Docket: 2011-67(IT)G

BETWEEN:

BLACKBURN RADIO INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on February 5, 2013 at Toronto, Ontario

By: The Honourable Justice J.M. Woods

Appearances:

Counsel for the Appellant:	Daniel Sandler
Counsel for the Respondent:	Josée Tremblay Serena Sial

ORDER

Upon application by the appellant for an increase in costs, it is ordered that costs be increased to a total of $25,000, inclusive of disbursements and costs of this motion.

Signed at Toronto, Ontario this 5th day of April 2013.

"J. M. Woods"

Woods J.

Citation: 2013 TCC 98
Date: 20130405
Docket: 2011-67(IT)G

BETWEEN:

BLACKBURN RADIO INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Woods J.

[1] In this motion, Blackburn Radio Inc. (Blackburn) seeks an increase in costs that were awarded to it following a successful appeal (2012 TCC 255). The increase is sought on the ground that the Crown should have accepted a reasonable settlement offer.

[2] By letter dated July 5, 2011, Blackburn offered to settle on the basis that the appeal be allowed in full, without costs. The letter stated that Blackburn has a strong case and that, if the offer is not accepted and the appeal is successful, Blackburn will seek costs in accordance with proposed section 147(3.1) of the *Tax Court of Canada Rules (General Procedure)* (*Rules*).

[3] The offer was rejected by the Crown, without a counter-offer, for these reasons: (1) the Crown was prohibited from making a compromise counter-offer because the issue was "all or nothing," (2) the Crown considered that its position was legally correct, and (3) Blackburn's offer was not an offer of settlement as contemplated by the *Rules* but a request to consent to judgment.

[4] At the commencement of the hearing, Blackburn's counsel stated that the motion involved an important issue of principle, that is, whether an offer of

settlement without an element of compromise should be taken into account in awarding costs.

[5] Blackburn seeks a substantial increase in costs from $6,472.20 (per the tariff) to $58,914.95. The amount requested represents partial indemnity costs (50 percent of solicitor and client costs) to the date of service of the offer of settlement and substantial indemnity costs (80 percent of solicitor and client costs) after that date. Blackburn also seeks costs in respect of this motion.

[6] Blackburn's actual fees and disbursements (excluding this motion) are $83,524.70.

Relevant Provisions

[7] Subsections 147(1) and (3) of the *Rules*, reproduced below, provide the Court with considerable latitude in awarding costs.

> 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.
>
> […]
>
> (3) In exercising its discretionary power pursuant to subsection (1) the Court may consider,
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> (*a*) the result of the proceeding,
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> (*b*) the amounts in issue,
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> (*c*) the importance of the issues,
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> (*d*) any offer of settlement made in writing,
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> (*e*) the volume of work,
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> (*f*) the complexity of the issues,
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> (*g*) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding,
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> (*h*) the denial or the neglect or refusal of any party to admit anything that should have been admitted,
>
> (*i*) whether any stage in the proceedings was,

> (i) improper, vexatious, or unnecessary, or
> (ii) taken through negligence, mistake or excessive caution,
>
> (*j*) any other matter relevant to the question of costs.

[8] In 2010, the Rules Committee of this Court proposed amendments to section 147 dealing with settlement offers. The most recent proposal is set out in Practice Note No. 18, which is pending approval by the Governor in Council. Practice Note No. 17 informs litigants that it is the practice of the Court to conform to the proposed amendment pending approval. The decision that I have reached in this motion would be the same regardless of whether the proposed amendment is taken into account or not.

Discussion

[9] The starting point for my analysis is the reasonable proposition that, if there is a substantial issue to be decided, the Crown should not be expected to concede the issue or face an award of increased costs. This proposition was not disputed by Blackburn and has support in *OMERS Realty Corp. v Ontario (Minister of Finance)*, 2012 ONSC 159. Lederer J. comments:

> [8] […] I do observe that accepting a 14% solution would have required the Minister to essentially concede an important proposition. There was a significant issue to be determined. A party should be free to have such matters decided without the fear of elevated costs brought on by a settlement offer it believes is unacceptable.

[10] In this case, it is clear that the Crown thought there was a substantial issue to be decided. The problem appears to be that the Crown did not appreciate the weakness of its position. Blackburn's position was clearly correct, based on the provisions of the *Income Tax Act* and judicial authorities. The relevant references are set out below.

(a) If an assessment has been vacated by this Court pursuant to s. 171(1)(b)(i) of the *Act*, the Minister of National Revenue is not given authority to reassess outside a limitation period. This is in marked contrast to an assessment which the Court has referred back to the Minister for reassessment pursuant to s. 171(1)(b)(iii).

(b) If the vacation of an assessment gives rise to an overpayment of tax, the Minister is required to issue a refund pursuant to s. 164(4.1) of the *Act*.

