Date: 20080304

Docket: A-449-97

Citation: 2008 FCA 80

Present: **DÉCARY J.A.**
NOËL J.A.
SHARLOW J.A.

BETWEEN:

URBANDALE REALTY CORPORATION LIMITED

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on March 4, 2008.

REASONS FOR ORDER BY: SHARLOW J.A.

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REASONS FOR ORDER

SHARLOW J.A.

[1] On February 10, 2000, this Court rendered judgment allowing the appellant's appeal from a decision of what was then the Federal Court, Trial Division, in an income tax appeal. The decision is reported as *Urbandale Realty Corp. v. Canada (Minister of National Revenue)* (2000), 252 N.R. 117, [2000] 2 C.T.C. 250 (F.C.A.). The appellant was also awarded its costs in this Court and in the Federal Court, Trial Division. The appellant now seeks an order under Rule 403 of the *Federal Courts Rules*, SOR/98-106, asking for an order directing the assessment officer to assess those costs

on a solicitor and client sale, or in the alternative on the basis of double the maximum amount allowed under Column V of Tariff B.

[2] This motion will be dismissed because it is out of time and the appellant has not sought an extension. Rule 403 permits a party to request that directions be given to the assessment officer in relation to costs, but provides that the request is to be made by serving and filing a notice of motion within 30 days after judgment is pronounced. The notice of motion was filed eight years too late.

[3] Even if an extension of time were granted, the appellant is not even close to establishing a case for costs on a solicitor and client scale. The appellant has presented no evidence that could possibly be taken as establishing reprehensible, scandalous or outrageous conduct on the part of the respondent or counsel for the respondent. It was not an abuse of process for the respondent to defend its position, and to continue to do so after its position was accepted by the Tax Court of Canada in 1992 and the Federal Court, Trial Division in 1997. Nor was it an abuse of process for the respondent to maintain its position after the Supreme Court of Canada rendered its decisions *Canderel Ltd. v. Canada*, [1998] 1 S.C.R. 147, and *Toronto College Park Ltd. v. Canada*, [1998] 1 S.C.R. 183. The appellant believed those cases would inevitably result in a decision in its favour in this Court, but the respondent was entitled to disagree and did so. The fact that the appellant's view was finally accepted by this Court does not indicate that the respondent's position was abusive.

[4] Finally, with respect to the alternative motion for costs on an increased scale, the only possible justification for an award of costs in excess of the normal tariff is that the appellant may have made one or more offers to settle that were not accepted. There are circumstances in which a written offer to settle may justify an increased award of costs under the *Federal Courts Rules*: see Rules 419 and 420. Generally, the party seeking such an increased award must establish that the judgment obtained was at least as favourable as the terms of the offer to settle. In my view, it is open to the assessment officer to consider the possible application of those provisions in any case even if no direction is made under Rule 403. I express no opinion as to whether or not there were any offers to settle in this case that would cause Rules 419 and 420 to apply.

"K. Sharlow"
J.A.

"I agree.
Robert Décary J.A."

"I agree.
Marc Noël J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-449-97
STYLE OF CAUSE:	Urbandale Realty Corp. Ltd. v. Her Majesty the Queen

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	DÉCARY, NOËL, SHARLOW JJ.A.
DATED:	March 4, 2008

WRITTEN REPRESENTATIONS BY:

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Michael Ezri	FOR THE RESPONDENT

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