Citation: 2015 TCC 138
Date: 20150605
Dockets: 2012-1431(IT)G
2013-203(IT)G

BETWEEN:

THE STANDARD LIFE ASSURANCE
COMPANY OF CANADA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS RESPECTING SUBMISSIONS ON COSTS

Pizzitelli J.

[1] The Respondent has made a request for an increased cost award following complete success, with costs, on the merits at trial. The Respondent requests a total cost award of $529,163, consisting of $491,345.61 in fees and $37,818 in disbursements, be awarded against the Appellant based on 80 percent of the Respondent's solicitor and client costs from January 27, 2014 being the date of its offer of settlement and 50 percent of its solicitor and client costs before that date, plus all reasonable disbursements throughout.

[2] Judgment was rendered on April 20, 2015 (the "Judgment") following 4 full days of trial in October 2014, written argument by both parties and two days of oral argument at the end of March, 2015, which found entirely in the Respondent's favour on all issues before me and costs were awarded to the Respondent with a proviso that if any party was not satisfied with such decision on costs, they could make written submissions to me on costs within 30 days of my decision for my reconsideration. The Court received submissions from both, with the Appellant suggesting costs of $125,000 including a maximum of $25,000 for disbursements if I determine a lump sum is in order.

[3] The Appellant has requested, in its covering letter enclosing its cost submissions to the Court, that since it has appealed my decision, the issue of costs

be held in abeyance and that this Court defer its consideration of the submissions pending disposition of the appeal. I do not agree. The Appellant may appeal my decision on costs if it so chooses and thus allow the Court of Appeal to deal with both issues on appeal at the same time, rather than entertain two appeals at different times, while the same relevant facts and issues that affect both are before it.

[4] There is no dispute that Rule 147(1) of the *Tax Court of Canada Rules (General Procedure)* grants the Court discretion to determine the amount of costs, their allocation and the persons required to pay them. There is also no dispute that Rule 147(3) sets out the factors the Court may consider in exercising the aforesaid discretion and Rule 147(4) allows the Court to fix costs with or without reference to the tariff and in a lump sum. Rule 147(3) reads as follows:

> **147.** (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,
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> (c) the importance of the issues,
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> (d) any offer of settlement made in writing,
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> (e) the volume of work,
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> (f) the complexity of the issues,
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> (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,
>
> (i.1) whether the expense required to have an expert witness give evidence was justified given

(i) the nature of the proceeding, its public significance and any need to clarify the law,

(ii) the number, complexity or technical nature of the issues in dispute, or

(iii) the amount in dispute; and

(j) any other matter relevant to the question of costs.

[5] While I intend to review the factors in more detail shortly, I will first deal with the issue of the settlement offer. While Rule 147(3) provides that the Court may consider a written offer of settlement in exercising its general discretion as to costs, a fairly new Rule 147(3.2) grants a successful respondent substantial indemnity costs after the date of its offer to settle, defined in Rule 147(3.5) to mean "80% of solicitor and client costs", if the appellant obtains a judgment as favourable as or less favourable than the terms of the offer of settlement and Rule 147(3.4) places the burden on the respondent to prove there is a relationship between the terms of the offer and judgment and that the judgment is as favourable as or less favourable than the terms of the offer to settle. Rules 147(3.2) to (3.5) read as follows:

147. (3.2) Unless otherwise ordered by the Court, if a respondent makes an offer of settlement and the appellant obtains a judgment as favourable as or less favourable than the terms of the offer of settlement or fails to obtain judgment, the respondent is entitled to party and party costs to the date of service of the offer and substantial indemnity costs after that date, as determined by the Court, plus reasonable disbursements and applicable taxes.

(3.3) Subsections (3.1) and (3.2) do not apply unless the offer of settlement

(a) is in writing;

(b) is served no earlier than 30 days after the close of pleadings and at least 90 days before the commencement of the hearing;

(c) is not withdrawn; and

(d) does not expire earlier than 30 days before the commencement of the hearing.

(3.4) A party who is relying on subsection (3.1) or (3.2) has the burden of proving that

(a) there is a relationship between the terms of the offer of settlement and the judgment; and

(b) the judgment is as favourable as or more favourable than the terms of the offer of settlement, or as favourable or less favourable, as the case may be.

(3.5) For the purposes of this section, "substantial indemnity costs" means 80% of solicitor and client costs.

[6] It should be noted that there was no dispute as to the applicability of the requirements of the settlement offer to be in writing and served and not withdrawn, nor that it did not expire earlier than 30 days before the commencement of the hearing, pursuant to Rule 147(3.3) above, so it is not necessary for me to deal with same.

[7] The Respondent's settlement offer of January 27, 2014 contained the following:

a) The Standard Life of Canada, Bermuda branch, was not carrying on an insurance business in Bermuda in 2006;
b) The Standard Life of Canada, Bermuda branch, was carrying on an insurance business in Bermuda in 2007;
c) Subsection 138(11.3) first applies to Standard Life of Canada's 2008 year; that is 2008 is the first year that Standard Life of Canada had designated property in the preceding taxation year; and
d) Each party shall bear their own costs.

[8] The issues at trial were directly and my decisions were directly related to the terms of the settlement offer above. The Appellant had sought to obtain a decision that provided it was carrying on business in Bermuda via its Bermuda branch, SLAC, in both 2006 and 2007 and that subsection 138(11.3) of the *Income Tax Act* (the "*Act*") first applied to its 2006 year, effectively arguing it did not have to carry on business in Bermuda in 2005 as a precondition to the applicability of that provision in 2006.

[9] The Judgment clearly found that the Appellant was not carrying on business in Bermuda in either of 2006 nor 2007 and that in effect the earliest the Appellant would be able to avail itself of the provisions of subsection 138(11.3) was in 2009. The settlement offer granted the Appellant the relief it sought to confirm it was carrying on business in Bermuda in 2007. Accordingly it is abundantly clear to me that the Appellant has proven, by the results, that the Judgment was less favourable than the terms of the settlement to offer.

[10] The Appellant argues in its submissions on costs that the offer to settle contains no element of compromise and is effectively a demand that the other party abandon the appeal and that an offer not to seek costs is not sufficient to constitute a "compromise" under the jurisprudence, relying on *Mckenzie v The Queen*, 2012 TCC 329, 2012 DTC 1291, a decision of Boyle J. of this Court, to conclude the offer of the respondent would not attract the consequences of Rule 147(3.2) or 147(3)(d) above.

[11] Unlike in *Mckenzie* above, the settlement offer in question does not just contemplate that only costs would be waived. The Respondent's settlement offer contemplated allowing the Appellant to participate in the subsection 138(11.3) regime fully one taxation year earlier than my decision allows it to do at the earliest by agreeing the Appellant was carrying on business in 2007, the latter as argued by the Appellant. This alone takes the settlement offer beyond a cost waiver only type of offer.

[12] The Appellant suggests that this is not enough, that it does not otherwise affect the reassessment for the 2006 and 2007 taxation years and so it is not a compromise. I do not agree. In my view, the evidence of the Appellant was that it continued to operate in Bermuda and still does, accordingly, having regard to the substantially large tax savings it would have achieved over the next 5 years had it been successful in this appeal, somewhere between $200,000,000 to $250,000,000 by the admission of its own witness, accessing the regime as a multi-national one year earlier had the possibility of generating a clear benefit to the Appellant, one largely within its control to decide whether and to what extent it wished to utilize it. I am quite satisfied from the evidence in the trial that the ability to access the application of the multi-national regime contemplated by subsection 138(11.3) of the *Act* during that 5 year period contemplated to produce the tax savings by the Appellant itself, is proof enough that the offer was more generous than my decision on this matter. The mere fact the settlement offer conceded it was carrying in business in Bermuda in 2007 is enough in and of itself.

[13] In any event, based on the clear wording of Rule 147(3.2), the Respondent needs only establish that the Judgment was as favourable as the terms of the settlement offer to succeed. It won completely on all the issues before the Court, so clearly a Judgment acknowledging same *prima facie* meets that threshold test.

