Docket: 2007-4121(IT)G

BETWEEN:

DAISHOWA-MARUBENI INTERNATIONAL LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on July 17, 2013 at Vancouver, British Columbia

By: The Honourable Justice Campbell J. Miller

Appearances:

Counsel for the Appellant:	John H. Saunders
Counsel for the Respondent:	Matthew Turnell

ORDER

Upon application by the Appellant pursuant to Rule 147 of the *Tax Court of Canada Rules (General Procedure)* for increased costs beyond Tariff,

IT IS HEREBY ORDERED that the Appellant be awarded costs in a lump sum of $74,190.

Signed at Toronto, Ontario, this 5th day of September 2013.

"Campbell J. Miller"

C. Miller J.

Citation: 2013 TCC 275
Date: 20130905
Docket: 2007-4121(IT)G

BETWEEN:

DAISHOWA-MARUBENI INTERNATIONAL LTD.,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

C. Miller J.

[1] This is an application by the Appellant, Daishowa-Marubeni International Ltd. ("Daishowa") for an increased award of costs of $148,380, pursuant to Rule 147 of the *Tax Court of Canada Rules (General Procedure)* (the "*Rules*"). At the hearing of the application, I was also asked to decide whether the Applicant is out of time for bringing such an application, pursuant to Rule 147(7). If so, are there extenuating circumstances to extend the deadline to bring such a cost application? Having received subsequent written submissions, I then asked the Parties to address the impact of section 51 of the *Supreme Court Act*. I was subsequently advised that the Respondent was withdrawing its argument that the Appellant was out of time. Section 51 of the *Supreme Court Act* and its interpretation in the case of *Eli Lilly & Co. v. Novopharm*[1] suggest the 30 day time limit in Rule 147(7) runs from the judgment of the Supreme Court of Canada. In this case, Daishowa brought its application within 30 days of that judgment.

[1] [1999] 2 F.C. 175 (FCA).

[2] I turn therefore directly to the substantive issue in this application – the request for costs of $148,380, which represents one-third of the total of the fees, costs and taxes incurred by Daishowa at the Tax Court of Canada.

[3] Rules 147(1) and (3) read as follows:

> (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.
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> …
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> (3) In exercising its discretionary power pursuant to subsection (1) the Court may consider,
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> (*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,
> (*g*) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding,
> (*h*) the denial or the neglect or refusal of any party to admit anything that should have been admitted,
> (*i*) whether any stage in the proceedings was,
> (i) improper, vexatious, or unnecessary, or
> (ii) taken through negligence, mistake or excessive caution,
> (*j*) any other matter relevant to the question of costs.

Rule 147(3) sets out the factors the Court is to consider in awarding costs. The Appellant suggests there is a new approach at the Tax Court of Canada regarding costs. Mr. Saunders, for the Appellant, explained it in his written submissions as follows:

> 14. There have been significant recent developments in the case law interpreting rule 147. While it used to be thought that malfeasance was a requirement for elevated costs, the recent decisions of *General Electric Capital Canada*, *Velcro* and *Blackburn Radio* have made it clear that malfeasance is only required for an award of solicitor-client costs, elevated costs do not require exceptional circumstances (far from it), the starting point is rule 147 (not the Tariff) and that the tariff is insignificant in cost considerations. For example, Rossiter ACJ said I *Velcro*:

2. 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")* .

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.

6. 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

8. The Tariff annexed to the *Rules* is a reference point only should the Court wish to rely upon it.

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.

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

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. . . .

15. In April of this year, Woods, J. affirmed this in *Blackburn Radio*:

14. The work involved in tax litigation has increasingly become a factor in awarding costs. It is also being considered in intellectual property litigation: Consorzio del Prosciutto di Parma v. Maple Leaf Meats Inc., 2002 FCA 417 (Maple Leafs Meats),

15. The Crown submits that complexity should not be a factor and relies on the traditionally-accepted approach set out by Bowman J. (as he then was) in *Continental Bank of Canada v The Queen*, [1994] TCJ No. 863. The problem that the case law has evolved since *Continental Bank* was decided. The decision of the Federal Court of Appeal in *Maple Leaf Meats* is one example of this.

> 16. And in *Maple Leafs Meats* (cited with approval in *Velcro*) Rothstein J.A. and Nadon J.A., writing for the majority, said:
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> "9. Columns III of Tariff B is a default provision. It is only when he court does not make a specific order otherwise the costs will be assessed in accordance with calm III of Tariff B."

[4] A year before the Associate Chief Justice's comments in *Velcro*, I awarded costs in the case of *Peter Sommerer v Her Majesty the Queen*[2] and indicated that in my view the Court has moved away from the position of limiting costs beyond Tariff to situations of malfeasance or misconduct. As I indicated at that time, the appropriate course in the determination of costs beyond Tariff is to consider those relevant factors found in Rule 147(3) and reach a reasoned, balanced and just result.

[5] The Respondent recognizes this recent jurisprudence but argues that the law of costs is more accurately reflected in a recent decision of the Federal Court of Appeal, *The Queen v Canadian Imperial Bank of Commerce*,[3] confirming, in the Respondent's view, the basic tenet that there must be exceptional circumstances to justify costs beyond Tariff, and that actual costs far greater than Tariff is not such a circumstance. The Respondent also raises the caution raised by the Federal Court of Appeal that fluctuation in cost awards would jeopardize the degree of uniformity and foreseeability litigants are entitled to expect.

[6] With respect, litigants should not be entitled to expect uniformly low costs at the Tax Court of Canada, not appropriate when taking a principled, balanced view of the Rule 147(3) factors. It is clear the Tax Court of Canada has serious concerns about the inadequacy of its Tariff as evidenced from recent rule changes, as well as the recent jurisprudence. Consistency will follow from a principled approach of the enumerated factors, which I now turn to.

Result of proceedings

[7] Daishowa had partial success at the Tax Court of Canada but was wholly successful at the Supreme Court of Canada. The Respondent argues that the Supreme Court of Canada decision is not a proper consideration for me in exercising my discretion to award increased costs, as it somehow would encroach on the

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2 2011 TCC 212.

3 2013 FCA 179.

discretionary power of the Supreme Court of Canada. I awarded costs at trial based on Daishowa's partial success. I now have direction from the Supreme Court of Canada that Daishowa is entitled to costs at the Tax Court of Canada because of its full success. That is a significant factor in causing me to reconsider my earlier costs award, but I view it more as a gatekeeping factor than a significant reason itself for increased costs. In effect, if a litigant is wholly successful, rather than only partially successful, it flings the door wide open to a closer scrutiny of the factors to determine if increased costs are appropriate.

Amounts in issue

[8] The amount in issue of approximately $14,000,000 of proceeds seems a large number, but it must be contextualized. It was approximately six percent of the proceeds of the major transaction in issue; it resulted, due to the use of losses, in minimal tax in the years in issue; Daishowa is a multi-million dollar business. So, what is a significant amount in this regard – a small business facing a $100,000 tax bill that could bankrupt it, or a large multi-national organization, bringing a case based on principle, regardless of the numbers? I conclude the amount is not such a significant factor in this case to justify increased costs.

Importance of issue

[9] The Respondent claims that this was not a public policy matter but just the taxpayer's "perspective on his own litigation".[4] The Respondent maintains the case grew in importance as it went up the appellate hierarchy, and at the Supreme Court of Canada was limited to just two issues:

a) are the reforestation liabilities to be included in the proceeds of disposition because the vendor is relieved of a liability or are they integral to and run with the forest tenures?

b) does it make any difference that the Parties agreed to a specific amount of the future reforestation liability?

[10] This compares to the Tax Court of Canada where the issues were stated as follows:

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4 Para. 39 of the Respondent's Submissions.

a) whether in the 1999 and 2000 taxation years the Minister of National Revenue (the "Minister") properly included in Daishowa's proceeds of disposition the amounts of silviculture obligations assumed by the purchasers;

b) whether these additional assessed proceeds of disposition were properly allocated to timber resource properties; and

c) whether the Appellant is entitled to any deductions in respect of the assumed silviculture obligations.

