

Farms and Families of North America Inc. (carrying on business as Farmers of North America)

Appellant
(Plaintiff/Defendant by Counterclaim/Respondent)

and

James Mann

Appellant
(Non-Party/Defendant by Counterclaim/Respondent)

and

AgraCity Crop & Nutrition Ltd.

Respondent
(Defendant/Plaintiff by Counterclaim)

and

Jason Mann

Respondent
(Defendant/Plaintiff by Counterclaim/Non-Party)

and

Robert Friesen

Non-Party
(Non-Party/Defendant by Counterclaim/Respondent)

Before: Amy Groothuis, Registrar (on October 25, 2024)

Fiat

I. Introduction

A. Preliminary matters

[1] On October 25, 2024, eight (8) Notice of Appointment for Taxation of Costs came before me for hearing, involving a number of different parties in a total of eleven different appeal files. One lead decision for the court file CACV3505 provides background and outlines the reasoning on common issues arising in most of the taxations of costs. The fiat issued for CACV3505 is to be read in conjunction with this decision.

B. Adjournment Request – Jason Mann

[2] During the taxation hearing, which as noted above concerned the taxation of bills of costs in 11 appeal files, an issue arose that resulted in the respondent Jason Mann [Jason] requesting an adjournment to file an amended notice of application for taxation of costs. Some context is necessary before outlining why this request to adjourn is denied.

1. Background and Context

[3] The Notice of Appointment for Taxation of Costs in CACV3815 arose out of the Court of Appeal’s decision dated October 10, 2023, bearing the citation *Farms and Families of North America Inc. (Farmers of North America) v AgraCity Crop & Nutrition Ltd.*, 2023 SKCA 113, which dismissed the appeal brought by Farms and Families of North America [FNA] and James Mann [James], awarding costs to the AgraCity Crop & Nutrition [AgraCity] and Jason as follows:

[52] I would grant to each of AgraCity and Jason one set of costs in relation to this appeal against FNA and James, on a joint and several basis. These costs are to be calculated in accordance with Column 3 of the Tariff of Costs in the Court of Appeal.

[4] A formal judgment reflecting the above was issued on September 23, 2024, essentially contemporaneously with the filing of the Notice of Appointment for Taxation of Costs [Appointment].

[5] The Appointment was taken out jointly by AgraCity and Jason; it uses language indicating that it was prepared and filed by both parties, and the contact information and address for service for the solicitors of both respondent parties is included.

[6] While 11 appeals had their costs taxed on October 25, 2024, this was accomplished via eight (8) Notices of Appointment for Taxation of Costs, all taken out at the same time and returnable on the same date [collectively, Notices]. This is because in some instances, appeals had been heard and determined together, such that certain of the Notices referenced two appeal files. Counsel for AgraCity filed one certificate of service for the Notices. The certificate of service included counsel’s statement that James Mann and his counsel had been served with a copy of the “Notice of Appointment for Taxation of Costs (CACV3815)”, a copy of which was concurrently being filed with the Court.

[7] As is more robustly reviewed in the taxation fiat for CACV3505, the Notices were originally returnable on September 27, 2024, but at the beginning of the hearing an agent for James Mann requested an adjournment, which was granted. Ultimately the hearing was rescheduled to October 25, 2024.

[8] Aside from the materials filed on CACV3815, which I will come to momentarily, the Notices in each of the other 7 matters were accompanied by the related bill of costs. For example, the Notice of Appointment for Taxation of Costs filed on CACV3649 and CACV3986 only included a proposed bill of costs for AgraCity, because the Court did not award Jason costs on those applications. By way of further example, on CACV3637, each of AgraCity and Jason Mann attached separate bills of costs to the jointly filed notice of appointment for taxation of costs.

[9] That brings me to the materials filed on CACV3815. In this instance, the Appointment – again, filed jointly by the two respondents – includes the standard language that “Copies of the proposed Bill of Costs are attached to this Appointment”. However, only AgraCity’s proposed bill of costs was appended to the Appointment.

[10] It was only at the point that CACV3815 was spoken to on October 25, 2024 that counsel for Jason realized that his proposed bill of costs had not been filed. This led to the request to adjourn for the purpose of completing and filing an amended Appointment (for Jason Mann).

[11] This adjournment request was opposed by counsel for FNA and by James. After hearing arguments, I reserved on the issue, advising the parties that I would either decline to grant the adjournment request and only tax AgraCity’s costs on CACV3815, or would allow the adjournment request and provide direction on next steps, recognizing that this latter option would necessary result in an adjournment of the hearing related to AgraCity’s proposed bill of costs, which had already started when the issue of Jason’s missing bill of costs arose.

2. Analysis and Decision

[12] The Registrar’s authority to tax costs arises solely out of *The Court of Appeal Rules* [Rules]. Absent an order from the Court that costs be taxed on a solicitor-client basis, such authority is limited to taxing costs in accordance with the Tariff of Costs [Tariff], subject to any direction provided by the panel of the Court constituted to hear an appeal. For example, if an appeal would normally be taxed pursuant to Column 2 of the Tariff but the Court’s judgment orders costs be taxed pursuant to Column 3, then that order binds the Registrar.

[13] For the within issue, the relevant provisions of Rule 54 provide:

54(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.

[14] While Rule 54(7) speaks to the procedural aspects of the Registrar’s authority on a taxation, this must be read in conjunction with Rule 54(3), which imposes requirements on a party entitled to costs who wish to have those costs taxed:

54(3) A party entitled to costs shall:

- (a) take out a Notice of Appointment for Taxation of Costs in Form 11a by first obtaining a date and time for taxation from the registrar;
- (b) prepare a proposed bill of costs in Form 11b;

(c) serve the Notice of Appointment for Taxation of Costs and proposed bill of costs on the party against whom costs were imposed; and

(d) file the Notice of Appointment for Taxation of Costs, proposed bill of costs and proof of service with the registrar.

[15] In this instance, the Appointment and *one* proposed bill of costs was filed with proof of service. The issue before me is whether, given Jason's non-compliance with Rule 54(3), I am able to rely upon Rule 54(7)(d) to adjourn the hearing to provide him with the opportunity to serve and file an amended Appointment, supported by his proposed bill of costs.

[16] I accept that Rule 54(7) permits the Registrar to adjourn a taxation hearing; indeed, James made such a request (through his agent) and received an adjournment of the original September 27, 2024 hearing (which, I note parenthetically, was opposed by counsel for the respondents). In that instance, I orally granted the adjournment on essentially three grounds. First, that the appellants only had five business days' notice of the hearing, which was to hear and decide taxations on eleven matters that even on an initial review was clearly going to result in a significant bill of costs to FNA and James. Second, that most of the taxations concerned appeals or applications that had been disposed of at least a year ago, with no indication that taxing their costs was a priority for the respondents. And, third, that the respondents were unable to satisfy me of any significant prejudice that would result from a brief delay.

[17] However, while Rule 54(7)(d) empowers the Registrar to adjourn a taxation hearing, the question of whether that extends to the within request, which is to adjourn to permit Jason to file an amended notice of appointment, supported by his proposed bill of costs, is less clear to me. Rule 54 does not speak to amending a notice of appointment, and Rule 54(3) clearly states the process by which costs are taxed by the Registrar.

[18] Having considered the interplay of Rule 54(7)(d) and Rule 54(3), in the context of the facts now before me, I am not convinced that Rule 54 allows me to adjourn a taxation hearing for the purpose of preparing, serving and filing an amended notice of appointment of taxation. For example, does Rule 54 allow for a Notice of Appointment for Taxation of Costs to be amended, and if so, does that require an application or can it simply be done through the filing of an additional proposed bill of costs? What does that mean for AgraCity's proposed bill of costs?

