Docket: 2017-1882(IT)G

BETWEEN:

RICK HANSEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion for Costs by Written Submissions

Before: The Honourable Justice Johanne D'Auray

Appearances:

Counsel for the Appellant:	Susan Tataryn Asha Bradford
Counsel for the Respondent:	Élise Rivest

ORDER

UPON motion of the Appellant for an Order for costs;

AND UPON reading the Appellant's Written Submissions on Costs, the Respondent's Written Submissions on Costs, the Appellant's Reply Submissions, the Respondent's Written Responding Submissions on Costs and various letters from Appellant counsel and Respondent counsel;

THIS COURT ORDERS that:

1. the appellant is entitled to an enhanced substantial indemnity of 85% for the period after the offer of settlement dated January 10, 2018 and to costs pursuant to the Tariff for the period before January 10, 2018, plus disbursements and applicable taxes; and

2. costs of this Motion are in favour of the appellant.

Signed at Ottawa, Canada, this 21st day of May 2021.

"Johanne D'Auray"

D'Auray J.

Citation: 2021 TCC 39
Date: 20200521
Docket: 2017-1882(IT)G

BETWEEN:

RICK HANSEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

REASONS FOR ORDER

D'Auray J.

I. OVERVIEW

[1] Following a four-day trial in June of 2019, this Court rendered judgment on September 14, 2020. The judgment was more favourable than the appellant's offer of settlement dated January 10, 2018.

[2] The appellant now asks this Court to award him enhanced costs for both the period prior to the settlement offer and the period after.

[3] The general factors guiding the Court's discretion in awarding costs are set out in subsection 147(3) of the *Tax Court of Canada Rules (General Procedure)* (the "*Rules"*). Where an offer of settlement is made by an appellant, subsection 147(3.1) of the *Rules* comes into play and provides an additional factor. It states that unless otherwise ordered by the Court, if an appellant makes an offer of settlement and obtains a judgment as favourable as or more favourable than the terms of the offer of settlement, the appellant is entitled to party and party costs to the date of service of the offer and substantial indemnity costs after that date. Pursuant to subsection 147(3.5) of the *Rules*, substantial indemnity means 80% of solicitor and client costs.

[4] The appellant relies upon the factors set out in subsection 147(3) in support of his request for enhanced costs for the period prior to the settlement offer and for costs higher than the substantial indemnity of 80% for the period after. In his written submissions, the appellant sets out three alternative costs awards, namely:

(a) enhanced costs in the amount of 50% of the fees reflected in his Bill of Costs, plus HST for the period prior to January 10, 2018;

(b) enhanced costs of 90% of the fees reflected in his Bill of Costs, plus HST for the period following January 10, 2018;

(c) full disbursements plus HST throughout.

Alternatively:

(a) enhanced costs in the amount of 50% of the fees reflected in his Bill of Costs, plus HST for the period prior to January 10, 2018;

(b) substantial indemnity of no less than 80% of the fees reflected in his Bill of Costs, plus HST for the period following January 10, 2018;

(c) full disbursements plus HST throughout.

Or in the further alternative:

(a) Tariff fees plus HST for the period prior to January 10, 2018;

(b) substantial indemnity of no less than 80% of the fees reflected in the his Bill of Costs, plus HST for the period following January 10, 2018;

(c) full disbursements plus HST throughout.

[5] The respondent does not contest that the judgment was more favourable than the appellant's offer of settlement. However, the respondent submits that in light of the concessions made by her before the hearing of the appeal, the appellant should be awarded costs under Tariff B for Class C up to 30% of the appellant's eligible solicitor-client costs plus reasonable disbursements.

II. FACTS

[6] The issue in the appeal was whether the sale by the appellant of five properties was business income, an adventure in the nature of trade, or a capital gain subject to the principal residence exemption pursuant to paragraph 40(2)(b) of the *Income Tax Act* (the "*Act*").

