Citation: 2012 TCC 273
Date: 20120723
Docket: 2007-1806(IT)G

BETWEEN:

VELCRO CANADA INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

ORDER AND REASONS FOR ORDER

Rossiter A.C.J.

[1] After rendering Judgment in this matter, I invited both parties to speak to or make written submissions on costs, and both parties have done so.

Positions of the Parties:

[2] (a) Appellant's position:

The Appellant submits that an elevated costs award is appropriate in the circumstances of the case, mainly due to the following:

- the Appellant was entirely successful in the appeal;
- the amount at issue was in excess of $9 million;
- the issues raised in the appeal were of national and international importance; and
- the novelty of the issues dictated that the Appellant spend a substantial amount of time and resources in preparing for and presenting the appeal.

The Appellant is of the view that the Court should award the Appellant lump sum costs in excess of the Tariff and in doing so provide particulars with respect to their solicitor-client account including disbursements.

(b) Respondent's position:

The Respondent takes the position that the Appellant's costs ought to be assessed by the taxing officer in accordance with Tariff B of Schedule II of the *Tax Court of Canada Rules (General Procedure)* (the "*Rules*"). The Respondent is of the view that the issue was already determined in *Prévost Car Inc*. v. Canada, 2008 TCC 231, affirmed in 2009 FCA 57 ("*Prévost Car Inc.*"), and that the Appellant did not substantiate by way of evidence the work and effort put into the appeal. The Respondent submits that exceptional circumstances do not exist that would justify the Court exercising its discretion to award costs beyond the Tariff, and relies upon the decision of former Chief Justice Bowman in *Continental Bank of Canada et al v. R*., [1994] T.C.J. No. 863 ("*Continental Bank")* .

Analysis:

[3] In recent years, costs have played a more significant role in tax litigation. Tax cases are becoming more complex, taking longer to prepare with detailed case management and larger amounts in dispute – all contributing to what appears to be more resources being used to litigate appeals. One issue that arises constantly is the application of the Tariff versus awards in excess of the Tariff, lump sum awards, the circumstances where the Tariff is not applied, and the analytical process in awarding and fixing costs.

[4] There seems to be some confusion with respect to the Respondent's understanding of the authority of the Tax Court of Canada to award costs under the *Rules*. The Respondent appears to be of the view that former Chief Justice Bowman's comments in *Continental Bank* were meant to express that the Court is unable to award costs above Tariff barring exceptional circumstances such as misconduct or undue delay. In *Continental Bank*, the Appellant sought an Order for costs on a party-and-party scale, as well as for costs in excess of the amounts in Tariff B of Schedule II for services and disbursements reasonably incurred. In evaluating the Appellant's request for amounts above Tariff, former Chief Justice Bowman considered the role of the Tariff and the amounts listed there, stating in part:

> [9] It is obvious that the amounts provided in the tariff were never intended to compensate a litigant fully for the legal expenses incurred in

> prosecuting an appeal. The fact that the amounts set out in the tariff appear to be inordinately low in relation to a party's actual costs is not a reason for increasing the costs awarded beyond those provided in the tariff. I do not think it is appropriate that every time a large and complex tax case comes before this court we should exercise our discretion to increase the costs awarded to an amount that is more commensurate with what the taxpayers' lawyers are likely to charge. It must have been obvious to the members of the Rules Committee who prepared the tariff that the party and party costs recoverable are small in relation to a litigant's actual costs. Many cases that come before this court are large and complex. Tax litigation is a complex and specialized area of the law and the drafters of our Rules must be taken to have known that.
>
> [10] In the normal course the tariff is to be respected unless exceptional circumstances dictate a departure from it. Such circumstances could be misconduct by one of the parties, undue delay, inappropriate prolongation of the proceedings, unnecessary procedural wrangling, to mention only a few. None of these elements exists here.