[19] While I have grappled with these questions in the context of this taxation hearing and request to adjourn, ultimately, I conclude that I do not need to answer the substantive question to address the procedural issue of whether to adjourn the hearing or not. Presuming without deciding that Rule 54 permits a party to file an amended Notice of Appointment and likewise authorizes the Registrar to adjourn a jointly filed Notice of Appointment for that purpose, I decline to exercise that authority and therefore deny Jason's request. I will explain.

[20] In the end, I am guided by principles of fairness in these proceedings, in terms of the balancing of the parties' interests, which includes the impact on each party to either refuse or grant the adjournment. In opposing Jason's request for an adjournment, James submits that throughout the entire legal proceedings, he and his company have been required to meet the specific requirements of the Rules, and they have been held to a high technical standard of their applications and appeals, which has impaired his ability to litigate the dispute properly and fully. As I

understand his position, James considers that it would be unfair to him if Jason was able to “do-over” the taxation given that James has not been afforded similar opportunities in the past. While I do not accept the totality of James’ argument, I do accept that where he has not followed the strict requirements of the Rules, that has at times resulted in procedural rulings or cost consequences that were not in his favour.

[21] It is not lost on me that a denial of an adjournment will result in Jason foregoing taxable costs to which the Court has judged he is entitled to receive. However, this is counterbalanced by a few considerations, including that the Court’s decision dismissing the appeal in CACV3815 was issued in October, 2023; that is, 54 weeks before the hearing that took place. The respondents elected, whether through litigation strategy or for some other reason, to delay in having their costs taxed. While there may be some expediency in having all eight Notices proceed together, this decision also adds a level of procedural complexity, simply owing to the sheer number of decisions, orders, and issued judgments that are in play in considering the proposed bill of costs. The respondents were in control of how these proceedings were conducted, both in terms of their timing and the materials filed in support. They cannot be said to be unfairly taken by surprise or were unaware.

[22] Additionally, Jason’s failure to file his proposed bill of costs on CACV3815 does not impact or limit his ability to tax his costs on the remaining Notices. Indeed, this fiat is being released contemporaneously with seven others, all but one of which include taxed costs for Jason.

[23] I will conclude by noting that I rest this discretionary decision, at least in part, on the timing of the adjournment request and the fact that the hearing had already started when counsel realized that Jason’s proposed bill of costs had not been filed. The hearing was well underway, and I had already received submissions on AgraCity’s proposed bill of costs filed with the Appointment. As noted above, the taxation hearing had already been adjourned once. That is, Jason had every opportunity to put before me those materials he wished me to consider with respect to this particular taxation. It would be unfair to the appellants to further delay these proceedings when they are already facing a significant totality of costs.

[24] Ultimately, I find that the balance must tip in favour of James, and I deny Jason’s request to adjourn the hearing to take out a new or amended Notice. These proceedings have gone on for a significant period of time, and I conclude that there is value in finality, with James knowing the full amount of taxed costs he and his company are liable to pay to the respondents.

II. Proposed Bill of Costs

[25] AgraCity filed a proposed bill of costs that relies on Column 3 of the Tariff, as follows:

3.	Fee to Respondent on receipt of Notice of Appeal	\$ 150.00
5a.	Complex Motion (opposed)	\$2,000.00
8.	Preparation of Factum	\$3,500.00

9.	All Other Preparation of Hearing	\$1,000.00
10.	Appearance to present argument on appeal (plus second counsel fee)	\$ 750.00
11.	Preparing formal order or judgment	\$ 300.00
13.	Preparation of Bill of Costs	\$ 200.00

[26] As such, AgraCity claims a total of \$7,900.00 in fees plus PST in the amount of \$474.00 and GST in the amount of \$395.00, for a total claimed amount of \$8,769.00.

III. Issues and Analysis

[27] With respect to the proposed bill of costs, the appellants raised two issues. First, as with many of the other taxations, they take issue with the inclusion of a second counsel fee under Tariff item #10. Additionally, in this instance the appellants argue that there was no court order providing for the taxed costs associated with an application to adduce fresh evidence, which is indicated on the proposed bill of costs as Tariff Item #5 – complex motion.