[7] The issues were:

(a) whether the Minister of National Revenue had the authority to reassess the appellant after the normal period for reassessing a taxpayer with respect to the 2007, 2008 and 2009 taxation years;

(b) whether pursuant to paragraph 40(2)(b) and section 54 of the *Act*, the appellant was entitled to claim the principal residence exemption upon the disposition of the Lakeforest, Pebblewoods, Meadowshire 1, Cedardown, and Kilbirnie houses (collectively the "Houses") during the taxation years 2007, 2008, 2009, 2011, and 2012;

(c) whether the appellant's spouse Ms. Tanya Weiland was a co-owner (each owning 50%) of the houses;

(d) whether the Adjusted Cost Base (the "ACB") for each house was correctly determined by the appellant;

(e) whether the appellant was entitled to claim as a deduction an amount of $6,600 as management fees paid to his spouse Ms. Weiland in each of the 2009 and 2011 taxation years;

(f) whether the appellant was entitled to deduct $878 as advertising expenses during the 2009 taxation year;

(g) whether the appellant was entitled to deduct $1,459 and $2,317 for meal and entertainment expenses for the 2009 and 2011 taxation years respectively; and

(h) whether penalties under subsection 163(2) of the *Act* were properly levied by the Minister.

[8] The appellant's settlement offer dated January 10, 2018 contained the following terms:

a. The Minister of National Revenue could not reassess the appellant beyond the normal reassessment period. Accordingly, the Lakeforest, Pebblewoods, and Meadowshire 1 houses would benefit from the principal residence exemption. With respect to the reassessments during the normal assessment period, the Cedardown house (2010 taxation year) would be covered by the exemption but not the Kilbirnie house (2012 taxation year);

b. the Minister would take into account that the Houses were co-owned by Ms. Tanya Weiland, with the result that the appellant should be taxed only on 50% of the income arising from the disposition of the Houses;

c. the respondent's alleged purchase and renovation costs are correct. That is, Kilbirnie was purchased for $379,051.52, as opposed to the appellant's assertion of $400,646. This concession increases the profit earned from Kilbirnie by $21,594.48;

d. the respondent's allowable expense calculation is correct. That is, allowable expenses are $33,374.94 as opposed to the appellant's assertion of $55,253. This results in a further increase $21,878.06 to the profit earned on Kilbirnie;

e. the proceeds of disposition include the $2,493.31 of adjustments related to realty taxes and water heater rental that were paid in addition to the sale price quoted in Appendix A of the Reply. Therefore, the business income derived from Kilbirnie would be, for settlement purposes, $190,066.85;

f. the Canada Revenue Agency (the "CRA") reverse the gross negligence penalties levied against the appellant; and

g. the CRA's blanket denial of advertising, meals and entertainment expenses for the appellant's concrete pouring business is unreasonable, and the model used to determine "reasonable"

> management is inapplicable (having used national rather than local data, among other flaws).

[9] Following the offer of settlement, the respondent wrote to counsel for the appellant requesting documentary evidence with respect to the Meadowshire 1 house. The appellant provided the requested documents. After receiving the documents, the respondent did not at any time respond to the appellant's offer of settlement.

[10] During the examination for discovery of the respondent's nominee held on May 24, 2018, the nominee stated that in light of the documents provided to him during the examination for discovery, if "*he had to redo the audit, it would be 50% to Mr. Hansen and 50% to Tanya"*.

[11] Sometime in 2019, a new counsel was appointed to handle the file on behalf of the respondent. After reviewing the file, counsel forwarded an offer of settlement dated May 10, 2019, indicating that the respondent was ready to concede that the appellant and his spouse were equal co-owners of the Houses. In the offer, the respondent was also ready to concede that the expenses claimed by the appellant on account of management fees paid to his spouse in the amount of $6,600 for each of the 2009 and 2011 taxation years were business expenses and deductible from the appellant's income. This offer expired 30 days prior to the commencement of the hearing.

[12] The appellant made a counter-offer on June 10, 2019. This offer was also more favourable than the judgment issued by this Court. It is not clear from the records what has happened with this offer, but it has to be rejected by the respondent as the appeal of the appellant proceeded before the Court.

