IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Taylor, 2007 NSSC 56

Date: 20070322
Docket: SH 257619
Registry: Halifax

Between:

Terry E. Taylor

Applicant

v.

Her Majesty the Queen

Respondent

Revised Decision:	The date of the original decision has been corrected according to the erratum released April 23, 2007.
Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	November 14, 2006, in Halifax, Nova Scotia
Counsel:	Duncan Beveridge, Q.C., for the Applicant Christa MacKinnon, for the Respondent

By the Court:

[1] The applicant seeks costs following a successful *certiorari* application to quash a search warrant issued in respect of the applicant's premises pursuant to section 487 of the *Criminal Code*.

[2] At the adjourned hearing, counsel for Mr. Taylor advised the court that the Canada Revenue Agency had consented to return of all of the documents and items seized as a result of the search of the Taylor premises. The Crown also indicated that Mr. Taylor would not be charged with respect to alleged violations of the *Income Tax Act*.

[3] Mr. Taylor claims that the court should award him costs because of the egregious conduct of officials of the CRA. He seeks costs by way of the Court's inherent jurisdiction and on account of the violation of his *Charter* rights. The Crown argues that the search was conducted in good faith and that costs should not be awarded.

[4] The search warrant was obtained by Mr. Patterson on the basis of an Information To Obtain prepared over a period of some six months. Mr. Patterson met with various officials of the Agency and had access to information on Mr. Taylor, including his personal income tax information and the HST database. He was provided with various documents which were important to the investigation, as a result of which he sought the warrant. It is clear that he had access to these

sources of information while he was preparing the Information and before he appeared before Mr. McIntyre, the Justice of the Peace.

[5] I found that Mr. Patterson made serious errors in his allegation that Mr. Taylor misrepresented his HST sales for 2001, 2002 and 2003. He failed to verify information in his possession and apparently failed to check the database to determine the exact amount owing. In cross-examination, Mr. Patterson agreed that there were errors in the allegations in paragraphs 20-22 of the Information, and that the basis for belief set out in paragraph 23 was thus misrepresented. He stated that these allegations were the crux of his investigation, and that he would not have proceeded with the investigation without this material. He modified this position somewhat when he was asked by Crown counsel whether he would have proceeded if the offending paragraphs were omitted. He nevertheless maintained that he would have felt more comfortable with those paragraphs included. I concluded that he would not have proceeded without the offending paragraphs.

[6] Mr. Patterson came upon information in the course of the search to establish that some of his conclusions were subject to question, in particular, whether Mr. Taylor had earned income as an employee be of AMTL. Despite this additional

information he did not change his course of conduct or rethink the search of Mr. Taylor's premises.

[7] Mr. Patterson was approached by Mr. Taylor to return the seized items and declined to do so, stating that they were important to his investigation. Mr. Patterson was also told that his calculations respecting HST were erroneous, but refused to modify his position with respect to the search warrant at that time. He initially declined to provide copies of the documents he had seized from Mr. Taylor, although this position was eventually altered.

[8] Mr. Patterson clearly had in his file, or could clearly access, information which would have contradicted his theory as to HST sales being under-reported by Mr. Taylor. As to the *Income Tax Act* allegation, he came across information in the course of the search that suggested that Mr. Taylor had, in fact, earned income from AMTL in the year in question. Admittedly, he had information from the president of the company and the auditor to the effect that Mr. Taylor had not worked for AMTL in the time period.

Issue

[9] Is Mr. Taylor entitled to an award of costs?

