Court of Appeal for Saskatchewan
Docket: CACV3907 **Date: 2023-12-08**

Dr. Satyam Patel	Applicant/Appellant (Respondent)
and	
Dr. Robert Younghusband McMurtry and Western Medical Assessment Corporation	Respondent/Respondent (Appellant)

Before: Amy Groothuis, Registrar (on October 25, 2023)

Fiat

I. Introduction

[1] This taxation for costs follows from an application to strike or quash an appeal. While the appeal itself is not directly related to the costs at issue, I find it is useful to briefly outline the procedural background to this matter.

[2] On October 5, 2021, Dr. Satyam Patel [appellant] filed a notice of appeal of a judgment dated September 8, 2021 that had the effect of striking the actions he commenced against Dr. Robert Younghusband McMurtry [Dr. McMurtry] and Western Medical Assessment Corporation [WMA; collectively, the respondents] for disclosing no cause of action.

[3] On November 29, 2021, the respondent WMA applied to strike or quash the appeal. On December 17, 2021, the respondent Dr. McMurty filed a similar application, seeking the same relief – that the appeal be struck or quashed. Given that the applications each sought a final disposition of the appeal, they were scheduled for hearing before a panel of the Court.

[4] On February 4, 2022, the strike applications came before a panel comprised of Ottenbreit, Schwann and Kalmakoff, JJ.A., who dismissed both applications from the bench. In so doing, they concluded by awarding Dr. Patel one set of costs as between the two applicants, calculated in the usual way.

[5] Following the dismissal of these two applications, the appeal proceeded towards a hearing on the merits, though not without further disagreements arising between the parties. Both the appellant and the respondents filed interlocutory applications, though costs arising from those proceedings are not before me, as the Chambers decisions either expressly awarded no costs or set costs in favour of one party in a specific amount.

[6] Ultimately, the appeal was perfected and heard on December 5, 2022. The Court's decision granting the appeal was issued on July 4, 2023. While the appeal was allowed, the Court's reasons for decision concluded that no award of costs was made.

[7] As such, the only aspect of this appeal where costs will be taxed results from the February 4, 2022 application to strike.

II. Proposed Bill of Costs

[8] The appellant filed a proposed bill of costs that relies on Column 2 of the Court of Appeal Tariff of Costs [Tariff], as follows:

5.	Complex Motion (opposed)	$1,500.00
9.	All Other Preparation of Hearing	$ 750.00
10.	Appearance to present argument on appeal (1/2 day)	$ 400.00
11.	Preparing formal order or judgment	$ 200.00
12.	Correspondence	$ 200.00
13.	Preparation of Bill of Costs	$ 150.00
14.	Taxation of Bill of Costs	$ TBD

[9] The total fees claimed come to $3,200.00. At the taxation hearing, the appellant also claimed post-judgment interest on the costs ultimately awarded. As further explained below, the request for post-judgment interest became the focus of the hearing.

[10] While the proposed bill of costs did not identify any disbursements, as discussed below the Registrar's general practice is to include the filing fees associated with the taxation of costs.

III. Issues

[11] Ultimately, almost all Tariff items claimed on the proposed bill of costs became an issue, as did the appellant's request for post-judgment interest, which was not included on the proposed bill of costs but was advanced for the first time at the taxation hearing. The respondents took no issue with item #12 (correspondence), item #13 (preparation of bill of costs) or item #14 (taxation of bill of costs). The respondents took no issue with the costs being taxed on Column 2.

IV. Analysis

A. Taxing Costs

[12] I find it useful to orient myself, at the outset, by identifying the scope of the registrar's authority to tax costs. *The Court of Appeal Rules* [*Rules*] at Rule 54 provides:

> 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; and
>
> (b) Column 2 of Schedule 1 applies to the taxation of costs where non-monetary relief is involved.

[13] In taxing a bill of costs, I am bound by (a) the *Rules*, which includes the Tariff, and (b) any applicable order of a judge or of the court. In this instance, when dismissing the applications to strike or quash the appeal, the Court ordered, as follows:

> Dr. Patel shall be entitled to one set of costs as between the two applicants, calculated in the usual way.

[14] Therefore, taxing the appellant's costs must be done "in the usual way". He is entitled to one set of costs as between the two applicants (respondents). And those costs are determined in accordance with the *Rules* and the Tariff. I simply do not have the authority to go beyond these two constraints.

B. Post-Judgment Interest

[15] I understand the appellant's argument for claiming post-judgment interest to be grounded in two arguments. First, he relies on section 129 of *The Court of Justice Act*, RSO 1990, c C.43 [CJA], which provides that money owing under an order, including costs to be assessed or costs fixed by the court, bears interest at the post-judgment interest rate, calculated from the date of the order. In support of this argument, he relies on a number of cases, including *Bank of America Canada v. Mutual Trust Co*., 2002 SCC 43; *M.P.A.N. v. J.N.*, 2019 ONCJ 96; and, *University of Regina v HTC Purenergy Inc*., 2017 SKQB 310. The CJA can be easily distinguished on the basis that it is an Ontario statute and has no application in Saskatchewan. The cases cited are likewise inapplicable as they all relate to orders made by a judge, and not by the registrar.

