

Docket: 2008-2315(IT)G

BETWEEN:

4145356 CANADA LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Costs determined by written submissions

By: The Honourable Justice Campbell J. Miller

Participants:

Counsel for the Appellant:

Al Meghji and
Martha MacDonald

Counsel for the Respondent:

Daniel Bourgeois and
Andrew Miller

ORDER

Upon application by the parties for costs of a motion heard on September 10, 2009, at Toronto, Ontario,

And upon reviewing the written submissions of the parties;

IT IS ORDERED THAT costs shall be in the cause.

Signed at Ottawa, Canada, this 26th day of October 2009.

"Campbell J. Miller"

C. Miller J.

Citation: 2009 TCC 546
Date: 20091026
Docket: 2008-2315(IT)G

BETWEEN:

4145356 CANADA LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Campbell J. Miller

[1] Subsequent to my order of September 28, 2009, I received written submissions from the parties with respect to costs. The Appellant seeks costs of the two motions against the Crown payable forthwith:

- a) on a solicitor-and-client basis plus GST as of the date of an offer to settle the motions made by the Appellant on August 17, 2009; or
- b) in the alternative, a lump sum amount over and above Schedule II, Tariff B of the *Tax Court of Canada Rules (General Procedure)* (the “Rules”) plus \$700.00 (ie. the amount set out in Schedule II, Tariff B, for a one-day motion in a Class C proceeding) and GST.

[2] The Respondent argues the award of costs of the motions should follow the outcome of the appeal.

[3] Both parties were substantially successful on their respective motions. This would normally result in costs following the outcome. Are there circumstances in this matter to depart from such normal course? The Appellant suggests there are, being an

offer it made on August 17, 2009. It is helpful to set out Mr. Meghji's letter of August 18, 2009, to Mr. Bourgeois:¹

This letter will confirm my offer of yesterday wherein we offered to settle the motions scheduled to be heard on September 10th on the basis that the Appellant would provide the Respondent with the materials that it seeks and the Respondent would similarly produce the materials in the CRA files referred to in the Discovery. The letter will also confirm that the Attorney General has rejected this offer.

As you would expect, the preparation and attendance at the motions will result in significant costs being incurred. The Appellant reserves the right to refer to this settlement offer in any subsequent determination of the costs of the motion.

[4] On September 8, 2009, two days before the hearing of the motion, the Respondent countered with the following offer:²

Further to our voice mail, we are hereby offering to settle the motions to be held on Thursday, September 10, 2009, on the following basis:

1. The Respondent will provide an answer to questions 146, 185 and 235, found in the transcript of the examination for discovery of Simmin Hirji.
2. The Respondent will extend the undertaking given to question 175 to question 168: "provide all of the materials relating to any discussions that the CRA had with anyone about the U.S. tax treatment of this transaction". As such, the Respondent will provide any documents, subject to privilege, contained in the audit materials of the Appellant's sister companies as they relate to question 168.
3. The Appellant will provide all documents referred to in question 76 of the transcript of the examination for discovery of Donovan Flynn and provide an answer to question 458 of the said transcript.

This offer of settlement will be valid until 10am on September 9, 2009.

[5] The Appellant argues that its offer was more favourable to the Respondent than my Order, but that the Respondent's offer was not more favourable than my Order. It appears from the two brief offers that the Appellant was prepared to provide the Respondent with answers, but the Respondent was not prepared to produce the contents of its files. The thrusts and parries of litigation can be at times broad and sweeping and, at other times, intricate and pointed. Early in this litigation, the Respondent sought full disclosure pursuant to *Rule* 82, but as indicated in my

¹ Tab 2, Appellant's Submission on Costs of Motion.

² Tab 3, Appellant's Submission on Costs of Motion.

Reasons on the motions, such procedure was rejected by the Appellant and the Respondent eventually withdrew its motion. Yet, here we are many months later, with the Respondent digging in its heels and the Appellant seemingly prepared to provide all. What can explain this apparent seismic shift of position?

[6] The answer lies in what each party was seeking. The Appellant was effectively seeking full disclosure from the Respondent in asking for the contents of its files. The Respondent's request of the Appellant was somewhat more focused. I conclude that the Appellant, in offering to provide answers to the Respondent's requests, was not giving up as much as it was seeking in return. The Appellant wants me to attach considerable significance to the Respondent's rejection of its offer. In the circumstances, I am not prepared to attach any more significance to the rejected offer than I am to the Appellant's rejection of the *Rule* 82 full disclosure sought earlier by the Respondent. If either the Respondent's initial approach (full disclosure) or the Appellant's offer had been accepted, there would have been no need for these motions.

[7] There is considerable discretion given to the Court in awarding costs. *Rule* 147 identifies a non-exclusive list of factors that might be considered. I have considered the following:

- a) both offers of settlement;
- b) the parties conduct from the outset of the litigation, specifically the *Rule* 82 request.

[8] I have concluded counsel on both sides have strategized themselves into proceeding with motions that the untrained eye of a less experienced litigator might view as unnecessary. I conclude, in these circumstances, that costs shall be in the cause.

Signed at Ottawa, Canada, this 26th day of October 2009.

"Campbell J. Miller"

C. Miller J.

CITATION: 2009 TCC 546

COURT FILE NO.: 2008-2315(IT)G

STYLE OF CAUSE: 4145356 CANADA LIMITED AND HER
MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 10, 2009

REASONS FOR ORDER BY: Campbell J. Miller

DATE OF ORDER: October 26, 2009

APPEARANCES:

Counsel for the Appellant: Al Meghji and Martha MacDonald
Counsel for the Respondent: Daniel Bourgeois and Andrew Miller

COUNSEL OF RECORD:

For the Appellant:

Name: Al Meghji

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For the Respondent: John H. Sims, Q.C.
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