Dockets: 2005-1631(IT)G
2005-1760(IT)G

BETWEEN:

POTASH CORPORATION OF SASKATCHEWAN INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appellant's Motion for an enhanced cost award heard by telephone conference call on February 29, 2012 at Ottawa, Canada

Before: The Honourable Justice J.E. Hershfield

Appearances:

Counsel for the Appellant:	Stéphane Eljarrat
Counsel for the Respondent:	Ifeanyi Nwachukwu

ORDER

For the reasons set out in the attached Reasons for Order, the Motion for enhanced costs is allowed in the fixed amount of $40,000.00 payable forthwith by the Respondent to the Appellant. Such fixed cost award is inclusive of the cost of the Motion but in addition to such tariff amounts as are applicable pursuant to the terms set out in the attached Reasons for Order.

Signed at Ottawa, Canada this 29th day of June 2012.

"J.E. Hershfield"

Hershfield J.

Citation: 2012 TCC 235
Date: 20120629
Dockets: 2005-1631(IT)G
2005-1760(IT)G

BETWEEN:

POTASH CORPORATION OF SASKATCHEWAN INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Hershfield J.

[1] The Appellant brings a Motion for an enhanced cost award of 80% of solicitor and client costs incurred after July 13, 2009 in respect of its successful appeal of an assessment denying certain expenses claimed by it in respect of each of its 1997 and 1998 taxation years.

[2] The Motion relies primarily on a proposed amendment to the *Tax Court of Canada Rules (General Procedure*) (the "TCC Rules") which will allow for such an enhanced cost award where a party has made a written settlement offer and obtains a judgment as or more favourable than the terms of the offer.

[3] In this case, the Appellant did make a written settlement offer well before the hearing of the appeal. More specifically, the offer was made on January 27, 2009. The two day hearing of the appeal commenced on September 30, 2010 and Judgment in the Appellant's favour was rendered on April 20, 2011. The Judgment

corresponded with the settlement offer and meets the requirement for applying the proposed enhanced cost provision.

[4] The relevance of the July 13, 2009 date as the starting point to assess the enhanced costs amount is that it was the date that the Respondent clearly rejected the offer. During the 14 months or so between that rejection and the commencement of the hearing of the appeal, no counter-offer was ever made and except in a very limited context that I will address later in these Reasons, no argument was advanced that the offer was ever withdrawn or had expired.

[5] The enhanced costs amount claimed is $234,458.00 being 80% of the solicitor and client costs of $293,072.00 incurred by the Appellant between July 13, 2009 and September 30, 2010. The tariff amount for services performed during this period would be $7,900.00.

[6] The issue at trial was the deductibility of professional fees incurred in respect of a reorganization of the Appellant's subsidiary holdings undertaken in order to increase its cash flow on repatriated foreign subsidiary earnings by reducing foreign withholding taxes. The expenses were claimed as a deduction from income. That claim was pursued at trial and, in the alternative, it was argued that they qualified as eligible capital expenditures (ECE).

[7] The Judgment of the Court allowed the appeal on the basis that the professional fees incurred did, in fact, qualify as ECE.

[8] The offer to accept ECE treatment allowed that the expenses in question were capital in nature subject to the deduction restriction in paragraph 18(1)(*b*) of the *Income Tax Act* (the "*Act*"). That concession was rejected as a basis for settlement at a pre-hearing conference (which was acknowledged to be a settlement conference) both in a pre-hearing conference brief (settlement conference brief) and verbally at the settlement conference itself.

[9] The Respondent, initially at least, did not take issue with the offer having been discussed and rejected at a settlement conference. Indeed, in a letter dated January 18, 2012 it was acknowledged that the parties were in agreement that the settlement conference documentation could be unsealed at the Court's leisure. Moreover, the settlement conference briefs were submitted by the Respondent, in response to the Motion, as part of an affidavit of a lawyer from the Department of Justice which set out the record of events preceding the trial including reference to matters discussed at the settlement conference (the "Affidavit").

Issues Concerning the Settlement Conference

[10] Three preliminary issues arise in this case in relation to the settlement conference. The first concerns opening the Court's settlement conference file; the second concerns the reference in the Appellant's submissions to the comments made by the settlement conference judge; and, the third concerns the settlement conference briefs and the Affidavit that includes a recounting of discussions at the settlement conference.

[11] During argument, Respondent's counsel acknowledged that the agreement to unseal the settlement conference file was made prior to knowing of the January 10, 2012 decision in *CIBC World Markets Inc. v. Canada*, 2012 FCA 3. Nonetheless, having already provided the Court with the Affidavit and settlement conference briefs, the Respondent agreed that all the material provided to the Court relating to the settlement conference would not be retracted. On that basis, it was agreed that the sealed file need not be opened.

[12] The Respondent did, however, expressly object to any references to any remarks made by the judge presiding at the settlement conference in respect of settlement prospects. One could hardly disagree with that. Indeed, that was expressly dealt with in *CIBC World Markets*. In that case, the Minister of National Revenue

(the "Minister") asked that the judge's comments at a pre-trial hearing be expunged from the appellant's motion record and the Federal Court of Appeal agreed.

[13] The Federal Court of Appeal in *CIBC World Markets* agreed with the rationale developed in *Bell Canada v. Olympia & York Developments Ltd.*, 1994 O.J. No. 343 (Ont. C.A.). In that case, the settlement opinions of the pre-trial judge were found to be irrelevant to proceedings that followed and the consent of the parties could not justify a court acting on them in a subsequent proceeding.[1] Accordingly, I have effectively expunged all references in the Appellant's submissions to the settlement conference judge's comments at the settlement conference.

