

Federal Court of Appeal



Cour d'appel fédérale

Date: 20131206

Docket: A-486-12

Citation: 2013 FCA 285

**CORAM: BLAIS C.J.
DAWSON J.A.
O'REILLY J.A. (*ex officio*)**

BETWEEN:

TRANSALTA CORPORATION

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Calgary, Alberta, on October 3, 2013.

Judgment delivered at Ottawa, Ontario, on December 6, 2013.

REASONS FOR JUDGMENT BY:

BLAIS C.J.

CONCURRED IN BY:

**DAWSON J.A.
O'REILLY J.A. (*ex officio*)**

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REASONS FOR JUDGMENT

BLAIS C.J.

[1] This is an appeal from the order of Justice Margeson (Judge) of the Tax Court of Canada (Tax Court), dated October 23, 2012, in which the Appellant's motion for substantial indemnity costs was dismissed (*Transalta Corporation v. The Queen*, 2012 TCC 375).

FACTUAL BACKGROUND

[2] The Minister of National Revenue (the Minister) assessed the Appellant for the 2001, 2002, 2003 and 2004 taxation years, denying its deductions of share and cash bonuses.

[3] The Appellant challenged this decision before the Tax Court (*Transalta Corporation v. The Queen*, 2012 TCC 86) and the appeal was allowed. The Judge sent the matter back to the Minister and costs were awarded to the Appellant.

[4] The real issue in this appeal is not about the Tax Court's substantive decision. It is rather about substantial indemnity costs unsuccessfully sought by the Appellant in relation to the Crown's refusal to accept a settlement offer the Appellant made several months prior to the trial.

[5] Indeed, on April 28, 2011 the Appellant made a settlement offer to the Minister to have him deny the deduction of certain Performance Share Ownership Plan (PSOP) bonuses paid in cash in the 2004 taxation year to employees of non-Canadian resident subsidiaries of the Appellant (cash bonuses). In addition, this offer provided that the Minister would allow the remainder of the PSOP bonus deductions. The Respondent rejected the offer on June 3, 2011.

[6] Having been successful before the Tax Court, the Appellant requested party and party costs to the date the settlement offer was made, substantial indemnity costs in the amount of \$265,000 thereafter, reasonable disbursements on the appeal and the costs on the motion for costs calculated at 80% of solicitor and client costs plus reasonable disbursements. The Appellant's request was

largely based on Practice Note 18 of the Tax Court (described below) and the fact the result at trial was more favorable for the Appellant than a settlement offer it had made.

[7] It is important to point out that even though the Respondent did not provide reasons for rejecting the offer at the time it did, it conceded, prior to trial, that the PSOP cash bonuses were in fact deductible. Therefore, the appeal proceeded only on the issue of deducting the shares bonuses.

[8] Before the Tax Court, the Rules (*Tax Court of Canada Rules (General Procedure)*, SOR/90-688a) that refer to costs are 147 to 153. Rule 147 reads as follows:

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.

(2) Costs may be awarded to or against the Crown.

(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,

147. (1) La Cour peut fixer les frais et dépens, les répartir et désigner les personnes qui doivent les supporter.

(2) Des dépens peuvent être adjugés à la Couronne ou contre elle.

(3) En exerçant sa discrétion conformément au paragraphe (1), la Cour peut tenir compte :

a) du résultat de l'instance;

b) des sommes en cause;

c) de l'importance des questions en litige;

d) de toute offre de règlement présentée par écrit;

e) de la charge de travail;

f) de la complexité des questions en litige;

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| <p>(g) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding,</p> <p>(h) the denial or the neglect or refusal of any party to admit anything that should have been admitted,</p> <p>(i) whether any stage in the proceedings was,</p> <p style="padding-left: 40px;">(i) improper, vexatious, or unnecessary, or</p> <p style="padding-left: 40px;">(ii) taken through negligence, mistake or excessive caution,</p> <p>(j) any other matter relevant to the question of costs.</p> | <p>g) de la conduite d'une partie qui aurait abrégé ou prolongé inutilement la durée de l'instance;</p> <p>h) de la dénégation d'un fait par une partie ou de sa négligence ou de son refus de l'admettre, lorsque ce fait aurait dû être admis;</p> <p>i) de la question de savoir si une étape de l'instance,</p> <p style="padding-left: 40px;">(i) était inappropriée, vexatoire ou inutile,</p> <p style="padding-left: 40px;">(ii) a été accomplie de manière négligente, par erreur ou avec trop de circonspection;</p> <p>j) de toute autre question pouvant influencer sur la détermination des dépens.</p> |
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(4) The Court may fix all or part of the costs with or without reference to Schedule II, Tariff B and, further, it may award a lump sum in lieu of or in addition to any taxed costs.