[11] At the Supreme Court of Canada it was found that the reforestation obligation was not a separate existing debt but "embedded" in the asset, the forest tenure. The Respondent argued this was a finding particular to Daishowa and not a test case.

[12] Daishowa argues the granting of leave by the Supreme Court of Canada, having received representations from every major natural resource association in Canada, affirms the public importance of the matter. Further, the court granted leave to four British Columbia forestry companies, the Canadian Association of Petroleum Products Producers ("CAPP") and the Alberta Government. CAPP, in its reply to the memorandum that the Respondent filed opposing its intervention application, said:

> As a result of the lower court decisions in this case, the Canada Revenue Agency ("CRA") began reassessing taxpayers in the oil and gas industry in respect of reclamation obligations associated with oil and gas property in purchase and sale transactions. The amounts in issue in respect of such reclamation obligations exposed to reassessment easily aggregate to several billion dollars.

[13] The Respondent argues that CAPP's intervention arose as a result of a change in assessing position, resulting from the lower court's decisions; in other words, according to the Respondent, the broader importance of the case resulted after the lower court decisions. Conversely, this illustrates to me how important the lower decisions were.

[14] The Respondent also points out, with respect to the intervenors, that the interventions were because they disagreed with how Daishowa was characterizing the effect of Alberta and British Columbia law. Regardless, this still demonstrates to me an industry-wide interest in getting a favourable result.

[15] I agree with the Respondent that the importance of this case does appear to have grown since the Tax Court of Canada decision, but it is the same case and the fundamental issue remained the same. Clearly, not only the forestry industry, but resource industries generally, had a keen interest in the final outcome of this case. The Supreme Court of Canada introduced a novel concept of "embedded" and also had some significant comments on the asymmetrical treatment of taxpayers under the *Income Tax Act* (the "*Act*"). These findings will have ramifications well beyond the specific case of Daishowa.

[16] The Respondent seems to be mixing the importance of the case with the importance of specific issues argued at different court levels. The Supreme Court of Canada did not make an unimportant case important: it confirmed the importance of the issues, the primary one being whether the reforestation liabilities are to be included in proceeds of disposition. That is an issue of concern to both a vendor and a purchaser. The fact that different arguments were raised at the Supreme Court of Canada and by different parties – intervenors – does not render that issue any more or less important to taxpayers and tax jurisprudence generally.

[17] I conclude the issue was of such importance to justify an increased award. Why did I not consider that at the time I issued my judgment at trial – the trite answer is that I was not asked as there was only partial success. It cannot be presumed that because I did not unilaterally award costs above Tariff that I addressed all the Rule 147(3) factors and found increased costs were not justified.

Offer of settlement

[18] There was no offer of settlement. It is clear from recent rule changes that the Tax Court of Canada considers settlement offers a very significant factor, if not the most significant factor, in the determination of costs.

Volume of work

[19] The Appellant's counsel advised that "voluminous" case law, including U.S. case law was necessary to "delineate the fundamental principles governing proceeds inclusions, deductibility of expenses and distinguishing payments on account of income versus payments on account of capital; all in an attempt to come up with cases which were relevant by an analogy".[5]

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[5] Para. 31 Appellant's Written Argument.

[20] With respect, my recollection was that the Appellant put emphasis on a handful of cases. Any research with respect to the "embedded" concept would have been subsequent to the Tax Court of Canada hearing.

[21] There were only two witnesses, the evidence lasting less than a couple hours, as most of it was entered through an Agreed Statement of Facts. I accept the Appellant's categorization that considerable time was spent negotiating the Agreed Statement of Facts, and that it was difficult and contentious, but ultimately saved considerable court time.

[22] The Appellant indicated Alberta counsels' opinion in forestry law was sought and that multiple conferences with counsel for the Alberta Government were necessary to determine the justification of Alberta's administrative policy with respect to reforestation obligations. I recognize there is a fine and difficult line between work necessary to mount a case, additional work required due to the particular circumstances of the case (that might justify increased costs) and work arising from enthusiasm that leaves no stone unturned. As I indicated in *Sommerer*, it is always difficult to assess one firm's efforts compared to another's or any normative standard, if there is such a thing. How much should a losing party cover the winning party's diligence? Surely, there comes a point when one side cannot expect the other to cover all the legal costs in extensive research and preparation. In this case, along the continuum of volume of work, I accept some additional work was necessary that justify increased costs.

[23] I am prepared to give this factor some weight though not considerable as, unlike *Sommerer* for example, there was no need for translation of documents, foreign experts, consideration of foreign laws, nor a huge document review.

Complexity of issues

[24] The fundamental issue at the Tax Court of Canada was not complex in its formulation, but the resolution required a Cirque du Soleilian acrobatic twisting and turning to grapple it to the ground. I did not have the benefit of any argument with respect to an "embedded" liability that might have simplified the analysis.

[25] Complexity also arose in the nature of the secondary issue, which I described as somewhat circuitous. This tied in to the concern with respect to asymmetry; again, not a particularly complex concept to understand but certainly a concerning one and tricky to resolve.

[26] On balance, I am prepared to give some weight to this factor, but like the volume of work, not a great deal. Again, I find this is not in the same league as the cases of *General Electric* and *Sommerer*, where the issues were many, interconnected and indeed complex.

Conduct of the Respondent and refusal to admit

[27] The Appellant expresses considerable concern that the Respondent characterized the estimate attributed to the reforestation obligation as a valuation, and would not acknowledge that they were not present valued. This necessitated the Appellant calling Mr. Lucknow, from Alberta, to testify in that regard. I do not share the depth of the Appellant's concern, though agree Mr. Lucknow's testimony was probably unnecessary.

[28] The first issue I had to address at trial was whether the reforestation obligations form part of the consideration – the issue ultimately answered in the negative by the Supreme Court of Canada. Once I decided the obligation was part of the consideration, then I had to address its value. The Respondent maintained the Parties had agreed the value was the estimate. I disagreed, but I found nothing egregious in the Respondent's approach, nor, apart from the Appellant finding it necessary to call Mr. Lucknow, anything that effectively lengthened the proceeding.

[29] The Appellant suggests that the Respondent's position left me in an untenable position; that is, having to determine fair market value of the reforestation obligations without any valuation evidence. Making a judge's difficult job more difficult is not uncommon. Even if I agreed that that was the effect of the Respondent's position, I do not view it as a significant factor, certainly not an enumerated factor in Rule 147(7), that, in this case, justifies an increased cost award.

[30] The Appellant also complains that considerable unnecessary work was undertaken in exploring with the Respondent the nature of the reforestation obligations. The Appellant points out this was less a facts-based case than a case determining important legal principles. While I agree with that characterization, I also appreciate that getting a full understanding of the obligations at the core of the issue would be seen by the Respondent as important.

[31] In summary on this factor, the Respondent might have been more forthcoming and perhaps conciliatory on how it would deal with the fair market value issue, but that was a strategy clearly taken by the Respondent, a strategy that ultimately worked against it in my judgment. I do not believe this is a factor that goes to costs.

Quantum

[32] The Appellant argues that a reasonable entitlement to costs would be one-third of the costs actually incurred. It points to *Blackburn Radio Inc. v Her Majesty the Queen*[6] and *Consorzio del Prosciutto di Parma v Maple Leafs Meats Inc.*[7] as cases where awards were in the 30% range. Yet, every case is going to be different; factors will be weighted differently. The consistency in costs awards should be in the principled approach, not in some formulaic percentage award.

[33] I conclude that in this case the Tariff is inadequate, but not by as much as the Appellant might suggest. My review of the factors does not leave me with an overriding sense that significant costs were justified. I weigh no settlement and no untoward conduct versus some complexity, some volume and the importance of the

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6 2013 TCC 98.

7 2002 FCA 417.

issue and determine that one-half of what the Appellant seeks is an appropriate award. I therefore award the Appellant costs of $74,190.

Signed at Toronto, Ontario, this 5th day of September 2013.

"Campbell J. Miller"

C. Miller J.

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APPEARANCES:

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