[14] It is also noteworthy that the procedure rule in *Bell Canada* was identical to section 128 of the TCC Rules which provides:

> *No Disclosure to the Court*
> 128. No communication shall be made to the judge presiding at the hearing of the appeal or at a motion in the appeal with respect to any statement made at a pre-hearing conference, except as disclosed in the memorandum or direction under section 127. [Emphasis added]

[15] Section 127 of the TCC Rules provides:

> *Memorandum or Direction*
> 127. (1) At the conclusion of the conference,
>
> (*a*) counsel may sign a memorandum setting out the results of the conference, and
>
> (*b*) the judge conducting the conference may give such direction as the judge considers necessary or advisable with respect to the conduct of the hearing,
>
> and the memorandum or direction binds the parties unless the judge presiding at the hearing of the appeal directs otherwise.
>
> (2) [Repealed, SOR/2007-142, s. 14]

[16] However, Practice Note No. 17 proposes to amend both sections 127 and 128 of the TCC Rules:

> *Memorandum or Direction*

[1] Paragraphs 33 and 34.

> 127. (1) At the conclusion of a litigation process conference under Rules 125, 126.1 or 126.2:
>
> (*a*) counsel may sign a memorandum setting out the results of the conference, and
>
> (*b*) the judge conducting the conference may give such direction as the judge considers necessary or advisable with respect to the conduct of the appeal or the appeal hearing.
>
> (2) Any memorandum executed by counsel or direction given by the judge binds the parties unless the judge presiding at the hearing of the appeal directs otherwise.
>
> *No disclosure to the Court*
> 128. No communication shall be made to the judge presiding at the hearing of the appeal or at a motion in the appeal with respect to matters related to settlement or settlement discussions at any of the litigation process conferences.[2]
>
> [Emphasis added]

[17] The proposed wording of section 128 clearly differs from that of its present wording in at least two respects:

- it broadens the non-disclosure requirement beyond communications made at a settlement conference to include communications made at any litigation process conference; and

- it changes the non-disclosure requirement from communications with respect to statements made to matters discussed.

[18] What is constant, however, is that the non-disclosure requirement relates to communications made to the judge presiding *at the hearing of the appeal or at a motion in the appeal*. While I am tempted to suggest that a motion for costs made after the hearing of an appeal and after a judgment has been rendered is a motion in respect of an appeal but not a "motion in the appeal", such suggestion would appear to fly in the face of the authorities.

[19] Consider the reasoning in *CIBC World Markets*:

> [9] … Pre-hearing conferences are *in camera* matters and statements made in them should not be used in submissions concerning costs: *Morrissey v. Canada*, 2011 TCC 373 at paragraphs 59 and 60. The rationale is well-said in *Bell Canada*

[2] Practice Note No. 17, January 18, 2010.

v. Olympia & York Developments Ltd., [1994] O.J. No. 343 at pages 144-145 (C.A.), cited in *Morrissey*:

> Pre-trials were designed to provide the court with an opportunity to intervene with the experience and influence of its judges to persuade litigants to reach reasonable settlements or refine the issues. None of that would be possible without assurance to the litigants that they can speak freely, negotiate openly, and consider recommendations from a judge, all without concern that their positions in the litigation will be affected.

[10] Typically, in pre-hearing conferences, parties assert positions and make proposals for compromise, and often presiding judges offer views and suggest proposals. After a pre-hearing conference, there is nothing wrong with a party communicating its own positions and proposals, for instance in an offer of settlement, and those positions and proposals can mirror the ones discussed in the pre-hearing conference. The settlement offer can be disclosed for the purposes of later costs submissions.

[11] Where, as here, a party seeks an enhanced level of costs, what is forbidden is the bare recounting of discussions, positions and proposals made by the parties in the pre-hearing conference and not embodied in later settlement offers, or disclosure of the comments and opinions of the justice presiding at the pre-hearing conference. All of these remain protected from disclosure.

[12] It was permissible for CIBC World Markets to include in its motion record the letter setting out its settlement offer. However, the references in this letter to the Tax Court judge's comments and opinions should have been blacked out. I shall disregard those references. [Emphasis Added]

[20] These views make it clear that where a settlement offer is made after a settlement conference, it can reflect discussions, positions and proposals made at the settlement conference provided they are embodied in that settlement offer. I might presume that they would be embodied only as terms necessary to resolve issues in dispute so as to avoid further litigation if accepted. That appears to leave little or no room to recount discussions and positions that are one's reasons for rejecting a settlement offer that arose from a settlement conference. However, that very narrow view, although seemingly unqualified, might best be understood in a broader context.

[21] While a settlement offer speaks for itself whenever made, the reasons for its rejection need to be told in a hearing for enhanced costs. If the reason for rejecting the offer is a legal impediment, as was, for example, the case in *CIBC World Markets*, then as that case necessarily suggests, that issue needs to be in front of the

judge at a cost hearing even if it is a reiteration of a discussion and position taken at the settlement conference. Recounting one's own position from the time of receipt of the offer throughout the time it was open for acceptance cannot be barred because it reiterates a position taken at a prior settlement conference whether receipt of the offer was after or, as in the present case, before the settlement conference.