(4) La Cour peut fixer la totalité ou partie des dépens en tenant compte ou non du tarif B de l'annexe II et peut adjuger une somme globale au lieu ou en sus des dépens taxés.

(5) Notwithstanding any other provision in these rules, the Court has the discretionary power,

(5) Nonobstant toute autre disposition des présentes règles, la Cour peut, à sa discrétion :

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| <p>(a) to award or refuse costs in respect of a particular issue or part of a proceeding,</p> <p>(b) to award a percentage of taxed costs or award taxed costs up to and for a particular stage of a proceeding, or</p> | <p>a) adjuger ou refuser d'adjuger les dépens à l'égard d'une question ou d'une partie de l'instance particulière;</p> <p>b) adjuger l'ensemble ou un pourcentage des dépens taxés jusqu'à et y compris une certaine étape de l'instance;</p> |
|---|---|

(c) to award all or part of the costs on a solicitor and client basis.

c) adjuger la totalité ou partie des dépens sur une base procureur-client.

(6) The Court may give directions to the taxing officer and, without limiting the generality of the foregoing, the Court in any particular proceeding may give directions,

(6) La Cour peut, dans toute instance, donner des directives à l'officier taxateur, notamment en vue :

(a) respecting increases over the amounts specified for the items in Schedule II, Tariff B,

a) d'accorder des sommes supplémentaires à celles prévues pour les postes mentionnés au tarif B de l'annexe II;

(b) respecting services rendered or disbursements incurred that are not included in Schedule II, Tariff B, and

b) de tenir compte des services rendus ou des débours effectués qui ne sont pas inclus dans le tarif B de l'annexe II;

(c) to permit the taxing officer to consider factors other than those specified in section 154 when the costs are taxed.

c) de permettre à l'officier taxateur de prendre en considération, pour la taxation des dépens, des facteurs autres que ceux précisés à l'article 154.

(7) Any party may,

(7) Une partie peut :

(a) within thirty days after the party has knowledge of the judgment, or

a) dans les trente jours suivant la date à laquelle elle a pris connaissance du jugement;

(b) after the Court has reached a conclusion as to the judgment to be pronounced, at the time of the return of the motion for judgment,

b) après que la Cour a décidé du jugement à prononcer, au moment de la présentation de la requête pour jugement,

whether or not the judgment included any direction concerning costs, apply to the Court to request that directions be given to the taxing officer

que le jugement règle ou non la question des dépens, demander à la Cour que des directives soient données à l'officier taxateur à l'égard des

respecting any matter referred to in this section or in sections 148 to 152 or that the Court reconsider its award of costs.

questions visées au présent article ou aux articles 148 à 152 ou qu'elle reconsidère son adjudication des dépens.

[9] There are also two Practice Notes concerning proposed Rules and Amendments with respect to, among other things, settlement offers. They are not yet in effect but the parties are nevertheless aware of the Court's intentions regarding settlement offers.

[10] Practice Note 17, as amended by Practice Note 18, reads as follows with respect to enhanced costs:

The Rules Committee of the Tax Court of Canada has proposed amendments and new rules to the Tax Court of Canada Rules (General Procedure) substantially in the form annexed hereto.

Le Comité des règles de la Cour canadienne de l'impôt a proposé de modifier les Règles de la Cour canadienne de l'impôt (procédure générale), notamment par l'adjonction de nouvelles règles. Les nouvelles règles et les modifications revêtiront essentiellement la forme de celles-ci annexées, comme il est indiqué ci-après :

Until such time as the proposed rules and amendments receive approval of the Governor in Council and become effective, the practice of the Court with respect to Status Hearings, Pre-Hearing Conferences, offers of settlement of an appeal and any other matter referred to in the proposed rules and amendments shall conform to the proposed rules and amendments annexed hereto;

Jusqu'à ce que les nouvelles règles et les modifications proposées reçoivent l'approbation du gouverneur en conseil et entrent en vigueur, la pratique de la Cour portant sur les audiences sur l'état de l'instance, les conférences préparatoires à l'audience, les offres de règlement d'un appel et tout autre sujet auquel les nouvelles règles et les modifications font référence doit être conforme aux nouvelles règles proposées ainsi qu'aux modifications, ci-jointes ;

147(3.1) Settlement offers

(a) Unless otherwise ordered by the Court and subject to paragraph (c), where an Appellant makes a written offer to settle and obtains a judgment as favourable as or more favourable than the terms of the offer to settle, 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.

...

- (c) Paragraphs (a) and (b) do not apply unless the offer to settle
- (i) is a written offer of settlement;
 - (ii) is served no earlier than 30 days after the close of pleadings and at least 90 days before the commencement of the hearing;
 - (iii) is not withdrawn; and
 - (iv) does not expire earlier than 30 days before the commencement of the hearing.
- (d) The party who claims the benefit of paragraphs (a) or (b) has the burden of proving that:
- (i) there is a relationship between the terms of the settlement offer and the

147(3.1) Offres de règlement

a) À moins que la Cour n'en ordonne autrement et sous réserve de l'alinéa c), lorsque l'appelant fait une offre écrite de règlement et qu'il obtient un jugement qui est au moins aussi favorable que l'offre de règlement, l'appelant a droit aux dépens entre parties jusqu'à la date de la signification de l'offre et, après cette date, aux dépens indemnitaires substantiels que fixe la Cour, plus les débours raisonnables et les taxes applicables.

[...]

- c) Les alinéas a) et b) ne s'appliquent que si l'offre de règlement
- (i) est faite par écrit;
 - (ii) est signifiée au moins 30 jours après la clôture de la procédure écrite et au moins 90 jours avant le début de l'audience;
 - (iii) n'est pas retirée;
 - (iv) n'expire pas moins de 30 jours avant le début de l'audience.
- d) Il incombe à la partie qui invoque l'alinéa a) ou l'alinéa b) de prouver
- (i) qu'il existe un rapport entre la teneur de l'offre de règlement et le jugement;

judgment; and
(ii) that the judgment is as favourable as the terms of the offer to settle, or more or less favourable, as the case may be.

(ii) que le jugement est au moins aussi favorable que l'offre de règlement ou qu'il n'est pas plus favorable que l'offre de règlement, selon le cas.

(e) For the purposes of this section "substantial indemnity" costs means 80% of solicitor and client costs.

e) Pour l'application du présent article, les dépens « indemnitaires substantiels » correspondent à 80 % des dépens établis sur une base procureur-client.

147(3.2)(a) In circumstances where a written offer to settle does not provide for the settlement of the issue of costs, if a party requests the Court to consider subsection 147(3.1), the Court, in ascertaining whether the judgment granted is more or less favourable than the offer to settle, shall not have regard to costs awarded in the judgment or that would otherwise be awarded.

147(3.2) a) Dans le cas où l'offre écrite de règlement ne prévoit pas le règlement de la question des dépens, si une partie demande à la Cour de tenir compte du paragraphe 147(3.1), celle-ci, en déterminant si le jugement accordé est plus favorable ou moins favorable que l'offre de règlement, ne tient pas compte des dépens accordés dans le jugement ou qui seraient par ailleurs accordés.

(b) For greater certainty, if a written offer to settle that does not provide for the settlement of the issue of costs is accepted, a party to the offer may apply to the Court for an order determining costs.

b) Pour plus de certitude, si une offre écrite de règlement qui ne prévoit pas le règlement de la question des dépens est acceptée, une partie à la règlement peut demander à la Cour une ordonnance quant aux dépens.

[11] While the Judge agreed that the issues raised on the appeal were important and deserved careful attention, the Judge accepted the Respondent's submission that the Minister was prevented from accepting the Appellant's settlement offer and that he did not have to provide reasons for this

refusal. This was because the Minister could not accept the offer because of the application of the concept of legal disability.

[12] The Judge also accepted the Respondent's submission that, notwithstanding the Practice Notes, he retained full discretion to allow or deny enhanced costs.

[13] Regarding the standard of review to be applied to the Judge's decision as to costs, Justice Dawson wrote, in *Guibord et al v. Canada*, 2011 FCA 346 at paragraph 10, that:

An appellate court must thus defer to a Tax Court judge's exercise of discretion in determining costs and should only intervene if the judge considered irrelevant factors, failed to consider relevant factors, or reached an unreasonable conclusion.

[14] Indeed, awarding costs is a highly discretionary power which is necessarily subject to deference.

[15] In another case, *Canada v. Landry*, 2010 FCA 135, at paragraph 22, our Court stated that highly discretionary powers imply that an appellate court may not substitute its view for the trial judge's unless said trial judge did not exercise his discretion on a principled basis.

[16] The legal disability concept was discussed in *CIBC World Markets Inc. v. Canada*, 2012 FCA 3 (*CIBC World Markets*) where the Appellant was seeking increased costs in light of its successful appeal, following the Respondent's rejection of an ultimately favorable settlement offer.

[17] Interpreting Rule 147(3)(d) of the *Tax Court Rules*, Justice Stratas wrote, at paragraph 14, that it is:

[a]imed at encouraging parties to make offers of settlement and to treat them seriously. An unaccepted offer can trigger adverse costs consequences if, in light of the Court's decision, it turns out that the offer should have been accepted.

[18] Justice Stratas then specified, at paragraph 15, that this principle was nevertheless subject to an important pre-requisite:

... only offers that, as a matter of law, could have been accepted can trigger costs consequences. If, due to some legal disability, a party could not have accepted an offer, adverse costs consequences should not be visited upon that party.

[19] Both in *CIBC World Markets* and in the case at bar, the issue before the Tax Court was a question of statutory interpretation that has to be answered either by "yes or no". In *CIBC World Markets*, at paragraph 17, it was said that:

... the Minister's assessment denying CIBC World Markets input tax credits would have been confirmed in its entirety or rejected in its entirety.

[20] Stratas J.A. continued, at paragraph 18:

... If the answer were affirmative [in allowing multiple claims for input tax credits], then the Minister's reassessment would have been quashed and CIBC World Markets would receive 100% of the input tax credits it claimed. If the answer were negative, then the Minister's reassessment would have been confirmed and CIBC World Markets would receive none of the input tax credits it claimed.

[21] The situation in *CIBC World Markets* is substantially similar to this one. In the present case, the issue was whether all of the share bonuses were deductible or whether none of them were. There was no principled basis on which the Minister could have accepted that the cash bonuses were non-deductible in exchange for treating the share bonuses as deductible. The Minister's position was, in fact, the opposite – that the cash bonuses were deductible and the share bonuses were not.

[22] As for the possibility of a compromise, Justice Stratas stated at paragraph 19 of *CIBC World*

Markets that:

Due to the precise circumstances of this case, I agree with the Minister that under no factual or legal scenario could CIBC World Markets have been granted 90% of the input tax credits it claimed. The situation might have been different if, for example, the quantum of input tax credits were in issue and, theoretically, the Minister could defend the 90% figure on the facts and the law. But here, the issue was an all-or-nothing question of statutory interpretation.

[23] Later on, at paragraphs 22 and 23, he wrote:

[22] This Court is bound by its decision in *Galway v. Minister of National Revenue*, [1974] 1 F.C. 600 (C.A.) [(*Galway*)]. In that decision, Jackett C.J., writing for the unanimous Court, stated (at page 602) that “the Minister has a statutory duty to assess the amount of tax payable on the [facts] as he finds them in accordance with the law as he understands it.” In his view, “it follows that he cannot assess for some amount designed to implement a compromise settlement.” The Minister is obligated to assess “on the facts in accordance with the law and not to implement a compromise settlement.” See also *Cohen v. The Queen*, [1980] C.T.C. 318 (F.C.A.) [(*Cohen*)].

[23] More recently, this Court reaffirmed *Galway* in *Harris v. Canada*, [2000] 4 F.C. 37 (C.A.). Sexton J.A., writing for a unanimous Court, stated (at paragraph 37) that “the Minister of National Revenue is limited to making decisions based solely on considerations arising from the Act itself” and cannot make “deals” divorced from those considerations. To similar effect, see *Longley v. Minister of National Revenue* (1992), 66 B.C.L.R. (2d) 238 (C.A.) at page 455.

[24] In oral argument, the Appellant alleged that the legal disability exception, as explained in *Galway* and *Cohen*, had been narrowed by *CIBC World Markets*. For the reasons that follow, I do not read *CIBC World Markets* as departing in any way from this jurisprudence.

[25] As a matter of fact, in *CIBC World Markets*, the Court explicitly considered itself bound by the decision in *Galway*. At paragraph 25, the Court noted that no legislative provision has repealed

the principle articulated in *Galway*. This language is inconsistent with the Court narrowing the principle articulated therein.

[26] In so concluding, I am mindful of the policy arguments raised by Transalta. However, as noted in *CIBC World Markets*, there are policy arguments both for and against repeal of the principle articulated in *Galway* and *Cohen*. Moreover, it is for Parliament to determine tax policy through amendment of the Act to give the Minister express authority to settle cases on a compromise basis (see, for example, section 109 of the *Corporation Tax Act*, R.S.O. 1990, c. C-40 and sections 7121 and 7122 of the *Internal Revenue Code of 1986*).

[27] Another argument raised by the Appellant at the hearing is that the Judge misapplied the test for the legal disability exception since he only considered whether the Crown could concede the share bonus issue. According to the Appellant, the Judge was required to apply the test to the whole offer, which means applying it to both the cash and share bonuses.

[28] To this submission, I must answer that, even assuming the Judge did err, such error could not be considered material. Indeed, the Judge correctly ruled that the Crown could not concede the share bonus issue and this fact alone is sufficient to conclude that the Crown could not accept the settlement offer.

[29] Finally, the Appellant suggested that the Judge misapprehended the facts when he stated that the Crown had conceded the deductibility of the cash bonuses. This argument also cannot stand for the same reason discussed at paragraph 28. Even assuming the Appellant's allegation was true, the

Judge correctly concluded the Crown could not compromise with respect to the share bonuses because the assessing policy of the Canada Revenue Agency was that any issuance of shares to employees of a corporation under a salary bonus or stock bonus plan constituted an agreement falling within the ambit of section 7 of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1. As such, an employer could not deduct laid out costs incurred in respect of such an agreement (see IT-113R4). Being of this view of the law, the Minister was obliged to assess in accordance with the law as he understood it (See *Cohen* at page 319).

[30] For the aforementioned reasons and on the basis of the prior jurisprudence of this Court, I cannot conclude that the Judge made a reviewable error in concluding that the Minister was justified in rejecting the settlement offer as it was put forward by the Appellant.

[31] Further, since Practice Note 18 is not yet in force, it cannot affect the discretion of the Court to allow further costs when it is justified or to deny them when it is not. Even if the Practice Notes were in force, proposed Rule 147(3.1) recognizes that judges of the Tax Court retain discretion to not award enhanced costs. Were this not the case, the proposed rule would interfere with the ability of Tax Court judges to fashion just and appropriate cost awards, suitable to the particular circumstances of individual cases.

[32] Both parties submitted substantial written briefs and made representations during conference calls regarding costs. Rule 147(3) lists a wide range of factors a judge may consider when awarding costs and the Appellant failed to demonstrate that those factors were not considered by the Judge.

[33] No obligation or duty required the Respondent to provide reasons or propose settlement alternatives (*Campbell v. The Queen*, 2010 TCC 323 (*Campbell*)).

[34] In *Campbell*, the judge wrote, at paragraph 10 that:

Although this Court encourages settlement negotiations between parties wherever possible, the Respondent was under no obligation to provide a counter-offer, as the Appellant implies, and was free to promptly reject the offer made.

[35] In light of the above, I have not been persuaded that the Judge erred in law, failed to consider relevant factors, considered irrelevant factors or reached an unreasonable conclusion. I have concluded that the Judge exercised his discretion appropriately and that this Court should not intervene.

[36] I would dismiss the appeal with costs in favour of the Respondent.

“Pierre Blais”

Chief Justice

“I agree

Eleanor R. Dawson J.A.”

“I agree

James W. O’Reilly J.A. (*ex officio*)

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-486-12

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O'REILLY J.A. (*ex officio*)

DATED: DECEMBER 6, 2013

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