

CACV2886

Akomeno Oruaroghene Egware

APPELLANT

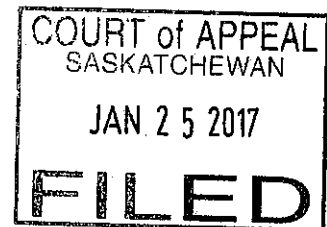
- and -

Oluwatomi Opeyemi Egware

RESPONDENT

David Barth for the Appellant
Kayla Demars-Krentz and Andrew Campbell for the Respondent

Taxation before Melanie A. Baldwin
Registrar, Court of Appeal
January 24, 2017



Background

On April 29, 2016 the appellant filed a notice of appeal relating to an April 6, 2016 judgment of Brown J. striking the appellant's petition. The appellant also filed a notice under *The Constitutional Questions Act, 2012*, SS 2012, c C-29.01 on May 5, 2016, alleging a violation of his rights pursuant to s. 7 of the *Canadian Charter of Rights and Freedoms*. The Attorney General for Saskatchewan responded to the notice in writing on May 12, 2016.

An application for perfection was filed by the respondent on June 10, 2016 returnable on June 22, 2016. The appellant filed his appeal book and factum on June 20, 2016. As a result, the only issue left to be determined on the perfection application was the issue of costs. On June 22, 2016, Justice Jackson (in chambers) left the issue of costs of the perfection application to the panel hearing the appeal.

The appellant filed an application for fresh evidence on November 17, 2016. That application and the appeal proper were heard by the Court on December 5, 2016 and were disposed of in an oral decision from the bench. The Court dismissed the application for fresh evidence and the appeal. The court also declined to consider the appellant's constitutional claim on the basis that it had been raised for the first time on appeal.

The appeal was dismissed "with costs to the respondent to be assessed." The fresh evidence application was dismissed with "costs of the motion to be assessed in the usual way." The Court also ordered costs for the motion to perfect "to be assessed in the usual way." Finally, the Court directed that "all cost assessments are to be pursuant to column 2 of the Court of Appeal Tariff of Costs."

A judgment was issued on January 5, 2017 and a notice of appointment for taxation was filed returnable on January 24, 2017, together with a proposed bill of costs and affidavit of disbursements. Mr. Barth, Ms. Demars-Krentz and Mr. Campbell appeared before me on the return date to make submissions on the taxation of the proposed bill of costs and this fiat represents my taxation decision.

Proposed Bill of Costs

The proposed bill of costs lists the following fees under column 2 of the Court of Appeal Tariff of Costs:

3	Fee to respondent on receipt of notice of appeal	\$ 125
5	Complex opposed motions (Constitutional Questions Act, Fresh Evidence and Perfection)	\$ 4500
6	Agreement as to contents of appeal book	\$ 200
8	Preparation of Factum	\$ 2000
9	All Other Preparation for Hearing	\$ 750
10	Appearance to Present Argument on Appeal	\$ 400
	Second counsel	\$ 200
11	Preparation of Formal Judgment	\$ 200
12	Correspondence	\$ 200
13	Preparation of Bill of Costs	\$ 150

The fees claimed total \$8725. PST and GST totaling \$872.50 are also claimed.

The proposed bill of costs claims disbursements amounting to \$450 composed of \$10 for the Court's fee for filing the application for perfection and \$440 for photocopies, printing and courier. GST on disbursements is claimed totaling \$22.

Disputed Items

There is no dispute between the parties about most of the tariff fee items claimed in the proposed bill of costs but the parties disagree about fee items 5 and 10. The parties also disagree about the disbursements claimed in the proposed bill of costs.

Parties Submissions on Disputed Items

Item 5

The respondent claims \$4500 for three complex opposed motions. The three motions identified are the appellant's notice under *The Constitutional Questions Act*, the respondent's application for perfection and the appellant's fresh evidence application.

On the notice under *The Constitutional Questions Act*, the respondent, through Ms. Demars-Krentz, argues that this is an application and should be treated as such for the purposes of taxation. The notice was filed and the Attorney General responded to it. It was addressed by both the appellant and the respondent in their facta and it was the subject of oral argument before the Court. Counsel had to do research in order to address the constitutional claim in the respondent factum and before the Court.

Mr. Barth, for the appellant, argues that the notice under *The Constitutional Questions Act* is not an application but is rather a notice to the Attorney General. The issues raised by the notice were dealt with by the Court as part of the appeal proper and not as a separate application (which can be contrasted with the treatment of the applications for perfection and fresh evidence).

On the application for perfection, Ms. Demars-Krentz argues that the line between simple and complex applications is not clear. The application materials were drafted at the respondent's cost and would not have been necessary if the appellant had filed the appeal book and appellant factum within the time specified in *The Court of Appeal Rules*.

Mr. Barth argues that the application for perfection is a simple application. There are forms provided by the Court for the application and it can be done almost on a "fill in the blank" basis. In this case, he notes that the appeal book and factum were filed before the hearing of the application for perfection so the only issue addressed in chambers was the issue of costs.

On the fresh evidence application, Mr. Barth argues that it should also be treated as a simple application. These applications are common and the test for admission of fresh evidence is well established in the case law. Ms. Demars-Krentz counters that, while the test for admission of fresh evidence is well known, its application to the fresh evidence which the appellant sought to admit in this appeal required research and preparation of the oral arguments made at the appeal hearing.

Item 10

The respondent claims \$200 for second counsel at the appeal hearing. While Ms. Demars-Krentz argued the appeal, her colleague Mr. Deagle was also present at the counsel table. Ms. Demars-Krentz advises that she conferred with Mr. Deagle before and during the appeal hearing. Mr. Barth argues that, as Mr. Deagle made no submissions at the appeal hearing, no second counsel fee is warranted.

Disbursements

The respondent claims \$440 for photocopies, printing and courier, supported by an affidavit of a support staff person from Ms. Demars-Krentz's firm advising that this amount is a percentage (4%) intended to account for disbursement expenses that can legitimately be charged back to a client. The firm's policy is to charge for disbursements for things like photocopying in this way rather than on a per copy basis and this is the amount that would actually be charged to the respondent by the firm. Ms. Demars-Krentz argues that the affidavit constitutes a proper voucher for the disbursements claimed and that the disbursements claimed should be allowed.

The respondent also claims \$10 for the Court's fee for filing the application for perfection. This amount is not correct – the Court's fee for filing the application for perfection was \$25.

Mr. Barth argues that the affidavit filed in support of the disbursement for photocopies, printing and courier is not a proper voucher. He notes that the respondent's factum was not particularly lengthy and takes the position that the amount claimed is likely two times what would be reasonable.

Decision

Item 5

In my view, the notice under *The Constitutional Questions Act* is not a motion under the Court of Appeal Tariff of Costs. The purpose of the notice is to identify a constitutional issue to be dealt with as part of the appeal proper.

There are many differences between the notice under *The Constitutional Questions Act* and a motion like the fresh evidence and/or perfection motions filed in connection with this appeal. There is no motion filed in support of the notice and no motion filing fee is charged for filing the notice. The issue identified in the notice is addressed in the parties' facta, not in separate written arguments and the oral argument on the issue is part of the oral argument on the appeal proper. There are specific tariff items for preparation of the respondent factum and the appearance to make oral argument before the Court on the appeal proper which have also been claimed by the respondent. Finally, the Court's decision on the constitutional issue is part of the Court's decision on the appeal proper.

I will therefore tax off the \$1500 claimed for the notice under *The Constitutional Questions Act*.

On the application for perfection, I advised counsel at the taxation hearing that my past practice has been to treat this type of application as a simple application to which item 4 of the Court of Appeal Tariff of Costs applies. I am not persuaded that this practice is not also appropriate for the application for perfection filed on this appeal.

There are specific forms provided for an application for perfection which are relatively simple to complete. There was, at least in this case, no complicated law to apply to the facts before the chambers judge. In fact, there was really no opposition to the application – the appeal book and appellant factum were filed before the return date. I will therefore treat the application for perfection as a simple application and will tax off \$1125 (\$1500 - \$375) for this item.

As for the fresh evidence application, I have concluded that, at least in this case, it constitutes a complex opposed motion. There are no specific forms for this type of motion and, although the test is well established in the case law, relatively detailed analysis and argument are still required to address the application of the test to the proposed fresh evidence. A not insignificant portion of the appeal hearing was used for the parties' arguments and the Court's decision on the fresh evidence application. The respondent will be entitled to \$1500 claimed under item 5 for this motion.

Item 10

Mr. Deagle accompanied Ms. Demars-Krentz at the appeal hearing. He was gowned and sat at the counsel table. He is identified in the Court's endorsement as appearing on behalf of the respondent. The Court did not, as it sometimes does, indicate in its decision that only one counsel fee could be claimed on the appeal. As such, the respondent's claim for \$200 for a second counsel fee is upheld.

Disbursements

The Court of Appeal Tariff of Costs says that necessary disbursements may be claimed with proper vouchers. Court filing/issuing fees are necessary disbursements which are supported by the Court file – no further voucher is necessary for these disbursements. On this appeal, the respondent paid the following Court fees: \$25 for filing the application for perfection, \$20 for taking out the formal judgment and \$20 for the appointment for taxation. All of these amounts are properly claimed by the respondent and will be taxed on. The \$10 motion filing fee incorrectly claimed by the respondent will be taxed off.

For disbursements other than Court fees, the Court of Appeal Tariff of Costs says that vouchers are required. In this case, the respondent has filed an affidavit attesting to her counsel's firm policy of billing a percentage for disbursements like photocopying rather than an actual per copy cost. While this might be simpler to administer for the firm and be more transparent for the client as claimed in the affidavit, I am not convinced that an affidavit describing this policy constitutes a proper voucher upon which to base a claim for disbursements.

Having said this, it was clearly necessary for respondent counsel to print or make photocopies of material served and filed on the appeal. It is therefore appropriate to permit the respondent to claim something under this heading.

The respondent filed 10 pages of material on the application for perfection. It is likely that four copies of this material were required (one for appellant counsel, one for respondent counsel, one for the Court and one for the respondent) for a total of 40 pages. The respondent factum is 43 pages long. It is likely that 6 copies of this document were required (one for appellant counsel, one for respondent counsel, three for the Court and one for the respondent) for a total of 258 pages. There would have also been other photocopies/printing required for the taxation documents and formal judgment. I will allow a claim for \$87.50 for photocopying (350 pages x 25 cents per page).

Assessment

The costs are therefore taxed as follows:

3	Fee to respondent on receipt of notice of appeal	\$ 125
4	Simple motion (Perfection)	\$ 375
5	Complex opposed motion (Fresh Evidence)	\$ 1500
6	Agreement as to contents of appeal book	\$ 200
8	Preparation of Factum	\$ 2000
9	All Other Preparation for Hearing	\$ 750
10	Appearance to Present Argument on Appeal	\$ 400
	Second counsel	\$ 200
11	Preparation of Formal Judgment	\$ 200
12	Correspondence	\$ 200
13	Preparation of Bill of Costs	\$ 150
	Fees:	\$6100
	Plus \$610 (GST and PST on fees)	
	Total fees plus taxes:	\$6710
	Disbursements:	\$152.50
	Plus \$4.38 (GST)	
	Total disbursements plus tax:	\$156.88
	Grand total (\$6710 plus \$156.88):	\$6866.88

The proposed Bill of Costs is therefore taxed and allowed at \$6866.88. Ms. Demars-Krentz may prepare and file a Certificate of Taxation of Costs to this effect (in Form 11d) for issuance if necessary.

DATED at Regina, Saskatchewan, this 25th day of January, 2017



REGISTRAR – COURT OF APPEAL