[22] Further, recounting one's own position does not strike me as necessarily offending the rationale for *in camera* conferences which is to ensure parties speak and negotiate freely. The bar to disclosure relates largely to communications of the other party's settlement statements, positions and arguments. Indeed, if one was barred from raising reasons for rejecting an offer at a cost hearing because they were raised at a settlement conference, one might be less inclined to speak freely at such a conference.

[23] This is what I am faced with in accepting the Affidavit and its inclusions for consideration in my dealing with this Motion for enhanced costs. The Respondent's settlement brief included as part of the Affidavit contemplates and responds to an offer already made. The Affidavit traces the sequence of events preceding the trial and recounts the Crown's position in respect of the offer including positions taken and discussed at the settlement conference. I see nothing about my consideration of these inclusions that frustrates the principle set out in *CIBC World Markets*. If they reflect the same or evolving position of the parties after the settlement conference as before it or during it, then having them submitted at a motion for enhanced costs is not a betrayal of the *in camera* nature of the settlement conference. Accordingly, aside from effectively redacting comments made by the settlement conference judge as set out in the Appellant's written submission, I have accepted the settlement conference briefs and the Affidavit and its inclusions as submitted and agreed to by the parties.

[24] That said, if it needs repeating in the context of the present or proposed TCC Rules set out above, I am not of the view that the non-disclosure provisions in the TCC Rules can be applied to give a different result. As well, I see little difference, in this case at least, between a signed memorandum setting out the results of a settlement conference (which is allowed under the TCC Rules set out above) and a post conference agreement as to what material dealt with at the settlement conference could be put before a judge at a subsequent proceeding. In the case at bar, such an agreement was struck.

[25] The remaining issue then is simply whether the Appellant is entitled to enhanced costs based on having made a settlement offer that was as favourable as the judgment of the Court.

The Appellant's Arguments

[26] The Appellant relies on Practice Note No. 18 which sets out a proposed rule in subsection 147(3.1) of the TCC Rules which provides that where an appellant has made a written offer and obtains a judgment as favourable as or more favourable than the terms of the offer to settle, the appellant shall be entitled to party-and-party costs to the date of service of the offer and substantial indemnity costs after that date, as determined by the Court, plus reasonable disbursements and applicable taxes.

[27] As well, in the alternative, the Appellant relies on subsection 147(1) and paragraph 147(3)(*d*) of the TCC Rules. They provide as follows:

> COSTS
>
> *General Principles*
>
> 147(1) The Court may determine the amount of the costs of all parties involved in any proceeding, the allocation of those costs and the persons required to pay them.
>
> 147(3) In exercising its discretionary power pursuant to subsection (1) the Court may consider,
>
> …
>
> (*d*) any offer of settlement made in writing,

[28] The relevant portion of the proposed subsection 147(3.1) of the TCC Rules which is set out in full in Practice Note No. 18 reads as follows:

> (*a*) Unless otherwise ordered by the Court and subject to paragraph (c), where an Appellant makes a written offer to settle and obtains a judgment as favourable as or more favourable than the terms of the offer to settle, the Appellant is entitled to party-and-party costs to the date of service of the offer and substantial indemnity costs after that date, as determined by the Court, plus reasonable disbursements and applicable taxes.
>
> **…**
>
> (***e***) For the purposes of this section "substantial indemnity" costs means 80% of solicitor and client costs.

[29] Reliance is placed on *Barrington Lane Developments Limited v. The Queen*, 2010 TCC 476 where, at paragraph 13, Justice Pizzitelli wrote:

> 13 There is no disputing that while a settlement offer is only one of the factors to consider under Rule 147(3)*(d)* above, it has taken on the role of one of the more important factors, as alluded to in the decisions of this Court in *Langille*, *Donato v. R.*, 2010 TCC 16, 2010 CarswellNat 44, 2010 DTC 2788, and *Campbell v. R.*, 2010 TCC 323, 2010 CarswellNat 1701, 2010 DTC 3619, all of which refer to the practice in many jurisdictions to award costs on a solicitor/client basis where the unsuccessful party rejects a settlement offer which is at least as favourable as the outcome of the hearing. In addition, the growing importance of the settlement offer is mentioned by both Woods J. and Boyle J. in *Donato* and *Langille* respectively, where reference was made to the recent endorsement of the Rules Committee of the Court of an increase in costs when a written settlement offer has been made that is no less favourable than the actual outcome and the new Practice Note 17 issued by Rip C.J. of this Court stressing the importance of settlement and the awarding of solicitor/client costs to encourage settlement.

The Respondent's Arguments

[30] The Respondent maintains that at the time of rejecting the offer, on July 13, 2009, there remained a factual dispute as to whether the expenses claimed were incurred by the Appellant and, if so, for what purpose. It was not until just prior to the trial that quantum issues were resolved and until then they created a legal impediment to accepting the offer. Further, there was the underlying problem that the Appellant had never satisfied the Respondent that the expenses claimed were incurred to earn income from its own business as required under the *Act*. That is, the Respondent maintains that the offer was incapable of being accepted and relies on the Federal Court of Appeal decision in *CIBC World Markets* to support the position that enhanced costs should not be allowed in this case.

