

Dockets: 2009-3864(IT)G
2009-2694(IT)G
2009-2695(IT)G

BETWEEN:

MARGARET SWAIN,
RANDALL W. MARUSYK,
SCOTT R. MILLER,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

Costs Submissions dated March 15, 2012 and April 13, 2012 regarding the
Judgment issued on February 10, 2012

Before: The Honourable Justice Patrick Boyle

Counsel for the Appellants: Matthew G. Williams
Shaun Doody

Counsel for the Respondent: Suzanie Chua

ORDER

UPON having signed reasons for judgment on February 10, 2012 for the appeals of *Margaret Swain* (2009-3864(IT)G), *Randall W. Marusyk* (2009-2694(IT)G) and *Scott R. Miller* (2009-2695(IT)G), which were heard together on common evidence on June 2, 2011 at Ottawa, Canada;

AND UPON having read submissions on costs from both parties and in accordance with the reasons for judgment;

The Respondent is awarded costs in the amount of \$25,000 plus disbursements payable as to 1/3 by each of the Appellants to be paid no later than 60 days from the date of this Order.

Signed at Vancouver, British Columbia, this 9th day of October 2012.

"Patrick Boyle"

Boyle J.

Citation: 2012 TCC 323
Date: 20121009
Dockets: 2009-3864(IT)G
2009-2694(IT)G
2009-2695(IT)G

BETWEEN:

MARGARET SWAIN,
RANDALL W. MARUSYK,
SCOTT R. MILLER,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Boyle J.

[1] These three appeals were heard together in a one-day trial in June 2011. The appeals were dismissed with costs in February 2012. The Respondent filed written submissions in support of her request that costs be fixed in the aggregate of \$25,000 plus disbursements. This request is made primarily on the basis of a more favourable written settlement offer having been made by the Respondent to the Appellants. The Appellants' written submissions indicate that the \$25,000 requested by the Respondent represents three times the applicable tariff. The Appellants do not suggest that, if the Respondent's settlement offer warrants costs after the date thereof being awarded on a substantial indemnity basis, the \$25,000 amount requested is inappropriate.

[2] The Appellants sought to deduct certain losses on income account as relating to their law practices. This position was not upheld. The Appellants' position at trial was remarkable, inconsistent, and very incomplete notwithstanding that the Appellants were successful lawyers represented by very capable tax counsel. There was insufficient evidence presented to even support that the loss was a capital loss for

tax purposes. The evidence presented left the very real possibility that one of the lawyers had been duped personally for the full amount.

[3] The Respondent's written settlement offer was made in November 2010. It included a clear offer to settle on the basis that the entire loss claimed be treated as a capital loss in the year claimed. It was not accepted by the Appellants. I am now told that the Appellants believed their loss was properly on income account and, moreover, the capital loss would have been of no benefit as none had any capital gains to offset.

[4] In their written submissions the Appellants ask that, since I observed in my reasons that Dr. Swain appears to have been duped, they should not be penalised any further with an increased costs award. Given that the Appellants controlled the story I was told and I concluded that I was only told part of the story by the Appellants, it is hard not to think of the apocryphal courtroom story of the bold and cheeky accused who, when charged with murdering his parents, threw himself on the mercy of the court on the basis he was an orphan.

[5] Litigants have long been urged to make an effort to settle with their adversaries as they proceed to the courts. In fixing a costs award a settlement offer is an important consideration. It is one of the factors specifically enumerated in Rule 147(3) of the *Tax Court of Canada Rules (General Procedure)*. Settlement offers are also addressed in the Tax Court of Canada's Practice Notes Nos. 17 and 18. Proposed Rule 147(3.1), if enacted, will address the cost consequences of settlement offers in greater detail and with greater specificity. In recent years, a number of costs awards in this Court have underscored the significance of settlement offers to costs awards. Settlement offers should be taken and considered seriously as costs may be awarded in an amount significantly in excess of tariff against an unsuccessful party who has not accepted a settlement offer that would have been more favourable than the outcome at trial. See for example, *Donato v. Her Majesty the Queen*, 2010 TCC 16, 2010 DTC 1049; *Her Majesty the Queen v. Donato*, 2010 FCA 312, 2010 DTC 5195, *Langille v. Her Majesty the Queen*, 2009 TCC 540, 2009 DTC 1351, *Jolly Farmer Products Inc. v. Her Majesty the Queen*, 2008 TCC 693, 2009 DTC 1040 and *Barrington Lane Developments Limited v. Her Majesty the Queen*, 2010 TCC 476, 2010 D.T.C. 1323. This is so, even in advance of proposed Rule 147(3.1) being enacted.

[6] But for the settlement offer, I am satisfied that upon a consideration and weighing of all of the factors relevant to a costs award, including those enumerated in

Rule 147(3), there is no reason in this case to depart from the Court's applicable tariff of costs with only one set of costs for the hearing date.

[7] I am satisfied that this is an appropriate case for fixing costs in excess of tariff to reflect the Respondent's more favourable settlement offer. I have no reason to doubt that that \$25,000 amount requested does not reflect significantly more than costs on a substantial indemnity basis after a reasonable period following the date of the Respondent's settlement offer and tariff costs prior thereto. This was not challenged or even questioned by Appellants' counsel and he would have accurate knowledge of the costs of his services during the period following the Respondent's November 2010 settlement offer.

[8] Accordingly, I am fixing costs in the amount of \$25,000 in the aggregate, plus disbursements, payable to the Respondent within 60 days hereof to be payable as to 1/3 by each of the Appellants.

Signed at Vancouver, British Columbia, this 9th day of October 2012.

"Patrick Boyle"

Boyle J.

CITATION: 2012 TCC 323

COURT FILE NOS.: 2009-3864(IT)G, 2009-2694(IT)G,
2009-2695(IT)G

STYLES OF CAUSE: MARGARET SWAIN v. HER MAJESTY
THE QUEEN, RANDALL W. MARUSYK
v. HER MAJESTY THE QUEEN, SCOTT
R. MILLER v. HER MAJESTY THE
QUEEN

REASONS FOR ORDER BY: The Honourable Justice Patrick Boyle

DATE OF REASONS: October 9, 2012

APPEARANCES:

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Shaun Doody

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