Docket: 2013-1383(IT)G

BETWEEN:

DOUGLAS MCCARTHY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

ORDER

Upon reviewing submissions on costs from counsel of both parties, the Court orders as follows, in accordance with the attached reasons:

1. The Appellant shall pay costs to the Respondent fixed at $5,052 within 30 days of the date of this order.

2. Counsel for the Appellant shall reimburse the Appellant one half of such costs award, being $2,026, promptly upon the payment of such costs to the Respondent.

3. Counsel for the Appellant shall send a copy of this order and the reasons for order promptly to the Appellant.

Signed at Ottawa, Canada, this 11th day of April 2016.

"Patrick Boyle"

Boyle J.

Citation: 2016 TCC 86
Date: 20160411
Docket: 2013-1383(IT)G

BETWEEN:

DOUGLAS MCCARTHY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Boyle J.

[1] In my decision of February 25, 2016 in this case, I requested written submissions on costs, including submissions from Mr. Sumner on whether a Rule 152 order should be made in respect of some or all of any costs awarded against his client.

[2] I have received and reviewed those submissions. The Respondent is asking for costs in accordance with the Tariff for a Class B proceeding. The Appellant's submissions largely consist of disputing the correctness of my decisions to date. I will leave that to the Federal Court of Appeal. The Appellant's submissions end with a request that costs continue to be left to the trial judge, something I had already decided was no longer appropriate. In the alternative, he requests that any costs award should be minimal. Counsel for the Appellant does not make any submissions with respect to Rule 152 of the *Tax Court of Canada Rules (General Procedure)* and why it would not be appropriate for the Court in this case to require counsel to personally indemnify his client for all or any portion of any costs award against his client.

[3] In the circumstances of this case, I am awarding costs in accordance with the Tariff in respect of the January 2016 case management conference at which I presided, the two February 2016 hearings at which I presided, and the two scheduled examinations for discovery giving rise to this situation. Any other

pretrial costs incurred to date continue to be left to the trial judge. The Tariff amounts total $3,700. The Respondent's disbursements total $1,352. I will therefore fix costs payable by the Appellant to the Respondent at $5,052. These are payable within 30 days of the date of this order.

[4] I now turn to the Rule 152 issue raised by the circumstances of this case. The most reasonable inference I see from the facts of this case, from what was argued, and from what was said and what was not said, is that Mr. McCarthy's initial decision to not attend the originally scheduled discovery, and his subsequent refusal to answer questions when he attended his second, were made on the advice of his counsel that he was not required to do so on grounds of claims of torture and unlawful coercion.

[5] This implicates counsel directly and causally to the breaches by Mr. McCarthy of orders of this Court to complete discoveries. At least one of the examination dates had been scheduled with Mr. Sumner's input. He did not inform the Respondent in advance of the failure to attend.

[6] The more complete chronology and listing of concerns with the non-attendance and non-completion of discoveries can be found in my earlier reasons on the merits of these motions.

[7] In the grounds put forward by counsel in support of his position that this Court's ordinary pretrial discovery process constituted torture and unlawful coercion, he was unable to put forward anything approaching an arguable case and the authorities he cited fell far short of saying what he said that they did. I am tempted to compare the sophomoric arguments advanced to those one might expect to hear in a high school civics or Canadian law class, or to hear amongst young adults at a family dinner table, but I am not sure that would be entirely fair to Canadian high school students or family dinner times.

[8] My costs award against the Appellant reflects the appropriate non-punitive contributions set in the Tariff as the portion of the Respondent's costs that should be borne by the unsuccessful appellant. The Rule 152 issue is whether his counsel should be required to reimburse Mr. McCarthy in respect of all or a portion of those costs.

[9] Rule 152 provides:

> **Liability of Counsel for Costs**
>
> 152(1) Where a counsel for a party has caused costs to be incurred improperly or without reasonable cause or to be wasted by undue delay, misconduct or other default, the Court may make a direction,
>
> (*a*) disallowing some or all of the costs as between the counsel and the client,
>
> (*b*) directing the counsel to reimburse the client for any costs that the client has been ordered to pay to any other party, and
>
> (*c*) requiring the counsel to indemnify any other party against costs payable by that party.
>
> (2) A direction under subsection (1) may be made by the Court on its own initiative or on the motion of any party to the proceeding, but no such direction shall be made unless the counsel is given a reasonable opportunity to make representations to the Court.
>
> (3) The Court may direct that notice of a direction against a counsel under subsection (1) be given to the client in the manner specified in the direction.

[10] In *9128-8456 Québec Inc. v. The Queen*, 2014 TCC 85, I wrote:

> 15 I have previously summarized the circumstances in which this Court can order that costs be payable by a party's counsel personally under Section 152 of the Rules and under the Court's inherent jurisdiction to control abuse of process and contempt of court. In *Dacosta v. The Queen*, 2008 TCC 136, I wrote:
>
> > 20 An award of costs payable by counsel personally is permitted both as part of the Court's inherent jurisdiction as well as under the statutory jurisdiction of Rule 152. Such awards are, in either event, extraordinary.
> >
> > 21 Chief Justice McLachlin writing for the majority of the Supreme Court of Canada on this point wrote in *Young v. Young* (1993), 108 D.L.R. (4th) 46:
> >
> > > It is as clear that the courts possess that jurisdiction to make such an award, often under statute and, in any event, as part of their inherent jurisdiction to control abuse of process and contempt of court…
> >
> > 22 An order that counsel pay costs personally can be made as part of the inherent jurisdiction of a superior court to control abuse of process, contempt of court and the conduct of its own officers. In contrast, Rule 152 clearly increases the circumstances permitting of such orders if counsel has caused costs to be incurred without

reasonable cause or to be wasted by undue delay, misconduct or other default.

> ... [Rule 152 omitted.]

23 The common law inherent jurisdiction requirement that there be a finding of bad faith clearly does not constitute a prerequisite under Rule 152. The words of Rule 152 should be given their ordinary meaning. There is no requirement that the lawyer's conduct be abusive, negligent or in bad faith. See, for example, the recent Ontario decisions in *Walsh v. 1124660 Ontario Ltd. et al.*, [2007] O.J. No. 639 and *Standard Life Assurance Co. v. Elliott et al.*, [2007] O.J. No. 2031.

24 In *Standard Life*, Justice Molloy writes at paragraph 25:

> However, just because the actions of a solicitor may fall within the defined circumstances in which costs may be awarded against him personally, does not mean that the court's discretion ought to be exercised in that manner. On the contrary, the discretion ought to be exercised sparingly and only in exceptional circumstances.

Justice Molloy then quotes approvingly from paragraph 115 of Justice Granger's decision in *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham*, [1998] O.J. No. 527 (O.C.J.Gen.Div.) as follows:

> Applying the ordinary meaning to the words found in Rule 57.07, costs incurred without reasonable cause, or by reason of undue delay, negligence or other default can be charged back to the solicitor who is responsible for such costs being incurred.

And later:

> Although "bad faith" is not a requirement to invoking the costs sanctions of Rule 57.07 against a solicitor, such an order should only be made in rare circumstances and such orders should not discourage lawyers from pursuing unpopular or difficult cases. It is only when a lawyer pursues a goal which is clearly unattainable or is clearly derelict in his or her duties as an officer of the court that resort should be had to R. 57.07.

25 Although this Court's Rule 152 differs in some respect from Ontario's Rule 57.07, notably our rule does not refer to negligence but to misconduct, the words of Molloy J. and Granger J. are equally applicable to a consideration of our Rule 152.

> 26 Most of the cases dealing with awarding costs personally against a solicitor are concerned that lawyers not be deterred from pursuing unpopular causes or taking positions that are novel and untested. Those considerations do not apply here. We simply have a counsel whose behaviour towards this Court and whose failure to comply with a court order is inexcusable. Justice Lane's Reasons in *Walsh* quoted at paragraph 17 from the Reasons of Justice Quinn in *Belanger v. McGrade Estate*, [2003] O.J. No. 2853 (S.C.J.):
>
> > [Counsel] caused costs to be incurred without reasonable cause and to be wasted, by his failure to provide the necessary material to the applicant's counsel in the time frame set out in the order of Marshall J. This has nothing to do with the fearless representation of a client.
> >
> > The discretion available under subrule 57.07(1) should be exercised with the utmost care and only in the clearest of cases. Any doubt should be resolved in favour of the solicitor. Nevertheless, even with those cautions, I think that what occurred in this case is precisely the kind of scenario intended to be caught by the rule.
>
> 27 I could not word it better than that in this case.
>
> 28 This is not a case such as *Jurchison*, 2000 DTC 1660 where, to paraphrase Justice Bowie, counsel's behaviour merely did not rise to the level of civility which at one time did, and still should, characterize the way in which members of the bar conduct their dealings with one another. In this case Appellant's counsel disregarded a Court order and did not communicate with the Court regarding the failure. This case is more similar to this Court's decision in *Whiteway v. Canada*, (1998 TCC 91158, [1998] T.C.J. No. 84, [1998] 2 C.T.C. 3254) as well as the decision of this Court in *Anctil v. Canada*, 97 DTC 1462.

[11] The Appellant's waste of the time and resources of both the Respondent and of the Court are a waste of public resources. One of the purposes of Rule 152 is to discourage the wasting of such valuable, limited and expensive public resources by officers of the Court who are counsel to a party. What can reasonably be described as wasting resources needs to be determined cautiously, charitably and generously in order to ensure that the courts do not discourage counsel from fearlessly representing their client's interest including putting forward novel, unpopular or heretofore unrecognized positions.

[12] In these circumstances, I am entirely satisfied that the requirements of Rule 152 and the preconditions for the Court's inherent power are met. Costs have been necessitated without reasonable cause, and costs have been wasted by undue delay at the very least. I am satisfied this is an exceptional case in which it is appropriate to order that an award of costs be borne by counsel personally. What I wrote in paragraphs 26 through 28 of *Dacosta v. The Queen*, 2008 TCC 136, quoted in *9128-8456 Québec*, above, applies equally to counsel's performance in this case to date.

[13] This Court will order and direct that one half of the costs award in favour of the Respondent and payable by the Appellant, being $2,526, is to be reimbursed promptly by counsel for the Appellant to the Appellant pursuant to Rule 152(1)(*b*). Counsel for the Appellant is directed to promptly send a copy of this order and the reasons for order to his client as provided for in Rule 152(3).

Signed at Ottawa, Canada, this 11th day of April 2016.

"Patrick Boyle"

Boyle J.

CITATION:	2016 TCC 86
COURT FILE NO.:	2013-1383(IT)G
STYLE OF CAUSE:	DOUGLAS MCCARTHY v. THE QUEEN
REASONS FOR ORDER BY:	The Honourable Justice Patrick Boyle
DATE OF ORDER:	April 11, 2016

REPRESENTATIVES:

Counsel for the Appellant:	Joel Allan Sumner
Counsel for the Respondent:	H. Annette Evans Rishma Bhimji Victoria Iozzo

COUNSEL OF RECORD:

For the Appellant:	Joel Allan Sumner
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