Docket: 2011-940(IT)G

BETWEEN:

MYRDAN INVESTMENTS INC.,

appellant,

and

HER MAJESTY THE QUEEN,

respondent.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the appellant:	Curtis R. Stewart Lisa Handfield
Counsel for the respondent:	Robert Neilson

ORDER

Upon a Judgment being rendered on January 31, 2013 and an Amended Judgment being rendered on February 13, 2013;

And upon both parties filing written submissions on costs as requested by the Court;

The appellant is awarded costs as set out in the attached Reasons for Order.

Signed at Ottawa, Canada, this 29th day of May 2013.

"Robert J. Hogan"

Hogan J.

Docket: 2011-943(IT)G

BETWEEN:

DANIEL HALYK,

appellant,

and

HER MAJESTY THE QUEEN,

respondent.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the appellant:	Curtis R. Stewart Lisa Handfield
Counsel for the respondent:	Robert Neilson

ORDER

Upon a Judgment being rendered on January 31, 2013 and an Amended Judgment being rendered on February 13, 2013;

And upon both parties filing written submissions on costs as requested by the Court;

The appellant is awarded costs as set out in the attached Reasons for Order.

Signed at Ottawa, Canada, this 29th day of May 2013.

"Robert J. Hogan"

Hogan J.

Citation: 2013 TCC 168
Date: 20130529
Docket: 2011-940(IT)G

BETWEEN:

MYRDAN INVESTMENTS INC.,

appellant,

and

HER MAJESTY THE QUEEN,

respondent,

AND BETWEEN:

Docket: 2011-943(IT)G

DANIEL HALYK,

appellant,

and

HER MAJESTY THE QUEEN,

respondent.

REASONS FOR ORDER

Hogan J.

I Introduction

[1] The taxpayers in this case, Myrdan Investments Inc. (“Myrdan”) and Daniel Halyk, were successful in their appeals to this Court.[1] In my judgment, I invited both parties to provide me with representations on costs. Both parties filed written submissions and I am now prepared to dispose of the matter of costs.

[1] *Myrdan Investments Inc. v. The Queen*, 2013 TCC 35.

[2] A number of issues in dispute had been settled by Consent to Judgment on the eve of the trial. Thus, the only issues that were litigated at trial were whether a truck was an "automobile" for the purposes of the deduction of capital cost allowance by Myrdan, and to what extent Mr. Halyk's use of the truck in question was personal. This Court found that Mr. Halyk made minimal personal use of the truck and that there was a $950 shareholder benefit to him in respect of that personal use.

[3] The appellants request solicitor-client costs on a full indemnity basis. Alternatively, they request party-and-party costs up to the date of their September 28, 2011 settlement offer and costs on a solicitor-client basis from that date, in addition to disbursements. The respondent concedes that the appellants are entitled to costs in accordance with Tariff B of the Rules. However, the respondent contests the appellants' request for costs in excess of the tariff amounts.

II Summary of Myrdan's Costs, Result of Judgment, and Tariff Cost Award[2]

Total costs[3] (including audit and objection stage)	Costs[4] from Notice of Appeal to hearing	Costs[5] post-settlement offer[6] (up to and including the hearing)	Result at trial: net reduction in income	Taxes recovered as a result of trial (estimated)	Tariff Award
$48,076.75	$37,845.89	$33,106.59	$19,380	$4,845.00[7]	$9,619.76

[4] In Myrdan's case, the legal costs subsequent to the audit/objection stage exceeded the total amounts in issue. The amount in issue on appeal does not present the entire picture, however. Much more was at stake for Myrdan prior to the settlement by Consent to Judgment reached on October 12, 2012. It would therefore appear that many of Myrdan's costs pertain to issues that were settled with the Minister on the eve of the trial.

III Summary of Mr. Halyk's Costs, Result of Judgment, and Tariff Cost Award[8]

[2] These values are based on the Appellant's Written Submissions on Costs, Tabs B, C and D.
[3] Costs include legal fees, disbursements, and GST.
[4] Costs include legal fees, disbursements, and GST.
[5] Costs include legal fees, disbursements, and GST.
[6] "Settlement offer" refers to the Appellants' September 28, 2011 offer of settlement to the Respondent.
[7] Estimated amount.
[8] These values are based on the Appellant's Written Submissions on Costs, Tabs B, C, D and E.