Discussion and Law

[10] The Rules are made pursuant to the *Judicature Act*, which permits the judges of this Court to make rules with respect to costs (see ss. 2(g) and 46(j)). Rule 63 sets out the Court's authority to award costs. Of particular relevance are rules 63.02 and 63.03, which provide, in part:

Costs in discretion of court

> 63.02. (1) Notwithstanding the provisions of rules 63.03 to 63.15, the costs of any party, the amount thereof, the party by whom, or the fund or estate or portion of an estate out of which they are to be paid, are in the discretion of the court, and the court may,
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> (a) award a gross sum in lieu of, or in addition to any taxed costs;
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> (b) allow a percentage of the taxed costs, or allow taxed costs from or up to a specific stage of a proceeding; [E. 62/9(4)]
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> (c) direct whether or not any costs are to be set off.
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> * * *
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> 63.03.
> (1) Unless the court otherwise orders, the costs of a proceeding, or of any issue of fact or law therein, shall follow the event.

[11] The *Criminal Code* makes limited provision for an award of costs against the Crown, such as a prosecution for defamatory libel and summary proceedings. It

appears that costs are in the discretion of the court in respect of proceedings under section 487 of the *Code*, namely, prerogative writs. The present proceeding was initiated under Civil Procedure Rule 58, which was adopted pursuant to section 487. This proceeding was brought under Rule 58.01, which provides that "[t]he Civil Procedure Rules,with any necessary modification, including any rule relating to the abridgment or extension of time, apply in all matters not provided for in Rule 58."

[12] Mr. Beveridge maintains that this is a civil proceeding. The Crown maintains that it is a criminal proceeding. In *Newfoundland and Labrador v. Canadian Broadcasting Corp.*, [2006] N.J. No. 91 (Nfld. C.A.) an application was made under the rules of court to challenge a warrant issued under the *Criminal Code*. Wells C.J.N.L. held that such a proceeding was criminal in nature and should be processed as if it were criminal appeal. The court did award costs on the application, however.

[13] In *Temelini v. Ontario Provincial Police (Commissioner)* Justice O'Connor of the Ontario Court of Appeal stated that the s. 27 of the *Crown Liability and*

Proceedings Act subjected the Federal Crown to the rules of practice of superior courts. Sections 27 and 28 of the *Act* state, in part:

> 27. Except as otherwise provided by this Act or the regulations, the rules of practice and procedure of the court in which proceedings are taken apply in those proceedings.
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> 28. (1) In any proceedings to which the Crown is a party, costs may be awarded to or against the Crown.

[14] In deciding whether section 27 applied to the Crown, the Court stated that this was the only logical inference that could be drawn.This extended the jurisdiction of the courts of the provinces over proceedings involving the Federal Crown. Justice O'Connor considered the term "proceedings":

> To what proceedings does s. 27 refer?
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> ¶ 44 The word "proceedings" is not defined in the CLPA. The language of s. 27 does not limit the proceedings to which the section applies. There is no dispute that the word "proceedings" includes actions for damages and that it includes, as well, proceedings brought in the courts of the provinces. A major change in the 1990 amendments to the CLPA, that came into force in 1992, was to extend to the courts of the provinces concurrent jurisdiction with the Federal Court for proceedings brought against the federal Crown. The many references to "proceedings" in the *Act* very plainly mean proceedings in the courts of the provinces.
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> ¶ 45 The respondents argue, however, that the "proceedings" referred to in s. 27 are limited to proceedings brought by or against the federal Crown and do not include proceedings, such as the appellant's action, in which the Crown is not a party. The ordinary meaning of the language of the section does not contain this limitation. It would therefore be necessary to read into the section the limitation contended for by the respondents.
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> ¶ 46 In determining the scope of the "proceedings" to which s. 27 refers, it is helpful to consider the other provisions in the Act that also refer to "proceedings."