A. Item #10 – Appearance to Present Argument

[28] As with the other proposed bill of costs, AgraCity has claimed a second counsel fee. This issue was comprehensively addressed in the fiat arising out of CACV3505’s taxation of costs: the Court did not award a second counsel fee, and as in CACV3505, this amount is taxed off of AgraCity’s proposed bill of costs in CACV3815.

B. Item #5 – Complex Motion (Opposed)

[29] As noted above, the Court dismissed the appeal and awarded one set of costs “in relation to this appeal” against FNA and James on a joint and several basis, calculated in accordance with Column 3 of the Tariff.

[30] FNA and James both take the position that the language used by the Court spoke only to the *appeal* and not to the application to adduce evidence that was not before the court below. In response, AgraCity takes the position that even though the Court’s decision does not explicitly state that costs are awarded with respect to the Rule 59 application to adduce fresh evidence, that I have the authority to grant these costs to AgraCity given that the application was not successful.

[31] I disagree with AgraCity’s characterization of my authority, which is limited to taxing costs according to the Tariff and the Court’s direction. The Court’s decision does reference the Rule 59 application and confirms that it is dismissed. However, that does not fully answer the question of whether the Court’s order that AgraCity be entitled to “one set of costs in relation to this appeal” includes the application filed pursuant to Rule 59.

[32] The language employed by the Court in CACV3815 can be contrasted with that used in the decision that dismissed the appeals in CACV3536 and CACV3634. There, the Court ordered as follows (in part):

[140] I would grant to each of AgraCity and Jason costs in both appeals, to be calculated in accordance with Column 3 of the Tariff of Costs in the Court of Appeal. As part of this, both respondents are entitled to taxable costs in both appeals for responding to FNA's application under Rule 59 dated July 7, 2023. ...

[33] The above excerpt displays the Court's standard language when making a cost order for a specific application that was heard and determined. Generally, a decision that is silent on costs is interpreted as meaning that the judges or the Court has declined to award costs: see, for example: *Taylor Furneaux v James Furneaux*, August 3, 2022, Groothuis (CACV3995) at paragraphs 14 and 15:

[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)

[34] While the above citations speak to a decision that is entirely silent on costs, I see no logical reason why that principle would not extend to a decision that addressed a number of matters (e.g. an appeal and an application) and was silent with respect to one of the matters heard and determined by the Court. In the within instance, it is clear that the Court dismissed the application to adduce fresh evidence filed pursuant to Rule 59, and it is equally clear that the judgment was

silent on any resulting costs for that application. This can be contrasted with a similar decision involving the same parties (heard at the same time, though resulting in different written judgments) where the costs of the fresh evidence application were explicitly referenced. As such, in this instance I am persuaded to tax off the amount claimed for Tariff item #5, being a complex motion.

IV. Decision

[35] As a result of the above, I tax AgraCity's costs on Column 3 of the Tariff, as follows:

3.	Fee to Respondent on receipt of Notice of Appeal	\$ 150.00
8.	Preparation of Factum	\$3,500.00
9.	All Other Preparation of Hearing	\$1,000.00
10.	Appearance to present argument on appeal (plus second counsel fee)	\$ 500.00
11.	Preparing formal order or judgment	\$ 300.00
13.	Preparation of Bill of Costs	<u>\$ 200.00</u>
		\$5,650.00

[36] GST and PST are properly added in the amounts of \$282.50 and \$339.00, respectively. The total amount of taxed costs, inclusive of taxes, is therefore \$6,271.50.

[37] For enforcement purposes, AgraCity may wish to prepare and file a certificate of taxation of costs in Form 11d in the amounts noted herein for issuance.



Amy Groothuis, Registrar
Court of Appeal for Saskatchewan

Counsel: James Mann for himself
Alex Baboi for Farms and Families of North America
Daniel Cherian for AgraCity Crop & Nutrition Ltd.
Matthew Scott for Jason Mann