Docket: 2015-2998(IT)G

BETWEEN:

LOBLAW FINANCIAL HOLDINGS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

By: The Honourable Justice Campbell J. Miller

ORDER

IT IS HEREBY ORDERED there is no award of costs.

Signed at Ottawa, Canada, this 20th day of December 2018.

"Campbell J. Miller"

C. Miller J.

Citation: 2018 TCC 263
Date: 20181220
Docket: 2015-2998(IT)G

BETWEEN:

LOBLAW FINANCIAL HOLDINGS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS RESPECTING SUBMISSIONS ON COSTS

C. Miller J.

[1] Last September, I issued my Judgment in this matter indicating to the Parties that I was not inclined to make an award of costs, unless there was some compelling reason to do so, such as a rejected settlement offer. I have now received representations that there was a rejected settlement offer, yet not one that meets the requirements of Rule 147(3.3) of the *Tax Court of Canada Rules (General Procedure)* (the "*Rules*"). I have attached Rule 147 in its entirety as Appendix A to these Reasons.

[2] My impression is that this litigation has been pursued tooth and nail throughout, and ongoing argument on costs is another opportunity to flex adversarial muscle. The Parties have provided me with nothing that would alter my initial view on the matter of costs. I stand by it for the following reasons.

[3] The Respondent requests her costs of $457,755.82 on the following basis:

(a) $15,500 – respondent's fees up to March 20, 2018 (the date of the Crown's settlement offer), in accordance with Tariff B of the *Rules*;

(b) $327,242.56 – respondent's fees after March 20, 2018, at 30% of the respondent's solicitor and client costs; and

(c) $115,013.26 – all of the respondent's reasonable disbursements (excluding those related to the expert witnesses.)

[4] The Appellant requests that the Court maintain its decision not to award the Crown any costs.

[5] It has become clear over the last several years that the Tax Court of Canada is quite prepared to consider the factors set out in Rule 147(3) without any slavish adherence to tariff. See also Rule 147(4). I will review the factors set out in Rule 147(3).

[6] First, in considering the result of the proceeding, the Respondent brought to my attention the comment of Justice Hogan in *SWS Communication v R*, 2012 TCC 377:

> 34. As indicated in General Electric Capital, there is a strong tendency in the case law to accept the principle that costs awards should not be distributive, with the amounts being based on the outcome of particular arguments of the parties. Thus, the appellants' arguments should not be analyzed individually in order to establish the amount of costs to be awarded. Only the overall result of the appeals, that is, the complete vacation of the assessments made against the appellants, is relevant.

[7] With respect, there is no hard and fast principle in this regard and Rule 147(3)(*j*) certainly encourages a judge to take into account any other matter that he or she believes has some relevance to the question of costs. Further, Rule 147(5)(*a*) specifically contemplates the award of costs on an issue-by-issue basis. I agree with the following approach of Justice Graham in *2078970 Ontario Inc. et al. v The Queen*, 2018 TCC 214:

> 10. In my view, when determining the quantum of costs to be awarded, the result of the proceeding is only an appropriate factor to consider if it is possible for a party to have had mixed success in the proceeding. If a proceeding involves a number of different issues and a party has been completely successful on all of those issues, that will argue in favour of higher costs. If a proceeding involves a number of different issues and a party has had mixed success on those issues, the degree of the party's overall success will be relevant when determining the quantum of costs. If a proceeding involves a single issue over which there are a number of different potential outcomes (e.g. a valuation issue), the degree of a party's success on that issue will be relevant to the quantum of costs. However, when the only issue before the Court is a black-or-white issue on which there is no potential for partial success, the fact that a party succeeded on that issue should not, in my view, affect the quantum of costs awarded. The party achieved success. That success was no better or worse than what the party could have hoped to achieve and thus neither argues for higher nor lower costs.

[8] It would be burying my head in the sand to ignore that in this case there were several discrete issues, any one of which could have been determinative of the overall result. For Loblaw to be successful in the result, it was essential that it successfully check off each and every issue: the lack of success on any one single issue would lead to an unsuccessful result.

[9] For example, Loblaw needed to prove to me that, during the years in question, Glenhuron Bank employed more than five full-time employees or the equivalent thereof. Considerable evidence was adduced on this point from a number of witnesses. In argument, both sides went into detailed mathematic precision in devising formulas to convince me one way or the other. With respect, this was not rocket science and need not have been treated as such: a simple, practical, commercial overview could readily resolve the matter. What do I take from this one issue? First, way too much time was spent on it; second, I attribute this to the Respondent forcing the issue; third, the Appellant was successful.

[10] I recognize in a case with so much at stake, both sides would want to hunker down and clash swords over every possible disagreement. But surely, some hills are more worth dying on than others. Indeed, many of the other issues (for example foreign bank, waivers, GAAR) were such hills. And, Loblaw was successful on those issues as well.

[11] So, yes the Respondent had success in the ultimate result, but it was due to the one issue – the conduct of business principally with persons with whom it did not deal at arm's length. That is it. Given Loblaw's success on virtually all other issues, I am not convinced that the result favours a cost award to the Respondent.

[12] When I look at the factors of volume, importance of issues and complexity of issues, I likewise look at them on an issue-by-issue basis, and in so doing again, I am not prepared to order costs, based on those factors, against the Party who ultimately was successful on those issues.

[13] What factors then are left to review in this costs award: amount, conduct of Party, refusal to admit, vexatious conduct and rejected settlement offer.

[14] There is no doubt that the amount was significant.

[15] With respect to the three factors that all go to the behaviour of a Party, the Respondent has indicated these factors are neutral in coming to any costs award. The Appellant, on the other hand, suggested the Respondent was unreasonably

adversarial. The Appellant went into considerable detail regarding the Respondent's conduct, arguing ultimately that it should not be rewarded with costs. It is unnecessary to review all the Appellant's criticisms in this regard, as it is not the Appellant who is seeking costs. It suffices that, given the Respondent's view, these are not factors I need to take into account.

[16] As I indicated in my Reasons for Judgment, I felt that given how the trial unfolded, with the Appellant being successful on most issues, the equitable result was for each side to bear its costs; only something extraordinary such as a rejected settlement offer might cause me to decide otherwise. So, let me look at what transpired with respect to settlement offers, as this remains the sole determinative factor for an award of costs.

[17] The Appellant made an offer to the Respondent on March 15, 2018, "predicated on the basis that the taxpayer complied with the technical requirements of the Act, the waivers preclude the Minister from reassessing the 2001 to 2005 taxation years on the basis of the GAAR, and the GAAR applied to Glenhuron Bank's years 2006 to 2013."

[18] The Respondent rejected that offer on March 20, 2018 and countered as follows:

> We are in receipt of the appellant's settlement offer dated March 15, 2018.
>
> Please be advised that the respondent is rejecting the appellant's settlement proposal. However, the respondent is prepared to settle the above noted appeal as follows:
>
> 1. the Minister will reassess the appellant for its 2001 to 2012 taxation years on the basis that the income from Glenhuron Bank Limited was foreign accrual property income ("FAPI") for the purposes of the *Income Tax Act*, treating the amounts of Glenhuron's foreign exchange gains and/or losses in each year as having been realized on account of income rather than capital for the purpose of re-computing FAPI / FAPL for each taxation year and for the purposes of applying the FAPL carryover provisions in the *Act*;
>
> 2. Each party will bear their own costs.

[19] The first point to note is that Rule 3.2 does not apply as the counteroffer was not made at least 90 days before the commencement of the hearing. This does not mean, however, that I cannot consider the offer and counteroffer as relevant factors in determining costs generally. Indeed, the Respondent argues that the factor

favours an increased cost award though less than substantial indemnity costs, suggesting 30% of solicitor-client costs after the counteroffer of March 20, 2018. I disagree.

[20] The offer made by the Appellant on March 15, 2018, which, I am now advised, was repeated after the end of trial, was a true compromise offer made on a principled basis. It was rejected by the Respondent. The counteroffer by the Respondent of March 20, 2018, while mirroring the ultimate outcome sought, was in the Appellant's words, a "complete surrender from Loblaw on the central issue." The Appellant argues the Respondent's concession on the characterization of foreign exchange gains and losses was neither a compromise nor a good faith attempt to settle, given the relative insignificance of the issue. I agree. As an Ontario Court indicated in the case of *Gohm v York*, 2014 ONSC 4459:

> 11. The overriding objective of Rule 49 is to promote compromise and settlement. Offers that take a "no liability" position, do not encourage, but rather discourage settlement.
>
> 12. I do not accept the defendant, York's, offers to settle in this matter as being "reasonable" offers to settle. Rather, they were an invitation to the plaintiff to capitulate and do not constitute an offer to "compromise". The absence of compromise is a factor the court may consider when exercising its discretion under s. 131 of the *Court of Justice Act* and Rule 49 and the court's option to "order otherwise".

[21] The Respondent sheds no light in the counteroffer on what basis she believes she would be successful, but for the time and effort put into the issues of the definition of foreign bank, number of employees and GAAR, I conclude she had confidence she would be successful on those matters. She was not. As I indicated in my Reasons for Judgment, my view at the conclusion of trial was that there was a settlement screaming to be reached. Holding out for a virtual complete victory, which I recognize she ultimately obtained, is less a counter-offer but more a simple rejection of an offer, an emphatic "let's go to trial" rather than "let's sit down and settle." I see no merit in awarding costs on this basis, especially given the timing of the Respondent's rejection. To be clear, this is not a criticism of the Respondent's strategy: it worked. But, as a factor in determining costs, it is simply not a settlement offer that pushes me away from my initial view that this is a case where the equitable result is for the Parties to each absorb their own costs.

[22] In conclusion, a review of the Rule 147 factors does not support an award of costs to the Respondent.

Signed at Ottawa, Canada, this 20th day of December 2018.

"Campbell J. Miller"

C. Miller J.

Appendix A

General Principles

147 (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.

(2) Costs may be awarded to or against the Crown.

(3) In exercising its discretionary power pursuant to subsection (1) the Court may consider,

(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,

(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.

(3.1) Unless otherwise ordered by the Court, if an appellant makes an offer of settlement and obtains a judgment as favourable as or more favourable than the terms of the offer of settlement, the appellant 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.

(3.2) 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.

(3.6) In ascertaining whether the judgment granted is as favourable as or more favourable than the offer of settlement for the purposes of applying subsection (3.1) or as favourable as or less favourable than the offer of settlement for the purposes of applying subsection (3.2), the Court shall not have regard to costs awarded in the judgment or that would otherwise be awarded, if an offer of settlement does not provide for the settlement of the issue of costs.

(3.7) For greater certainty, if an offer of settlement that does not provide for the settlement of the issue of costs is accepted, a party to the offer may apply to the Court for an order determining the amount of costs.

(3.8) No communication respecting an offer of settlement shall be made to the Court, other than to a judge in a litigation process conference who is not the judge at the hearing, until all of the issues, other than costs, have been determined.

(4) The Court may fix all or part of the costs with or without reference to Schedule II, Tariff B and, further, it may award a lump sum in lieu of or in addition to any taxed costs.

(5) Notwithstanding any other provision in these rules, the Court has the discretionary power,

(a) to award or refuse costs in respect of a particular issue or part of a proceeding,

(b) to award a percentage of taxed costs or award taxed costs up to and for a particular stage of a proceeding, or

(c) to award all or part of the costs on a solicitor and client basis.

(6) The Court may give directions to the taxing officer and, without limiting the generality of the foregoing, the Court in any particular proceeding may give directions,

(a) respecting increases over the amounts specified for the items in Schedule II, Tariff B,

(b) respecting 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 the costs are taxed.

(7) Any party may,

(a) within thirty days after the party has knowledge of the judgment, or

(b) after the Court has reached a conclusion as to the judgment to be pronounced, at the time of the return of the motion for judgment,

whether or not the judgment included any direction concerning costs, apply to the Court to request that directions be given to the taxing officer respecting any matter referred to in this section or in sections 148 to 152 or that the Court reconsider its award of costs.

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REASONS RESPECTING SUBMISSIONS ON COSTS BY:	The Honourable Justice Campbell J. Miller
DATE OF ORDER:	December 20, 2018

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