Total costs[9] (including audit and objection stage)	Costs[10] from Notice of Appeal to hearing	Costs[11] post-settlement offer[12] (up to and including the hearing)	Result at trial: net reduction in income	Taxes recovered as a result of trial (estimated)	Tariff award
$11,914.47[13]	$11,914.47	$4,363.19	$16,733	$6,525.87[14]	$3,450.00

[5] The amount at issue for Mr. Halyk on appeal was $17,683 (not taking into account the $950 shareholder benefit that the Tax Court found to have been received by him). Thus, the income inclusions he was appealing clearly exceeded his costs in pursuing the appeal. However, his estimated tax in issue only exceeds his costs incurred after the appellants' settlement offer of September 28, 2011.

IV Issue

[6] Can an award of costs above the tariff amounts be based on the Minister's conduct at the pre-litigation stage?

V Positions of the Parties

(A) Appellants' Position

[7] The appellants argue that the Minister issued reassessments without completing her audit. In particular, the appellants take issue with the Minister's failure to review the management services agreement between Myrdan and Total Energy Services Ltd., since a review of that document could have resolved many of the issues in dispute.[15] The appellants filed Notices of Objection and, since they did not hear from Appeals within the estimated normal time frame for a review, they filed Notices of Appeal just over 12 months after the Notices of Objection were filed.

[8] The appellants admit that the amounts in issue were small, and that the issues were not of national importance. However, the appellants argue that these factors, as well as the large volume of work required to prepare for trying such simple issues,

[9] Costs include legal fees, disbursements, and GST.
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[11] Costs include legal fees, disbursements, and GST.
[12] "Settlement offer" refers to the Appellants' September 28, 2011 offer of settlement to the Respondent.
[13] Mr. Halyk has no costs relating to the audit/objection stage, so his total costs are from the appeal stage up to and including the trial.
[14] Assuming the top marginal rate for Alberta applies.
[15] The appellants also point out that the Minister did not review the invoices relating to advertising expenses, which could have resolved that issue prior to discovery, and that the Minister did not respond to certain letters from Myrdan's accountant asking whether the Minister needed additional information to complete her audit.

ought to have motivated the Minister to settle. The appellants point out that a significant portion of their costs was incurred in pursuing a settlement with the Minister on the issues that formed part of the October 12, 2012 settlement. The appellants argue that, because the settlement took the form of a Consent to Judgment on the settled issues, I should consider, in disposing of this matter, costs incurred in reaching that settlement.

(B) Respondent's Position

[9] The respondent submits that the appellants ought to have settled the issues that were not resolved by the October 12, 2012 settlement. The respondent appears to rely on paragraph 147(3)(*d*)[16] of the Rules for the proposition that her attempts at settlement ought to mitigate an adverse award of costs, since her two attempts at settlement were successful, except with respect to the litigated issue as to the use of the truck. However, the appellants' (mostly) successful participation in the settlement negotiation process ought also to be commended, so the respondent is in no better position to claim that her settlement efforts weigh in her favour in fixing costs than are the appellants to make a similar claim with regard to their own such efforts.

[10] The respondent points out that the appellants have admitted that the issues before the Court were not complex or of national importance and that the quantum in issue was small. The respondent submits that the amount of time required to prepare for trial ought to have been minimal since there were few pertinent documents and only one witness, and the trial lasted less than one day.

[11] The respondent's arguments on settlement, quantum and complexity also cut both ways: one can equally as well argue that the respondent ought to have been more flexible and settled the remaining issues instead of forcing the appellants to trial, where the appellants prevailed (with the minor exception of the $950 shareholder benefit found by this Court). The respondent's position also fails to take into account the time required to prepare for the trial of the issues that were settled by Consent to Judgment on the eve of the trial.

[12] The respondent further argues that it was "entirely reasonable" to test the evidence regarding the truck at trial since the respondent considered that Mr. Halyk's mileage record was inadequate and that his mileage summary was based on hearsay.

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[16] The respondent also relies on *CIBC World Markets Inc. v. The Queen*, 2012 FCA 3, 426 N.R. 182, for the proposition that the purpose of subsection 147(3) of the Rules is to encourage parties to make settlement offers and to take settlement offers seriously.

Since the respondent would not accept Mr. Halyk's records, it was also reasonable for Mr. Halyk to decide to testify in Court, under oath, as to the use of the truck.

[13] The respondent also contends that the Minister's conduct prior to the commencement of proceedings should not be taken into account in determining the award of costs since there are no exceptional circumstances here that would justify an increased award on that basis. The respondent maintains that the conduct complained of by the appellants (namely, failure to review a management services agreement and advertising invoices, and failure to respond to letters from the appellants' accountant) had no effect on the issue regarding use of the truck. An award of solicitor-client costs on the basis of conduct requires that the conduct be reprehensible, scandalous or outrageous.[17] The respondent argues that the Minister's conduct did not reach that threshold. In fact, the respondent maintains, in footnote 6 to the Respondent's Submissions on Costs, that "the actions complained of by the appellants do not constitute improper conduct by the Minister."

[14] With respect, the failure to inspect documents made available to the auditor and the failure to respond to offers to provide information required for the audit can hardly be called proper conduct on the part of the Minister. The Minister's conduct might not meet the "reprehensible, scandalous or outrageous" threshold, but it did impede the dispute resolution process and this led to a late partial settlement on the eve of the hearing.

VI Analysis

[15] The appellants rely on the decision of Judge Bowman (as he then was) in *Merchant v. Canada*[18] for the proposition that, although it is a general rule that conduct prior to the commencement of an action is not relevant to an award of costs, that rule is not invariable. In *Merchant*, it was the taxpayer who engaged in obstructionist behaviour that made an orderly audit process all but impossible. The Court was forced to act as auditor and to review documents that should have been provided to the CRA in the audit phase. The Crown was awarded solicitor-client costs for the trial process and for all pre-trial motions.

[16] The appellants also rely on *Hunter v. Canada*,[19] a case in which the Minister did not contact the appellants prior to issuing reassessments and refused to

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[17] See, for example, *General Electric Capital Canada Inc. v. The Queen*, 2010 TCC 490, 2010 DTC 1353, at para. 24.
[18] *Merchant v. Canada*, [1998] T.C.J. No. 278 (QL), 98 DTC 1734, aff'd. 2001 FCA 19, 2001 DTC 5245.
[19] *Hunter v. Canada*, [2002] T.C.J. No. 625 (QL), 2003 DTC 51.

acknowledge the relevance of *Stewart v. Canada*[20] to the taxpayers' business losses from their farm operation. No determination was made in the award of costs in *Hunter* as to whether pre-litigation conduct should be taken into account in the awarding of costs, since the obstructionist behaviour of the Minister continued well into the appeal process. However, two cases referred to[21] in that decision suggest that conduct prior to the commencement of proceedings may justify fixing a lump sum amount of costs beyond the tariff amounts.

[17] In the present case, the Minister was the party who impeded the CRA's own audit process by refusing to accept or review relevant documents. The respondent has pointed out that these documents could have been reviewed by an appeals officer had the appellants waited to file their Notices of Appeal with the Tax Court. However, the appellants waited beyond the 12-month period within which an appeals officer could be expected to be assigned to the case. With respect, it is not reasonable to blame the appellants for advancing the dispute resolution process by filing Notices of Appeal.

[18] The respondent relies on *The Queen v. Landry*[22] for the proposition that conduct of the parties prior to court proceedings should only be taken into account in awards of costs in exceptional circumstances. In *Landry*, the Federal Court of Appeal overturned a lump-sum award of costs granted by me and ordered that each party bear its own costs of the Tax Court proceedings. In that case, the Federal Court of Appeal concluded that, significantly, the taxpayer (to whom the lump-sum award of costs had been granted) and her lawyer did not cooperate with the Minister during the audit and the time preceding the hearing. Information favourable to the taxpayer was withheld by the taxpayer's counsel until late in the appeal stage.

[19] The present case is distinguishable from *Landry*. Mr. Halyk went to some effort and expense to have documents relevant to these appeals made available to the CRA auditor. Those documents were not reviewed by the auditor, though she was aware of their existence. Further, the auditor did not respond to requests for guidance on what additional documents would assist in the audit process, but instead went ahead with reassessments that were not founded on documents made available by the appellants.