[5] This statement was referred to by Justice Hogan in *General Electric Capital Canada Inc. v. Canada*, 2010 TCC 490 ("*General Electric*"). Justice Hogan also referred to the fact that lump sum costs were awarded by Associate Chief Justice Bowman, as he then was, in *Lau v. R.*, 2003 TCC 74 which was affirmed by the Federal Court of Appeal at 2004 FCA 10. He noted that Respondent's counsel in *General Electric* was arguing strenuously that he should adhere to the principle that the Court should not depart from the Tariff absent special circumstances justifying solicitor-client costs relating to the conduct of the parties during the litigation. Justice Hogan again quoted Bowman, J., as he then was, in *McGorman v. Canada*, 99 D.T.C. 591 (T.C.C.) at paras. 13-14 ("*McGorman*") as follows:

> [23] Counsel for the Respondent argued strenuously that I should adhere to the principle enunciated previously in some of the judgments of my current and former colleagues, namely that this Court should respect the principle that there should be no departure from the tariff, absent special circumstances justifying solicitor-client costs relating to the conduct of the parties or their counsel during the litigation.[9] As stated by Bowman J., as he then was, in *McGorman et al. v. The Queen*, 99 DTC 591 (TCC):
>
> > 13 I shall endeavour to set out briefly my views on how the costs should be awarded in these cases. Obviously, the court has a fairly broad discretion with respect to costs, but that discretion must be exercised on proper principles and not capriciously. For example, the mere fact that a case is novel, unique, complex or difficult, or that it

> involves a great deal of money is not a reason for departing from the tariff, which, generally speaking, should be respected in the absence of exceptional circumstances. I shall not repeat what I said about awarding solicitor and client costs in *Continental Bank of Canada et al. v. The Queen*, 94 DTC 1858 at page 1874.
>
> 14 Do exceptional circumstances exist here that would justify an award of solicitor and client costs? It is true the cases were important and difficult and they raised a wide variety of legal and ecclesiastical questions requiring the assistance of experts. This in itself does not warrant solicitor and client costs

[6] I note, as Justice Hogan did, that former Chief Justice Bowman in *McGorman* appears to have been dealing with solicitor-client costs, as was the Supreme Court of Canada in *Young v. Young*, [1993] 4 S.C.R. 3, where Justice McLachlin (as she then was) held that there must be evidence of reprehensible, scandalous, or outrageous conduct before an award of costs could be made on a solicitor-client basis. If former Chief Justice Bowman was suggesting that the Tax Court of Canada can only deviate from the Tariff in exceptional circumstances, then I would beg to differ. The exceptional circumstances I believe he referred to in *Continental Bank* include circumstances that might justify solicitor-client costs which is most certainly outside the Tariff. To my mind, it does not take exceptional circumstances to justify a deviation from the Tariff – far from it. The authority of the Tax Court of Canada is quite clear.

[7] The *Rules* are made by the Tax Court of Canada Rules Committee which is statutory in nature pursuant to section 22 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2. The *Rules* are subject to the approval of the Governor in Council.

[8] The Tariff annexed to the *Rules* is a reference point only should the Court wish to rely upon it. It is interesting to note that the first of two references to the Tariff in Rule 147 is subsection 147(4) which in and of itself gives extremely broad authority to the Court in the awarding of costs.

[9] Notwithstanding former Chief Justice Bowman's comments in *Continental Bank, supra* at paragraph [9], it is my view that:

1. The Tariff was never intended to compensate a litigant fully for legal expenses incurred in an appeal;

2. The Tariff was also never intended to be so paltry as to be insignificant and play a trivial role for litigants in dealing with their litigation. The Court's discretionary power is always available to fix amounts as appropriate;
3. Costs should be awarded by the Court in its sole and absolute discretion after considering the factors of subsection 147(3);
4. The discretion of the Court must be exercised on a principled basis;
5. The factors in Rule 147(3) are the key considerations in the Court's determination of costs awards as well as the quantum and in determining if the Court should move away from the Tariff;
6. In the normal course the Court should apply the factors of Rule 147(3) on a principled basis, with submissions from the parties as to costs, and only reference the Tariff at its discretion; and
7. The manner that the Tariff is referenced in Rule 147 indicates the insignificance of the Tariff in costs considerations.