[13] One week prior to the commencement of the trial, namely, on June 17, 2019, the respondent conceded that the appellant and his spouse equally co-owned the Houses. Counsel for the respondent advised that she would make the concession at the commencement of the hearing, which she did.

[14] The appeal was heard on June 24, 25, 26 and 27, 2019.

[15] On June 27, 2019, a Partial Consent to Judgment was filed with the Court, whereby the respondent agreed that the appellant was entitled to deduct from his

income the claim for management fees and the expenses related to advertising, meals and entertainment. This is reflected in the judgment issued on September 14, 2020.

[16] At trial, due to time constraints, the issue of the ACB for each house was not addressed. The parties indicated that they would try to reach an agreement on it and provide the Court with the numbers. However, the Court received a letter from the parties stating that they could not agree on the ACB for all Houses and requested a date for the continuation of the trial. At that time, a new counsel was appointed to act on behalf of the respondent.

[17] The Court scheduled the continuation of the trial for September 22, 2020. On September 2, 2020, the parties informed the Court that they had agreed on the ACB for the Houses.

[18] The judgment and reasons for judgment were issued on September 14, 2020. The appeal was allowed on the following basis:

a. The respondent did not establish that the appellant had made any misrepresentation attributable to neglect, carelessness or wilful default as contemplated by subparagraph 152(4)(a)(i) of the *Act*. Therefore, the Minister of National Revenue (the "Minister") did not have the authority to reassess the appellant after the normal period for reassessment for the sales transactions that occurred in 2007, 2008, and 2009 taxation years, namely, with respect to Lakeforest, Pebblewoods, and Meadowshire 1. As a result, the appellant was entitled to claim the principal residence exemption on those houses.

b. The appellant was not entitled to claim the principal residence exemption for the sale transactions that occurred in 2011 and 2012 taxation years, namely, with respect to Cedardown and Kilbirnie. As a result, these transactions should be taxed pursuant to subsection 9(1) of the *Act*. However, the Minister had to take into account, that the appellant was a co-owner of these houses with Ms. Weiland. The Appellant should be taxed on 50% of the net proceeds.

c. In calculating the ACB for the Cedardown house, an additional amount of $8,531 was allowed as expenses.

d. In calculating the ACB for the Kilbirnie house, an additional amount of $54,387.53 was allowed as expenses.

e. The penalties levied by the Minister for the taxation years 2007, 2008, 2009, 2011 and 2012 were waived.

[19] The appellant, therefore, achieved a result more favourable than its offer of January 10, 2018 by $13,681 ($5,249 less income on the properties plus additional expenses of $8,432).

III. Appellant's Position

[20] The appellant's position is that his offer of settlement of January 10, 2018 met all the requirements of subsections 147(3.1) and 147(3.3) of the *Rules*, namely, the judgment was more favourable than the offer, the offer was made more than 30 days after the close of the pleadings and more than 90 days before the commencement of the hearing, the offer was not withdrawn, and the offer did not expire. There was also a relationship between the terms of the offer of settlement and the judgment thereby meeting the requirement of subsection 147(3.4) of the *Rules*.

[21] Accordingly, the appellant submits that pursuant to subsections 147(3.1) and 147(3.5) of the *Rules*, he should at least be awarded the substantial indemnity of 80% of the solicitor-client costs. The appellant submits that subsection 147(3.1) is a default rule. If the conditions of the subsection are met, unless there are exceptional circumstances, the Court has to apply it. The appellant submits that no exceptional circumstances exist for not applying the rule.

[22] Moreover, the appellant submits that in light of the factors set out in subsection 147(3) of the *Rules*, he should be awarded costs above the Tariff for the period before the January 10, 2018 offer, and enhanced costs above the normal 80% substantial indemnity for the period after, namely 90% of the solicitor-client costs.