[14] Moreover, I have some concerns as to the Appellant's reliance on the broad principle enunciated in *Mckenzie*. Justice Boyle made it clear that his decision was based on the circumstances of that case. In paragraph 14 thereof, he stated:

> In the circumstances of this case, even had the application for increased costs been timely, the settlement offer relied upon does not constitute the type of settlement offer warranting consideration for the purposes of Rule 147(3)…nor, in my view, should it for the purposes of proposed Rule 147(3.1) if enacted as worded.

[15] In paragraph 15, Boyle J. commented that "the only basis for the appellant's request for increased costs set out in the Notice of Motion is the settlement offer." He went on to comment that "…I would not think that, in the overall circumstances of this case, costs beyond tariff are warranted after considering the relevant factors enumerated in Rule 147(3)" and discussed how in that trial no material facts were in issue, the evidence was straightforward, the respondent did not call any witnesses and the issue was not particularly complex.

[16] When considering the relevant factors in Rule 147(3), I am strongly of the view that the circumstances of this case support a basis for increased costs in favour of the Respondent and refer to the relevant factors by their paragraph in the Rule below:

(a) The Respondent was 100 percent successful on all the issues in dispute, including the issue of who bore the burden of establishing whether the Appellant carried on business in Bermuda, having regard to the Appellant's position that the Respondent did not assume it did not carry on business, which I disagreed with, as well as the issues of interpretation of subsection 138(1), which the Appellant suggested automatically meant the Appellant was carrying on business in Bermuda and which I also disagreed on.

(b) The amounts in issue were in my opinion extremely large. The Appellant sought to bump up the cost base of certain of its assets by over $1.16 billion dollars, save over $12 million in taxes for 2006 and save over $200-250 million over a 5 year period.

(c) The Appellant suggested the importance of the issues was limited to the taxpayer and is of interest only to the small community of life insurers. This is quite a bald assertion in my view and no evidence was presented to back it up. I would think it is common knowledge that life insurers in the country are generally large corporations, many of them multi-national, that are major players in our country's financial, investment and insurance industries and the interpretation of provisions that deal with both the reserves they carry, as well as their contribution to the country's tax base,

are in my view of interest to the general public as well, not to mention the Respondent. I would also think the development of jurisprudence on whether one "carries on business" is of wide import.

From a legal perspective, this appears to be the first decision to interpret and apply subsection 138(11.3) in its modern context, as well as one of the few cases dealing with the essential elements test in determining whether a party carried on business, particularly in another jurisdiction as a branch, so it has potential for precedential value. In this regard, I fail to see how it substantially differs from the importance of the transfer pricing issues in *General Electric Capital Canada Inc. v The Queen*, 2010 TCC 490, 2010 DTC 1353, decided by Hogan J. that too would affect the small community of multinational corporations relative to the larger community of taxpayers, but which as stated by the Appellant in its submissions on costs at paragraph 19 as being of "...widespread interest to the tax and business communities in Canada".

(d) I have already discussed the offer of settlement of the Respondent and my view is that it meets the threshold of consideration for substantial indemnity. However, in the context of this factor alone, and in the circumstances of this case, I must say that the settlement offer was frankly as reasonable and principled as the Respondent could make in these circumstances. The Respondent clearly evaluated the strength of its case relative to that of the Appellant and made a settlement offer that went beyond mere cost waiving, both on an issue of timing of the application of the provision that could benefit the Appellant in the future as well as conceding the factual requirement agreed by the Appellant that it carried on business in Bermuda in 2007. The evidence demonstrated to me that the Respondent took great pains to investigate and evaluate the strength of its position, both in follow-up on discovery and in the number of witnesses it subpoenaed and called.

While I take note of the criteria for evaluating settlement offers where only costs are waived and the concerns on the settlement process such approach may have, having regard to Boyle J's comments in *Mckenzie*, I also take note of the need to evaluate the merits of a settlement offer in the context of the circumstances of each case, including the relative merits of the parties' arguments and their reasonableness in the circumstances. I am satisfied in this case, the Respondent was being reasonable in its offer to settle the question.

Frankly, there may well be circumstances where a waiver of costs and the threat of seeking greater costs alone would be reasonable as well, so caution must be applied in suggesting Mckenzie and the cases referred to therein pre-empt any such possibility. Clearly, in cases where a respondent has a reasonable basis to rely on assumptions involving fraud, sham, window dressing or other serious conduct of an appellant, a settlement offer involving a waiver of costs may seem extremely principled and appropriate. In the case at hand the Respondent assumed window dressing.

(e) With respect to the volume of work, there were clearly multiple issues involved in this appeal, including at least two interpretive law issues dealing with the interpretation of subsection 138(1) and 138(11.3), which imported the interpretation of other provisions in section 138. In addition the issues of whether the Appellant carried on business in Bermuda in different years, coupled with reference to Bermuda laws added to the volume of work involved in this appeal. Although there were only 4 days of actual trial, the volume of evidence was large and frankly included review of multiple detailed documents evidencing the Appellant's business plans and resolutions, and the written arguments were lengthy and detailed. Moreover, I found that the Respondent was required to call more witnesses and fill in the factual blanks the Appellant itself failed to do, including dealing with the duties of the Appellant's first manager in Bermuda whom the Appellant failed to call as a witness yet relied on her activities as a basis for argument in support of it carrying on business.

In my opinion from all the evidence at trial, the Respondent's volume of work on this file was far disproportionate to that of the Appellant, which seemed to take a minimalist view to the presentation of its evidence and expect the Court to fill in the blanks, consistent with its wrongly held position that the onus of establishing the Appellant did not carry on business in Bermuda was on the Respondent.

(f) The complexity of the issues factor supports the Respondent's award for greater costs. The Appellant takes the position that this case was not as complicated as *General Electric* above which Hogan J. noted "raised numerous and extremely complex issues". I find it incredulous that the same Appellant who in opening argument classified the special rules pertaining to multinational insurers as extremely complex, now rates their complexity only in comparison to the complex but completely different issues of transfer pricing provisions. I am of the view that the complexity and detail of the provisions found in section 138: Insurance Corporations, in Division F of

Part I of the *Act* titled "Special Rules Applicable in Certain Circumstances" are frankly on their face and in practice as complex or more complex than the section 247 provisions. The fact it did not serve as a lead case as did *General Electric* does not define its complexity nor necessarily its importance. This case involved complex issues of interpretation as well as detailed facts pertaining to them, including textual and contextual and purposive analysis, all required due to the Appellant's positions.

(g) The conduct of the parties that tended to shorten or lengthen unnecessarily the duration of the proceeding is a factor with mixed results. I agree with the Appellant that the parties worked to agree on a Joint Book of Documents and an Agreed Statement of Facts and presented written arguments in addition to the oral arguments which in my opinion streamlined the presentation of the case.

It should be noted that the greatest dispute as to the facts between the parties dealt with those applicable to determining whether or not the Appellant was carrying on a branch business in Bermuda in those years and almost the entire trial was dedicated to the presentation of evidence relevant to that issue, so while the Agreed Statement of Facts was of assistance, particularly with respect to background and ancillary facts, it was of limited assistance in determining those significant issues.

While I certainly agree the trial itself was conducted in an efficient and professional manner by both sides, I cannot ignore that my decision found that the Appellant's actions led me to conclude that it was engaged in window dressing to enable it to argue it met the factual criteria of the judicial tests for carrying on business when it did not; to give the illusion of doing so as the Respondent pleaded and argued. While this type of conduct is different than the type of conduct referenced in *Merchant v The Queen*, [1998] TCJ No. 278, 98 DTC 1734, relied upon by the Appellant, which awarded solicitor and client costs where the Appellant therein did "everything possible to obstruct the Crown from putting its case forward in an orderly way", the conduct of the Appellant in acting in such a manner as to create the illusion it did, which it relied upon to make and further its appeal, is nonetheless conduct that is, in my view, reprehensible and should be discouraged. In the case at hand of course, the Respondent is only seeking a percentage of solicitor and client costs, a position that I feel is quite reasonable on its part having regard to such conduct.

(h) The Respondent argues that the Appellant's witness denied the tax motivation of the Appellant was the sole reason for its foray into Bermuda on examination for discovery while effectively admitting on cross-examination it was the only reason in his view, should be a factor to consider. Frankly, while I effectively agreed with that sole reason in my decision, I would not be prepared to find the witness actually denied this motivation in discovery nor refused or neglected to state such. On effective cross-examination the Respondent was able to obtain such admission, but it was qualified that it was his opinion as a director of taxation, not necessarily that of the Appellant, so the weight to be given to such evidence was clearly mine to decide.

(i) This factor is not applicable as it was not argued that any stage of the actual proceeding was improper in any way.

(i.1) As this factor reads it is not applicable as no expert witness gave evidence, however the Respondent has sought expert fees for hiring an insurance industry actuarial expert to assist it in understanding and exploring various issues relating to the insurance business which I will deal with as another matter below.

(j) The Appellant has raised a few other matters relevant to the question of costs. Firstly, it argues that the Respondent should not be given credit for expert fees of $16,622.79 as no expert witness was called by the Respondent to testify at trial thus evidencing the Respondent did not need assistance in understanding the various issues of reinsurance, longevity and mortality risk and other industry specific issues. While I agree no expert witness was called to testify nor prepared a report for the Court and so the Respondent should not be given expert fees pursuant to the factor listed in (i.1) above, that does not preclude reasonable expenses where the Court may find them warranted. In this case, the provisions under section 138: Insurance Corporations are special rules that I have determined are complex and a great deal of the Appellant's evidence was spent explaining the concepts of mortality and longevity risk and their contradictory actuarial effects. These concepts were referred to in the Appellant's pleadings as well. Having regard to the complexity of the provisions, their applicability to a specialized industry and the Appellant's reliance on the various actuarial concepts, it seems entirely reasonable that the Respondent should seek expert assistance to understand them so it could properly conduct its case in a more efficient manner. While I appreciate there was no breakdown in the expert fees, the fact fees were only $16,622.79 in relation to the cost base bump up of over

$1.16 billion sought by the Appellant that would have saved it between $200-250 million hardly seems unreasonable. The Respondent is entitled to those fees.

The Appellant also objects to the hourly rate charged by the Respondent for its junior lawyer, one Mr. S.O. at $219.60 per hour as well as the necessity of him travelling to Montreal with the Respondent's two main counsel after January 27, 2014 to meet with witnesses. The Appellant also suggests he did not lead evidence or make any submissions at trial and was not even present for the second day of oral argument and hence his time spent on the file was unnecessary duplication and charged at an excessive rate, which the Appellant says should be closer to $140 per hour.

In reviewing the Respondent's Bill of Costs, it seems evident that Mr. S.O. was heavily involved in the discovery and trial preparation and in fact dedicated more time than his two more senior counsel in preparation of the written submissions. It appears the Respondent utilized his talent and lower rate extensively which clearly reduced overall costs of the Respondent, something that is commendable and that should be encouraged. Having regard to his extensive participation prior to the trial at all stages, including discovery, I do not find it unreasonable that he attended with co-counsel to meet with witnesses in Montreal nor that he was present at trial to assist co-counsel notwithstanding that he did not present to the Court. I note the Appellant had a higher number of counsel present at trial itself. The fact Mr. S.O. appears to have been the major contributor to the preparation of written submissions suggests to me that the Respondent was being as efficient and cost effective as possible in the circumstances. As I indicated, all steps a party takes to reduce costs should be applauded and so I am not prepared to reduce credit for Mr. S.O.'s hours spent on this matter, other than to cut his trial attendance time by one-half to 20 hours as he did not present but was there to be available for assistance only to his co-counsel.

I do agree that junior counsel's fees should be lower. His hourly rate was about two-thirds that of his more senior counsel, about $220 per hour and in keeping with the rate for junior counsel expressed in *General Electric*, I would reduce his hourly rate to $140 per hour, a roughly 35 percent decrease. The Respondent made no submissions to justify a higher rate so I am awarding the lower rate above.

The total hours of Mr. S.0. claimed by the Respondent were 649.5 hours which should be reduced to 629.5. At a reduced rate of $140 per hour the

> Respondent may claim a total of $88,130 instead of the $142,630.20. Accordingly the Respondent's fees are reduced by $54,500.20.

[17] On the whole, having regard to the factors set out in Rule 147(3) I find that the Respondent has justified its request for increased costs beyond the initial tariff costs awarded in my Judgment. The Respondent was 100 percent successful in a matter involving extremely large sums of taxes in issue that dealt with very complex multiple issues requiring a large volume of work for the parties, particularly the Respondent, in circumstances where the Appellant's personal conduct was found to have been for the purpose of creating window dressing to give the illusion it conducted business in Bermuda for the purposes of obtaining what its own counsel described as a wind-fall tax benefit; to which it claimed it was nonetheless entitled based on its unsuccessful interpretation of the law. In my opinion the circumstances of this case justifies the level of costs requested by the Respondent. Frankly, the Respondent has only sought 50 percent of its costs prior to the date of settlement, a very generous and reasonable position in my view having regard to the circumstances of this case which I am convinced would have merited more. Needless to say, the circumstances clearly support the Respondent's request for 80 percent of costs on a solicitor and its own client basis, for which the Respondent relies on Rule 147(3.2) to obtain, but which I believe it would have been entitled to nevertheless.

[18] Finally, I wish to address the Appellant's suggestion that notwithstanding the Court's discretion to award costs beyond the tariff, cost awards under Rule 147(3) are not intended to compensate litigants for their actual litigation costs, even in complex cases and even with complete success. The Appellant relied on *Velcro Canada Inc. v The Queen*, 2012 TCC 57, 2012 DTC 1100 at paragraphs 9 and 29, *Continental Bank of Canada v The Queen*, [1994] TCJ No. 863 at paragraph 9 and *Jolly Farmer Products Inc. v The Queen*, 2008 TCC 693, 2009 DTC 1040 at paragraph 8. While all of these cases deal with requests to depart from tariff and the requirement of special circumstances to do so, all of these cases predate the amendment to *the General Procedure Rules* in 2014 that created Rules 147(3.1) to 147(3.5) dealing with awards on a substantial indemnity basis with respect to settlement offers.

[19] Bowman J. made reference to the statement relied upon by the appellant in *Continental Bank of Canada* above, also referenced in *Jolly Farmer* at paragraph 8, that "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." However, he went on to say in the same paragraph that "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.". It is equally clear to me that the drafters of the Rules were aware that the new Rules involving substantial indemnity costs would result in compensating litigants for 80 percent of their costs after the settlement offer date in issue where such Rules applied and they do.

[20] I find those Rules, in particular 147(3.2) to apply here to as to give the Respondent 80 percent of its solicitor and client fees after the date of its settlement offer of January 27, 2014, subject to the reduction above.

[21] Moreover, as Hogan J. found in *General Electric*, the Rules Committee was also aware of the fact that numerous factors set out in Rule 147(3) can also warrant moving away from the tariff. As I referred to above, granting the Respondent 50 percent of its solicitor and client costs for the pre-settlement offer time period is also justified in the circumstances under Rule 147(3) and further support granting the Respondent 80 percent after the settlement offer date.

[22] Accordingly, I exercise my discretion to depart from the tariff and apply the new Rules pertaining to settlement offers so as to award a lump sum in costs to the Respondent equal to $474,663 in total, being the $529,163 claimed less the deduction of $54,500 regarding junior solicitor fees.

Signed at Ottawa, Canada, this 5th day of June 2015.

"F.J. Pizzitelli"

Pizzitelli J.

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APPEARANCES:

Counsel for the Appellant:	Hemant Tilak Pooja Samtani Al Meghji Alexander Cobb Victoria Creighton
Counsel for the Respondent:	Naomi Goldstein Stephen Oakey Jenna Clark
For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada