
Taylor Dalyce Furneaux

Appellant
(Respondent)

And

James Christopher Furneaux

Respondent
(Petitioner)

Before: Amy Groothuis, Registrar (on July 14, 2022)

Fiat

I. Introduction

[1] On March 23, 2022, Taylor Furneaux [appellant] applied for an extension of time within which to file a notice of appeal. The application was heard in Chambers before Tholl J.A., who issued a fiat on April 18, 2022 [April 18 fiat] granting the appellant the requested extension of time. The April 18 fiat also set filing deadlines for the parties' facta and related materials; notably, the appellant was to serve her appeal book, factum and application to adduce new or fresh evidence by no later than 4:00 pm on May 19, 2022. The notice of appeal was filed on April 19, 2022, and this was followed on April 21 by James Furneaux [respondent] filing an application to lift the stay of execution and stay of proceedings. The stay application came before Leurer J.A. on April 27, 2022, who issued a fiat on April 29, 2022 [April 29 fiat] lifting the stay of execution and stay of proceedings, except for proceedings in relation to the parenting of the child.

[2] On May 18, 2022, the appellant served and filed a notice of abandonment. At no time did the appellant file her factum, appeal book, or any application to adduce new or fresh evidence. On June 3, 2022, the respondent took out a notice of appointment for taxation of costs, returnable before me on July 13, 2022, and supported by a proposed bill of costs.

II. Proposed Bill of Costs

[3] The respondent 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 |
|---|-----------|

5.	Complex Motions (a) opposed (two)	\$3,000.00
8.	Preparation of Factum	\$2,000.00
12.	Correspondence	\$ 200.00
13.	Preparation of Bill of Costs	\$ 150.00

[4] The proposed fees total \$5,475.00. To this amount, Mr. Furneaux adds \$273.75 for GST and \$328.50 for PST on fees as well as one motion filing fee disbursement in the amount of \$25.00. The total fees and disbursements claimed are \$6,102.25

III. Issues

[5] The following issues arise in this matter:

- (a) Is the respondent entitled to claim the Tariff items for the two motions?
- (b) Were the two motions complex or simple?
- (c) Is the respondent entitled to Tariff item #8 for preparation of the factum?
- (d) Should Tariff items #12 (correspondence) and #13 (preparation of bill of costs) be prorated?

[6] The parties agreed that Column II was the appropriate column given that non-monetary relief was sought.

IV. Analysis

[7] My authority to tax costs is derived from *The Court of Appeal Rules* [Rules] and any orders of the Court or a judge sitting in Chambers. Rule 45 governs abandonments. It reads:

45 A party intending to abandon an appeal, cross-appeal or application shall serve on all other parties a copy of the notice of abandonment and file the original with proof of service. The other parties shall be entitled to their taxable costs without order.

[Emphasis added]

- (a) **Is the respondent entitled to claim the Tariff item for the motions?**

[8] As noted above, the two applications resulted in the April 18 fiat and the April 29 fiat, each issued by a single judge sitting in Chambers. I will consider each in turn.

[9] First, the April 18 fiat addressed the appellant's application to extend time to appeal. Paragraph 21 of the April 18 fiat provided the following direction with respect to costs:

[21] Costs of this application are reserved to the panel that hears the appeal.

[10] Counsel for the respondent takes the position that by reserving the costs of the application to extend time to the panel hearing the appeal, this in effect equates to an order that costs are "in the cause"; by abandoning the appeal the result is effectively that the appeal was dismissed. Counsel submits that had Tholl J.A. intended to order *no costs* to either party, the fiat would have reflected this. Thus, counsel submits that the respondent is thereby entitled to his costs for this motion.

[11] With respect, I cannot accept counsel's position. If costs had been ordered "in the cause", then I agree that the respondent would be entitled to the costs on the motion before Tholl J.A., because Rule 45 provides that upon an abandonment a respondent is entitled to costs "without order". But in this instance, by reserving the costs to the panel hearing the appeal, no decision had yet been made as to which party was entitled to its costs pursuant to the April 18 fiat and whether those costs were to be set at a specific amount or be pursuant to the Tariff. As such, I tax off \$1,500 for this motion as the respondent had not been awarded that amount.

[12] Second, with respect to the April 29 fiat that lifted the stay of proceedings, Leurer J.A.'s decision was silent with respect to costs. Again, counsel for the respondent submits that the logical outcome is that Mr. Furneaux is entitled to his costs for this application, in light of Rule 45, that silence must be equated with an entitlement to costs.

[13] However, Rule 45 does not automatically result in the respondent being entitled to all possible costs, only that the respondent is entitled to their "taxable costs without order". Put another way, the respondent must be entitled to claim a Tariff amount, in which case that amount is owed by the appellant "without order".

[14] Neither counsel provided any authorities that specifically addressed the question that arises from the April 29 fiat: what is the meaning of a fiat that is silent on costs? I was unable to find any previous taxation decision that examined this particular scenario, and I therefore turn to *Orkin on the Law of Costs, 2nd Edition* (Aurora, Ont.: Canada Law Book Inc., 2001), which at 1-15 provides:

A statement by the court or endorsement on the record to the effect of "no order as to costs" is, of course, an order as to costs, and means that neither party shall pay any costs to the other. Similarly, if judgment is given for a party without any order being made as to costs, no costs can be assessed by either party; so that when a matter is disposed of on a motion or at trial with no mention of costs, it is as though the judge had said that he "saw fit to make no order as to costs".

(Footnotes omitted)

[15] This approach has been adopted by the Ontario Court of Appeal. In *Delrina Corp. v Triolet Systems Inc.*, 2002 CarswellOnt 3220, the Ontario Court of Appeal heard and decided a costs

application following an appeal. With respect to the interlocutory motions heard before the appeal was finally disposed of, the Court wrote:

36 The respondents are not entitled to any costs for interlocutory proceedings. The order of Abella J.A. dated July 21, 2000, on which they rely and which was made on consent, orders that the appellant post a bond with the court in the amount of \$12,000,000 as security for the trial judgment (not as security for costs) and that the appellant had until October 31, 2000 to perfect its appeal. It does not contain a costs order. Accordingly, it is as though it had ordered no costs with respect to the motion: M. Orkin, *The Law of Costs*, looseleaf (Aurora, Ont.: Canada Law Book Inc., 2001) at 1-15.

(Emphasis added)

[16] This approach is persuasive. As the April 29 fiat was entirely silent on the issue of costs flowing from the stay application, I conclude that neither party is entitled to claim a Tariff item for that appearance. Therefore, I also tax off the \$1,500.00 for this motion as the respondent had not been awarded that amount.

(b) Were the two motions complex or simple?

[17] Given my conclusion that neither application results in an entitlement to costs, this question is moot, and I decline to consider whether these applications were complex or simple.

(c) Is the respondent entitled to Tariff item #8?

[18] It is uncontroverted that the respondent did not file a factum. Generally, a Tariff item is only awarded for a step that has been taken: *Tyacke v Tyacke*, CACV3524, September 14, 2021 (Groothuis) at paragraph 28. However, in this instance counsel encourages me to follow the approach taken in *Stack v Stack*, CACV3918, May 12, 2022 (Groothuis) [*Stack*] and award a prorated amount for the factum. Counsel represents that the respondent's factum was largely completed, though there is no evidence before me to confirm that submission.

[19] With respect, the assessment of costs before me can be wholly distinguished from *Stack*. As properly pointed out by counsel for the appellant, in this instance Mr. Furneaux did not swear an affidavit that the respondent's factum was complete. Similarly, counsel is correct that this was a Rule 43 appeal, meaning that the respondent only had 15 days to complete and file his factum upon receipt of the appellant's factum. A tight timeframe within which to complete, serve and file a factum is nothing out of the ordinary. By extension, counsel argues that permitting a respondent to claim even a prorated amount for a factum in this circumstance will open the door for parties to claim Tariff items for steps not yet taken.

[20] I agree with counsel for the appellant. Other than the common factor of an abandonment of appeal, the factual and evidentiary record that was outlined at paragraph 35 of my decision in *Stack* is wholly absent in the matter before me.

[21] I therefore decline to award any amount for Tariff #8, and tax off the \$2,000.00 contained in the proposed bill of costs.

(d) Should Tariff items #12 (correspondence) and #13 (preparation of bill of costs) be prorated?

[22] Counsel for the appellant acknowledges that these amounts are relatively small, but requests that these Tariff items be prorated. While I acknowledge the Registrar's discretion to prorate Tariff items in appropriate circumstances, I do not consider this to be an appropriate situation for pro-rating. Additionally, I note that I have no evidence before me of the amount or complexity of correspondence between counsel. There is letter correspondence on the Court file, and I am thus satisfied that this Tariff amount is properly claimed. Similarly, both counsel appeared before me for the taxation hearing, and I see no convincing reason to prorate the Tariff item amount of \$150.00 for the preparation of the bill of costs.

[23] To her credit, counsel for the appellant noted the absence of any amount claimed for Tariff item #14, which allows \$75.00 per hour for an appearance at a taxation of costs hearing. She suggested that given the brevity of the hearing, an amount representing 50% of this Tariff item be taxed on. I agree with this approach, and I further note that the parties agreed that I tax on \$20.00 for the cost to take out the notice of appointment for taxation of costs.

V. Decision

[24] I therefore conclude Mr. Furneaux is entitled to the following costs:

3.	Fee to Respondent on receipt of Notice of Appeal	\$ 125.00
12.	Correspondence	\$ 200.00
13.	Preparation of Bill of Costs	\$ 150.00
14.	Taxation of Bill of Costs	<u>\$ 37.50</u>
		\$ 512.50

[25] The proposed bill of costs is therefore taxed and allowed at \$512.50, plus GST in the amount of \$25.63, and PST in the amount of \$30.75 for a total of \$568.88. To this amount is added \$45.00 for non-taxable disbursements, being the two filing fees paid by the respondent. The total taxed fees and disbursements are \$613.88.

[26] For enforcement purposes, Mr. Furneaux may wish to prepare and file a certificate of taxation of costs in Form 11d in the amount of \$613.88 for issuance.



Counsel: Joanne Moser, Q.C. for Taylor Dalyce Furneaux
Roxanne S. Ouellette for James Christopher Furneaux