> In some instances, the application of a specific section is limited to "proceedings against the Crown." See ss. 22(1), 23, 24, 25 and 26. Other sections have a broader application but are nevertheless limited. For example, s. 28 applies to "proceedings to which the Crown is a party" and s. 34(a) gives the Governor in Council authority to make regulations in respect of "proceedings by or against the Crown." In contrast, there are no words limiting the scope of the proceedings to which s. 27 applies. The inference, therefore, often called the presumption of consistent expression, is that it was the intent to include in s. 27 more than "proceedings against the Crown" and more than "proceedings to which the Crown is a party."
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> ¶ 47 The presumption of consistent expression has been described as follows:
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> > It is presumed that the Legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is to say that the Legislature is presumed to avoid stylistic variation. Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended. Given this practice, it then makes sense to infer that where a different form of expression is used, a different meaning is intended.
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> ¶ 48 See R. Sullivan, ed., *Driedger on the Construction of Statutes*, 3d ed., (Toronto: Butterworths 1994) at 163.
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> ¶ 49 The presumption of consistent expression leads to the broader interpretation of s. 27 that is consistent with the ordinary meaning of the language of the section. To read into the section the words "in which the Crown is a party" would be inconsistent with what appears to be a careful pattern of expression in delineating to what proceedings particular sections of the CLPA apply.
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> ¶ 50 This interpretation is also in keeping with the modern legislative trend to remove Crown immunity from pre-trial production and discovery obligations and to move towards putting the Crown on an equal footing with everyone else...

[15] There is therefore clear authority for the Court to impose costs against the Crown in respect of proceedings in this court.

[16] In *Johnson v The King*, [1904] A.C. 817, the Privy Council held that the Crown neither pays nor receives costs unless the case is governed by some local statute, or there are exceptional circumstances justifying a departure from the ordinary rule.

[17] Costs are not awarded against the Crown unless there has been improper or egregious conduct. The Crown is compelled to act on behalf of the public and the individual is required to respond to the allegation. In performing this duty, the Crown generally should not be subject to costs. In this case, Mr. Taylor informed Canada Revenue of its mistake, and explained the error to Mr. Patterson. Mr. Patterson did not take any remedial steps at that point. Before commencing legal proceedings, Mr. Taylor had requested that copies of the documents be returned to him. The Agency did not act on this request until after he initiated the application. The agency's conduct amounted to more than error or simple negligence. It was serious negligence bordering on gross negligence; in fact, it was willful blindness on the part of Mr. Patterson in conducting the investigation.

[18] There appear to be two bases upon which the Court could award costs in these circumstances, namely, the inherent jurisdiction of a superior court of

criminal jurisdiction, and as a remedy under section 24(1) of the *Charter of Rights and Freedoms*.

[19] The extent to which the court can exercise its inherent jurisdiction to award costs in criminal proceedings was canvassed in *R. v. Jedynack*, [1994] O.J. No. 29 (Ont. Ct. – Gen. Div.). Goodearle J. said:

> 35 Courts of superior jurisdiction, empowered, as always they have been with inherent jurisdiction, were able to award costs against the Crown. Prior to the enactment of the *Charter*, this power was sparingly used; perhaps as noted by Galligan J.A. in *R. v. Pawlowski* (1993), 12 O.R. (3d) 709 at p. 712, 14 C.R.R. (2d) 296 (C.A.), "only where there was serious misconduct on the part of the prosecution". Galligan J.A. went on to say that s. 24(1) has had the effect of enlarging the grounds upon which a court of competent jurisdiction could exercise its discretion in awarding costs. Thus it would seem that any court of competent jurisdiction can award costs to any person whose rights have been infringed or denied. How extensive should this discretion be? It will no doubt be the ultimate responsibility of an appellate court superior to this one to enunciate the threshold that must be penetrated to warrant an award of costs against the Crown.
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> 36 In the meantime it would be my view that such an order should only be made in circumstances where:
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> 1) The acts, or failures to act, collectively amount to something well beyond inadvertent or careless failure to discharge a duty;
> 2) Rather the conduct would have to fall within the realm of recklessness, conscious indifference to duty, or whether conscious or otherwise, a marked and unacceptable departure from usual and reasonable standards of prosecution;
> 3) Such conduct must be seen to have resulted in an indisputable and clearly measurable infringement or denial of a right;
> 4) Where the costs order is intended to ensure compliance with an order or show disapproval for conduct which resulted in serious prejudice to the accused it should, as well, be founded in circumstances of clear and obvious compensatory need.

> 37 Nothing even close to a standard of perfection should be imposed on prosecutors who, in this day and age, are overburdened with work and, as was the case here, often largely dependent upon outside resources over which they have little daily control in the development of their cases, which many times impact on the discharge or the manner in which they are able to discharge their duties.
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> 38 It would be very much contrary to the best interests of law- abiding society, to allow a policy to develop that in effect allowed costs awards on a routine basis. For such a policy, if ever allowed to blossom, could terribly fetter, even cripple, an orderly and generally competent prosecution process.

[20] *Jedynack* was considered by Hood J. in *R. v. Cole*, [1999] N.S.J. No. 308 (S.C.), in awarding costs against the Crown after concluding that the Crown's use of a stay to postpone the accused's trial amounted to an improper motive. The Court of Appeal stated, *per* Bateman J.A. at [2000] N.S.J. No. 84, that, although the guidelines in *Jedynack* should not be treated as exhaustive, they represent a reasonable starting point for a principled assessment of the issue. Adding that an award of costs in a criminal proceeding is a rare and exceptional remedy, she stated at para 51:

> Costs do not automatically follow a finding that there has been an abuse of process, nor even, the granting of a stay. Before ordering costs, the court must conduct a separate inquiry to determine whether the Crown or police actions which led to the stay support the additional remedy. In this regard, it is instructive to review past cases where costs against the Crown have been ordered.

[21] The Court of Appeal held that there had been no prejudice to the accused because he would have had to face the costs of trial in any event. The desirability

of the joint trial was a legitimate objective. This was the purpose of the stay imposed by the Crown. As such, the award of costs was set aside.

[22] I have found that Mr. Taylor's *Charter* rights were violated. An award of costs can be made in certain circumstances for a breach of *Charter* rights. I refer to the decision of the Ontario Court of Appeal in *R. Pawlowski*, [1993] O.J. No. 554, where the Court held that the chambers judge had jurisdiction to "award costs against the Crown in a criminal case and ... the clear effect of s. 24(1) is to enlarge the grounds upon which that jurisdiction can be exercised to include a *Charter* infringement, along with misconduct by the prosecution." *Pawlowksi* suggests that an award of costs against the Crown under s. 24(1) of the *Charter* will be available "only in a rare case that is unique and one where it is questionable whether there will ever be a similar prosecution."

[23] In *R. v. Dostaler*, [1994] N.W.T.J. No. 36 the Crown was ordered to pay costs because of a failure to make proper disclosure. The non-disclosure was not a result of mere inadvertence, but constituted conscious indifference to the Crown's duty. It was necessary to declare a mistrial three days into the trial because of the

inability of the accused to make proper answer and defense. It was held that there was a clear departure from the normal standard of prosecution.

[24] It is clear that the conduct of the Crown must be egregious and amount to more than mere indifference. In *R. v. Robinson*, [1999] A.J. No. 1469, MacFadyen J.A. of the Alberta Court of Appeal stated, at para. 30:

> ... Costs should not be routinely awarded. Something more than a bona fide disagreement as to the applicable law, or a technical, unintended or innocent breach, whether clearly established or not, must be required. Otherwise, the criminal courts will be inundated with applications in this regard.... Some degree of misconduct or an unacceptable degree of negligence must be present before costs are awarded against the Crown under s. 24(1) of the *Charter*.

[25] Although s. 24(1) of the *Charter* has enlarged the jurisdiction of the court the circumstances still has to be exceptional and the misconduct or negligence must be to an unacceptable degree.

[26] In *R .v. LeBlanc*, [1999] N.S.J. No. 179 the Nova Scotia Court of Appeal held that the trial judge had erred by using evidence relating to unfounded *Charter* breaches as a basis for awarding costs against the Crown. Glube C.J.N.S. wrote, for the Court, at paras. 15-16:

> The general rule found in *Berry v. British Transport Commission*, [1961] 3 ALL E.R. 65 (C.A.) and confirmed by the Supreme Court of Canada in *R. v. M (C.A.)* 1996, 105 C.C.C. (3d) 327 (S.C.C.), is that a prosecutor brings proceedings in the

> public interest and generally costs are not awarded whether or not the Crown wins or loses the case. This is in contrast to the individual who brings an action for his or her own ends and if he or she loses, should pay costs. To award costs there must be exceptional circumstances, something "remarkable about the defendant's case" or "oppressive or improper conduct" proven against the Crown. (See: *M (C.A.)* at p. 377 and *Trask, supra*.) Ordinarily, the costs of a person charged with a criminal offence are borne by that person. (See: *R. v. Curragh Inc.* (1997), 113 C.C.C. (3d) 481 (S.C.C.) and M (C.A.))
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> What has happened in this case is really an attempt to obtain damages through costs in a criminal matter instead of commencing a civil action against the R.C.M.P. Even if a *Charter* breach had been found against the R.C.M.P., a breach by a law enforcement agency should not be attributed to the Crown unless the Crown was a party to the breach. A criminal case cannot form the basis of an award of damages through costs. There was nothing to indicate oppressive or improper conduct on the part of the Crown. Justice Haliburton placed reliance on allegations which we find were either not proven or ones which would require findings of credibility. In neither case should these provide a foundation for the award of costs.

[27] The *LeBlanc* decision was recently applied in *O'Neil v. Canada (Attorney General)*, [2007] O.J. No. 496, where Ratushny J. held that certain provisions of the *Security of Information Act* breached ss. 7 and 2(b) of the *Charter*, thus invalidating two search warrants. The Chambers judge cited *LeBlanc* and other cases, including *R. v. Ciarniello* (2006), 81 O.R. (3d) 561 (Ont. C.A.), in support of the conclusion that a *Charter* breach by a law enforcement agency could not be attributed to the Crown unless the Crown was a party to the breach:

> 19 However, the applicants cannot succeed in their request to be compensated for their costs incurred in vindicating their constitutional rights.
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> 20 There is no evidence to support a conclusion of Crown misconduct and the applicants do not allege Crown misconduct. None of the *Charter* breaches committed by the RCMP in their obtaining and executing of the Warrants can be

attributed to the Crown. There is no evidence the Crown was a party to the abuse of process committed by the actions of the RCMP.

21 Instead, the effect of the applicants' request is to request compensation for their success in defending themselves against the leakage provisions of the SOIA that were "dangerously over-inclusive in their punitive scope" (Judgment, at para. 109) and against *Charter* breaches committed by the RCMP who had been relying on the apparent validity of the leakage provisions.

22 Remedies for this success have already been granted. The leakage provisions of the SOIA have been declared to be of no force and effect. The Warrants have been quashed and the things seized have been returned.

23 The question then becomes whether this is one of those cases where "exceptional circumstances exist such that fairness requires that the individual litigant not carry the financial burden flowing from his or her involvement in the litigation" (*Foster*, at para. 63).

24 The abuse of process that did occur had as its "original culprit" (Judgment, para. 159), the leakage provisions of the SOIA. The constitutionality of the leakage provisions, though long criticized, had never been tested in a court of law.

25 The Crown was not acting in bad faith in defending the constitutionality of these sections. Neither was there any conclusion in the Judgment of bad faith on the part of the RCMP in making their allegations of criminality against Juliet O'Neill.

26 This is in contrast to *Ciarniello* where, as I understand the reasons of Sharpe J.A., the features of that case that came together to make it appropriate to order costs included "cavalier and reckless behaviour of the B.C. officer who was not subject to the control of the Ontario Crown" and "despite a clear warning that there were serious problems with the information provided by the B.C. officer, the Ontario Crown decided to tough it out" and adopt a "hardball attitude towards the appellant and his *Charter* rights" (para. 45). Justice Sharpe concluded,

> [T]he decision of the Crown staunchly to resist the application to quash the warrant in the face of the clear warning from the B.C. Crown that the information was tainted provides an additional factor which, together with the other circumstances discussed above, makes it "appropriate and just" to require the Crown to indemnify the appellant for a reasonable portion of the costs he incurred to secure his *Charter* rights (para. 45).

[28] As I found in my original decision, Mr. Patterson failed to take basic steps to verify the information in his file. He had access to the database with reference to Mr. Taylor. He had access to files provided by auditors and investigators with reference to Mr. Taylor's obligation for HST and could have discovered that the amount he thought Mr. Taylor owed with respect HST was erroneous and that Mr. Taylor had been issued an assessment reducing the amount owing for HST. In addition the search recovered a letter signed by the president of AMTL stating that Mr. Taylor had employment income for 2003 thereby offering information that was inconsistent with other information provided by the president of the company and the auditor for the trustee in bankruptcy. All of this information ought to have made the investigation more doubtful, on Mr. Patterson's own evidence. I concluded, based on his evidence, that he would not have sworn the Information to Obtain had he been aware of the full facts available to him.

[29] In addition to the serious errors in seeking the search warrant, once the search was completed, and the materials removed, including a significant number of documents, computer equipment, electronic data and solicitor and client materials, Mr. Taylor requested their return on account of the serious errors in the information. Counsel for Mr. Taylor indicates that on May 30, 2005 a number of

documents were returned to Mr. Taylor that were outside the scope of the warrant, but CRA retained copies. More documents were returned later, including copies, but many of the documents were retained by CRA until at least November 10, 2006. It was only after my decision quashing the warrant, and on the eve of a further hearing requesting a direction to return the items seized, that Crown and CRA officials notified Mr. Taylor's counsel that they would not be pressing charges under the *Income Tax Act*.

Conclusion

[30] The Crown's position is that costs should not be awarded because Mr. Patterson and other CRA officials were only performing their duties in good faith. The Crown maintained this position even after having the benefit of my findings on the obtaining of the warrant. As will be clear from the foregoing, I do not accept this argument. The Crown's position implies that a taxpayer subjected to a negligent and reckless investigation leading to criminal charges should have no remedy, short of incurring the additional expense of commencing an action for damages. I am satisfied that the conduct complained of was sufficiently serious and egregious to be the basis for an award of costs.

[31] It has not been argued that this case is similar to *LeBlanc*, in that a line should be drawn between the investigating authorities and the prosecuting authorities for purpose of awarding costs against the Crown. While I am cognizant of that line of cases, it has not been suggested that Canada Revenue is analagous to the police in *LeBlanc* and similar cases. If that were the case, I would still be satisfied that there is no clear line between the conduct of the Canada Revenue investigators and that of the Crown. While the original obtaining of the warrant would appear to be purely the responsibility of the CRA, the egregious and oppressive conduct continued until well into the course of the prosecution, in fact, after the decision quashing the warrant, with the refusal to return the seized items until the eve of a hearing on the issue. As such, I am satisfied that the Crown is implicated in conduct justifying an award of costs.

[32] Mr. Beveridge stated that his legal account is in the area of $25,000.00 and that of Mr. Gerard Tompkins, counsel on behalf of Mr. Taylor, in respect of the tax claims by CCRA, in the neighborhood of $36,000.00, a substantial portion of which is attributable to the application to quash the warrant. Mr. Taylor is indeed looking at substantial costs arising from these proceedings. An award of costs should provide a substantial contribution to legal expenses, though not a complete

indemnity. Taking Mr. Beveridge submission in terms of his costs to date, I have added an amount to take into consideration what he likely would have spent in preparing for the hearing on costs, and his presentation before the court. The Crown has taken issue not with the amount of costs, but only whether costs in any been amount should be awarded. I am prepared to award Mr. Taylor $10,000.00 in respect of Mr. Beveridge's account and $7,000.00 in respect of Mr. Tompkins's account, for a total of $17,000.00.

J.