Docket: 2016-445(IT)G

BETWEEN:

THE BANK OF MONTREAL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion determined by Written Submissions

Before: The Honourable Justice David E. Graham

Participants:

Counsel for the Appellant:	Martha MacDonald Jerald Wortsman Patrick Reynaud
Counsel for the Respondent:	Natalie Goulard Sara Jahanbakhsh Marie-France Camiré

ORDER

In accordance with the attached Reasons for Order, lump sum costs of $870,595.12 are awarded to the Appellant.

Signed at Ottawa, Canada, this 3rd day of February 2021.

"David E. Graham"

Graham J.

Citation: 2021 TCC 3
Date: 20210203
Docket: 2016-445(IT)G

BETWEEN:

THE BANK OF MONTREAL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Graham J.

[1] The Minister of National Revenue reassessed the Bank of Montreal ("BMO") using the general anti-avoidance rule (the "GAAR"). BMO appealed the reassessment. In my Judgment dated September 12, 2018, I allowed BMO's appeal with costs.[1] The Respondent appealed my decision to the Federal Court of Appeal. That appeal was dismissed.[2]

A. Settlement Offer and Substantial Indemnity Costs

[2] BMO made a settlement offer on January 30, 2018 (the "Settlement Offer"). BMO obtained a judgment more favourable than the terms of the Settlement Offer. The parties agree that the Settlement Offer complied with the requirements set out in subsections 147(3.1) and (3.3) of the *Tax Court of Canada Rules (General*

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1 2018 TCC 187.

2 2020 FCA 82.

Procedure).[3] Accordingly, the parties agree that BMO is entitled to substantial indemnity costs after January 30, 2018 consisting of the following:

(a) substantial indemnity costs of $450,068.56;

(b) reimbursement of disbursements in the amount of $80,781.67; and

(c) reimbursement of non-recoverable HST in the amount of $69,036.52.

B. **Costs Remaining in Dispute**

[3] The parties take different positions in respect of the costs incurred by BMO prior to the Settlement Offer. BMO submits that it is entitled to enhanced costs equal to 75% of its actual costs plus reimbursement of the non-recoverable HST associated with those costs. The Respondent submits that BMO should only receive costs in accordance with the Tariff.[4]

[4] The general wording of subsection 147(3.1) supports the Respondent's position. It indicates that a party receiving substantial indemnity costs following a settlement offer is entitled to party and party costs to the date of service of the settlement offer. The subsection reads:

> 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.
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> [Emphasis added]

[5] That said, the preamble to the subsection indicates that the Court retains discretion to order different costs. As Justice Owen stated in *Sun Life Assurance Company of Canada v. The Queen*, ". . . the Court has the discretion to determine what the substantial indemnity costs are in each case and the discretion to override the default rule if the Court is of the view that the circumstances warrant such an

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3 As the parties have agreed to these points, I have not considered them.

4 Schedule II, Tariff B of the *Tax Court of Canada Rules (General Procedure)*.

approach. The discretionary aspects of the rule are consistent with the general proposition that costs awards are 'quintessentially discretionary'".[5]

[6] The settlement offer rules were designed not just to encourage settlement, but specifically to encourage early settlement, ideally before the beginning of the hearing.[6] Awarding substantial indemnity costs provides an incentive to settle early by guaranteeing a high costs award for all costs incurred after the offer is made. Subsection 147(3.3) ensures that offers are made early by requiring that, in order to qualify for substantial indemnity costs, an offer must be made at least 90 days before the hearing and must not expire earlier than 30 days before the hearing.

[7] However, in some circumstances, limiting a party to tariff costs for all costs incurred before a settlement offer was made could defeat the goals of the settlement rules. A party who made an offer within the time limits would be rewarded for making the offer but, at the same time, punished for not having made it sooner. Such a system could actually act as a disincentive for parties to make settlement offers more than 90 days before their hearing as the guaranteed high costs that they may receive after the offer may be outweighed by the lower tariff costs that they would be forced to accept for their work prior to the offer. Faced with this dilemma, parties could choose not to make an offer or choose to wait until the subsection 147(3.3) time limits had passed before making an offer, thus defeating the very goals that the rules were designed to achieve.

[8] The present case is a perfect illustration of this dilemma. If BMO had never made an offer, I would have awarded costs in respect of legal fees of $436,469.93, being 35% of BMO's actual costs. The Respondent did not provide me with a calculation of tariff costs but, for simplicity, I will assume that they would have totalled approximately $3,000. Thus, if I accepted the Respondent's position, BMO would have received a total of $453,068 in respect of legal fees.[7] This amount would be only $16,598.63 more than what I would have awarded without the Settlement Offer. If I were to have awarded costs in respect of legal fees equal to 37% of BMO's actual costs, BMO would actually have been worse off for having

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5 2015 TCC 171, at para. 9 (footnotes omitted).

6 *Practice Note No. 17 - Proposed Rules and Amendments with Respect to Settlement Offers, Lead Cases and Litigation Process Conferences* (January 13, 2010) and *Notice to the Public and to the Profession* (January 13, 2010), at para. 5.

7 $450,068 in substantial indemnity costs plus $3,000 in tariff costs.

made the Settlement Offer. Such an outcome would completely undermine the goal of the settlement rules.

[9] In light of all of the foregoing, I find that, while subsection 147(3.1) uses the Tariff as the starting point for pre-offer costs, in appropriate circumstances, the Court has discretion to award such costs otherwise than in accordance with the Tariff.

C. **Subsection 147(3) Factors**

[10] In *Sun Life*, Justice Owen emphasized that the discretion to override the default settlement costs rules must be exercised on a principled basis.[8] The parties agree that the factors that I should consider in deciding whether to exercise my discretion are the factors set out in subsection 147(3).

Result of the Proceeding

[11] As I stated in *2078970 Ontario Inc. v. The Queen*:[9]

> The result of a proceeding can affect costs in two ways. The degree of a party's overall success is an important factor in determining whether costs should be awarded to a party. Once a court decides to award costs to a party, the degree of the party's overall success may also be a factor in determining the quantum of those costs.
>
> 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

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8 *Sun Life*, at para. 10.

9 2018 TCC 214, at paras. 9 and 10.

> success was no better or worse than what the party could have hoped to achieve and thus neither argues for higher nor lower costs.

[12] BMO appealed on a black-or-white issue. Either the GAAR applied or it did not. While there were several sub-issues, ultimately, the success that BMO achieved was no better or worse than what it could have hoped to achieve. I awarded costs to BMO because of its success. That success is not, in itself, a factor that favours increased costs. As a result, I place no weight on this factor.

Amount in Issue

[13] The appeal involved the denial of $287,766,503 in capital losses. This is a significant amount and argues in favour of higher costs.

Importance of the Issues

[14] BMO succeeded based on the proper interpretation of the former version of subsection 39(2) of the *Income Tax Act*. That subsection was amended in 2013. Thus, the appeal did not advance the current state of the law. The issue was not one of broad public interest. While the outcome may have had an effect on other companies that employed similar structures in the years in question, I have not been provided with evidence of the number of cases affected.

[15] At the same time, the appeal did involve a number of issues. Had the appeal been decided on the issue of misuse or abuse, it may have advanced the law and would presumably have been of greater public interest.

[16] Overall, I find this factor to argue in favour of slightly higher costs.

Complexity of the Issues

[17] The issues in the appeal were complex. This argues for higher costs.

Volume of Work

[18] The volume of work was substantial. Normally, this would argue for higher costs. However, in situations like this appeal, where the volume of work is directly correlated to the complexity of the issues, I think it is inappropriate to effectively

double count the same factor. If the volume had been high for some other reason (e.g., the need to review voluminous documents or deal with a large number of tax years each with a different factual matrix), I would have given additional weight to the volume. However, in the circumstances, I give no weight to this factor.

Settlement Offers

[19] The Settlement Offer has already resulted in BMO receiving substantial indemnity costs. In my view, it should not be considered again in awarding pre-offer costs. I am awarding costs in respect of a period when the Settlement Offer had not yet been made. I cannot see what relevance it would have.

Conduct Affecting the Duration of the Proceeding

[20] There was no evidence that would suggest that the conduct of either party affected the duration of the proceeding.

[21] On the contrary, I would like to comment on the highly efficient manner in which this appeal proceeded to trial. BMO filed its Notice of Appeal in early 2016. Despite the massive amount of money at issue and the complexity of the issues, the litigation proceeded in an orderly manner without any intervention from the Court or the involvement of a case management judge. In less than 18 months, the parties were ready to have the matter set down for trial. In an era when too many appeals are bogged down for years in what often seems like unnecessary procedural wrangling, this appeal stands out as an example of how litigation can be handled efficiently. Counsel are to be commended for their conduct of the appeal.

[22] The Respondent submits that the conduct of the parties argues for lower costs. I disagree. If the Respondent had conducted herself admirably and BMO had not, that would certainly have argued for lower costs. However, when both parties conduct themselves in an exemplary manner, that neither argues for higher costs to reward the successful party's good conduct nor argues for lower costs to reward the conduct of the unsuccessful party. Conducting litigation in an efficient manner is a reward in itself. Both parties win as both parties keep their own costs low.

Denial or Refusal to Admit

[23] There was no evidence that would suggest that either party had denied or refused to admit anything that should have been admitted.

Improper, Vexatious or Unnecessary Stages

[24] There was no evidence that would suggest that any stage in the proceeding was improper, vexatious or unnecessary.

Stages Taken Through Negligence, Mistake or Excessive Caution

[25] There was no evidence that would suggest that any stage in the proceeding was taken through negligence, mistake or excessive caution.

Justification of Expert Witnesses

[26] The costs and disbursements associated with BMO's expert witness have already been agreed to by the parties. This is not a relevant factor to the pre-offer costs.

Other Relevant Matters

[27] I am not aware of any other matters relevant to the determination of costs.

Summary

[28] Overall, considering all of the above factors and, in particular, the complexity of the issues and the amount is dispute, I award pre-offer costs of $239,564.93 to BMO, being 35% of BMO's actual costs of $684,471.24. I also award $31,143.44 in non-recoverable HST associated with those costs.

D. **Costs in Respect of Submissions on Costs**

[29] No costs are awarded to either party in respect of their submissions on costs.

E. **Conclusion**

[30] Based on all of the foregoing, lump sum costs of $870,595.12 are awarded to BMO.[10]

Signed at Ottawa, Canada, this 3rd day of February 2021.

"David E. Graham"

Graham J

[10] $450,068.56 in substantial indemnity costs + $80,781.67 in disbursements + $69,036.52 in non-recoverable HST relating to the substantial indemnity costs + $239,564.93 in pre-offer costs + $31,143.44 in non-recoverable HST relating to the pre-offer costs.

CITATION:	2021 TCC 3
COURT FILE NO.:	2016-445(IT)G
STYLE OF CAUSE:	THE BANK OF MONTREAL v. HER MAJESTY THE QUEEN
DATE OF HEARING:	Motion determined by Written Submissions
REASONS FOR ORDER BY:	The Honourable Justice David E. Graham
DATE OF ORDER:	February 3, 2021

PARTICIPANTS:

Counsel for the Appellant:	Martha MacDonald Jerald Wortsman Patrick Reynaud
Counsel for the Respondent:	Natalie Goulard Sara Jahanbakhsh Marie-France Camiré

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