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[20] *Stewart v. Canada*, 2002 SCC 46, [2002] 2 S.C.R. 645.

[21] See paras. 28-30 of the *Hunter* decision, in particular the references to *RCP Inc. v. M.N.R.*, [1986] 1 F.C. 485 and *Murano v. Bank of Montreal*, 41 O.R. (3d) 222.

[22] *The Queen v. Landry*, 2010 FCA 135, 2010 DTC 5106. The respondent also relies on para. 24 of the Tax Court's decision in *General Electric Capital Canada Inc. note 18 supra*, which simply points out that the standard of reprehensible, scandalous or outrageous conduct applies to requests for solicitor-client costs and not to lesser, lump-sum awards.

[20] The respondent argues that this conduct by the CRA had no impact on the determination of the issue tried before this Court, namely, the use of the truck. However, in her written Submissions on Costs, the respondent asserts that Mr. Halyk's mileage log was inadequate. The respondent's position is that the Minister could not rely on the mileage log or the mileage summary, the latter being based on Mr. Halyk's Outlook calendar and on information from third parties whom the respondent did not have the opportunity to examine. This suggests that there was additional information in the appellants' possession that could have assisted the CRA auditor in making a determination regarding the use of the truck. The CRA auditor's failure to request such information, or even to respond to the appellants' accountant when asked what additional documents could assist in the audit, indicates that the conduct of the CRA auditor did have an impact on the issue litigated before this Court.[23]

VII Conclusions

[21] I conclude that the respondent's conduct prior to the appeal stage falls short of the "reprehensible, scandalous or outrageous"[24] standard required for an award of solicitor-client costs. I do find, however, that the dispute resolution process was undermined through considered inaction. The CRA auditor's responses to questioning by counsel for the appellants demonstrate that she made thoughtful decisions not to act and did so on the basis of instructions from, and prior positions taken by, her team leader. Whether the blame lies with the CRA auditor or her team leader is irrelevant. Effective dispute resolution requires effort on the part of all adverse parties. In this case, it is clear that the appellants went to some lengths to cooperate with the CRA auditor and facilitate the audit process. The Minister's subsequent offers to settle notwithstanding, it is clear that some or all of the issues before this Court could have been resolved at the outset if the auditor had reviewed the appellants' documentation, and pointed out gaps in their records, prior to the appeal stage.

[22] *Merchant* is authority for the proposition that conduct prior to the commencement of an appeal may be taken into account in fixing an award of costs. *Landry* is distinguishable on the basis that the current case is one in which the appellant has been nothing but forthcoming and cooperative in attempting to

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[23] Contrast the fact scenario in *Landry*, where a CRA auditor's failure to examine an unknown number of anonymous third parties did not justify a finding that the CRA's audit process was flawed. Here, the CRA was offered the relevant documents directly, prior to the appeals.

[24] See, for example, *General Electric Capital Canada Inc.*, *note 18 supra*, at para. 24.

facilitate the dispute resolution process. It is the Minister alone who has undermined that process by failing to review documents or communicate effectively with the appellants, which resulted in a lengthy dispute that might have been resolved well before it reached this Court. Thus, it is appropriate in this case to award a lump sum amount of costs against the respondent. For these reasons, I award the appellants costs of $20,000 plus disbursements.

Signed at Ottawa, Canada, this 29th day of May 2013.

"Robert J. Hogan"

Hogan J.

CITATION:	2013 TCC 168
COURT FILE NOS.:	2011-940(IT)G, 2011-943(IT)G
STYLE OF CAUSE:	MYRDAN INVESTMENTS INC. v. HER MAJESTY THE QUEEN and DANIEL HALYK v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	October 11, 2012
REASONS FOR ORDER BY:	The Honourable Justice Robert J. Hogan
DATE OF JUDGMENT:	January 31, 2013
DATE OF AMENDED JUDGMENT:	February 13, 2013
DATE OF ORDER ON COSTS:	May 29, 2013

APPEARANCES:

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Counsel for the respondent:	Robert Neilson

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