Docket: 2003-2432(IT)G

BETWEEN:

TERRY DACOSTA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Show cause and motion heard on January 21, 2008, at London, Ontario

Before: The Honourable Justice Patrick Boyle

Appearances:

Agent for the Appellant:	Andrea Cooley
Counsel for the Respondent:	Pascal Tétrault

ORDER

UPON motion made by counsel for the Appellant requesting an order extending the time to file and serve the Appellant's List of Documents, to complete the examinations for discovery and undertakings, and to communicate with the Court's Hearings Coordinator;

AND UPON hearing the submissions of the parties;

The Appellant's motion is allowed in part.

IT IS ORDERED that:

1. The Appellant shall file and serve a List of Documents (Partial Disclosure) on the Respondent by January 22, 2008.

2. The Appellant is to notify the Respondent by January 31, 2008 which dates in February, March and April 2008 the Appellant will not be available for discovery, failing which the Crown will have the right to set the date.

3. The examination for discovery of the Appellant shall be completed by April 30, 2008.

4. Any undertakings given by the Appellant at his examination for discovery shall be satisfied by May 30, 2008.

5. The parties shall communicate with the Hearings Coordinator, in writing, on or before June 30, 2008 to advise the Court of dates in August and September 2008 for a hearing date to be set in London peremptorily. The parties may file a joint application to fix a time and place for the hearing in accordance with section 123 of the *Tax Court of Canada Rules (General Procedure).*

6. Costs in the amount of $475 plus disbursements, with respect to the show cause and the motion, shall be payable to the Respondent by the Appellant and shall be reimbursed to the Appellant by counsel for the Appellant.

7. Pursuant to Rule 152(3), Appellant's counsel is directed to send a copy of this Order and the Reasons to the Appellant promptly and to indicate by letter to this Court when this has been done.

Signed at Ottawa, Canada, this 7th day of March 2008.

"Patrick Boyle"

Boyle, J.

Citation: 2008TCC136
Date: 20080307
Docket: 2003-2432(IT)G

BETWEEN:

TERRY DACOSTA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Boyle, J.

[1] At the conclusion of hearing both the show cause hearing ordered by the Court in London Ontario on January 21, 2008, and the Appellant's motion heard at the same time, I allowed the Appellant's motion in part and ordered new dates by which to complete the pre-trial process. I extended the time for filing and serving the Appellant's List of Documents, discovery of the Appellant, completion of the Appellant's undertakings, and required the parties to advise the Court by June 30, 2008 if the matter is ready to be set down for trial. The Crown had opposed the Appellant's motion and urged me to dismiss the appeal for delay in accordance with Rule 125(5). At that time I expressly reserved on the issue of costs for the show cause and for the motion and invited submissions on whether any or all costs should be payable personally by the Appellant's counsel.

History of the Appeal

[2] This appeal of the 1998 and 1999 taxation years was instituted by the Appellant on his own behalf in 2003 by filing a skeletal Notice of Appeal. At the first show cause hearing in November 2004, which the Appellant did not attend, this Court ordered production of Respondent's documents by December 31, 2004, production of the Appellant's documents by January 31, 2005 and communication with the Hearings Coordinator by February 28, 2005. The Respondent's List of

Documents was filed and served as ordered. The Appellant's was not. By the time of the most recent show cause hearing, it was three years late.

[3] Prior to February 28, 2005, the Appellant retained counsel. On February 28, 2005, the lawyer's office sent a letter indicating counsel had been consulted, was out of the office for the next week and had left no instructions with his assistant. On March 31, 2005, the Appellant's counsel requested an extension of the time to file the List of Documents to May 31, 2005. This request was opposed by the Crown.

[4] A status hearing was ordered by the Court on June 9, 2005. At that time the Court ordered that the Appellant had ten days to decide if he wished to elect to have the appeal governed by the Court's informal procedure or, if not, to file an Amended Notice of Appeal within 30 days. An Amended Notice of Appeal was filed within that time and an Amended Reply was filed thereafter.

[5] On March 26, 2007, this Court ordered a second show cause hearing for June 6, 2007 pursuant to Rule 125 to show cause why the appeal should not be dismissed for delay. On May 28, 2007, Appellant's counsel brought a motion for an order extending the time to file the Appellant's List of Documents, to complete discoveries and undertakings, and communicate with the Hearings Coordinator. The Respondent consented to the Appellant's 2007 motion. On May 31, 2007, the Court ordered that the Appellant's List of Documents was to be filed and served by July 16, 2007, discoveries were to be completed by October 1, 2007, undertakings by October 31, 2007 and the parties were to communicate with the Court by November 30, 2007.

[6] On November 30, 2007, the Crown wrote to advise the Court that the Appellant's List of Documents was not served in the time ordered and discovery of the Appellant had not been completed, and to suggest a case management conference may be helpful.

[7] Appellant's counsel attempted to file the Appellant's List of Documents with the Court on November 14, 2007, almost four months late. It was not accepted for filing and the Court so advised the Appellant's counsel by letter dated December 3, 2007. This Court's Practice Note 14 provides that following an order setting a date for completion of any step in an appeal, an application for further time shall proceed by way of motion supported by an affidavit except in special circumstances.

[8] No further communication having been received, on December 12, 2007 the Court ordered a third show cause hearing for Monday January 21, 2008 to show cause why this appeal should not be dismissed for delay.

[9] On Wednesday January 16, Appellant's counsel filed a motion requesting further extensions of time. The reasons given for the delay in the supporting affidavit for the January 2008 motion are identical to those in the May 2007 affidavit supporting the May 2007 Order extending the time.

The Hearing

[10] At the show cause hearing neither the Appellant's counsel nor the Appellant were in attendance. Appellant's counsel had arranged for an agent to attend in his place as he had another Court proceeding underway elsewhere.

[11] The Crown opposed the Appellant's motion and encouraged me to dismiss the appeal for delay in accordance with Rule 125. Needless to say, the Appellant's counsel's agent could not provide any insight or answers to any questions or concerns regarding the delays and the non-compliance with this Court's May 2007 Order.

[12] The most recent show cause hearing was the third show cause hearing ordered in this file. In addition, the Court had also ordered a status hearing. Three years after the initial Court ordered date for filing and serving his List of Documents, the Appellant had still not done so. Mr. Dacosta is very fortunate I did not decide to dismiss his appeal for delay. The only reason I did not do so was that I was less than certain that he and not his counsel was the cause of the delay. Having neither of them present did not help me in this regard.

[13] At the hearing I ordered new dates. The Appellant's List of Documents was to be filed and served by the following day. There would be no discovery of the Crown. Discovery of the Appellant would be completed by April 30 and undertakings satisfied by May 30. The Appellant was to notify the Respondent by the end of January which dates in February, March and April the Appellant would not be available for discovery, failing which the Crown would have the right to set the date. The parties are to advise the Court by June 30, 2008 of dates in August and September 2008 for the trial to be scheduled and heard. The trial date is to be set peremptorily. I advised the parties that there was no need for and would be no tolerance of further delays. The Appellant should assume that if any of the steps are not completed by the dates ordered, this Court will dismiss his appeal.

Costs

[14] This brings me to the question of costs. As stated, I asked for submissions on costs from both parties and asked the Appellant's counsel's agent to advise the Appellant's counsel that he should address whether costs should be payable by him personally in the circumstances.

[15] The Crown's submissions were filed almost a month late and only after a follow-up call from the Court. That leaves me with little interest in awarding costs beyond the tariff provided for in the Rules. Accordingly, I am awarding costs in favour of the Respondent based on the tariff for the show cause hearing and for the motion in the aggregate amount of $475 plus disbursements. The show cause hearing had to be ordered as a result of the Appellant's delay. While the Appellant's motion was allowed in part, in so far as the dates were extended again, this was necessitated solely by the Appellant not complying with the dates previously ordered by this Court.

[16] Appellant's counsel filed a costs submission. It was his view costs should be awarded in favour of the Appellant. His first reason was his success on the motion. He gave no reason in his costs submission as to why he never communicated with the Court, nor had this been addressed in the supporting affidavit for his motion or at the hearing.

[17] In the final paragraph of his submission asking for costs, Appellant's counsel submits that costs should not, in any event, be payable personally by him. His reasons were twofold. Firstly he had tried unsuccessfully to get the Respondent's consent to the motion. Secondly, the Appellant had had difficulty paying his accounts.

[18] I find the Appellant's submissions and his behaviour in this matter very disappointing. He does not address why he never contacted the Court to try to get dates rescheduled without the need for the Court and Respondent's counsel to spend Court time in London dealing with this (in his absence and the absence of the Appellant). His implicit suggestion seems to be that he may not have done things on a timely basis because he was not getting fully paid by his client. An even worse interpretation is that the Court and Crown had to hear the motion and have the show cause hearing to assist the Appellant's counsel get paid. Regardless of whether his client had fully paid him, as Appellant's counsel of record, a brief telephone call to the Hearings Coordinator may well have avoided the need for

scheduling a third show cause hearing and for the contested motion. The people of Canada cannot be expected to assist Appellant's counsel collect his accounts in such a manner or at such a cost.

[19] I find the performance of Appellant's counsel exceedingly disappointing, unprofessional and inexcusable, as well as in breach of Justice Rossiter's 2007 Order. I must then turn to whether it is of the character that warrants his personal responsibility for the costs award.

[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.

> 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.

[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.

[29] The costs awarded in favour of the Respondent payable by the Appellant for the most recent show cause hearing and the Appellant's motion are directed to be fully reimbursed by Appellant's counsel to the Appellant pursuant to Rule 152(1)(*b*). Pursuant to Rule 152(3), Appellant's counsel is directed to send a copy of these Reasons and today's Order to the Appellant promptly and to indicate by letter to this Court when this has been done.

Signed at Ottawa, Canada, this 7th day of March 2008.

"Patrick Boyle"

Boyle, J.

CITATION:	2008TCC136
COURT FILE NO.:	2003-2432(IT)G
STYLE OF CAUSE:	TERRY DACOSTA AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	London, Ontario
DATE OF HEARING:	January 21, 2008
REASONS FOR ORDER BY:	The Honourable Justice Patrick Boyle
DATE OF ORDER:	March 7, 2008

APPEARANCES:

Agent for the Appellant:	Andrea Cooley
Counsel for the Respondent:	Pascal Tétrault

COUNSEL OF RECORD:

For the Appellant:

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