

Federal Court of Appeal



CANADA

Cour d'appel fédérale

**Date: 20101118**

**Docket: A-47-10**

**Citation: 2010 FCA 312**

**CORAM: BLAIS C.J.  
NOËL J.A.  
PELLETIER J.A.**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**Appellant**

**and**

**ANDREW DONATO**

**Respondent**

Heard at Toronto, Ontario, on November 18, 2010.

Judgment delivered from the Bench at Toronto, Ontario, on November 18, 2010.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**PELLETIER J.A.**

Federal Court of Appeal



Cour d'appel fédérale

**Date: 20101118**

**Docket: A-47-10**

**Citation: 2010 FCA 312**

**CORAM: BLAIS C.J.  
NOËL J.A.  
PELLETIER J.A.**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**Appellant**

**and**

**ANDREW DONATO**

**Respondent**

**REASONS FOR JUDGMENT OF THE COURT**  
**(Delivered from the Bench at Toronto, Ontario, on November 18, 2010)**

**PELLETIER J.A.**

[1] For the reasons which follow, this appeal will be dismissed with costs.

[2] In his submissions with respect to costs, Mr. Donato disclosed the existence of an offer of settlement which he had made to the Crown before trial, an offer which the Crown refused.

[3] After trial, the result obtained by Mr. Donato was at least as favourable to him as the offer which he made and which the Crown rejected.

[4] In light of this state of affairs, Mr. Donato asked that he be awarded 75% of a portion of his actual outlay for legal fees and 100% of his disbursements, some \$68,000. The party and party costs, calculated in accordance with the tariff, amounted to approximately \$10,800. The Crown was aware of Mr. Donato's submissions and responded to them.

[5] Rule 147(3) of the *Tax Court of Canada Rules (General Procedure)* SOR/90-688a allows the Court, in the exercise of its discretion to award costs, to take into account various factors including, at Rule 147(3)(d), "any offer of settlement made in writing".

[6] As a result, the Tax Court Judge was entitled, on the state of the Rules as they existed on January 12, 2010, to take into account the written settlement offer.

[7] In the end, the Tax Court Judge awarded costs in a lump sum of \$40,000 which exceeded the tariff but which was less than the amount requested by Mr. Donato. This was a perfectly legitimate exercise of discretion which, in our view, is not to be interfered with because the Tax Court Judge referred to proposed amendments to the Rules in rendering her decision. That reference neither added to, nor detracted from, the discretion which the Tax Court Judge enjoyed at the time she rendered her order: see *Langille v. H.M.Q.*, 2009 TCC 540, referred to by the Tax Court Judge, and in particular, paragraphs 11 and 12.

[8] For these reasons, the appeal will be dismissed with costs.

“J.D. Denis Pelletier”

---

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-47-10

**(APPEAL FROM THE ORDER OF THE HONOURABLE MADAM JUSTICE WOODS,  
OF THE TAX COURT OF CANADA, DATED JANUARY 12, 2010 IN TAX COURT FILE  
NOS.: 2007-2495(IT)G AND 2008-1085(IT)G.).**

**STYLE OF CAUSE:** HER MAJESTY THE QUEEN v. ANDREW  
DONATO

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** NOVEMBER 18, 2010

**REASONS FOR JUDGMENT OF THE COURT BY:** (BLAIS C.J., NOËL J.A. &  
PELLETIER J.A.)

**DELIVERED FROM THE BENCH BY:** PELLETIER J.A.

**APPEARANCES:**

CRAIG MAW FOR THE APPELLANT  
DIANA AIRD

DAVID E. SPIRO FOR THE RESPONDENT  
DOUGLAS B.B. STEWART

**SOLICITORS OF RECORD:**

MYLES J. KIRVAN FOR THE APPELLANT  
DEPUTY ATTORNEY GENERAL OF CANADA  
TORONTO, ONTARIO

FRASER, MILNER, CASGRAIN LLP FOR THE RESPONDENT  
BARRISTERS & SOLICITORS  
TORONTO, ONTARIO