IV. Respondent's Position

[23] The respondent does not dispute that the appellant's settlement offer meets the criteria of subsections 147(3.1) and (3.3) of the *Rules*. However, the respondent submits that the particular circumstances of this appeal justify that the Court use its discretion to award costs in a lower amount than the substantial indemnity costs of 80% provided by subsection 147(3.5) of the *Rules*.

[24] In support, the respondent points out that the issue as to whether the appellant and his spouse were co-owners of the house was settled prior to the trial, as the respondent informed the appellant on June 17, 2019 that she was conceding this issue.

[25] The respondent also points to the Consent to Judgment filed on June 27, 2019 wherein the appellant's claim for deductions for management fees and advertising, meal and entertainment expenses was conceded.

[26] The respondent further notes that the respondent and the appellant agreed on the ACB for the Houses, and by doing so avoided the need for a continuation of the trial on September 22, 2020.

[27] The respondent's position is that the amounts agreed on by the parties and conceded by the respondent before the judgment had a significant impact on the result. This justifies the Court using its discretion to award costs in a lower amount than the substantial indemnity costs of 80% provided by subsection 147(3.5) of the *Rules*. The respondent submits that the purpose of subsection 147(3.1) of the *Rules* is to encourage parties to settle prior to trial and consideration should be given to the numerous exchanges between the parties to settle issues, and not only to the initial offer of settlement dated January 10, 2018.

[28] Accordingly, the respondent submits that the appellant should be awarded costs in the amount set out in Tariff B for Class C, up to 30% of the appellant's eligible solicitor-client costs plus reasonable disbursements.

V. Law

[29] In this Motion, section 147 of *the Rules* is the applicable provision. The relevant excerpts of section 147 of the *Rules* are:

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,

(a) the result of the proceeding,

(b) the amounts in issue,

(c) the importance of the issues,

(d) any offer of settlement made in writing,

(e) the volume of work,

(f) the complexity of the issues,

(g) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding,

(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.

147(3.1) Unless otherwise ordered by the Court, if an appellant makes an offer of settlement and obtains a judgment as favourable as or more favourable than the terms of the offer of settlement, 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.

147(3.2) Unless otherwise ordered by the Court, if a respondent makes an offer of settlement and the appellant obtains a judgment as favourable as or less favourable than the terms of the offer of settlement or fails to obtain judgment, the respondent 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.
>
> 147(3.3) Subsections (3.1) and (3.2) do not apply unless the offer of settlement
>
> > (a) is in writing;
> >
> > (b) is served no earlier than 30 days after the close of pleadings and at least 90 days before the commencement of the hearing;
> >
> > (c) is not withdrawn; and
> >
> > (d) does not expire earlier than 30 days before the commencement of the hearing.
>
> 147(3.4) A party who is relying on subsection (3.1) or (3.2) has the burden of proving that
>
> > (a) there is a relationship between the terms of the offer of settlement and the judgment; and
> >
> > (b) the judgment is as favourable as or more favourable than the terms of the offer of settlement, or as favourable or less favourable, as the case may be.
>
> 147(3.5) For the purposes of this section, substantial indemnity costs means 80% of solicitor and client costs.

VI. Analysis

[30] It is well established that the Court has a broad discretion in fixing costs. That said, the Court does not have an unfettered discretion. As was stated by Nadon J.A. of the Federal Court of Appeal in *Landry* v The *Queen*,[1] the Court's discretion must be based on a principled basis. It has to be exercised prudently and not capriciously.

[31] The respondent concedes that the judgment was more favourable than the offer of settlement made by appellant. However, the respondent argues that the Court has the discretion to override subsection 147 (3.1) of the *Rules*.

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[1] *Landry v The Queen*, 2010 FCA 135.

[32] I agree that the Court may use its discretion to override the application of subsection 147(3.1) of the *Rules*. This is clear from the opening words of the subsection "Unless otherwise ordered by the Court…". However, taking into account the language of the rest of the subsection, I am of the view that exceptional or extraordinary circumstances must exist before the Court exercises its discretion. The English version of subsection 147(3.1) refers to an entitlement: "a party is entitled to a substantial indemnity" and the French to a right: "une partie a droit aux dépens indemnitaires substantiels".