[31] As well, the Respondent set out in detail the pre-trial issues that were or needed to be addressed to fully consider the settlement offer and narrow the issues in preparing for trial. For example, such steps included:

- In respect of each year (1997 and 1998) the invoices that documented the subject expenses needed to be clarified as some were invoiced to entities other than the Appellant or were invoiced by reference to "LLC matters" or "various taxation matters" and in one instance a significant amount was evidenced only by summary of accounting entries without an invoice *per se*. Such issues were not fully resolved until the commencement of the trial;

- No jurisprudence was provided at the settlement conference by the Appellant supporting its position that the subject expenses could be considered ECE;

- On August 27, 2010, the Crown served on the Appellant a request to admit facts and documents. The factual admissions sought by the Crown and agreed to by the Appellant, or not denied, formed the basis for the Partial Agreed Statement of Facts. As well, the admission of the authenticity of documents formed the basis of the Joint Book of Documents submitted at the trial;
- The Crown called no witnesses at the trial and agreed with the Appellant as to the material conclusions of the expert in an Expert Witness Report prepared for the Appellant in order to obviate the need to submit the report and have the expert called to testify at trial.

[32] As well, the Respondent maintains that the request for enhanced costs should fail since it is grounded on a proposed rule which has no force of law and cannot, as drafted, have retroactive application to the matter at hand. The Respondent cites several authorities for this position including *Miller v. R.*, 2003 DTC 6 and further asserts that the Court cannot assume that the proposed rule will be adopted without amendment. Further and in any event, the offer and rejection were made prior to the Practice Note No. 17 announcement on January 13, 2010 of the proposed rule. Further still, the proposed rule was amended under Practice Note No. 18 which provided for an effective date of January 31, 2011. Even accepting that the new rule will have force as of that date, even though that would precede its adoption by the Governor in Council, it cannot be applied retroactively to an offer made in 2009.

[33] In this limited context the Respondent suggests that the settlement offer would have to have been renewed after the effective date of the new rule to fall within its scope.

[34] In any event, the Respondent also pointed out that in *CIBC World Markets*, the Federal Court of Appeal applied the existing paragraph 147(3)(*d*) without comment on the proposed new rule even though CIBC endeavoured to rely on it.

[35] Referring to that subsection 147(3), the Respondent noted that the Appellant has not made submissions in respect of other criteria to be taken into account in awarding costs. The Respondent, on the other hand, made submissions with respect to such other criteria.

[36] For example, the Respondent credits the Appellant with no actions that shortened the proceedings. Further still, the Respondent argued that none of: the volume of the work, the complexity of the issues, their importance as a matter of public policy, or, the tax savings amount that the judgment achieved, warranted an

award of enhanced costs. As to the tax savings that the Appellant achieved by having judgment in favour of ECE treatment, it was referred to as *de minimus* relative to the cost of the proceedings.

[37] It is also submitted that the Appellant did not succeed in having the subject expenses treated as ECE because of any arguments it advanced orally or in its written submissions.

[38] Other comments made in the Respondent's submissions include the unreasonableness of the counsel fees. It was pointed out, as well, that no allegations were made by the Appellant that the conduct of the Crown could be described as improper or unnecessary or being excessively cautious or the like.

[39] The Respondent also asserted that the Appellant has failed to produce evidence of disbursements claimed.

The Appellant's Answer to the Respondent's Submissions

[40] The Appellant challenges the Respondent's submission that the quantum issues were not agreed to until just prior to trial as well as the statements in the Respondent's submissions referring to the *de minimus* tax savings resulting from the treatment as ECE relative to the cost of the proceedings. The Appellant asserts that the Respondent has unduly minimized the amount at issue and the legal significance and complexity of the issues raised by the appeal.

[41] The Respondent should not be able to rely on a so-called legal impediment to accept an offer when it begs the question as to why it would waste the Court's time to make a joint request for a settlement conference.

[42] Further, as to the Respondent's position that there was a legal impediment to settlement, it is suggested that this attempted justification for not being able to settle cannot withstand scrutiny given the concessions made at trial and the Court's decision.

[43] The Appellant also asserts that it was inappropriate for the Respondent to use the current forum to dispute a quantum of disbursements that the Appellant never sought from the Respondent before this Court. The disbursements, if challenged, should be dealt with by the taxation officer regardless of the outcome of this Motion.

[44] Ultimately, the Appellant insists that the principle that it relies on is that greater relative weight must be afforded to settlement offers in determining whether or not the successful party is entitled to enhanced costs.

Analysis

[45] My analysis can be dealt with under separate headings:

A. Applying Practice Note No. 18

B. Was There a Legal Impediment to Settlement?

C. Other Considerations

D. The Numbers

E. Conclusions

A. Applying Practice Note No. 18

[46] I agree with the Respondent's submissions on this issue. That is, I agree with the Respondent that invoking Practice Note No. 18 as the centrepiece of an analysis of a motion for enhanced costs is premature. We do not know if the proposed rule it relates to will be promulgated as proposed. Accordingly, the basis of the Motion is reduced to reliance of paragraph 147(3)(*d*) of the TCC Rules.

[47] However, before taking the analysis in that direction, an observation is required in respect of the Respondent's position that for the proposed rule to apply, the offer needed to be renewed after the announced effective date of the proposed new rule. At common law an offer is generally extinguished once it is rejected.[3] While I acknowledge then that arguably the offer should have been extended again to avoid the possibility of this result having an impact on the application of the new rule, I am troubled by the broader implications of what might be seen as the Respondent's implied reliance on this common law principle.

[48] I do not intend, in these Reasons, to expound on such concerns other than to say I do not regard this common law principle as influencing a determination of costs under either paragraph 147(3)(*d*) of the TCC Rules or the proposed rule. This would be particularly true where the parties acknowledge that an offer has not been

[3] For example see *Tam v. Tam*, (1982), 38 O.R. (2d) 718; 138 D.L.R. (3d) 302.

withdrawn or expired.[4] Otherwise, assessing costs on a basis that gives weight to offers would be meaningless since in every enhanced cost case where an offer is being assessed in light of a particular judgment, that offer would have been rejected. To insist that it be re-extended in this context would lead to a never-ending cycle and frustrate the purpose of considering the offer in the first place. Further, a complete analysis of the common law might lead one to conclude that the application of the principle of rejection causing an offer to terminate might well depend on: the issue to which the principle is sought to be applied; the circumstances of each case; the understandings of the parties; or, whether the rejection is in the nature of an enquiry for more information.[5]

[49] That said, I return to my conclusion that the basis of the Motion is reduced to reliance on paragraph 147(3)(*d*) of the TCC Rules with recognition of this Court's recent leanings to substantial indemnity in circumstances described by the proposed rule.[6] In this context, my references to substantial indemnity and enhanced costs shall mean nothing more than a reference to a lump sum or fixed cost award that is substantially higher than tariff.

[50] This recognition should not only underline this Court's leanings, but it should also underline the continued role that the exercise of discretion plays. Even the proposed rule, if it comes into force as written, is subject to the wider discretion of the Court. The proposed substantial indemnity provision is prefaced by "Unless otherwise ordered by the Court". As well, subsections 147(1) and (5) recognize the broader discretionary powers of the Court in fixing costs.

[51] These elements of discretion together with the general rule in section 9 that the Court can dispense with any rule, lead to far too many possibilities as to how the proposed rule will be applied to speculate how the jurisprudence on its

---

[4] See *CIBC World Markets* at paragraph 3 where the Federal Court of Appeal in dealing with an offer on a motion for enhanced costs said: "CIBC World Markets' offer had no expiry date. It left its offer on the table, ready for acceptance, right through to the judgment of this Court". I take this as recognition that a rejected offer does not have to be revived to invoke an enhanced cost request.

[5] See for example S.M. Waddams, *The Law of Contracts*, 6th ed., Toronto, Canada Law Book Inc., 2010 at p. 116.

[6] See *Barrington Lane* at paragraph 13 where Justice Pizzitelli expounds on the greater role being played by paragraph 147(3)(*d*) of the TCC Rules as demonstrated by cases such as *Langille v. R.*, 2009 TCC 540 and *Donato v. R.*, 2010 TCC 16.

application will evolve once it comes into force. Consider the following passage in *Bell Canada* at page 140 which might, for example, temper its use:

> The courts must also be careful not to become too paternalistic with litigants or to unnecessarily discourage recourse to the trial as a forum for the resolution of disputes. Concern is properly directed to unreasonable conduct in the course of litigation which leads to unnecessary or prolonged trials. However, the judicial system is here to serve the public and no barriers to access should be imposed by warnings as to cost consequences arising from the court's assessment of how litigants should conduct their business.

[52] This brief extract speaks loudly, in my view. A substantial indemnity provision should not serve to bar access to this Court. It cannot unreasonably punish a party who has rejected a settlement offer in order to obtain judicial clarification of an issue where that quest is not unreasonable and where requiring the other party to participate in that exercise at its cost is not unreasonable in the circumstances. On the other hand, tariffs under the TCC Rules are inordinately low and beyond the ability of this Court to control other than by the exercise of its discretion. As such, conduct in the course of litigation which leads to a trial where there was a reasonable basis for settlement as evidenced by a judgment will frequently justify costs approaching, if not equal to, substantial indemnity (as defined in the proposed rule) where an equivalent or better offer was made and rejected. This trend has clearly been set already. As demonstrated in *Barrington Lane, Langille* and *Donato* this Court will not hesitate to grant substantial cost awards in appropriate settlement offer cases that go far beyond the guidance of other authorities that mandate a requirement for reprehensible, scandalous or outrageous conduct during litigation before costs on, or approaching, a solicitor and client basis will be considered.[7]

[53] In any event, my task is to determine a cost award pursuant to paragraph 147(3)(*d*) of the TCC Rules which balances these considerations and recognizes, to the extent justified, this Court's leanings to a higher cost award in circumstances described by the proposed rule. Application of this rule however, unlike the proposed rule, does not operate in a vacuum. It is only one factor that must be considered and balanced in determining a cost award under subsection 147(3). Still, being the basis of the Motion, it will serve as a convenient focal point in my analysis. That is, my analysis will be largely structured around paragraph 147(3)(*d*) of the TCC Rules and consideration of the settlement offer.

B. Was There a Legal Impediment to Settlement?

---

[7] See, for example, *Leriche v. Canada*, 2012 TCC 19 at paragraph 8.

[54] The question of the reasonableness of rejecting a settlement offer starts with the question of whether there is a legal impediment to accepting it.

[55] I do not agree with the Respondent that there were legal impediments to the acceptance of the settlement offer that prevented settlement over the period that it was acknowledged to have been on the table.

[56] The so-called legal impediments that the Crown relies on are:

a) the subject expenses could not be recognized until the Crown was satisfied who incurred the expense on whose behalf and in what amounts; and

b) the subject expenses could not be recognized until they could be attributed to a business carried on by the Appellant.

a) Who Incurred the Expense on Whose Behalf and in What Amounts?

[57] The exercise of becoming satisfied as to who incurred expenses, on whose behalf and in what amounts is a fact finding one. It is incumbent on the Crown, in considering a settlement offer, to assess on a balance of probability what a judicial forum might on a balance of probability conclude. The exercise is an ongoing one requiring an open posture to resolving factual concerns.

