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***Corey Heffernan***

Appellant  
(Applicant)

*And*

***The Saskatchewan Police Commission and The  
Chief of Police of the Prince Albert Police Service***

Respondents  
(Respondents)

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Before: Amy Groothuis, Registrar (on November 5, 2021)

***Fiat***

## **I. Introduction**

[1] Mr. Corey Heffernan appealed the judgment of Justice R.W. Elson dated March 1, 2020, which dismissed his application for judicial review. Mr. Heffernan had been subject to a disciplinary decision with which he disagreed, and he sought to appeal that decision to the Saskatchewan Police Commission, which dismissed his appeal.

[2] The appeal was heard on September 17, 2020 and by way of written decision dated October 23, 2020, it was dismissed. Mr. Heffernan had applied to adduce fresh evidence, and this application was likewise dismissed, with costs awarded to the Chief of Police of the Prince Albert Police Service [Chief of Police] “in the usual way”. The Court did not award costs to the Saskatchewan Police Commission.

[3] A formal judgment was taken out and issued by the Court on November 6, 2020, and on October 6, 2021, counsel for the Chief of Police took out a Notice of Appointment for Taxation of Costs returnable before me on November 5, 2021, supported by a proposed bill of costs and an affidavit of disbursements.

## **II. Proposed Bill of Costs**

[4] The Chief of Police 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 Motion (a) opposed - Fresh Evidence Application	\$1,500.00
5.	Complex Motion (a) opposed - Objecting to Affidavit Evidence	\$1,500.00
8.	Preparation of Factum	\$2,000.00
9.	All other preparation for hearing	\$ 750.00
10.	Appearance to present argument on appeal (each 1/5 day)	\$ 400.00
11.	Preparing Formal Judgment	\$ 200.00
12.	Correspondence	\$ 200.00
13.	Preparation of Bill of Costs	\$ 150.00
14.	Taxation of Bill of Costs	\$ 75.00

[5] The proposed fees total \$6,900.00. Disbursements for courier fees, court fees, printing, postage and fax total \$373.52, which includes taxes where applicable.

### III. Issues

[6] Counsel for Mr. Heffernan raised only one issue with the proposed bill of costs: the second \$1,500.00 claimed under item 5a of the Tariff. While counsel acknowledges that one amount claimed for item 5a, being the application for fresh evidence (which was opposed), is proper, the dispute lies with the proposed inclusion of the complex motion objecting to affidavit evidence.

[7] At the taxation hearing, counsel for Mr. Heffernan confirmed that all other fees claimed were appropriate, and there was no issue with the \$373.52 in disbursements claimed, though I note the disbursements include a \$25.00 court filing fee for the application objecting to affidavit evidence, which I discuss below. At the hearing, counsel for the Chief of Police also claimed the \$20 court filing fee for taking out the Notice of Appointment for Taxation of Costs.

### IV. Analysis

[8] The primary issue on this taxation is whether the Chief of Police is entitled to claim the Tariff amount for two complex, opposed, applications. I must therefore review both applications to confirm whether they are properly filed. This means not only that they were both filed in accordance with *The Court of Appeal Rules* [Rules], but that they are truly separate applications. As I raised with the parties at the taxation hearing, it was not clear to me whether the Chief of Police's application objecting to affidavit evidence was a stand-alone application, or whether it

was more properly seen as a response to Mr. Heffernan's application to adduce fresh evidence. If in fact the application objecting to affidavit evidence was a response to the fresh evidence application, then it would not result to a claim for a second item 5a under the Tariff.

[9] As further discussed below, I conclude that the Chief of Police's application objecting to affidavit evidence was not filed in accordance with the Rules, he was not granted leave by the Court to late file the application, and in any event the materials filed on that application are more accurately viewed as a response to the application for fresh evidence filed by Mr. Heffernan, rather than a second, standalone application for which costs may be claimed. I will explain.

[10] On April 21, 2020, Mr. Heffernan filed a fresh evidence application, which consisted of the notice of application, three affidavits, a draft order, and a memorandum of law. The Chief of Police did not immediately file any materials in response to Mr. Heffernan's fresh evidence application. Rather, the appeal was perfected and scheduled for hearing in the normal course.

[11] It was not until September 14, 2020, that counsel for the Chief of Police filed a "notice of objection to affidavit evidence", which by way of relief requested an order "pursuant to Rule 51 of the *Court of Appeal Rules* striking portions of the Affidavits the Appellant seeks to file in this appeal." Rule 51 incorporates the *Queen's Bench Rules*, with any necessary modification, to an application before the Court or a judge.