[16] The appellant's second, and broader argument, is that it would be nonsensical for the registrar to have authority to award costs but not post-judgment interest. However, that thinking misses the mark on the registrar's role, which is to *tax the costs awarded by a judge or the court*. While the registrar's authority extends to some exercise of discretion in assessing costs, the Registrar has no authority to *award* costs.

[17] It is also worth noting that in this instance, no formal order was taken out. While the appellant stated that he understood that an order was submitted to the Registry, a review of the court file confirms that the respondents submitted a draft order in support of their applications to strike or quash, but no formal order reflecting that the applications were dismissed was ever taken out by the appellant. Quite accurately, counsel for the respondents argued that post-judgment interest cannot accrue where the quantity of damages or costs is not confirmed via a court order. Finally, the Court's decision on costs, which is reproduced above, makes no comment on the inclusion of post-judgment interest and as such even if an issued order was on the court file, I cannot see a situation where the appellant would be entitled, in the within circumstances, to claim post-judgment interest arising from the date the applications were dismissed.

[18] Finally, I will comment on *MFI AG Services Ltd v Sotkowy*, 2014 SKCA 69 [*MFI AG*], which the appellant cited in support of his argument that he is entitled to receive post-judgment interest. *MFI AG* concerned an application in Chambers for a judge of the Court of Appeal to review the registrar's taxation of costs. One issue addressed by the Chambers judge was what "costs in the usual way" meant. The Registrar had held that "costs in the usual way" meant that costs were both taxable and payable forthwith. The Registrar's decision was upheld. In the present taxation, the appellant relied on *MFI AG* to argue that generally a party will await the outcome in the respective court before taxing the associated costs. Respectfully, I read *MFI AG* differently but ultimately, I do not consider that this argument is determinative of the issue. Had the appellant elected to tax his costs immediately after the application to strike was dismissed, it was open to him to do so. Conversely, there was no impediment to the appellant waiting until after the appeal was fully and finally determined to tax his costs. It is entirely reasonable for a party to wait until the conclusion of an appeal to address the resulting costs, especially where interlocutory applications arose with resulting cost implications. However, as explained above, in neither situation is a party entitled to post-judgment interest unless ordered by a judge or the court, and even in that scenario, only within the parameters of the specific order.

[19] The issue of whether the appellant was *obligated* to take out the notice of appointment for taxation of costs immediately after the application to strike or quashed was dismissed, or if he was *required* to wait until the conclusion of the appeal was deliberated at length during the taxation hearing. The appellant argued that Rule 11-8(1)(c) of the *Queen's Bench Rules* required him to wait until the final determination of the proceeding. In my view, this argument is a red herring and has no application, because there is no way that the appellant could be entitled to claim or receive post-judgment interest on his taxable costs. Put simply, the Court did not award post-judgment interest in its decision, I do not have authority to independently add it, there is no issued order granting it, and while not determinative, the respondents had no notice that the appellant was claiming post-judgment interest on the costs until the taxation hearing. The proposed bill of costs includes no amount for post-judgment interest, and none will be taxed on.

C. Item #5 – Complex Motion (Opposed)

[20] The respondents argued that the motion to strike or quash ought to be considered a simple motion, rather than a complex application. I will explain why I cannot accept that argument.

[21] A review of past taxation decisions makes clear that each proposed bill of costs is considered on its own, in the context of the costs order made by the court or a judge, and taking into account the specific factors of an appeal file. However, more often than not an application to strike or quash an appeal has been found to be a complex, rather than a simple, motion: see, for example, *Michael Hogan v Jennifer Hogan*, CACV2251, February 25, 2013 (Baldwin), *Joseph Melnick v Angela Tapp*, CACV3262, October 5, 2018 (Baldwin), and *Kalem Anderson v Saskatchewan Apprenticeship and Trade Certification Commission*, CACV3554, September 30, 2020 (Baldwin).

[22] This trend makes sense, and one need only look to the present circumstances to understand why. In the within matter, the appellant faced the prospect of his appeal being dismissed in its entirety. WMA filed an affidavit that was 41 pages, including four exhibits, and a brief of law that was 97 pages and included 6 cases. Dr. McMurtry's application was supported by a four-page affidavit and a 71-page brief of law, when including the authorities. While the scope of the applications before the court ultimately narrowed, the question was a novel one: whether Dr. Patel was required to seek leave to commence the appeal given that he was declared a vexatious litigant *after* the present appeal was commenced. In effect, the respondents were asking the court to retroactively impose a leave requirement on the commencement of the appeal.

