

Docket: 2009-2898(IT)G

BETWEEN:

SHIRLEY PATRICIA MCKENZIE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard in writing, as agreed upon by the parties at a case management hearing held by teleconference on January 13, 2012 at Ottawa, Ontario.

Before: The Honourable Justice Patrick Boyle

Representations:

Counsel for the Appellant:

David C. Nathanson, Q.C.

Adrienne K. Woodyard

Counsel for the Respondent:

Donna Dorosh

Darren Prevost

ORDER

UPON MOTION brought by the appellant for an order extending the time within which the appellant may request costs on a substantial indemnity basis after the date of a settlement offer; and,

A direction that the appellant is entitled to such costs, as well as party-and-party costs to the date of service of the Settlement Offer, plus reasonable disbursements and applicable taxes.

AND UPON reading the Affidavit of David C. Nathanson, dated February 3, 2012, filed in support thereof;

AND UPON receipt of the written submissions of both parties;

IT IS ORDERED THAT, in accordance with the attached Reasons for Order:

1. The appellant's motion for an extension of time to request increased costs is dismissed;
2. The appellant is entitled to costs in accordance with the applicable tariff, pursuant to the judgment rendered; and
3. The respondent is entitled to its costs of this motion.

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

"Patrick Boyle"

Boyle J.

Citation: 2012 TCC 329
Date: 20121009
Docket: 2009-2898(IT)G

BETWEEN:

SHIRLEY PATRICIA MCKENZIE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Boyle J.

[1] Taxpayer's counsel has made a request for an increased costs award following complete success, with costs, on the merits at trial. The request is for costs on a substantial indemnity basis following the date of a settlement proposal made by the appellant and based upon the Tax Court of Canada Practice Notes Nos. 17 and 18 and proposed Rule 147(3.1).

[2] The appellant is relying upon her pre-trial written proposal that the matter be settled "on the basis that the respondent consent to judgment allowing the appeal, without costs to either party".

[3] Following the hearing of the appeal on April 27 and 28, 2011, judgment was rendered on June 9, 2011 allowing the appeal in full with costs.

[4] At the conclusion of the hearing of the appeal, I raised with the parties the issue of counsel wishing to speak as to costs. I clearly indicated that, if either party wanted to make submissions on costs after judgment was issued, they were to be

made within 30 days following judgment. I asked taxpayer's counsel if that would be satisfactory and he indicated it would.

[5] The time frame of 30 days following judgment is consistent with the 30 day timeframe set out in Rule 147(7) dealing with costs generally.

[6] In his first request to the Court for costs in excess of tariff, made in a letter dated November 24, 2011, taxpayer's counsel indicated that the respondent had not referred to any requirement in the Rules, or any previous decision supporting her position that the request was out-of-time. Further, he did not recall the 30 day time frame being discussed and agreed to at the hearing.

[7] A teleconference hearing was held on January 13, 2012 to address the issue of the appellant's request for increased costs. At that time, I read the relevant portion of the transcript to counsel, drew his attention to Rule 143(7) and the decision of Rip J. in *Atcon Construction Inc. v. Her Majesty the Queen*, 2003 TCC 174, which in turn refers to the Federal Court of Appeal decision in *Canada v. Ontario Development Corp.*, 92 DTC 6121 . A schedule was set through to March 2012 to permit a motion to be brought and written submissions made with respect to:

1. a motion to extend the time to apply for increased costs;
2. the timeliness of the request already made; and
3. the merits of the request for increased costs in either event.

The appellant's motion was brought in February 2012 and the last of the submissions were received in March 2012.

I. Timeliness and application regarding extension of time:

[8] It is clear that the appellant's initial written request for increased costs was out of time, being beyond the applicable 30 day period. See the decision of Bowie J. in *Bibby v. Her Majesty the Queen*, 2010 TCC 111.

[9] This is not an appropriate case in which to grant the application to extend time under the Rules for the following reasons:

1. Taxpayer's counsel is a very experienced tax litigator before our Court, had co-counsel, and is a member of a well-resourced firm;

2. The 30 day time limit was drawn to counsel's attention by the judge at the conclusion of the hearing. Further, counsel was asked if 30 days was sufficient and he agreed that it was;
3. The 30 day limit is clearly set out in the same Rule 147 which permits increased costs in the event of a no less favourable settlement offer;
4. Rule 147(3.1) relating to settlement offers should not be automatic or mandatory. It certainly does not limit a trial judge's overall discretion with respect to the awarding of costs before it is enacted; this is implicit in Practice Note No. 17;
5. The appellant's counsel had no intention to apply for increased costs within the applicable 30 day period. Even if, as put forth, he wrongly thought the 30 days should start from the expiry of the appeal period, he still was outside the mistaken 30 day period, not having even contacted the respondent until after that time.
6. Inadvertence of counsel is not generally a reasonable explanation for delay sufficient to support an extension of time. The decision of this Court's current Chief Justice in *Atcon Construction Inc.*, addresses this clearly. Rip J., as he then was, quoted Heald J. in the Federal Court of Appeal decision in *Ontario Development Corp.*:

13 [. . .]

. . . In my view, the fact that counsel was not familiar with the Rules of this Court regarding costs is not a satisfactory basis for seeking an extension. . . . It seems to me that a 30 day time period is realistic and reasonable. Parties to litigation, particularly at the appellate level, have a right to expect some degree of finality to the proceedings in cases such as this where there has been no indication that the matter is to proceed further. There are no special extenuating circumstances in this case that would warrant an extension of the time provided in the Rules from 30 days to approximately 100 days. If this respondent is entitled, in the circumstances outlined herein, to an extension amounting to more than three times the period set out in the Rules, it would be difficult to think of a case where such an application could be refused. An extension in these circumstances would be tantamount to amending Rule 344(7)(a).

The analysis and comments in these two cases apply equally in this particular case.

II. The merits of the request for increased costs:

[10] Rule 147(3) provides that, in exercising its discretionary power to determine the amount of costs, the Court may consider a written offer of settlement. Proposed Rule 147(3.1) has yet to be enacted. It provides that, in the event a no less favourable settlement offer is made in certain circumstances, the successful party will be entitled to substantial indemnity costs after the date thereof. The proposed rule is addressed in the Court's Practice Note Nos. 17 and 18. Practice Note No. 17 provides that, until such time as the proposed Rule 147(3.1) becomes effective, the practice of the Court shall conform to the proposals.

[11] I do not accept that a proposal to settle on a basis that the appeal be allowed in full without costs, and under threat of seeking substantial indemnity costs if the appeal is allowed by the Court, constitutes a settlement offer for any of these purposes. I am of the view that a settlement offer for these purposes has to involve a degree of compromise. This is supported by such cases as *Imperial Oil Resources Ltd. v. Canada (Attorney General)*, 2011 FC 652 and *Hine v. Her Majesty The Queen*, 2012 TCC 295.

[12] Otherwise, both parties to every appeal would routinely propose that the appeal be allowed or withdrawn without costs, with a view to supporting a claim for increased costs in the event they succeed, and thereby defeating the ordinary rules, practices and considerations applicable to the awarding of costs.

[13] This can create certain difficulties in the context of proposing to settle all-or-nothing cases as discussed by the Federal Court of Appeal in *CIBC World Markets Inc. v. Her Majesty the Queen*, 2012 FCA 3, and by the Ontario Superior Court of Justice in *OMERS Realty Corporation v. Minister of Finance (Costs)*, 2012 ONSC 159.

[14] In the circumstances of this case, even had the application for increased costs been timely, the settlement offer relied upon does not constitute the type of settlement offer warranting consideration for purposes of Rule 147(3) or Practice Note Nos. 17 and 18, nor, in my view, should it for purposes of proposed Rule 147(3.1) if enacted as worded.

[15] The only basis for the appellant's request for increased costs set out in the Notice of Motion is the settlement offer. In the written representations, very brief mention is made of some of the other costs considerations in Rule 147(3). Had the

application been timely, I would not think that, in the overall circumstances of this case, costs beyond tariff are warranted after considering the relevant factors enumerated in Rule 147(3). I do not accept that the trial or the trial preparation proceeded inefficiently. The parties filed a Partial Agreed Statement of Facts. The trial involved only one issue. No material facts were in dispute. The parties agreed on a Joint Book of Documents. The evidence was straightforward. In addition to the taxpayer there were only two other witnesses. The respondent did not call any witnesses. While novel, the issue was not particularly complex. In the Reasons for Judgment the issue is described in a single-sentence paragraph, the position of the parties in three paragraphs and the Court's analysis in nine paragraphs.

III. Conclusion:

[16] In the circumstances, the appellant's motion for an extension of time is dismissed and the appellant is out of time to request increased costs. The appellant is entitled to costs in accordance with the applicable tariff, pursuant to the judgment rendered. The respondent is entitled to its costs of this motion.

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

"Patrick Boyle"

Boyle J.

CITATION: 2012 TCC 329
COURT FILE NO.: 2009-2898(IT)G
STYLE OF CAUSE: SHIRLEY PATRICIA MCKENZIE v. HER
MAJESTY THE QUEEN

PLACE OF HEARING:

DATE OF HEARING:

REASONS FOR ORDER BY: The Honourable Justice Patrick Boyle

DATE OF ORDER: October 9, 2012

REPRESENTATIONS:

Counsel for the Appellant: David C. Nathanson, Q.C.
Adrienne K. Woodyard
Counsel for the Respondent: Donna Dorosh
Darren Prevost

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