[12] In support of this application, the Chief of Police filed annotated affidavits identifying the objections, a draft order, and a brief of law. The brief of law is identified on its cover page as being filed "RE APPELLANT'S FRESH EVIDENCE APPLICATION", and on my review it appears to be filed in response to Mr. Heffernan's application for fresh evidence. The points covered in the Chief of Police's brief of law are summarized in the table of contents as follows:

- (a) The proposed evidence need not be addressed
- (b) The affidavits do not satisfy *Palmer*<sup>1</sup>
- (c) The affidavits contain objectionable evidence

[13] With respect to the submission that Mr. Heffernan's proposed new affidavits contained objectionable evidence, paragraph 4 of the Chief of Police's brief of law provides a summary of his position, namely:

4. Further, and in the alternative, in the event this Honourable Court were to allow the Appellant's fresh evidence application, the proposed affidavit evidence contains objectionable evidence that should be struck or disregarded.

[14] Indeed, much of the brief of law focuses on the *Palmer* test, and it advances the argument that the proposed fresh evidence ought not to be admitted, with only the final few pages speaking to the allegedly objectionable evidence.

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<sup>1</sup> Referring to the test outlined in *R v Palmer*, [1980] 1 SCR 759.



[15] During the taxation hearing heard on November 5, 2021, counsel for the Chief of Police (who was not counsel appearing at the appeal hearing on September 17, 2020) conceded that the application objecting to the affidavit evidence was not filed three clear days before the hearing, as required by the Rules, and to his credit he agreed that if the Court had not granted leave to late file the application, then this item is properly taxed off the proposed bill of costs. However, he maintained that if leave to late file the application was granted, then it is properly a second complex motion for which the Chief of Police is entitled to claim taxable costs.

[16] The Court's decision is entirely silent on the Chief of Police's late filed application objecting to certain parts of the affidavit evidence. The decision considers the proposed fresh evidence and concludes at paragraph 27 that it does not satisfy the test for its admission; the fresh evidence application was therefore dismissed.

[17] With the parties' acquiescence, I listened to the Court's recording of the hearing to determine whether the Court granted leave to the Chief of Police to late file his application objecting to affidavit evidence. Unfortunately, the recording was not started at the commencement of the hearing, and so it did not capture any discussion between the Court and counsel on this point. However, during the hearing, counsel for the Chief of Police advanced submissions opposing the fresh evidence application and reviewed, in detail, each part of the *Palmer* test. Moreover, during his submissions counsel acknowledged that the application objecting to the affidavit evidence was not filed with three clear days' notice as required by the Rules. On this point, counsel acknowledged that he was seeking the Court's leave to late file the application. Counsel requested that if the Court determined the *Palmer* criteria were established such that the fresh evidence be admitted, then the Chief of Police sought leave for the application to be filed and considered. I am therefore satisfied that leave to late file the application objecting to affidavit evidence was not granted by the Court during the appeal hearing.

[18] As noted above, the Court dismissed the fresh evidence application and did not refer to the application objecting to affidavit evidence in the written decision dismissing the appeal, and from that I further conclude that the Court had no need to consider whether to grant the Chief of Police's request to accept and consider the late-filed application objecting to certain portions of the proffered affidavit evidence.

[19] In addition, I pause to note that in reviewing all the materials it is clear to me that the Chief of Police's application objecting to affidavit evidence was, in fact, a response to Mr. Heffernan's application to admit fresh evidence. I see no need to file a separate and distinct application and indeed the brunt of the Chief of Police's written and oral submissions focused on the application of the *Palmer* test, in direct response to the fresh evidence application. I conclude that the Chief of Police is entitled to only one fee item for 5a, and I therefore tax off the second claimed \$1,500.00 for the complex motion (opposed).

[20] As I have determined that the Chief of Police is not entitled to claim the \$1,500.00 in fees for item 5a, for the application objecting to affidavit evidence, it follows that the \$25.00 filing fee for filing (or attempting to file) that motion must also be taxed off. I therefore tax off \$25.00 for that disbursement, though I tax on the \$20.00 filing fee to take out the Notice of Appointment for Taxation of Costs, which was incurred by the Chief of Police. This results in a net deduction of \$5.00 in the claimed disbursements.

**Decision**

[21] The fees are therefore taxed and allowed as follows:

5.	Fee to Respondent on receipt of Notice of Appeal	\$ 125.00
5.	Complex Motion (a) opposed - Fresh Evidence Application	\$1,500.00
8.	Preparation of Factum	\$2,000.00
9.	All other preparation for hearing	\$ 750.00
10.	Appearance to present argument on appeal (each 1/5 day)	\$ 400.00
11.	Preparing Formal Judgment	\$ 200.00
12.	Correspondence	\$ 200.00
13.	Preparation of Bill of Costs	\$ 150.00
14.	Taxation of Bill of Costs	<u>\$ 75.00</u>
	Total:	\$5,400.00

[22] The proposed bill of costs is therefore taxed and allowed at \$5,400.00, plus disbursements in the amount of \$368.52 (\$373.52 - \$5.00).

[23] For enforcement purposes, the Chief of Police may wish to prepare and file a certificate of taxation of costs in Form 11d in this amount for issuance.



Counsel: Mr. Peter Abrametz for Corey Heffernan  
Mr. Evan Strelloff for The Chief of Police of the Prince Albert Police Service