

Court of Appeal for Saskatchewan

Date: 2023-11-29

Docket: CACV3839

Alicia Yashcheshen

Applicant/Appellant
(*ex parte* Applicant/Proposed Plaintiff)

And

*Law Society of Saskatchewan, Ministry of
Advanced Education and Attorney General for
Saskatchewan*

Respondents/Respondents
(Respondents/Proposed Defendants)

Docket: CACV3841

Alicia Yashcheshen

Applicant/Appellant
(*ex parte* Applicant/Proposed Plaintiff)

And

The Attorney General for Saskatchewan

Respondent/Respondent
(Respondent/Proposed Defendant)

Docket: CACV3976

Alicia Yashcheshen

Applicant/Appellant
(*ex parte* Applicant/Proposed Plaintiff)

And

*Government of Saskatchewan and eHealth
Saskatchewan*

Respondents/Respondents
(Respondents/Proposed Defendants)

Before: Amy Groothuis, Registrar (on November 7, 2023)

Fiat

I. Introduction

[1] On March 17, 2023, being the date set for the hearing of the three within appeals, Ms. Yashcheshen, the appellant, completed, served, and filed a Notice of Abandonment in Form 8, in accordance with Rule 45 of *The Court of Appeal Rules* [Rules].

[2] The Government of Saskatchewan [Saskatchewan], a respondent in each of the three appeals, took out a notice of appointment for taxation of costs, supported by a proposed bill of costs, for each of the three abandoned appeals. The appointment for taxation was originally returnable on Tuesday, September 26, but at Ms. Yashcheshen's request, they were adjourned on consent to November 7, 2023.

II. Proposed Bill of Costs

[3] Saskatchewan claims the following fees under Column 1 of the Court of Appeal Tariff of Costs [Tariff] for each of the three abandoned appeals:

3.	Fee to Respondent on receipt of Notice of Appeal	\$ 100.00
8.	Preparation of Factum	\$ 1,000.00
9.	All Other Preparation of Hearing	\$ 500.00
13.	Preparation of Bill of Costs	\$ 100.00

[4] The proposed fees total \$1,700.00 for each appeal. Saskatchewan does not claim any disbursements or court filing fees. Ultimately, considering the identical bill of costs for the three appeals, Saskatchewan claims a total of \$5,100.00.

III. Issues

[5] Two issues arose in this taxation hearing:

- (a) Whether the *Fee Waiver Act*, SS 2015, c F-13.1001 [*Fee Waiver Act*] applies to the taxation of costs?
- (b) Whether the respondent is entitled to claim for three separate factums?

[6] When asked, Ms. Yashcheshen confirmed that aside from her more general argument about the proper approach to taxing costs given that she qualifies for a fee waiver certificate, she did not take issue with any of the specific Tariff items included on the proposed bill of costs, other than item #8, preparation of factum. Both issues are considered below.

IV. Analysis

[7] As noted, these three taxations each stem from an abandoned appeal. As such, Rule 45 applies:

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 notice with proof of service. The other parties shall be entitled to their taxable costs without order.

[8] All three appeals were originally taken from decisions of the Court of King’s bench that dismissed applications filed by Ms. Yashcheshen to commence an action. Having previously been declared a vexatious litigant in that court, Ms. Yashcheshen’s ability to commence new actions or applications is governed by a process that requires her to first seek leave to initiate an action: *Saskatchewan v Yashcheshen*, 2020 SKQB 160.

[9] As a result, the common theme through the three appeals was the question of whether, in each instance, the King’s Bench Chambers judge had erred in denying Ms. Yashcheshen leave to commence an action. That is, there was no monetary relief sought, and in the normal course pursuant to Rule 54(1)(b), this would result in the respondent’s costs being taxed on Column 2. However, during the taxation hearing Saskatchewan confirmed that it was only seeking its taxable costs pursuant to Column 1.

A. Application of the *Fee Waiver Act*

[10] Broadly speaking, Ms. Yashcheshen advances the argument that the considerations outlined at section 7 of the *Fee Waiver Act* ought to operate to decrease or eliminate the taxed costs that she is liable to pay. She points to criteria included at subsection 7(3) such as access to justice, fairness to the parties, the conduct of the parties, and any other factor that the court or public body considers appropriate when determining whether to make an order for costs against the holder of a fee waiver.

[11] In response to Ms. Yashcheshen’s point, Saskatchewan notes that it has submitted a “very conservative” bill of costs, in that no disbursements were claimed, not even the court filing fees, and it elected to utilize Column 1 rather than Column 2. It is evident that had Saskatchewan relied on Column 2, it would have had the effect of almost doubling the amount of costs now claimed. More broadly, counsel argued that a litigant (even a self-represented litigant) coming to court demonstrates an understanding that the usual process ought to apply – including with respect to costs. See, for example, *Rana v Rana*, 2023 ABCA 112, where a judge of the Alberta Court of Appeal, sitting in Chambers, noted that “when litigants choose the public court process, they are bound by the remedies imposed by the court, including the payment of costs by the unsuccessful party to the successful party” (at paragraph 7).

[12] Ms. Yashcheshen has a fee waiver certificate, and she is therefore exempt from paying court filing fees when she files a document for which a fee is generally charged. However, taxable costs owing upon the conclusion of a court proceeding is a separate and distinct question from the

payment of court filing fees. Section 7 of the *Fee Waiver Act* makes clear that a court retains ultimate discretion over costs, and that the Rules govern:

7(1) In this section, “costs” means any payment by one party to another party in a proceeding that is intended to reimburse the recipient for any fee or expense paid by the recipient with respect to that proceeding.

(2) Subject to the regulations, a court or public body maintains discretion to make an order for costs to or against the holder of a fee waiver certificate in accordance with any Act, regulation, rule or policy that governs the court or public body.

(3) When determining whether to make an order for costs to or against the holder of a fee waiver certificate, a court or public body may take into account one or more of the following:

- (a) access to justice;
- (b) fairness to the parties;
- (c) the conduct of the parties;
- (d) any other factor that the court or public body considers appropriate.

[underlining added]

[13] Section 7 applies to “a court or public body”, both of which are defined terms in that statute. “Court” includes the Court of Appeal, and “public body” means the Automobile Injury Appeal Commission; the Office of Residential Tenancies; and any other prescribed board, commission, ministry, Crown corporation or government body. It does not extend to include a court official such as the registrar. Moreover, I read the reference to “rule” in subsection 7(2) to include *The Court of Appeal Rules*, which necessarily includes Rule 45. Taken together, I understand section 7 of the Fee Waiver Act to provide guidance to courts or public bodies when considering whether to award costs against an unsuccessful party who has been issued a fee waiver certificate. That is not the situation now before me, and I cannot accept that section 7 applies to the registrar’s taxing of costs. Given that these appeals were abandoned, Rule 45 governs, and it entitles Saskatchewan to its taxable costs without order.

[14] Respectfully Ms. Yashcheshen’s argument must fail. Rule 45 incorporates an automatic award of costs without further order where an appellant abandons an appeal, which the Fee Waiver Act does not displace.

B. Item #8 – Preparation of Factum

[15] With respect to this Tariff item, Ms. Yashcheshen argues that Saskatchewan should not be able to seek its costs for the preparation of three factums. Rather, she submits that because the appeals had overlapping legal issues and given that she filed only one factum addressing all three appeals, the respondent should likewise have limited itself to only filing one factum. Ms. Yashcheshen considers that the respondent’s written argument was excessive, and she urges me to tax off or remove two of the three amounts claimed.

[16] In response, Saskatchewan submits that it was necessary to file three separate factums that addressed (a) the correct legal test when a Chambers judge is considering the granting of leave to a vexatious litigant to commence an action and (b) whether that test was properly applied in the circumstances, which necessarily meant some consideration of the underlying facts and alleged causes of action. Saskatchewan asserts that in this instance, it would not have been responsible or reasonable to address the issues before the Court in a summary fashion.

[17] This issue is fully answered by examining the procedural background to these three appeals. Briefly, Ms. Yashcheshen applied to consolidate the (at the time) four appeals involving the same underlying question: what test is to be applied by a Court of King’s Bench Chambers judge when considering whether to grant leave to commence an action by a vexatious litigant. The consolidation application came before Caldwell J.A. in August, 2022, who ultimately declined to consolidate the four appeals, holding instead that they should be heard by the same panel of the Court. I read the resulting fiat as identifying two pure questions of law common to all four appeals, yet also that the appeals are “unconnected by the issues they raise and in their underpinnings”.

[18] In setting filing deadlines and providing structure around how the four appeals would be perfected and scheduled for hearing, Caldwell J.A. did *not* order that Saskatchewan was only permitted to file one factum addressing the three appeals for which it was a party. As the appeals were not consolidated, and there were no restrictions placed on Saskatchewan’s filings outside the bounds of the Rules, I can reach no other conclusion than that it was entitled to serve and file a factum in each appeal. Moreover, a review of the court files confirms that three separate and distinct factums were filed by Saskatchewan. While there is some overlap in the legal authorities cited, I am satisfied that they each engaged different legal considerations and different underlying facts.

[19] I conclude that Saskatchewan is entitled to Tariff item #8 for each of the three appeals.

V. Decision

[20] As a result, for each of CACV3841, CACV3839 and CACV3976 I tax the respondent’s costs on Column 1 of the Tariff, as follows:

3.	Fee to Respondent on receipt of Notice of Appeal	\$ 100.00
8.	Preparation of Factum	\$ 1,000.00
9.	All Other Preparation of Hearing	\$ 500.00
13.	Preparation of Bill of Costs	<u>\$ 100.00</u>
		\$ 1,700.00

[21] The proposed bill of costs for each of the three appeals is therefore taxed and allowed as follows:

- (a) CACV3841 - \$1,700.00
- (b) CACV3839 - \$1,700.00
- (c) CACV3976 - \$1,700.00

[22] For enforcement purposes, Saskatchewan may wish to prepare and file a certificate of taxation of costs in Form 11d in the amount of \$1,700.00 for issuance in each of CACV3976, CACV3841 and CACV3839.



Counsel: Alicia Yashcheshen for herself

Noah Wernikowski for the Ministry of Advanced Education, the Attorney General of Saskatchewan,
the Government of Saskatchewan and eHealth Saskatchewan