[23] Quite reasonably, the appellant prepared and filed a comprehensive brief that addressed the legal issue before the court, citing to thirteen separate authorities in support of his position that the applications be dismissed.

[24] I therefore reject the respondents' argument that the application to strike or quash, even though it was ultimately narrowed before the hearing, was a simple motion and I decline to tax off or decrease the amount claimed on the proposed bill of costs.

D. Item #9 (preparation for hearing) and Item #10 (appearance to present argument on appeal)

[25] I will address these two Tariff items collectively, as the same reasoning as to why they must be taxed off applies to both. The appellant claims these two items as they relate to the application to strike or quash; he confirmed at the taxation hearing that he is not seeking any costs related to the hearing of the appeal proper, given the court's ultimate disposition that no costs be awarded on the appeal.

[26] Costs for an application, regardless of the appropriate Column and whether simple or complex, have historically been viewed as capturing all steps or actions, from the filing of the application to its hearing. That is, items #9 and #10 apply to the preparation and hearing of the appeal proper, but not to a single application. As Registrar Baldwin (as she then was) wrote in *Paulsen & Son Excavating Ltd v Royal Bank of Canada*, CACV2300, August 15, 2013 (Baldwin) [*Paulsen*]:

> My understanding is that the motion items in *The Court of Appeal Tariff for Costs* are intended to be all inclusive. In other words, items 1 (motion for leave to appeal, including brief and argument), 4 (simple motions) and 5 (complex motions) are 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. As such, 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 therefore be taxed off.

[27] During the taxation hearing, the appellant initially took the position that the inclusion of Tariff items #9 and #10 were "boilerplate" and not controversial. To be fair to him, I asked for his position on their inclusion given that traditionally those items were only taxed on with respect to an appeal, and not for an application. The appellant contends that past taxation decisions have included items for hearing preparation and appearance to present argument for an application, suggesting that one such case involved himself and the Saskatchewan Health Authority. However, at the taxation hearing he was unable to provide me with a cite to the authority on which he relied.

[28] Most taxation decisions issued after 2009 are included on the Court of Appeal's website. These are searchable by date, or by subject, and include the style of cause. In reviewing the available decisions, I found one decision, issued by then-Registrar Baldwin, that involved the appellant: *Dr. Satyam Patel v The Saskatchewan Health Authority and The Practitioner Staff Appeals Tribunal*, CACV3489, December 5, 2019 (Baldwin). That assessment of costs arose following an application for leave to appeal, which is analogous to a complex motion. No amount was claimed, nor was any amount taxed on, for either Tariff item #9 or #10.

[29] Having been directed to no other relevant and applicable authority, I adopt the same approach and reasoning as in *Paulsen*. The registrar is required to assess costs "in the usual way". The usual way is to consider the Tariff items for applications to be all-inclusive, representing the amount of costs for all steps taken as part of an application.

[30] As a result, I tax off the amounts claimed for item #9 and item #10.

E. Item #11 – Preparing formal order or judgment

[31] It is uncontroverted that no formal judgment or order was issued following the court's dismissal of the application to strike or quash. A review of the court file confirms that no order was submitted for filing, no motion filing fee was paid, and no resulting order was issued.

[32] Absent exceptional circumstances that are not present in this taxation, a Tariff item is only awarded for a step that has been taken: *Tyacke v Tyacke*, CACV3524, September 14, 2021 (Groothuis) at paragraph 28. I see no reason to depart from this standard practice, and as no formal order or judgment has been prepared, served, and filed, I tax off this amount.

F. Items #12, #13, and #14

[33] The respondents take no issue with the inclusion of the Tariff items for correspondence or the preparation of the bill of costs.

[34] The taxation hearing took approximately one hour, and as such I tax on $75.00 for that Tariff item.

V. Decision

[35] As a result of the above, I tax the appellant's cost on Column 2 of the Tariff:

5.	Complex Motion (opposed)	$1,500.00
12.	Correspondence	$ 200.00
13.	Preparation of Bill of Costs	$ 150.00
14.	Taxation of Bill of Costs	$ 75.00
		$1,925.00

[36] The proposed bill of costs is therefore taxed and allowed at $1,925.00. Properly added to this amount is the court filing fee to take out the appointment for taxation of costs, in the amount of $20.00, bringing the total taxed amount to $1,945.00.

[37] Dr. Patel is entitled to receive $1,945.00 from Dr. McMurtry and WMA for his taxable costs and disbursements related to the application to strike or quash his appeal. For enforcement purposes, Dr. Patel may wish to prepare and file a certificate of taxation of costs in Form 11d in the amount of $1,945.00 for issuance.

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Counsel: Dr. Satyam Patel for himself
Nicholas Stooshinoff, K.C. for Dr. McMurtry and
Jennifer Pereira for Western Medical Association Corporation