(c) If an assessment has been vacated on the ground that it is statute barred, an overpayment of tax can arise because the prior assessment still exists. This principle is set out in *Lornport Investments Ltd. v The Queen*, 92 DTC 6231 (FCA), at page 6233:

> […] It seems to me that the Court order amounted to judicial recognition that the second reassessment, issued as it was beyond the statutory time limit, was not legally issued. It did not, for that reason, displace and render the first reassessment a nullity. That reassessment continues to subsist, in my opinion.

(d) As for whether Blackburn needed to object to a statute-barred reassessment, it is relatively clear that this was not necessary: *Canadian Marconi Company v The Queen*, 91 DTC 5626 (FCA).

[11] If the Crown had been aware of these authorities, it should have realized that its position was weak, and conceded the case rather than putting Blackburn to the expense of litigation.

[12] It would have been helpful to Blackburn's position on this motion if it had referred to the relevant authorities in its "offer of settlement." The *Lornport* decision, in particular, was an important aspect of the case and it was not referred to in the offer letter.

[13] However, this does not mean that Blackburn should not receive some relief for its costs. Since the Crown thought that there was a substantial issue, Blackburn was left in a situation in which substantial legal expenses had to be incurred. In my view, it should be compensated more than the tariff for having to incur these costs.

[14] The work involved in tax litigation has increasingly become a factor in awarding costs. It has also been considered in intellectual property litigation: *Consorzio Del Prosciutto Di Parma v Maple Leaf Meats Inc.*, 2002 FCA 417(*Maple Leaf Meats*).

[15] The Crown submits that complexity should not be a factor and relies on the traditionally-accepted approach set out by Bowman J. (as he then was) in *Continental Bank of Canada v The Queen*, [1994] TCJ No. 863. The problem is that the case law has evolved since *Continental Bank* was decided. The decision of the Federal Court of Appeal in *Maple Leaf Meats* is one example of this.

[16] Blackburn's actual costs were $83,524.70, which as far as I can determine are reasonable in the circumstances of this appeal. Costs according to the tariff are less than 8 percent of this amount, which is not adequate compensation in the circumstances.

[17] I would award Blackburn costs fixed at $25,000, inclusive of disbursements and costs of this motion.

[18] In light of this conclusion, it is not necessary that I comment on whether a settlement offer needs to have an element of compromise. I will briefly set out the positions of the parties for the interest of readers.

[19] Counsel for Blackburn referred to authority from the Ontario Court of Appeal to the effect that a settlement offer without compromise may, in appropriate circumstances, be a valid settlement offer that engages the relevant cost rules. The rationale is that if one party's position is weak, it is only fair that the court should discourage litigation through its costs awards: *Data General (Canada) Ltd. v Molnar Systems Group Inc.* (1991), 6 OR (3d) 409 and *Walker Estate v York Finch General Hospital (*1999), 43 OR (3d) 689.

[20] In *Data General*, Morden A.C.J.O. comments, at page 415:

> The purpose of Rule 49 is to encourage the termination of litigation by agreement of the parties -- more speedily and less expensively than by judgment of the court at the end of a trial. The impetus to settle is a mechanism which enables a plaintiff to make a serious offer respecting his or her estimate of the value of the claim which will require the defendant to give early (that is, when the offer is served) and careful consideration to the merits of the case. There are many cases where there is no defence of any substance to a liquidated claim and, having regard to the purpose of the rule, I can see no reason, in such a case, why a plaintiff's offer must be for something less than the full amount of the claim. The purpose of the rule is to discourage a defendant from using the judicial process, and the increased cost to the plaintiff, to delay the granting of the inevitable judgment and, in my view, there is no valid policy reason why a plaintiff should have to forgo part of its claim in order to be able to avail itself of the benefit of the rule. In such a case, I do not think there is any unfair prejudice to the defendant in being faced with such an offer.

[21] In *Walker Estate*, the Court (Morden A.C.J.O., Doherty and Moldaver JJ.A.) states that "[t]he absence of compromise is to be considered together with the fact that the [defendant] was relying upon a defence of substance."

[22] The Crown's position that a settlement offer needs an element of compromise is based largely on a decision of this Court: *McKenzie v The Queen*, 2012 TCC 329. Boyle J. provides the following reasons:

> [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.

[23] In light of my conclusion above, it is best that this issue be left for another day.

[24] Finally, I wish to thank both counsel for their submissions on this motion.

Signed at Toronto, Ontario this 5th day of April 2013.

"J. M. Woods"

Woods J.

CITATION:	2013 TCC 98
COURT FILE NO.:	2011-67(IT)G
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APPEARANCES:

Counsel for the Appellant:	Daniel Sandler
Counsel for the Respondent:	Josée Tremblay Serena Sial

COUNSEL OF RECORD:

For the Appellant:

Name:	Daniel Sandler
Firm:	Couzin Taylor LLP Toronto, Ontario

For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario