Docket: 2003-3021(IT)G

BETWEEN:

AXA CANADA INC.,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Application presented on written representations.

Before: The Honourable Justice Louise Lamarre Proulx

Appearances:

Counsel for the Applicant: Dominic C. Belley
Counsel for the Respondent: Richard Gobeil

ORDER

Given the motion by the applicant to obtain an order under section 147 of the *Tax Court of Canada Rules (General Procedure)* (the "Rules"), setting part of the costs without reference to Schedule II, Tariff B, in addition to taxed costs;

Given the request by the applicant for the Court to make an order on this motion upon consideration of written representations without appearance by the parties, under section 69 of the Rules;

And given the written representations of the two parties;

The motion is granted in part, without costs, in accordance with the attached Reasons for Order.

Signed at Ottawa, Canada, this 14th day of June 2006.

"Louise Lamarre Proulx"

Lamarre Proulx J.

Translation certified true
on this 12th day of July 2007.

Elizabeth Tan, Translator

Citation: 2006TCC334
Date: 20060614
Docket: 2003-3021(IT)G

BETWEEN:

AXA CANADA INC.,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR ORDER

Lamarre Proulx J.

[1] This is a motion to be disposed of upon consideration of written representations without appearance by the parties, under section 69 of the *Tax Court of Canada Rules (General Procedure)* (the "Rules").

[2] This motion is to obtain an order, under section 147 of the Rules to:

(1) set part of the costs without reference to Schedule II, Tariff B, in addition to taxed costs;

(2) give instructions to the taxing officer:

(a) to grant increases over the amounts specified at Schedule II, Tariff B;

(b) to consider the services rendered or disbursements incurred that are not included in Schedule II, Tariff B; and

(c) to permit the taxing officer to consider factors other than those specified in section 154 when taxing disbursements.

[3] The costs and claims are described as follows at paragraphs 15 to 18 of the Appellant's written representations:

> [TRANSLATION]
>
> 15. The Appellant's bill of costs, prepared in accordance with Schedule II, Tariff B, allows the Appellant to claim expenses for a maximum of $55,938.
>
> 16. In preparation for this case, since the Notice of Appeal, the Appellant has incurred legal fees of $187,216 in addition to the costs indicated in its bill of costs.
>
> 17. Almost all of the costs incurred by the Appellant were caused by the Respondent's refusal to consider its arguments while also being unable to refute the Appellant's evidence at the hearing.
>
> 18. In its bill of costs, the Appellant claimed, *inter alia*, (i) all the costs incurred in preparing this appeal, including travel and expert fees; (ii) costs for the services of a second counsel during the hearing; and (iii) $50,000 in addition to the taxed costs.

[4] According to the Respondent's reply, and the Appellant's response, the amounts in question are the total of $50,000, costs for bailiffs, couriers, photocopies, etc. for $6,984.80, fees for a trip to Paris for counsel for the Appellant for $3,307.78, fees for the expert report for $18,600 and costs for the Paris/Montreal/Paris trip for the witness Patrick Werner for $13,745.42.

[5] The Appellant claims that it incurred fees for an amount significantly higher than those covered in Schedule II, Tariff B, for the most part due to the Respondent's action or lack thereof.

[6] The Respondent's reply to this was that counsel's professional conduct does not lead to an award of costs higher than the tariff.

[7] In response, the Appellant states that it was not the professional conduct of counsel for the Respondent that is at issue because it was not a solicitor-client claim but one based on the Court exercising its discretion in awarding costs as set out at section 147 of the Rules.

[8] The Appellant notes that the Respondent did not produce any witnesses, and cross-examined only one witness, Alain Lessard, an actuary who works for the Appellant.

[9] The Respondent replies that counsel for the Respondent chose to not present any witnesses, was not required to do so, and was also not required to cross-examine the Appellant's witnesses.

[10] The Respondent refers to a decision by Lamarre J. of this Court, in *Miller v. Canada*, [2002] T.C.J. No. 571 (QL), at paragraph 5:

> ... The fact that the respondent did not file a list of documents or that the auditor from the Canada Customs and Revenue Agency was not called to testify by the respondent was more detrimental to the respondent's case than to the applicant's. Indeed, those factors worked to the latter's advantage given the result of her appeals.

[11] The Respondent also refers to a decision by Bowman J. of this Court in *Continental Bank of Canada v. R.,* [1994] T.C.J. No. 863 (QL) and states that many of the cases this Court is faced with are complex cases, and there is no reason to grant higher costs than those set out in the tariff based solely on this reason. Counsel for the Respondent relies on the following passage:

> [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.

[12] As for the costs for the bailiff, mail, photocopies and others, the Respondent proposes paying for half.

[13] As for the trip to Paris by counsel for the Appellant, the Respondent cannot understand the principle under which she should pay the travel fees for counsel of the opposing party, who went to meet a potential witness. The Appellant replied that Mr. Werner's testimony was essential for understanding the events and that the fees incurred were reasonable. As for the applicable principle, section 2 of Tariff B

specifically states that costs that are essential to the conduct of the proceedings are admissible.

[14] As for the expert report, the Respondent accepts that a reasonable amount should be paid to the Appellant for expert's fees and would like a detailed invoice of the type of work carried out by the expert witness, the number of hours worked, and the hourly rate.

[15] Regarding the expenses for the Paris/Montréal/Paris trip taken by Patrick Werner, the Respondent offers to pay $1,414.72 for the plane ticket and $87.12 for meals, in accordance with the Treasury Board of Canada's Travel Directive.

Analysis and conclusion

[16] On January 11, 2006, I rendered a judgment allowing the Appellant's appeal in whole, finding that there had been no shareholder benefit.

[17] In the Reply to the Notice of Appeal, the Respondent states that she has no knowledge of and does not admit the facts alleged at paragraphs 11 and 15 of the Notice of Appeal, which state:

> [TRANSLATION]
> 11. During the period following the signing of the agreements described at paragraph 6, Abeille-Ré suffered significant losses due to these agreements of over $60 million at the end of 1993.
>
> ...
>
> 15. The economic losses suffered by Abeille-Ré regarding the two agreements described at paragraph 6 have greatly surpassed $60 million today.

[18] Paragraph 6 of the Notice of Appeal describes what was referred to as bailout agreements during the hearing and in the Reasons for Judgment:

> [TRANSLATION]
> 6. In 1990 and 1991, in an attempt to save the company operated by Boréal, Abeille-Ré, a French non-resident corporation with control over Victoire Canada made the following agreements with Boréal:
>
> a. on December 31, 1990, a "proportionate ownership stop loss" reinsurance agreement that included a "proportionate ownership" agreement for the Canadian operations (except for presumed

Canadian reinsurance) and a "stop loss" agreement" for the international reinsurance operations (hereinafter, the "POSL" agreement);

b. on December 19, 1991, a transfer by Boréal to Abeille-Ré of its international reinsurance portfolio for a $32.3M payment by Boréal to Abeille-Ré.

[19] For the purposes of analyzing this request for additional costs, I find it appropriate to add the following paragraph by Bowman J. in *Continental Bank* cited above by the Respondent:

> 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.

[20] Normally, even in a complex case, the tariff is respected unless there are exceptional circumstances. Could the Respondent's inaction be considered such an exceptional circumstance?

[21] In terms of burden of proof, I refer to L'Heureux-Dubé J. in *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336 at page 378 et seq.:

> 91 As I have noted, the appellant adduced clear, uncontradicted evidence, while the respondent did not adduce any evidence whatsoever. In my view, the law on that point is well settled, and the respondent failed to discharge its burden of proof for the following reasons.
>
> 92 It is trite law that in taxation the standard of proof is the civil balance of probabilities…and that within balance of probabilities, there can be varying degrees of proof required in order to discharge the onus, depending on the subject matter… The Minister, in making assessments, proceeds on assumptions…and the initial onus is on the taxpayer to “demolish” the Minister’s assumptions in the assessment…
>
> …
>
> 94 Where the Minister’s assumptions have been “demolished” by the appellant, “the onus . . . shifts to the Minister to rebut the prima facie case” made out by the appellant and to prove the assumptions…. Hence, in the case at bar, the onus has shifted to the Minister to prove its assumptions...
>
> 95 Where the burden has shifted to the Minister, and the Minister adduces no evidence whatsoever, the taxpayer is entitled to succeed...

[22] In this case, it is not simply a question of law. The facts were very important. It happens often enough that the factual evidence does not require high fees. But in this case, the Respondent had to have known that having to provide evidence of bailout agreement entered into by the corporate shareholder, their effect on the Appellant's financial statements, losses taken by the corporate shareholder and the history of negotiations that led to the purchase of shares and determining their price could only be done at great cost and effort.

[23] If the Respondent had made some effort in meeting her burden of proof, my decision would be different. It is strange that in a case such as the one I heard not a single Minister's officer came to testify to explain the Minister's position, that no other witness was called upon to raise any doubt as to the Appellant's evidence on the corporate shareholder's losses and on the context of negotiations. The Respondent acted as though she knew from the beginning that she was unable to refute the Appellant's evidence and unable to prove the Minister's presumptions. She waited for the Appellant to present its evidence. How could she believe that actuaries would not be able to demolish the Minister's presumptions? The Appellant incurred great fees to present solid evidence against that which the Respondent could have presented. However, the Respondent did nothing.

[24] It seems to me that in these circumstances, where the Appellant went to such costly effort to present evidence while the Respondent had no intention of even attempting to refute it, it can be considered an exceptional circumstance that would allow for the awarding of costs in addition to those in the tariff. I therefore feel it is fair to award an amount superior to the tariff to the successful party.

[25] The Appellant also made an offer of settlement for $300,000 dated November 2, 2000. This offer, being so minimal compared to the amount assessed and without legal basis, did not influence me in making my decision to award additional costs.

[26] The $50,000 requested by the Appellant as an overall amount in addition to the taxed costs, may seem high at first. According to the Appellant, the legal fees incurred in addition to the bill of costs were $187,216. The overall amount requested is therefore less than a third of the additional legal fees. However, I must also consider that awarding additional costs must be a restricted application. Legal tariffs exist to protect secure access to the courts and avoid arbitrariness. The awarding of additional costs is usually done to dissuade behaviour considered incorrect, but this award must not become a source of concern in terms of the right

to bring litigation before the courts. I feel that granting an overall amount of $20,000 would be acceptable to meet this balance.

[27] The application for costs for the services of a second counsel during the hearing was not contested by the Respondent in her Reply. They are therefore granted.

[28] As for the litigation disbursements, I feel that those regarding the bailiff, photocopies and others, and counsel for the Appellant's trip can be accepted as proposed by the Appellant. As for the fees for the expert report, I find them very high. In my opinion, one third of the amount requested seems reasonable. This fraction also seems reasonable for Mr. Werner's trip.

Signed at Ottawa, Canada, this 14th day of June 2006.

"Louise Lamarre Proulx"

Lamarre Proulx J.

Translation certified true
on this 12th day of July 2007.

Elizabeth Tan, Translator

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REASONS FOR ORDER BY:	The Honourable Justice Louise Lamarre Proulx
DATE OF ORDER:	June 14, 2006

APPEARANCES:

Counsel for the Applicant:	Dominic C. Belley
Counsel for the Respondent:	Richard Gobeil

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