
14.	Taxation of Bill of Costs	\$ 75.00

[13] The proposed fees total \$3,300.00. To this amount, Ms. Stack claims \$165.00 for GST and \$198.00 for PST on fees totalling \$3,663.00 as well as disbursements in the amount of \$144.62. The total fees and disbursements claimed are \$3,807.62

III. Issues

[14] At the taxation hearing, the appellant raised three issues with the proposed bill of costs:

- (a) Is the respondent entitled to Tariff item #4 for the January 10, 2022 motion?
- (b) Is the respondent entitled to Tariff item #4 for the February 3, 2022 motion?
- (c) Is the respondent entitled to Tariff item #8 for preparation of the factum?

[15] No other issues were raised by counsel for Mr. Stack.

IV. Analysis

[16] I will examine and consider each of the three issues in turn, noting again that as this taxation of costs involves an abandonment, I am governed by Rule 45 as well as Rule 54. Following the taxation hearing on March 16, 2022, both counsel emailed the Registry (with a copy to each other) providing previous taxation decisions in support of their respective positions. I confirm I have reviewed and considered the cases provided to me.

(a) Tariff Item #4 – January 10, 2022 motion

[17] The January 10, 2022 date refers to the date the application was filed; both Ms. Stack and Mr. Stack's separate motions came before Ottenbreit J.A. on January 17. However, as indicated in the endorsement reproduced above, the Chambers judge explicitly made "no order for costs". By this language, Ottenbreit J.A. removed any entitlement by either party to the costs arising from those two applications.

[18] As a result, I will tax off the \$375.00 claimed for the first Item #4, for the application filed on January 10 by Ms. Stack. This also necessitates the removal of two disbursements that were related to this particular application: the \$25.00 motion filing fee and a \$31.63 (GST included) charge for Purolator, for service and filing of documents.

(b) Tariff Item #4 – February 3, 2022 motion

[19] Counsel for Mr. Stack urges me to tax off this \$375.00 as well, on the basis that the abandonment was served and filed before the Chambers appearance, and thus (a) there was no need for counsel to appear and argue the motion and (b) no decision ever resulted from the Chambers judge.

[20] Conversely, counsel for Ms. Stack notes that the application was filed, with all supporting material, which included an affidavit, a memorandum of law, and a draft order. Each of those documents required time and effort to produce, and counsel was thus prepared to argue the motion.

[21] Both counsel referred to *Tyacke v Tyacke*, CACV3524, September 14, 2021 (Groothuis) [*Tyacke*] for the proposition that on a taxation of costs, the Registrar does not have authority to "tax on an amount for a step not taken" (at paragraph 28). The question before me is whether the "step" was taken on the filing of an application, or on the arguing of an application?

[22] I am satisfied that the filing of the motion materials constitutes a step taken, and that Ms. Stack is entitled to the \$375.00 claimed for this application. The Tariff does not assign an amount for the appearance on an application versus the preparation and filing of documents in support of an application; rather, the Tariff item is meant to capture all steps associated with preparing for and arguing an application. In this instance, while the hearing did not proceed, there is a clear record on the Court file of effort expended in preparing and filing the materials in support of the application. I note as well that past taxation decisions have seen the tariff item allowed for an application that was filed and where counsel prepared, but which ultimately did not proceed. See, for example, *Rachel Resch v Sean Dufour*, CACV2324, December 18, 2012 (Baldwin). As a result, I decline to tax off the \$375.00 for this item.

(c) Tariff Item #8 – Preparation of Factum

[23] It is uncontroverted that when the Registry received Mr. Stack's notice of abandonment, the respondent's factum had not been served and filed. Counsel for Mr. Stack submits this is determinative of the issue, and this item must therefore be taxed off. Counsel for Ms. Stack argues that the record before me demonstrates that the factum had been prepared, and that given the manner in which proceedings unfolded, Ms. Stack ought to receive the Tariff item for preparation of factum notwithstanding the fact that the respondent's factum had not yet been filed with the Court.

[24] I start my analysis with the applicable Rules.

54(1) Unless otherwise ordered:

(a) the costs of an appeal or application shall be taxed as between party and party by the registrar in accordance with the fees set out in the appropriate column of the 'TARIFF OF COSTS IN THE COURT OF APPEAL' which is attached as Schedule 1 to these Rules;

...

(7) On a taxation, the registrar may do any of the following:

(a) take evidence by affidavit, administer oaths or affirmations and examine witnesses, as the registrar considers appropriate;

(b) require production of records;

(c) require notice of the taxation to be given to all persons who may be interested in the taxation or in the fund or estate out of which costs are payable;

(d) give any directions and perform any duties that the registrar considers are necessary for the conduct of the taxation;

(e) refer a matter requiring direction to the court or a judge.

(8) After a taxation, the registrar may do any of the following:

(a) if parties are liable to pay costs to each other:

(i) adjust the costs by way of set-off; or

(ii) delay the allowance of costs a party is entitled to receive until that party has paid or tendered costs that the party is liable to pay;

(b) award the costs of a taxation to any party and fix those costs.

[25] Item #8 of the Tariff awards an amount for the action of "Preparation of Factum".

[26] A review of all published taxation decisions reveals that the specific and narrow question raised in this taxation has not previously been considered by the Registrar. In *Tyacke*, the issue was whether the party entitled to costs could claim a tariff amount for Item #11 – preparing formal judgment or order. At paragraph 28, I wrote:

[28] I agree that I do not have authority to tax on an amount for a step not taken. Orkin provides at paragraph 6:31:

It is a basic if obvious principle that on a party-and-party taxation the assessment officer can allow only those items which were in fact done. The classic statement of this proposition is by Meredith C.J.C.P., in *Flexlume Sign Co. Ltd. v. Globe Securities Co.*:

In all taxations of costs it should be borne in mind that allowances are to be made only for services actually performed, fees actually earned, and outlays actually incurred, all within the limitations which the tariff contains; that nothing is to be allowed for imaginary services, or services which might have been but were not performed.

(*Flexlume Sign Co. Ltd. v. Globe Securities Co.* (1918), 47 D.L.R. 22 (Ont. S.C. App. Div.), at p. 23.)

(Underlining added)

[27] In *Tyacke*, it was entirely within the appellant's control to prepare, file, and have issued a formal order, but this step was not taken. Similarly, while counsel in *Tyacke* stated during the taxation hearing that a draft order had been prepared and *would* be served and filed, I had no affidavit evidence before me upon which I could properly rely. These two factors therefore distinguish the outcome in that taxation hearing to the one presently before me.

[28] Put simply, the question before me is whether, on the facts of this case and in the context of the appellant abandoning his appeal, the respondent has demonstrated the service was actually performed, the item that was done, or the step taken.

[29] Counsel for Mr. Stack argues that the Tariff does not permit costs to be taxed for a factum where one is not filed; as one was not filed prior to the abandonment it must lead to the conclusion that Ms. Stack is not entitled to the Tariff amount.

[30] Conversely, counsel for Ms. Stack argues that while the filing of a document can act as a "bright line" that a step has been taken, in the within matter there is evidence of services actually performed that ought to displace the "bright line". I am urged to accept that the February 15 Affidavit confirms work was performed and the factum was prepared, with the necessary conclusion that Ms. Stack is entitled to receive her costs for this Tariff item. Indeed, Exhibit "C" to that affidavit is the respondent's complete but unfiled factum. Finally, counsel for Ms. Stack submits that as Mr. Stack had knowledge of this outlay that was incurred, he must be the party to bear the cost, given that he decided not to complete the steps required by Ottenbreit J.A.'s order.

[31] Counsel for the respondent makes a compelling argument. It is accurate that the Registrar has strictly confined authority when taxing costs, though that does not mean that no discretion or exercise of judgment exists. For example, past decisions confirm that the Registrar has pro-rated

costs (see, for example, *Lloyd Hanna v Nancy Beckman*, CACV3053, April 8, 2019 (Baldwin)). In *Stelter v Stelter*, CACV1987 & CACV2061, March 1, 2013 (Baldwin), which is one of the decisions provided to me by counsel for Mr. Stack, the Registrar declined to award two sets of costs for “preparation of bill of costs” for two appeals that had been heard together, because the proposed bill of costs was “essentially one document”. Both decisions are illustrative of the Registrar’s necessary exercise of discretion.

[32] Having reviewed the February 15 Affidavit, I find as a fact that as early as December 21, 2021, Mr. Stack knew through his lawyer that Ms. Stack’s factum was complete and would be filed once the contents of the appeal book was settled. Ms. Stack’s February 15 Affidavit includes invoices from December, 2021 for services billed to her by her legal counsel, such as the drafting and editing of her factum in response. Importantly, at or about the same time, counsel for Mr. Stack was in the process of bringing an application to require Ms. Stack to file her factum or have the appeal scheduled for hearing.

[33] I further find as a fact that Ms. Stack was prevented from filing her completed factum by Mr. Stack’s delay and reticence in complying with Ottenbreit J.A.’s order to revise and refile the appeal book and appellant factum. That is, Ms. Stack could not “take the step” of filing her completed factum because of Mr. Stack’s actions in failing or neglecting to revise the appeal book and factum.

[34] Given the affidavit evidence before me, coupled with the Court record, I have no difficulty concluding that the respondent’s factum had been prepared, that is, “the service was performed”, and fees were charged. As a result of the abandonment, coming when it did, these costs are in effect thrown away. I therefore conclude that Ms. Stack is entitled to the tariff amount identified for “preparation of factum” and I decline to tax off that entire amount. Rather, given that the respondent’s factum could not be finalized, served, and filed until the appellant completed the steps ordered of him (namely, to update the appeal book and factum and then re-serve and re-file those two documents), I determine the most proper course is to allow a pro-rated amount for this Tariff item, with Ms. Stack being entitled to 90% of the Tariff item to recognize the work performed and the actions taken. I therefore tax off \$200.00 and allow \$1,800.00 for item #8, in recognition that the respondent factum was substantially complete but not yet placed on the Court file.

[35] To be clear, my conclusion on this item is drawn from the specific fact pattern before me, namely:

- (a) Counsel for the respondent advised counsel for the appellant the factum was prepared and ready for filing at any early point, subject only to resolving the issue related to the contents of the appeal book;
- (b) The appellant applied for an order requiring the respondent to file her factum or for the appeal to be set down for hearing in the absence of such filing;
- (c) Both parties were subject to an order that directed procedural steps for the appeal to be perfected;

- (d) The appellant abandoned the appeal rather than perfect the appeal in accordance with Ottenbreit J.A.'s January 17, 2022 order;
- (e) Mr. Stack filed no evidence that he notified Ms. Stack that he may abandon the appeal before the abandonment was completed and served; and,
- (f) Affidavit evidence was filed on the taxation that allowed me to confirm the services were performed and the expense was incurred.

V. Decision

[36] I therefore conclude Ms. Stack is entitled to the following costs:

3.	Fee to Respondent on receipt of Notice of Appeal	\$ 125.00
4.	Simple Motion (Perfect Appeal, February 3, 2022)	\$ 375.00
8.	Preparation of Factum	\$ 1,800.00
12.	Correspondence	\$ 200.00
13.	Preparation of Bill of Costs	\$ 150.00
14.	Taxation of Bill of Costs	<u>\$ 75.00</u>
		\$2,725.00

[37] The proposed bill of costs is therefore taxed and allowed at \$2,725.00, plus GST in the amount of \$136.25, and PST in the amount of \$163.50 for a total of \$3,024.75. As noted above, I have taxed off disbursements related to the motion filed January 10, 2022, which taken together total \$56.63. The remaining disbursements, totalling \$87.99 are allowed. The total taxed fees and disbursements are \$3,112.74.

[38] For enforcement purposes, Ms. Stack may wish to prepare and file a certificate of taxation of costs in Form 11d in the amount of \$3,112.74 for issuance.



Counsel: Davin Burlingham for Jerame Michael Stack
Doc Crooks for Darlene Kimberly Stack