Docket: 2010-832(IT)G

BETWEEN:

TRANSALTA CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard by conference call on August 16, 2012, at Ottawa, Ontario.

Before: The Honourable Justice T.E. Margeson

Appearances:

Counsel for the Appellant:	Robert D. McCue
Counsel for the Respondent:	Mary Softley

ORDER

UPON motion by the Appellant for an Order of this Court awarding, or directing a taxing officer to award the Appellant:

(a) an amount for party and party costs (i.e. pursuant to Schedule 11, Tariff B, class C of the *Tax Court of Canada Rules (General Procedure)*) (the "*Rules*"), in the appeal to April 28, 2011, which the Appellant has calculated to be $2,300;

(b) an amount for substantial indemnity costs (i.e., 80% of solicitor and client costs) in the appeal after April 28, 2011, and to December 12, 2011, which the Appellant has calculated to be $265,410.23;

(c) an amount for reasonable disbursements on the appeal to December 12, 2011, which the Appellant has calculated to be $8,049.63;

(d) an award for costs on the motion to be calculated at 80% of solicitor and client costs, plus all reasonable disbursements, after March 15, 2012; and

(e) any further relief that this Honourable Court may grant.

AND UPON reading the materials filed, and hearing from counsel for the Appellant and counsel for the Respondent;

THIS COURT ORDERS that:

1. the Appellant's motion is dismissed; and

2. costs are awarded to the Respondent.

Signed at Vancouver, British Columbia, this 23rd day of October 2012.

"T.E. Margeson"

Margeson J.

Citation: 2012 TCC 375
Date: **20121212**
Docket: 2010-832(IT)G

BETWEEN:

TRANSALTA CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR ORDER

Margeson J.

[1] By Amended Notice of Motion dated the **5th** day of June, 2012, the Appellant sought an order of this Court awarding, or directing a taxing officer to award the Appellant:

(a) an amount for party and party costs (i.e. pursuant to Schedule 11, Tariff B, class C of the *Tax Court of Canada Rules (General Procedure)*) (the "*Rules*"), in the appeal to April 28, 2011, which the Appellant has calculated to be $2,300;

(b) an amount for substantial indemnity costs (i.e., 80% of solicitor and client costs) in the appeal after April 28, 2011, and to December 12, 2011, which the Appellant has calculated to be $265,410.23;

(c) an amount for reasonable disbursements on the appeal to December 12, 2011, which the Appellant has calculated to be $8,049.63;

(d) an award for costs on the motion to be calculated at 80% of solicitor and client costs, plus all reasonable disbursements, after March 15, 2012; and

(e) any further relief that this Honourable Court may grant.

[2] This motion was opposed by the Respondent.

[3] Both parties submitted substantial written briefs on the motion and both parties made further representations before the Court by way of telephone conference call on August 16, 2012.

[4] During the conference call, counsel for the Appellant opined that the motion would not have been made except for the settlement offer put forward by the Appellant and ultimately rejected by the Respondent. His position was that there was no reasonable basis for rejecting the offer of settlement and there was no legal impediment preventing the Respondent from settling the case on the basis of the offer of settlement.

[5] He indicated that the *CIBC World Markets Inc. v. Canada*[1] case sets out that the Legal Disability Exception should be narrowly construed generally as a result of the policy underlying the Enhanced Costs Rules and in any event the legal disability exception does not apply in this case.

[6] After the settlement offer was made by the Appellant, the Respondent did not attempt to negotiate with the Appellant respecting the terms of the settlement offer, did not make a counter-offer to the Appellant, and did not indicate to the Appellant that the settlement offer could not be accepted because it was insufficiently justified by legal principle.

[7] Under the circumstances, if the Respondent wishes to avoid the Enhanced Costs Rules it should have to justify the refusal. In *CIBC World Markets*, the Court did not have to go through the determination of whether or not under any factual or legal scenario CIBC could have been granted the tax credits it sought. But this case stands for the proposition that the legal disability rule only avoids the application of the "Enhanced Costs Rules" if the Respondent can show that the settlement was not legally possible. The Crown must demonstrate that it was not theoretically possible to

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1 2012 FCA 3, [2012] F.C.J. No. 3 (QL).

settle the case or only after making attempts to settle, it was not possible. That did not happen here.

[8] The Appellant and Respondent did not discuss any theoretical possibilities that may have justified the non-deductibility of some, but not all, of the PSOP bonuses, except for the terms set out in the settlement offer.

[9] The Appellant was never told of the legal disability issue. The Appellant had the will to settle. The offer could have been accepted. The Respondent should have said, "let us try to settle, let us find a way".

[10] There was not just one issue remaining to be settled, every payment and every worker presented an issue that had to be proved.

[11] It should not be easy for the Respondent to show that settlement on these issues was not possible. It is not enough for the Respondent merely to submit that the Appellant's settlement offer could not be accepted on the facts and the law. This is a complex area of the law and the reasons for rejection were not fully discussed.

[12] The Crown is attempting to avoid the effects of the Enhanced Costs Rules by creating a list of exceptions where the rules would not apply. This was an important case involving over $12,000,000. It was not an easy one and required much work. There are implications beyond this case. There was confusion in this area of the law which had to be resolved.

[13] On behalf of the Respondent, Counsel argued that Practice Note 18 is not a rule. It is not in force. It is a proposed rule only.

[14] The first issue was settled before trial on the basis that the Minister of National Revenue (the "Minister") was given evidence that the bonuses were paid.

[15] There is no burden on the Crown in this case. If there is, it has been met.

[16] Section 7 of the *Income Tax Act* (the "*Act*") was raised. It applied only to securities. Therefore, there was no basis for the Minister to disallow the cash bonuses. It was indicated before the settlement offer that the cash bonuses issue would not be pursued.

[17] Any theoretical alternative must be based upon what facts were known before the settlement offer was rejected that would have justified a settlement and the

Appellant could have said so. The mere fact that the Respondent did not say why the offer was rejected creates no problem for the Respondent here.

[18] It is not automatic that enhanced costs be awarded. The *CIBC World Markets* case is on all fours with the present case.

[19] No credence should be given to the Appellant's argument that the Minister should have provided reasons for rejecting the offer of settlement.

[20] The cases cited by the Appellant where increased costs were awarded are of no value here. Regard must be had to the particular circumstances of each case.

[21] There were no factors present in this case that would justify increased costs.

[22] The appeal of the Appellant concerned a question of statutory interpretation and a fairly large tax debt. These factors alone do not warrant an increased award of costs. The appeal did not involve an excessive volume of work. Discovery took only two days. The hearing lasted only one day. Only 16 documents were included in the Joint Book of Documents. Only one witness was called.

[23] The legal issues in the appeal were simple yes or no questions. The appeal did not raise any issue of public policy, public interest, or constitutional importance. The fact that part of the statute was being considered for the first time, or that the Court's decision might have some bearing on other taxpayers, does not give the appeal the character of a test case.

[24] The Respondent acted throughout in good faith and was cooperative resulting in the resolution of one of the issues and resulted in the filing of a comprehensive agreed statement of facts.

[25] The costs award sought by the Appellant is unreasonable. To allow these enhanced costs would be tantamount to making the Respondent liable for them because it advanced a position on a question of law that the Court did not agree with. The amount of costs requested is disproportionate to the work done by the Appellant on what was required to be done for a one-day trial.

[26] The elevated costs largely relate to the work for Mr. McCue and Mr. Marr who spent 297 and 180 hours working on the appeal. This work involved preparation of a 72-page memorandum of argument, later amended to 94 pages. Submissions of that length are excessive for a straightforward one-day trial. The amended memorandum

of argument is more than triple the limit of 30 pages prescribed by the Federal Court's Rules and more than double the limit of 40 pages for a factum prescribed by the Rules of the Supreme Court of Canada.

Decision

[27] The Court is satisfied that the issue before the Court was an important one and that both parties were cooperative in attempting to resolve the issues, resulting in only one outstanding issue to be resolved by the Court. Such cooperation obviously reduced the Court time considerably that was required for the trial and the whole case was presented to the Court in one day.

[28] As this Court indicated in the Reasons for Judgment, the Court directed its attention to four questions, the most significant of which was the meaning to be given to the word "agree" as used in subsection 7(3) of the *Act*. The Court agrees with the submissions of the Respondent that the legal issues posed by these four questions were basically yes or no questions. The Court is satisfied on the facts of this case that the Minister was justified in rejecting the offer of settlement put forward by the Appellant because the Minister was prohibited from implementing the offer of settlement. Either the Appellant made "agreements" with its employees or it did not for the purposes of section 7 of the *Income Tax Act*. Either the Appellant incurred an expense when it issued Treasury shares or it did not. As argued by Counsel for the Respondent, it had to be all or nothing. There was no way to compromise.

[29] The Court rejects the argument of counsel for the Appellant that there was a duty on the Minister to give reasons for the rejection of the offer of settlement because the Minister was prohibited from accepting the compromise by the law.

[30] Likewise, the Court rejects the argument of counsel for the Appellant that there was a burden on the Minister to prove that the offer was incapable of being accepted in law. There was no duty on the Minister to propose settlement alternatives after rejecting the Appellant's written offer or to explore the factual situation for each of the recipients of the bonuses in the belief that some of them might be deductible while others might not.

[31] If the Appellant had believed that this was the case then he should have disclosed the necessary facts to the Respondent in an attempt to change the Minister's mind. No attempts were made to provide another foundation for settlement by offering new facts to support that position such as internal accounting information.

[32] In effect, as argued by counsel for the Respondent, the Appellant was asking the Minister to turn a blind eye to facts already admitted or established.

[33] The Court accepts the argument of counsel for the Respondent that the discretion of the Court to allow further costs cannot be affected by the fact that the Appellant was aware of Practice Note 18 (which is not yet in force) as counsel for the Respondent argued there are no other factors that would justify an award of increased costs. The events raised by counsel for the Respondent respecting what she considered to be an unreasonable amount of time for preparation of the Appellant's case are well taken. Counsel cannot expect that an unlimited amount of time can be expended in any case and reasonably expect that the other side will be required to pay for it.

[34] This Court is painfully aware of the inadequacy of the present tariff for costs in the Tax Court of Canada, but unfortunately, under the circumstances of the present case, the Court does not believe that the granting of an order as sought by the Appellant here would be an appropriate exercise of this Court's jurisdiction.

[35] The motion is dismissed with costs to the Respondent.

This Amended Reasons for Order is issued in substitution of the Amended Reasons for Order dated October 23, 2012.

Signed at **New Glasgow, Nova Scotia**, this **12th** day of **December** 2012.

"T.E. Margeson"

Margeson J.

CITATION:	2012 TCC 375
COURT FILE NO.:	2010-832(IT)G
STYLE OF CAUSE:	TRANSALTA CORPORATION and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	August 16, 2012
REASONS FOR ORDER BY:	The Honourable Justice T.E. Margeson
DATE OF ORDER:	October 23, 2012
DATE OF AMENDED REASONS FOR ORDER:	**December 12, 2012**

APPEARANCES:

Counsel for the Appellant:	Robert D. McCue
Counsel for the Respondent:	Mary Softley

COUNSEL OF RECORD:

For the Appellant:

Name:	Robert D. McCue
Firm:	Bennett Jones LLP Calgary, Alberta

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