[10] A close examination of the structure and wording of Rule 147 reveals why the Tariff is an item for referral only if the Court so chooses. It would appear that the Rules Committee knew exactly what it was doing in structuring the *Rules* the way it did.

[11] Rule 147(1) provides the following:

> The Court may determine the amount of costs of all parties involved in any proceeding, the allocation of the costs and the persons required to pay them.

The discretion in 147(1) is extremely broad – it gives the Court total discretion in terms of (1) the amount of costs; (2) the allocation of costs; and (3) who must pay them.

[12] Rule 147(3) provides the factors to be considered in exercising the Court's discretionary power. After enumerating a list of factors, it specifies that the Court may consider "any other matter relevant to the question of costs", thereby providing the Court with even broader discretion to consider

other factors it thinks relevant on a case by case basis. Such other factors that may be relevant could include, but are not limited to:

1. the actual costs incurred by a litigant and their breakdown including the experience of counsel, rates charged, and time spent on the appeal;
2. the amount of costs an unsuccessful party could reasonably expect to pay in relation to the proceeding for which costs are being fixed; and
3. whether the expense incurred for an expert witness to give evidence was justified.

[13] The factors to be considered by the Court in exercising its discretionary power to award costs are extremely broad, they are specific to every appeal before the Court and as noted, the Court may consider any other matter relevant to the question of costs.

[14] There is no mention of the Tariff until Rule 147(4) which provides:

> 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.

[15] Rule 147(5) goes even further saying:

> Notwithstanding any other provision in these rules, the Court has the discretionary power,
>
> (a) to award or refuse costs in respect of a particular issue or part of a proceeding,
> (b) to award a percentage of taxed costs or award taxed costs up to and for a particular stage of a proceeding, or
> (c) to award all or part of the costs on a solicitor and client basis.

Note that there is no reference to the Tariff in Rule 147(5).

[16] Under the *Rules*, the Tax Court of Canada does not even have to make any reference to Schedule II, Tariff B in awarding costs. The Court may fix all or part of the costs, with or without reference to Schedule II of Tariff B and it can award a lump sum in lieu of or in addition to taxed costs. The *Rules* do not state or even suggest that the Court follow or make

reference to the Tariff. If the Tax Court of Canada Rules Committee had felt the Tariff was so significant, the *Rules* could easily have said that the Tariff shall be applied in all circumstances unless the Court is of the view otherwise. The Rules Committee did not do this, not even close. In fact, it is hard to imagine how the Tax Court of Canada's discretionary power could be broader for awarding costs given the wording in Rules 147(1), (3), (4) and (5). These particular provisions of Rule 147 really make reference to Schedule II, Tariff B a totally discretionary matter.

[17] It is my view that in every case the Judge should consider costs in light of the factors in Rule 147(3) and only after he or she considers those factors on a principled basis should the Court look to Tariff B of Schedule II if the Court chooses to do so. The Rules Committee in their wisdom made brief mention of the Tariff but only after giving the Tax Court of Canada very broad and significant discretion in all matters on costs. As stated by my colleague Justice Hogan in *General Electric*:

> [26] … I believe that the Rules Committee was well aware of the fact that there are numerous factors which can warrant a move away from the Tariff towards a different basis for an award of party and party costs, including lump sum awards. Subsection 147(3) of the *Rules* confirms this by listing specific factors and adding the catch-all paragraph (*j*), which refers to "any other matter relevant to the question of costs". If misconduct or malfeasance was the only case in which the Court could move away from the Tariff, subsection 147(3) would be redundant. Words found in legislation are not generally considered redundant. As stated by the Supreme Court in *Hills v. Canada (AG)*, [1988] 1 S.C.R. 513:
>
> > [106] ... In reading a statute it must be "assumed that each term, each sentence and each paragraph have been deliberately drafted with a specific result in mind. Parliament chooses its words carefully: it does not speak gratuitously" (P.-A. Côté, *The Interpretation of Legislation in Canada*, (1984), at p. 210).[10]
>
> [27] It has been repeatedly affirmed that McLachlin J.'s comment requiring misconduct or malfeasance in *Young v. Young*, above, was specifically and only made in reference to the availability of solicitor-client costs. It is true that "[t]he general rule is that a successful litigant is entitled to party and party costs," in accordance with the Tariff.[11] It is also true that a measure of reprehensibility is required for either party to be ordered to pay costs to the other party on a solicitor-client basis. The two rules must not be conflated, as to do so would remove all middle ground.

> [28] The *Interpretation Act* applies to the *ITA* and to this Court's *Rules*.[12] Section 12 of the *Interpretation Act* provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". It is reasonable to conclude that the purpose of section 147 of the *Rules* was to give a judge the discretion to move away from the Tariff in order to provide fair and reasonable relief in the circumstances -- with or without reference to Schedule II, Tariff B. A restrictive interpretation of that section that would require a taxpayer to meet the same burden in order to move from the Tariff to any level of partial indemnity or to a lump sum award in lieu of or in addition to any costs as it would have to meet to obtain solicitor-client costs would defeat at least one of the purposes of the section.

[18] A comparison of the discretionary power in Rule 147 of the *Rules* and Rule 400(4) of the *Federal Court Rules*, SOR/98-106 ("*Federal Court Rules*") provide an example of how a Rules Committee may take a different approach.

[19] The Tax Court of Canada's Rule 147(4) says:

> 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.
>
> [emphasis added]

The Federal Court's Rule 400(4) says:

> The Court may fix all or part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, any assessed costs.
>
> [emphasis added]

There is a significant difference in my view in the wording and the emphasis put on the Tariff in the *Federal Court Rules* compared to the Tax Court of Canada's Rule 147(4). Despite this distinction, the Federal Court of Appeal, when reviewing the *Federal Court Rules* in *Consorzio Del Prosciutto Di Parma v. Maple Leaf Meats Inc.*, 2002 FCA 417, concluded that those *Rules* nonetheless allow the Court discretion in awarding costs. As stated by the Federal Court of Appeal:

> [8] An award of party-party costs is not an exercise in exact science. It is only an estimate of the amount the Court considers appropriate as a contribution towards the successful party's solicitor-client costs (or, in unusual circumstances, the unsuccessful party's solicitor-client costs). Under

> rule 407, where the parties do not seek increased costs, costs will be assessed in accordance with Column III of the table to Tariff B. Even where increased costs are sought, the Court, in its discretion, may find that costs according to Column III provide appropriate party-party compensation.
>
> [9] However, the objective is to award an appropriate contribution towards solicitor-client costs, not rigid adherence to Column III of the table to Tariff B which is, itself, arbitrary. Rule 400(1) makes it clear that the first principle in the adjudication of costs is that the Court has "full discretionary power" as to the amount of costs. In exercising its discretion, the Court may fix the costs by reference to Tariff B or may depart from it. Column III of Tariff B is a default provision. It is only when the Court does not make a specific order otherwise that costs will be assessed in accordance with Column III of Tariff B.
>
> [10] The Court, therefore, does have discretion to depart from the Tariff, especially where it considers an award of costs according to the Tariff to be unsatisfactory. Further, the amount of solicitor-client costs, while not determinative of an appropriate party-party contribution, may be taken into account when the Court considers it appropriate to do so. Discretion should be prudently exercised. However, it must be borne in mind that the award of costs is a matter of judgment as to what is appropriate and not an accounting exercise.

[20] Reference may also be made to *Ontario's Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 ("*Ontario Rules*"), in particular Rule 57.01 and the Tariffs. Rule 57.01(3) states:

> Fixing Costs: Tariffs
> (3) When the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs.
>
> [emphasis added]

The Tax Court of Canada *Rules* have no similar provision such as Rule 57.01(3) of the *Ontario Rules* – nothing even remotely suggesting the Court shall fix costs according to the Tariff.

[21] Although Rule 57.01(3) of the Ontario *Rules* seems to provide the Court with little discretion, it is interesting to note that recent amendments have actually increased the Court's discretionary power in awarding costs. Previously, the *Ontario Rules* included a "costs grid" in Tariff A (Part I). The Court needed to follow the costs grid, and their only discretion available was to refer exceptional cases for assessment as described in Rule 57.01(3.1). On July 1, 2005, the costs grid was repealed. While the Tariffs

continue to address amounts for disbursements (Tariff A, Part II) and lawyer fees for accounts passed without a hearing (Tariff C), they no longer include set rates for lawyer fees. The Court now relies on s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and the discretionary factors listed in Rule 57.01(1). Parties seeking costs must bring a "costs outline" (using Form 57B) to the hearing. The Costs Subcommittee of the Civil Rules Committee also published a list of the maximum rates per hour that the Court will normally consider for partial indemnity costs. [See Professor Garry D. Watson, Q.C. and Michael McGowan, *Ontario Civil Practice 2012* (Toronto: Carswell, 2011) at 1200–1203; James J. Carthy, W.A. Derry Millar, & Jeffrey G. Cowan, *Ontario Annual Practice* (Aurora, Ontario: Thomson Reuters, 2011) at 1197-1198.]

[22] I will now turn to the specific appeal at hand.

[23] I consider this an appeal in which there should be a lump sum award without reference to Schedule II, Tariff B.

[24] As reviewed above, this Court has very broad discretion in awarding costs. I make reference to Rule 147(3).

1. The result of the proceeding: The Appellant was wholly successful in the proceeding. The position taken by the Respondent was entirely rejected.

2. The amounts in issue: The amounts in issue are always of significance to the parties to the litigation. The amounts in issue in this particular case were very significant, in excess of $9,000,000 made up of non-resident tax of approximately $8,600,000, plus penalties of approximately $860,000 with the amount of non-resident tax at issue per year ranging from approximately $230,000 to $1,600,000. Even though the Court was considering appeals from 1995 to 2004 inclusive, the amounts in issue are nonetheless very significant.

3. The importance of the issues: The issue before the Court was the application of the "beneficial ownership" test and who had beneficial ownership of the royalty payments in question. Although the Respondent notes that this is not the first time that the "beneficial ownership" test was considered and applied in Canada, it was the first time that it was applied in Canada in terms of royalties. *Prévost Car*

Inc., decided by Chief Justice Rip in 2008, and affirmed by the Federal Court of Appeal in 2009, is certainly the leading jurisprudence on the "beneficial ownership" test, but the litigation here was somewhat different in nature as it concerned royalty payments as opposed to the dividend payments that were the focus in *Prévost Car*. There are significant differences in the manner that dividends versus royalties are determined. Dividend payments are determined by a decision from within the corporation by the board of directors while obligations relating to royalties arise externally through contracts. The amount of interest in this case, both nationally and internationally, as indicated by subsequent commentaries in relation to the decision of the Court and the panels that discussed the case both nationally and internationally since the decision has been rendered, would certainly indicate that this case was of some importance. The issue before the Court was important because it focussed on the "beneficial ownership" test and the application of that test in an area that had not been dealt with by the Court previously. Also of note is that this case was the first to come before the Tax Court of Canada on this issue since the *Prévost Car Inc*. decision in the Federal Court of Appeal.

4. Any offer of settlement made in writing: The Court file does not indicate any offer of settlement made in writing by either party filed with the Court.

5. The volume of work: Any case coming before the Tax Court of Canada requires a certain amount of work and preparation but when you are dealing with a case with a significant amount at issue as well as the issue being somewhat novel and important, it can require that much more work. I saw the effort put into this case by the presentation in Court and the focussed nature of the parties; the effort was considerable.

6. The complexity of the issues: The issue itself was relatively straightforward but the facts surrounding the issues were somewhat complex because of the variety of agreements which related to the flow of royalties from and between parties to an agreement, including license agreements, assignment agreements and letters which relate to same, all of which contained certain provisions that affected or could have affected the interpretation of the agreements and the

determination of who in fact was the beneficial owner of the royalties in question.

7. The conduct of a party; the denial or refusal of any party to deny or admit anything which they should have admitted; and whether any stage of the proceedings was improper, vexatious or unnecessary, or taken through neglect, mistake or excessive caution:

   I did not find any conduct by either party to attempt to unnecessarily lengthen the duration of the proceeding, nor did I find that there was any refusal or neglect by any party to admit anything that should have been admitted; nor did I find that that there were improper, vexatious or unnecessary pleadings taken through negligence or mistake or excessive caution. I found that the appeal itself was very well pleaded and both counsel were most impressive in their presentations before the Court.

[25] The Respondent suggests that there is no evidence before the Court with respect to the issue of costs, but failed to note that submissions are made by counsel for the Appellant who is an officer of the Court. Any presentation of fact by an officer of the Court does not have to be under oath because the presentation is considered to be under oath as it is made by an officer of the court. I found this submission a technical argument for the Respondent to raise, certainly not in line with the significance of the appeal.

[26] I have considered all of the factors which I felt were relevant to the issue of costs in this particular case under Rule 147(3). Of particular importance in awarding costs in this case, to my mind, is: (a) the success or failure of the litigant in the litigation: the Appellant here was totally successful in the litigation; (b) the Appellant made an excellent focussed presentation at trial; (c) the amount at issue was quite significant in scale; (d) the issue was of importance on a national and international scale; and (e) the issue was novel in nature never having been dealt with by the Tax Court of Canada. These factors play a significant role in the awarding of costs in this case.

[27] Tax litigation is a complex and highly specialized area. There are many cases that come before the Court that regardless of size can be complex with issues of significance. The Respondent has really taken the position that unless the appeal requires that solicitor-clients costs should be

awarded, the Court must resort to the Tariff. This view is erroneous and is contrary to Rule 147 as written by the Tax Court of Canada Rules Committee. I again refer to the comments of my colleague Justice Hogan, hereof, as cited above regarding the application of Rule 147 and in particular Rule 147(3). I also again refer to my analysis of the construction of Rule 147 and the obvious and clear intention of the drafters as to the discretionary role of the Tariff in costs awards.

[28] Costs should reflect the efforts within reason of a litigant during the litigation. Accordingly, the complexity or the volume of the litigation or the amount at issue will and do play a role in the effort put into litigation and as such, the costs awarded must be something which reflects the realities of tax litigation in the context of each case.

[29] Considering all the factors I have referred to under Rule 147(3) and the wide discretion that the Court has in awarding costs, I make an award of $60,000 plus disbursements in favour of the Appellant as noted in the Appellant's Bill of Costs plus all applicable taxes. I readily recognize that the $60,000 lump sum award is nowhere near the legal fees incurred by the Appellant through the course of the appeal, nor does it reflect the amount presented under the Tariff. As noted by many jurists, costs are not intended to compensate litigants for their litigation costs. This lump sum award is significantly less than the actual litigation costs incurred by the Appellant. The fair disposition of this matter, partially compensating the Appellant for having to come to Court and justify their position and be as successful as they were, is the lump sum award of $60,000. This lump sum award also recognizes the significant effort put into the litigation by the Appellant and their focused presentation at the appeal hearing on this novel issue. This lump sum award is, in my view, a fair and reasonable reflection of what a costs award should be given the reasons that I enumerated above.

Signed at Ottawa, Canada, this 23rd day of July, 2012.

"E.P. Rossiter"

Rossiter A.C.J.

CITATION:	2012 TCC 273
COURT FILES NOS.:	2007-1806(IT)G
STYLE OF CAUSE:	VELCRO CANADA INC. v. HER MAJESTY THE QUEEN
REASONS FOR ORDER BY:	The Honourable Associate Chief Justice E.P. Rossiter
DATE OF ORDER:	July 23, 2012

APPEARANCES:

Counsel for the Appellant:	Louise Summerhill and Marni Pernica
Counsel for the Respondent:	Margaret Nott and Amit Ummat

COUNSEL OF RECORD:

For the Appellant:

Name:	Louise Summerhill
Firm:	Aird & Berlis Toronto, Ontario

For the Respondent:	Myles J. Kirvan, Q.C. Deputy Attorney General of Canada Ottawa, Canada