[33] I find support for this view of subsection 147(3.1) in the decision of my colleague Owen J. in *Sun Life Assurance Co. of Canada* v *R.*[2] At paragraph 19 of his decision, he stated:

> [19] The Respondent also says that her conduct was irreproachable, that her position had a reasonable degree of sustainability, and that there were no unusual circumstances that would justify an increased award of costs against the Respondent. While I do not quarrel with these contentions, the objective of subsection 147(3.1) of the Rules is to provide a default entitlement to substantial Indemnity costs with respect to qualifying settlements. None of the factors identified by the Respondent suggest to me that the default rule should not apply. To conclude otherwise would, without justification, materially water down the "entitlement" otherwise created by the plain words of the rule – an entitlement that is consistent with the purpose of the rule and the context in which it is found. If anything there would need to be unusual (in the sense of exceptional or extraordinary) circumstances that lead me to conclude that I should exercise my discretion to override the default rule on the basis of a principled analysis. As stated by counsel for the Respondent in his written representations, there are no unusual circumstances in this case. Consequently, the default rule in subsection 147(3.1) should be applied in accordance with its terms.

[34] In this Motion, the respondent argues that the Court should take into account that she conceded some issues the week prior to trial and all the efforts counsel made in order to settle some issues, namely the ACB for each house.

[35] I do not agree with the respondent.

[36] In the appellant's appeal, the issues that had a significant impact on the amounts in issue were whether the Minister had the authority to reassess after the

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[2] *Sun Life Assurance Co. of Canada* v *R,* 2015 TCC 171.

time limit and whether the appellant and his spouse Ms. Weiland each owned 50% of the Houses.

[37] It would have been relatively easy for the respondent to find out early on in the proceedings whether the appellant and Ms. Weiland were co-owners of the Houses. And it is clear that the respondent knew this by the time of the examination for discovery on May 24, 2018. The respondent's nominee admitted on discovery that the appellant and Ms. Weiland each owned 50% of the Houses. Yet, it was only on June 17, 2019, namely, one week prior to the trial, that the respondent conceded that the appellant and Ms. Weiland were co-owners.

[38] In addition, I agree with the appellant's assertion, that if the respondent's concessions made one week before trial are to be taken into account, I should also take into account the appellant's offer of settlement made on June 10, 2019. This offer was more beneficial to the respondent than the offer dated January 10, 2018**.**

[39] I am not saying that in some cases, concessions made by a party immediately before trial, should never be taken into account in awarding the substantial indemnity. It depends on the circumstances of each case.

[40] Here, I find it difficult to understand why it took the respondent more than a year to admit that the appellant was an equal co-owner with his spouse of the Houses. In addition, the concession was made only one week prior to the trial date. As to the other concessions made by the respondent, they had a minimum impact on the amounts in issue and, in addition, were only made after the trial had started.

[41] In my view, in light of the circumstances, the respondent has not established that there were exceptional or extraordinary circumstances that would justify ignoring subsection 147(3.1) of the *Rules*. Therefore, the appellant is entitled to a substantial indemnity, which is defined under subsection 147(3.5) of the *Rules* as 80% of solicitor-client costs.

[42] The appellant, however, argues that the substantial indemnity should be raised to 90% and that the costs prior to January 10, 2018 should be 50% of the fees reflected in the Bill of Costs (solicitor-client basis).

[43] It is well-established that the Court has the discretion to enhance a substantial indemnity award of costs. However, the Court must proceed with

caution in exercising this discretion. In *Repsol Canada Ltd. v R*,[3] Miller J. explained why at paragraph 10 of his reasons:

> Awarding costs beyond 80% is skirting with costs on a full solicitor-client basis and, I believe, we should proceed with caution. Those factors implying questionable behaviour of a party become, I suggest, more significant: conduct lengthening the duration, refusal to admit, improper, vexatious or unnecessary conduct – all these should be considered. I would go so far as to suggest it is the egregious nature of behaviour that would cause me to exercise my discretion beyond substantial indemnity. In the case before me, I do not see behaviour that would justify inching towards full indemnity. The Appellants rely on the comment of Justice Bocock in the case of *Thomas O'Dwyer v The Queen*, in which he awarded costs of 90% of solicitor-client costs given that he found the Crown to engage in "myopic, perfunctory and hasty evaluations of the merits of the assessment throughout (ultimately reflected in the Reply)". I note that award was in connection with a motion in which the court struck the Reply in its entirety for failure to show reasonable grounds. This is simply not the situation before me. This was a hard fought trial and I was left with no impression of behaviour on the part of the Respondent that she was unjustifiably or intentionally flogging a dead horse.

[44] The appellant's position is that in light of the factors set out in subsection 147(3) of the *Rules*, he should be awarded 90% of his solicitor-client costs.

[45] The appellant argues that he was substantially successful. The amount in issue was significant, approximately $1,000,000 before the concessions made by the respondent. Being a factual case, a large amount of work was required on the part of counsel for the appellant to prepare the witnesses and ensure that the documentation dealing with the five houses was in order for trial purposes. The appellant also argued that the appeal was an important case, as evidenced by the fact that the judgment has been discussed in many publications.

[46] Most importantly, the appellant pointed out that the respondent never responded to his offer of settlement dated January 10, 2018. The third counsel assigned by the respondent to the appeal, who only handled the issue of costs, admitted that the respondent never responded to this offer of settlement.

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[3] *Repsol Canada Ltd.* v *The Queen*, 2015 TCC 154.

[47] In addition, the appellant submitted that the respondent's first counsel refused to admit that the appellant and his spouse each owned 50% of the Houses and maintained the refusal even after the nominee of the respondent admitted as much at the examination for discovery. The appellant noted it was not until one week before trial, and more than a year after the examination for discovery, that the respondent through its second counsel admitted the co-ownership of the Houses.

[48] In my view, in light of the circumstances discussed in paragraphs 46 and 47, an increase of the substantial indemnity to 85% is warranted.

[49] As to the costs before the offer of settlement, I am not convinced by the appellant that he is entitled to enhanced costs.

[50] Questions were raised by the respondent as to the number of hours billed by different counsel for the appellant who worked on the appeal. Counsel are officers of the Court. In my view, unless it is obvious that the hours spent on a case are exaggerated, the Court should not intervene. As was stated by Owen J., in *Sun Life Assurance Co. of Canada* v *R:*[4]

> [23] The task falls on the court to assess whether the costs claimed were reasonably incurred and each case must be addressed on its own facts. However, a couple of points are worth noting. First, an assessment of the time spent on an appeal should be made on the basis of the circumstances in existence at the relevant time. It is not the role of the court to use hindsight to second-guess the judgment of counsel regarding the amount of time spent on an appeal....

[51] In sum, the appellant is entitled to an enhanced substantial indemnity of 85% for the period after the offer of settlement dated January 10, 2018 and to costs pursuant to the Tariff for the period before January 10, 2018, plus disbursements and applicable taxes.

[52] Costs of this Motion are in favour of the appellant.

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[4] *Sun Life Assurance Co. of Canada* supra at note 2.

Signed at Ottawa, Canada, this 21st day of May 2021.

"Johanne D'Auray"

D'Auray J.

CITATION:	2021 TCC 39
COURT FILE NO.:	2017-1882(IT)G
STYLE OF CAUSE:	RICK HANSEN AND THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	Motion for Costs by Written Submissions
REASONS FOR ORDER BY:	The Honourable Justice Johanne D'Auray
DATE OF ORDER:	May 21, 2021

APPEARANCES:

Counsel for the Appellants:	Susan Tataryn Asha Bradford
Counsel for the Respondent:	Élise Rivest

COUNSEL OF RECORD:

For the Appellants:

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