[58] While these could be all or nothing issues on an invoice by invoice basis, that is not necessarily always the case. Considerable room might well exist in settling which invoices in what amounts could, on a balance of probability, be found to have been incurred by or on behalf of the claimant. There is nothing in the Federal Court of Appeal decision in *CIBC World Markets* that suggests that the Crown is not at liberty to accept factual resolves on the basis of probability which should afford the Crown considerable leeway. As well, a concession might reflect appropriate recognition of proportionality. Even the Crown might, in some circumstances, properly consider the need to concede a fact that only has a marginal chance of being proven to the satisfaction of a judge, where the cost of such concession is small relative to the cost of having the question litigated.

[59] If this were not the case, the Crown could justify never settling anything. In other words, I agree with the Appellant on this point. There was no legal

impediment to settling the issues of who incurred expenses, on whose behalf and in what amounts.

[60] Further, that the Crown ultimately conceded these issues demonstrates that there was ultimately no legal impediment on these points. The question might then only relate to the weight to be given in a cost award to delays in making such concessions.

[61] Simplistically, if nothing changes from an evidentiary point of view from the time of the offer to the time of acceptance, then *prima facie* there is no apparent reason not to settle such issues earlier. In such case, some enhanced cost award might be considered under paragraphs 147(*g*) or (*h*) of the TCC Rules relating to delays and refusals to admit. However, claiming enhanced costs on this basis puts the onus on the Appellant, who made the claim in this case, to identify the point at which the evidence was sufficient to permit admission of the requisite facts. The Respondent, in essence, argues that that point was not reached until shortly before the day the hearing of the appeal commenced. I agree with the Respondent on this point.

[62] On July 13, 2009 at the settlement conference, the Respondent clearly rejected the Appellant's settlement offer on the basis that there remained a significant factual dispute regarding the extent to which the Appellant incurred the consulting fees in respect of the reorganization. The factual dispute issues as set out in the Respondent's submissions were as follows:[8]

a) in respect of $157,696.00 in dispute in 1997:

   (i) $60,624.82 invoiced, was to an entity other than PCS;

   (ii) $67,808.57 invoiced, referred to "LLC Matters" without any specificity about the nature of the legal or accounting services rendered;

   (iii) $4,262.00 was an internal allocation done by PCS in respect to $49,194.15 invoiced for "Various Taxation Matters", and;

b) in respect of $1,928,967.00 in dispute in 1998:

[8] Respondent's Written Representation Regarding Costs, paragraph 15.

(i) $7,386.31 invoiced, was to a entity other than PCS;

(ii) $167,926.39 was unsupported by invoices and was evidenced only by a summary of accounting entries;[9]

(iii) $905,505.43 invoiced, refers to "LLC Matters" without any specificity about the nature of the legal or accounting services rendered; and

(iv) $51,494.06 was an internal allocation done by PCS in respect to $248,135.22 invoiced for "Various Taxation Matters".

[63] The Respondent asserts that the Appellant refused to provide detailed billing records claiming privilege thus preventing the Crown from resolving these issues. However, post-settlement conference correspondence confirms that the Respondent had agreed at the settlement conference to work with the Appellant to resolve these issues. A letter, dated October 8, 2009 from the Appellant's counsel confirms that at a meeting in September, 2009, the Respondent agreed to the approach to be taken, namely by affidavit. The letter sets out in detail what the affidavit will address including the quantum of invoices related to the reorganization that were paid by the Appellant.

[64] However, the affidavit was not actually signed and affirmed until August, 2012. That affidavit submitted at that time was the required piece of evidence that the Respondent needed to make the concession made even though it essentially confirmed the numbers set out in the September 2009 letter and what the Appellant had agreed to at examinations for discovery.

[65] Accordingly, I do not find that the Respondent should be responsible for enhanced costs for a delay in making the concession made. It is not unreasonable to require receipt of this evidence in the form agreed upon prior to agreeing to the concession. Further, the costs incurred by the Appellant to get the concession saved the Appellant trial costs. It would not be reasonable to expect the Respondent to reimburse the Appellant for the cost of achieving such saving.

[9] However, the Appellant submits that this amount was conceded in the settlement offer. I agree with that submission.

[66] As well, it must be recognized that unless a settlement of all issues appears possible, there is a tendency to put off the final touches on issues that can be settled to a time closer to the steps of the Court. That is what the Appellant did knowing that ECE treatment was not acceptable to the Respondent and that a trial was inevitable. Again, it would not be reasonable to expect the Respondent to reimburse the Appellant for such delays.

[67] That leads me to the second question.

b) Were the Subject Expenses Incurred to Earn Income From a Business Carried on by the Appellant?

[68] It must be recognized that considerations such as consistency and transparency must weigh into the Crown's ability to accept an offer. Seeking judicial clarification of a provision of the *Act* can be a *bona fide* reason to reject an offer. However, not all such considerations should logically frustrate the taxpayer's right to an enhanced cost award if they do not constitute a legal impediment to settlement.

[69] I do not accept in this case that there was a legal impediment to acceptance of the offer. The Canada Revenue Agency ("CRA") could have accepted the line of cases referred to in the Appellant's settlement brief, namely: *BJ Services Co. Canada v. R.*, 2004 DTC 2032 (T.C.C.) and *International Colin Energy Corp. v. R.*, 2002 DTC 2185 (T.C.C.). Indeed, contrary to the Respondent's assertions, a reasonable legal basis for accepting the settlement offer was put forward by the Appellant based on such line of cases.

[70] This line of cases would have permitted the CRA to allow that the business needs of the Appellant where advanced by the subject expenditures and that for the purposes of either paragraphs 18(1)(*a*) or (*b*), that was sufficient. Indeed, my decision clearly found that applying the principles set out in those cases allowed for the deductions sought even though the income derived from the business of the Appellant was only indirectly enhanced by the expenditure.[10] That is, the settlement offer could have been accepted on a principled basis even though this line of cases clearly expanded the traditional requirement of a more direct relationship between the expenditure and the income earning process of a particular business carried on by the taxpayer. Further, that my decision may have been less predictable in seeming to apply that line of cases more readily to an ECE

[10] See paragraphs 108 and 109.

outlay does not suggest that there was legal impediment to accepting the offer in this case. The settlement offer was capable of acceptance on the basis of an existing line of authorities.

[71] However, this finding does not mean that the Respondent should have accepted the offer. It was a principled approach for the Respondent to refuse the settlement offer given the apparent need for further clarification of the law in light of the *BJ Services* line of cases.

[72] That takes me to my previous comment. The cost of litigation cannot unreasonably punish a taxpayer whose settlement offer has been rejected to enable the Crown to obtain judicial clarification of an issue even where neither that quest, nor requiring the taxpayer to participate in it, is unreasonable in the circumstances. That is, even in such circumstances, the Crown's refusal to accept a settlement offer may still justify giving considerable weight to the offer and the outcome of the appeal in awarding costs. Taxpayers should not necessarily bear the cost of the CRA working out its required assessing practises. To the CRA there is a "test case" aspect to wanting to proceed to litigation. However, this appeal was as much, if not more, a case of the Appellant knowingly and aggressively pushing for an assessing position beyond the predictable response of the CRA. This is less a case of the CRA paying the cost of a guinea pig as it is of a lion paying the cost of a better meal.

[73] While the foregoing "test case" analogy strikes me as an eminently reasonable way to approach fixing an enhanced cost award, for example by way of application of paragraph 147(3)(*c*) which brings into consideration the importance of the issues, it is a view that would appear to fly in the face of the authorities cited and relied on by the Respondent.

[74] The Respondent, perhaps anticipating my awarding costs on the basis of the offer being rejected in order to test the boundaries of the *BJ Services* line of cases, cited cases such as *Brown v. R.*, 2002 DTC 1925 where this Court suggested that notwithstanding that an appeal may help resolve an assessing issue or refine an assessing practise of the CRA, that is not a reason to require the Minister to absorb an appellant's costs as if it were a test case. While the analogy that I have drawn is in contradiction to the principle enunciated in *Brown*, I am not persuaded that the *Brown* line of cases should always govern in assessing the weight to be given to a rejected settlement offer that is as good or better than the judgment obtained.

[75] In *Brown*, the Court discussed increased cost awards for test cases and relied on the definition of a test case set out in *Vriend v. Alberta*, (1996), 141 D.L.R. (4th) 44 (Alta C.A.). At paragraph 29 of *Vriend*, a test case was said to be a case where the *parties* seek primarily to settle a point of law and where the impact of that rule on the *parties* is of secondary importance to the settlement of the rule itself. That definition, contemplating mutuality of emphasis on settling a point of law, precludes consideration of an award of enhanced costs based on "test case" analogy where the CRA refused a settlement offer in order that *it* can settle a point of law. While I do not find, in this case, that the CRA refused the settlement offer *primarily* to settle or clarify a point of law, I note that there may be a fine line in some cases between recognizing what I have by analogy called a test case, and, giving weight to an offer under paragraph 147(3)(*d*) as a factor favouring an enhanced cost award to a successful taxpayer where the rejection of that offer was based on the respondent's principled need to clarify a point of law.[11] The same reasoning can, in my view, be applied to the finding in *Canderel Ltd. v. R.*, 94 DTC 1426 (T.C.C.) that a test case does not *per se* entitle a litigant who succeeds in it to an increased cost award. That is, giving considerable weight to a rejected offer as a factor favouring an enhanced cost award to an appellant taxpayer under paragraph 147(3)(*d*) where the rejection is based on the respondent's need for settling or clarifying a point of law, is not reliance on the appeal being a test case *per se*.

[76] Regardless, given my finding in this case that the Appellant knowingly and aggressively pursued an assessing position beyond the predictable response of the CRA and my conclusion that the CRA cannot be said to have refused the settlement offer *primarily* to settle or clarify a point of law, I have not given any weight to this "test case" analogy in my determination of an enhanced cost award.

[77] Still, some enhanced costs are necessary here. A *bona fide* offer was made and judgment coincided with the offer. There was no legal impediment to accepting it. This was an important issue to both parties. It had its subtle difficulties and complexities that required a high degree of expertise and therefore a higher cost to put the issue before the Court.

---

[11] I have, admittedly, taken some liberties in drawing an analogy between a principled rejection of a settlement offer, based on an administrative need to test the limits of a doctrine, and a test case. Further, it must be acknowledged that there are other definitions of a test case that might make my analogy even less persuasive. For example, section 18.1(1) of the *Tax Court of Canada Act* suggests that a test case is one where the issue is common to a group or class of persons. In that context, there is, arguably, no analogy between a principled rejection of a settlement offer, based on an administrative need to test the limits of a doctrine, and a test case. Still, I am drawn to it, nonetheless.

[78] The award, however, will not be on the indemnity basis sought by the Appellant. By not applying the proposed rule in subsection 147(3.1), I am required to consider all of the factors set out in subsection 147(3) of the current TCC Rules. Looking at those factors not already dealt with, I note that the volume of work done by Appellant's counsel, although significant, was not such that the Crown might have reasonably expected the type of cost award requested by the Appellant. Further, the Respondent's cooperative approach assisted in keeping the duration of the proceedings shorter than they might otherwise have been and certainly there can be no finding that the Respondent, in any way, acted improperly. In such circumstances, but for the operation of the new rule which I am not applying, anything approaching costs on a solicitor and client basis would be unduly severe. Indeed, the Respondent cites cases like *Lyons v. R.*, 1995 CarswellNat 2123 (T.C.C.) in support of the position that in such circumstances no enhanced costs should be awarded at all.

[79] While more recent cases, as referred to earlier, suggest a different trend, I am satisfied that an award of costs in this case must be tempered by all the factors set out in subsection 147(3) of the TCC Rules. That is, even considering that I have already said that paragraph 147(3)(*d*) should be applied with recognition of this Court's emphasis on assessing substantial costs in cases where the new rule would apply if it were in place and in force, I am not inclined to go as far as some other cases have gone.

[80] That leaves me to a few last considerations.

C. Other Considerations

[81] The Respondent has raised the question of proportionality. A large sum was spent to get an income deduction. The value of an income deduction relative to the legal costs incurred was material. However, the value, relatively, of the ECE allowance afforded by my decision, in and by itself, was not. That the Crown required the Appellant to incur increased legal fees to get what it was willing to take earlier, does not address the fact that the increased fees were paid for the considerable upside of being forced to litigate by the refusal of the Crown to accept the settlement offer – an upside that it lost.

[82] On the other hand, the amount at issue is the same even though the value of the recognition of the subject expenses is diminished by ECE treatment. More importantly, that the value was less than sought after by the Appellant does not

change the fact that it was the Crown's refusal to accept even the lower valued deduction that forced the litigation.

[83] That said, overall, I do not find the Crown's argument on this point to be totally persuasive. That is, while the relative value of the Appellant's success might be seen as modest, that the Respondent forced the litigation still favours some measure of enhanced costs to the Appellant.

D. The Numbers

[84] I asked the Appellant for billing records and received unchallenged representations of such records that reflect legal fees since the offer was rejected of $293,072.00.

[85] As far as I can discern, aside from what I noted above regarding the quantum issues, nothing much happened between the settlement conference and August 27, 2010 when the Respondent served on the Appellant a Request to Admit Facts and Documents. That was replied to by the Appellant on September 13, 2010 and on September 24, 2010 the Partial Agreed Statement of Facts filed with the Court at the hearing was completed.

[86] Having already concluded that the resolution of the quantum issues do not warrant an enhanced cost award, I am left to consider a solicitor and client fee calculated from mid-September, 2010 to the end of the hearing of the appeal. That amount is in excess of $124,000.00.

[87] While I believed the billing records that revealed this number would be of assistance, I am now of the view that the determination of a lump sum cost award does not start and end by calculating hours times an hourly rate. As found by the Ontario Court of Appeal in *Boucher v. Public Accountants Council for the Province of Ontario*[12] the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the circumstances. In my view, a time billing for the period in question of $125,000.00 does not reflect the efficiencies that might have been expected and may even reflect some duplication of work done prior to mid-September, 2000 including the preparation of the offer and the settlement conference brief. Indeed, the case presented to support the offer at the settlement conference was essentially the case presented at the appeal.

[12] (2004) 71 O.R. (3d) 291 (Ont. C.A.).

[88] That is, the amount that is fair and reasonable for the Respondent to pay in this case, in my view, is considerably less than the solicitor and client costs as reflected by my calculation of fees incurred from mid-September to the end of the hearing of the appeal.

E. Conclusions

[89] My conclusion then is to award fixed costs pursuant to subsection 147(3) of the TCC Rules that reflect the views expressed herein.

[90] All things considered including the Crown having agreed to facts that limited the hearing of the appeal to the examination of one witness, albeit somewhat late in the case of an expert witness, the Appellant having made a reasonable settlement offer which was rejected, the importance and potential benefits to both parties to securing a successful outcome by proceeding to litigation, I fix representation costs at $40,000.00, including costs of the Motion. Such fixed cost award is in addition to costs payable as per the applicable tariff up to September 13, 2010. Disbursements shall be taxed in the normal course.

Signed at Ottawa, Canada this 29th day of June 2012.

"J.E. Hershfield"

Hershfield J.

CITATION:	2012 TCC 235
COURT FILE NOS.:	2005-1631(IT)G; 2005-1760(IT)G
STYLE OF CAUSE:	POTASH CORPORATION OF SASKATCHEWAN INC. AND H.M.Q.
PLACE OF HEARING:	Ottawa, Canada (Motions Room)
DATE OF HEARING:	February 29, 2012
REASONS FOR ORDER BY:	The Honourable Justice J.E. Hershfield
DATE OF ORDER:	June 29, 2012

APPEARANCES:

Counsel for the Appellant:	Stéphane Eljarrat
Counsel for the Respondent:	Ifeanyi Nwachukwu

COUNSEL OF RECORD:

For the Appellant:

Name:	Stéphane Eljarrat
Firm:	Davies Ward Phillips & Vineberg LLP 26th Floor – 1501 McGill College Avenue Montreal, Quebec, H3A 3N9

For the Respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada