Federal Court		Cour fédérale

Date: 20100426

Docket: T-555-08

Citation: 2010 FC 448

Ottawa, Ontario, April 26, 2010

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

RYAN MURPHY et al

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR ORDER AND ORDER

[1] This is a motion for a lump sum award of costs in excess of Tariff B or alternatively, an order for costs to be assessed under either Column V of Tariff B or under a combination of Columns IV and V of Tariff B. There was also a request for an extension of time to bring the motion for directions.

[2] The underlying judicial review was a challenge to Requests for Information (RFIs) issued by officials of the Canada Revenue Agency (CRA) in Vancouver. The Court found that the RFIs were unlawful because of improper delegation of authority and because the RFIs were not issued for the

purpose of the administration and enforcement of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1. In so concluding, the Court found that specific actions taken by or on behalf of CRA officials were highly improper (*Murphy v. Canada (Minister of National Revenue – M.N.R.)*, 2009 FC 1226). Costs were awarded in favour of the Applicants.

[3] The Applicants primarily seek a lump sum award of $250,000 plus disbursements which is approximately 80% of the actual solicitor-client costs.

[4] There are a number of points upon which the parties agree:

- that a lump sum award is preferable to a detailed taxation; however, the basis and quantum is much in dispute;
- a two counsel award is appropriate;
- the extension of time to seek Directions is appropriate; and
- there is no conduct during the litigation by counsel which gives rise to a basis for an increased costs award.

[5] On all of these points, the Court is in agreement.

[6] The Respondent contends that costs should be based on the high end of Column III of the Tariff, and that in view of the Applicants' Offer to Settle, these costs should be doubled pursuant to Rule 420 from the date of the Offer. The result would be a cost award of approximately $102,000 including taxes and disbursements. Assuming the $13,000 (approximate) of disbursements claimed

by the Applicants is included in the Respondent's calculation, the fees would constitute approximately $90,000.

[7] The Court has a broad discretion under Rule 400 in setting the amount of costs. However, that discretion is to be tempered by reference to the Tariff and the principles for awarding costs.

[8] The fact that the Applicants were successful does not entitle them, *per se*, to reimbursement of their legal fees and disbursements. They are entitled to costs under the Tariff and the Rules unless it can be shown that there is egregious conduct which justifies a higher award.

[9] It is important to bear in mind that solicitor-client costs are to be awarded only in exceptional circumstances where there is reprehensible, scandalous or outrageous conduct during or closely connected to the litigation (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817).

[10] There is nothing in this litigation or the conduct of it which approaches this threshold. An award of solicitor-client costs in these circumstances would require something akin to a finding of bad faith on the part of CRA officials. While such a claim may be open to the Applicants, the appropriate way to deal with this type of conduct and the punitive nature of relief would be by an action based upon a finding of the unlawful issuance of the RFIs.

[11] The Offer to Settle made by the Applicants early in this litigation is not *per se* a factor justifying the higher end of party and party costs. The Respondent recognizes that the Applicants are entitled to double party-party costs from the date of the offer, April 11, 2008.

[12] Absent such a finding or such conduct, the appropriate starting place for consideration is the Tariff. The question is which Column more closely reflects the basis for a lump sum award. As indicated earlier and as reflected in *Dimplex North America Ltd. v. CFM Corp.*, 2006 FC 1403, lump sum awards are becoming more readily accepted as an efficient and fair way to dispose of costs.

[13] There are a number of factors which justify an award at the high end of the highest column in the Tariff without granting the Applicants an indemnity of legal costs:

(a) the Respondent's attempt to downplay the importance of this case to the public as a "one-off", "unique to its facts" case, does a disservice to its own forceful arguments that s. 244 (13) acts as a shield against any challenge by the public to the exercise of delegated powers.

(b) The Respondent's position would have foreclosed any legal challenge to the authority of matters delegated by the Minister to his/her officials. The Respondent's position also ignores the debate as to whether the proper legal test for a challenge to RFIs generally was a "serious and genuine inquiry" or "predominant purpose".

(c) the Respondent advances, with no evidence, that the issues in the case related only to the Vancouver office – the prospect that this office could or would operate at such

variance from other CRA offices across the country raises other issues about the control of the significant and invasive powers of CRA officials.

(d) the Respondent's suggestion that the case did not deal with complex legal and constitutional issues ignores the arguments advanced by the Respondent to justify the legal basis for the specific conduct at issue and ignores the constitutional/*Charter* arguments raised. These issues did not have to be decided only because the Court could resolve the issues on other legal principles.

(e) while the Respondent's conduct might not rise to the level justifying solicitor-client costs, there was an air of disregard for the citizen's legal rights, including confidentiality obligations imposed on CRA officials, which elevate the unlawful conduct to one deserving of some reprobation.

[14] Having determined that the cost award should reflect the above factors including the seriousness of the Respondent's conduct, the Court has concluded that party-party costs at the higher end of the Tariff are appropriate. Therefore, Column 5 is the appropriate measure for awarding costs.

[15] There is no magic formula to establish a lump sum amount. However, the Court is mindful that the Respondent's starting point was the high end of Column III and that the fees component reflecting the doubling effect of the Offer to Settle is approximately $90,000.

[16] In coming to that figure, the Respondent was unduly parsimonious in recognizing time allocated to cross-examinations and similar matters. For example, the Respondent allowed, albeit on a rounding-up basis, time for cross-examinations based upon the start-up and shut-down of the court reporter's machine rather than the actual time consumed by counsel in appearing for a cross-examination. An undefined increase in the Respondent's $90,000 figure is required.

[17] Having found that the high end of Column V is the proper basis for calculating fees, by rough measure the difference in units assigned under Column III and those under Column V respectively is approximately 2:1. This results in a doubling of the adjusted costs award (see paragraph 16).

[18] Therefore, the Court awards the Applicants fees of $200,000 plus disbursements of $13,986.92. The Applicants shall have their costs of this motion of $3,000 plus disbursements of $500.

ORDER

THIS COURT ORDERS that the Applicants are awarded fees of $200,000 plus disbursements of $13,986.92. The Applicants are to have their costs of this motion of $3,000 plus disbursements of $500.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-555-08
STYLE OF CAUSE:	RYAN MURPHY et al and MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	April 22, 2010
REASONS FOR ORDER AND ORDER:	Phelan J.
DATED:	April 26, 2010

APPEARANCES:

Mr. Martin Peters	FOR THE APPLICANTS
Mr. Robert Carvalho Mr. Ron Wilhelm	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MARTIN PETERS Barrister & Solicitor Vancouver, British Columbia	FOR THE APPLICANTS
MR. MYLES J. KIRVAN Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT