Docket: 2016-1686(IT)G

BETWEEN:

MARGO DIANNE BOWKER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard by virtual hearing on October 7, 2021 at Ottawa, Canada

Before: The Honourable Justice Sylvain Ouimet

Appearances:

Counsel for the Appellant:	Alistair G. Campbell Margaret MacDonald
Counsel for the Respondent:	Patrick Cashman Natasha Tso

ORDER

In accordance with the attached Reasons for Order, the Motion under section 147 of the *Tax Court of Canada Rules* requesting an order for costs on a lump sum basis, is allowed, with costs.

Signed at Ottawa, Canada, this 8th day of April 2022.

"Sylvain Ouimet"

Ouimet J.

Citation: 2022 TCC 43
Date: 08/04/2022
Docket: 2016-1686(IT)G

BETWEEN:

MARGO DIANNE BOWKER,

Appellant,

and

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Respondent.

REASONS FOR ORDER

Ouimet J.

I. INTRODUCTION

[1] On April 30, 2011, the Appellant filed her income tax return for the 2010 taxation year. In the return, she reported a total income of $78,798. The total income reported by the Appellant consisted of employment income of $45,641 from the Bakerview Mennonite Brethren Church, other employment income of $22,181, Old Age Security Benefit of $6,222, Canada Pension Plan benefits of $4,750 and interest income of $4.[1]

[2] On March 26, 2012, an amended income tax return ("Amended Income Tax Return") was filed by DeMara Consulting Inc. ("DeMara") on behalf of the Appellant for her 2010 taxation year. The total income reported by the Appellant remained the same as reported in the income tax return originally filed, but net business losses of $666,447 were claimed in respect of a consulting business. The business losses consisted of a deduction claimed for interest expenses of $666,047 and professional fees of $400. Net capital losses of $333,024 were also claimed as a result of the disposition of bonds, debentures, promissory notes and other similar properties. Finally, requests to carry back non-capital losses of $32,566, $39,021 and

[1] *Bowker v. The Queen*, 2021 TCC 14 at para 2 [*Bowker*].

$50,214 to the Appellant's 2007, 2008 and 2009 tax returns respectively were also found in the return.[2]

[3] On June 12, 2014, the Minister of National Revenue (the "Minister") reassessed the Appellant's 2010 taxation year to disallow the business losses, the net capital losses and the carry-back losses claimed in her Amended Income Tax Return. Pursuant to subsection 163(2) of the *Income Tax Act* ("*ITA*"),[3] the Minister also imposed a gross negligence penalty of $139,032 on the Appellant.[4]

[4] On February 26, 2021, I issued a Judgment and Reasons for Judgment in this case allowing the Appellant's appeal.[5] The only issue in the appeal was whether the Minister had correctly imposed on the Appellant a gross negligence penalty of $139,032 under subsection 163(2) of the *ITA*. I ruled that the Minister had not because the Appellant did not knowingly, or under circumstances amounting to gross negligence, make or participate in, assent to or acquiesce in the making of a false statement in her Return.[6]

[5] On April 1, 2021, the Appellant filed a Notice of Motion under section 147 of the *Tax Court of Canada Rules* (the "*Rules*")[7] requesting an order for costs on a lump sum basis. Under subsection 147(1) of the *Rules*, the Court may determine the amount of costs of all parties involved in any proceeding, the allocation of those costs and the persons required to pay them. Under subsection 147(7) of the *Rules*, any party may, within thirty days after the party has knowledge of the judgment of this Court, apply to the Court to request that directions be given to the taxing officer respecting any matter referred to in section 147 of the *Rules*.

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[2] *Ibid* at para 4.
[3] *Income Tax Act*, RSC 1985, c 1 (5th Supp) [*ITA*].
[4] *Bowker*, supra note 1 at para 5.
[5] *Bowker*, supra note 1.
[6] *Bowker*, supra note 1.
[7] *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a [*Rules*].

[6] The amount of costs sought by the Appellant is $136,650.55. It is the total of the following amounts:

- 50 percent of the legal fees incurred by the Appellant up to January 6, 2020, inclusively, being $33,830.19;
- 80 percent of the legal fees incurred by the Appellant after January 6, 2020, the date of service of her settlement offer, being $99,574.73; and
- Disbursements of $3,245.63.

[7] In addition, the Appellant asks that this Court fix the amount of costs for this motion at $2,500.

II. ISSUES

[8] The issues before the Court are as follows:

1. What is the appropriate quantum of costs to be awarded to the Appellant following the conclusion of her appeal?
2. What is the appropriate quantum of costs to be awarded to the Appellant for this motion?

III. THE RELEVANT LEGISLATIVE PROVISIONS

[9] The applicable provisions of the Rules are:

> **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.
>
> [...]
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> **(3)** In exercising its discretionary power pursuant to subsection (1) the Court may consider,
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> (a) the result of the proceeding,
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> (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,

(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.

[...]

(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.

IV. THE POSITIONS OF THE PARTIES

1. The Appellant's Position

[10] The Appellant is asking this Court to exercise its discretion and order the Respondent to pay costs on a lump sum basis.

[11] The Appellant submits that section 147 of the *Rules* gives this Court broad discretion in awarding costs. Specifically, the Appellant submits that the Court should award costs without reference to Tariff B of Schedule II of the *Rules* (the "Tariff"). Rather, this Court should order the Respondent to pay a percentage of her legal fees on a partial indemnity basis.

[12] Citing *Zeller Estate v. The Queen*,[8] a case decided by this Court, the Appellant submits that partial indemnity awards of costs in this Court traditionally vary between 50% and 75% of legal fees incurred. Counsel for the Appellant provided detailed submissions on the factors listed at subsection 147(3) of the *Rules.* The Appellant submits that these factors should be taken into consideration when determining the amount of costs to be awarded. The Appellant's submissions on each of these factors can be summarized as follows:

1. The Appellant's appeal was completely successful;
2. The amount of the penalty was important vis-à-vis the Appellant's financial means;
3. The Appellant's case served as a "quasi-lead case" due to the number of other DeMara appeals on the Court's docket;
4. Thirty-five (35) days before trial, the Appellant sent a settlement offer which was rejected by the Respondent;
5. The volume of work was substantial;
6. The Appellant's conduct did not lengthen the trial. Rather, it was the Respondent's failure to produce the original copy of the amended income tax return and the introduction of affidavit evidence with limited notice that caused an unduly long hearing; and

[8] *Zeller Estate v The Queen*, 2009 TCC 135 [*Zeller Estate*].

7. The Appellant's testimony during oral examination for discovery was consistent with the Appellant's testimony at trial. As such, the Respondent had a full opportunity to hear the Appellant's story and test her credibility, but still alleged that the Appellant had knowingly made false statements.

2. The Respondent's Position

[13] The Respondent submits that an award of costs based on Tariff B of Schedule II of the *Rules*, plus reasonable disbursements, is appropriate.

[14] The Respondent also submits that costs must be awarded on a principled basis in light of the factors set out in subsection 147(3) of the *Rules*. The Respondent's submissions on these factors can be summarized as follows:

1. The result of the proceeding is neutral as it was an "all or nothing" case;
2. Although the amount at issue was significant, the Appellant's conduct, that is her participation in the making of false statements, should not be rewarded by this Court;
3. While the issue was important for the Appellant, this Court is only to consider whether the decision will have a significant precedential value, which is not the case;
4. The offer of settlement could not be accepted by the Minister, as she was precluded to do so by subsection 162(7) of the *ITA*. As such, the offer to settle should be a neutral factor in the Court's analysis;
5. The issue on appeal was not particularly complex and, since the Respondent bore the burden of proof on the imposed penalties, this factor does not weigh in favour of additional costs;
6. The Respondent did not lengthen the proceeding, as the hearing was concluded within the timeframe agreed upon by the parties in the Joint Application for Time and Place of Hearing. Rather, the proceeding was lengthened by the Appellant's tardiness in raising an objection as to the authenticity of certain documents and the Appellant's purported failure to answer questions during her discovery, which resulted in a motion pursuant section 95 of the *Rules* to compel answers;

7. The Respondent correctly alleged in her Reply to the Notice of Appeal and in her Memorandum of Fact and Law submitted to the Court that the Appellant had knowingly made false statements in her tax returns. The allegation was necessary to ground the assessment of the Appellant.

[15] The Respondent submits that I should follow *Morrison v. The Queen.*[9] In that case, this Court awarded costs in accordance with the Tariff after the successful appeal of a gross negligence penalty assessed for the taxpayer's participation in a fiscal arbitrator-style scheme. However, the Respondent agrees that this Court is not bound by the Tariff.

[16] Finally, the Respondent submits that each party should bear the costs of the present motion.

V. DISCUSSION

1. The Principles Applicable to Costs Awards

(a) The Purpose of Costs Awards

[17] The general rule in civil litigation is that the successful party is entitled to receive costs unless there are exceptional circumstances.[10] The successful party is entitled to be indemnified for the allowable expenses and services incurred in the proceeding.[11] The award of costs is remedial in nature; it serves to indemnify the winning party, not to punish the losing party.[12] When determining the amount of costs that the successful party should receive, the trial judge must seek a compromise

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[9] *Morrison v. The Queen*, 2016 TCC 99 [*Morrison*].

[10] Janet Walker & Lorne Mitchell Sossin, *Civil Litigation* (Toronto, Ontario: Irwin Law, 2010) at 34; Mark M. Orkin & Robert G. Schipper, *The Law of Costs*, 2nd ed (Toronto, Ontario: Thomson Reuters, 1987) (looseleaf updated October 2021, release 6) at §2:1; G.D. Watson et al., *Civil Litigation: Cases and Materials*, 4th ed (Toronto: Edmond Montgomery Publications, 1991) at 419. See also *Promised Land Ministries v The Queen*, 2019 TCC 282 at paras 4-8 [*Promised Land*]; *Bonik Inc. v. The Queen*, 2007 TCC 267 at para 4 [*Bonik*]; *Labow v. Canada*, 2011 TCC 26 at para 7 [*Labow*], citing *RMM Canadian Enterprises Inc. v. R.*, [1997] 3 C.T.C. 2103 at para 3.

[11] *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at para 20.

[12] Walker, supra note 10 at 34; *Otteson v. R.*, 2014 TCC 362 at para 17; *Cameco Corporation v The Queen*, 2019 TCC 92 at para 46 [*Cameco*], aff'd 2020 FCA 112, leave to appeal to SCC refused, 39368 (18 February 2021) citing *Martin v. R.*, 2014 TCC 50 at para 14, aff'd in part 2015 FCA 95.

between compensating the successful party and unduly burdening the unsuccessful party.[13]

[18] In *Martin v. The Queen*,[14] this Court summarized the general principles of costs awards as follows:

> "The Court's approach to fixing costs should be compensatory and contributory, not punitive nor extravagant. The proper question is: What should be the losing party's appropriate contribution to the successful party's costs of pursuing the appeal in which his or her position prevailed?"[15]

[19] Furthermore, costs awards do not only serve to indemnify the successful party, they also allow the judge to encourage settlement, to prevent frivolous or vexatious litigation and to discourage unnecessary and costly litigation steps.[16] As such, this Court has an inherent jurisdiction to prevent and control any possible abuse of process by awarding costs.[17]

[20] Finally, the Court will generally not award costs not requested by a party.[18] The Court must allow the parties an opportunity to make submissions on costs.[19]

(b) Costs Limited to the Proceeding

[21] Subsection 147(1) of the *Rules* provides that this Court may determine the amount of costs involved in any proceeding. Section 2 of the *Rules* defines "proceeding" as meaning an appeal or a reference. Therefore, legal fees incurred for preparing and filing a notice of appeal can be taken into account for an award for

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[13] *General Electric Capital Canada Inc. v R.*, 2010 TCC 490 at para 17 [*General Electric*], citing *Apotex Inc. v Wellcome Foundation Ltd*. 1998 CarswellNat 2330, [1998] F.C.J. No. 1736 at para 7, aff'd 2001 CarswellNat 105, [2001] F.C.J. No. 37.
[14] *Martin v. R.*, 2014 TCC 50 [*Martin TCC*].
[15] *Ibid* at para 14. See also *Mariano v The Queen*, 2016 TCC 161 at para 27 [*Mariano*]; *Ford Motor Co. of Canada, Ltd. v R*, 2015 TCC 185 at para 7 [*Ford*].
[16] Walker, *supra note* 10 at 34. See also *ACSIS EHR (Electronic Health Record) Inc. v R*, 2016 TCC 50 at para 6 [*ACSIS*], citing *1465778 Ontario Inc. v* 1122077 Ontario Ltd., 2006 CarswellOnt 6582, [2006] O.J. No. 4248 at paras 26-27.
[17] *Foster v R.*, 2007 TCC 659 at para 65 [*Foster*], citing *Fournier c R.*, 2005 FCA 131 at paras 11-12 [*Fournier*].
[18] *Kibalian v. Canada*, 2019 FCA 160 at para 16 [*Kibalian*], citing *Exeter v. Canada* (*Attorney General*), 2013 FCA 134 at para 12.
[19] *General Electric, supra* note 13 at para 12, citing *Finch v. R.*, 2003 FCA 267 at para 6 [*Finch*]; *Fiducie Financière Lapierre c R*, 2017 TCC 19 at paras 6, 10 [*FFL*].

costs.[20] Expenses incurred before the commencement of the proceeding cannot be included in an award of costs.[21]

(c) The Principled Basis for Costs Awards

[22] In addition to the general principles summarized above, the *Rules* make it clear at subsections 147(1), 147(4) and 147(5) that this Court has broad discretion to determine the amount of costs awards.[22] However, this discretion must be exercised on a principled basis.[23]

[23] The standard of review for costs awards articulated by the Federal Court of Appeal of Canada (the "Federal Court of Appeal") is a useful guideline. In *Guibord v. R.*,[24] the Federal Court of Appeal stated that appellate courts "should only intervene if the judge considered irrelevant factors, failed to consider relevant factors, or reached an unreasonable conclusion."[25] In *Martin v. R.*, the Federal Court of Appeal added that "[d]iscretionary costs awards should only be set aside if the judge made an error in principle, or if the award is plainly wrong."[26] Therefore, even though this Court has broad discretion in exercising its power over costs awards, its discretion cannot be exercised arbitrarily or capriciously.[27]

[24] Subsection 147(3) of the *Rules* lists the factors that may be considered when determining the amount of the costs to award and their allocation to parties. However, the factors listed at subsection 147(3) are not mandatory; they serve as a helpful framework for assessing costs awards on a principled basis.[28] They merely provide guidance to the Court, which is not limited to those factors.[29]

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[20] *Martin v. R.*, 2015 FCA 95 at paras 18-22 [*Martin FCA*]; *Landry v. R.*, 2010 FCA 135 at paras 24, 34 [*Landry*]. See also *M.N.R. v. McMahon*, 2020 TCC 104 at para 69; *9196-7448 Québec Inc. c. R.*, 2017 TCC 50 at footnote 3 (fees likely incurred prior to the preparation of the notice of appeal were disallowed).
[21] *Martin FCA, supra* note 20 at paras 18-22.
[22] *Duffy v The Queen*, 2020 TCC 135 at para 18 [*Duffy*].
[23] *Lau v R.*, 2004 FCA 10 at para 5 [*Lau*]; *Landry*, supra note 20 at para 22.
[24] *Guibord v. R.*, 2011 FCA 346 [*Guibord*].
[25] *Ibid* at para 10.
[26] *Martin FCA*, supra note 20 at para 13, citing *Hamilton v. Open Window Bakery Ltd*. 2004 SCC 9 at para 27 [*Open Window Bakery*] and *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 at para 247.
[27] *Landry, supra* note 20 para 54.
[28] *CIT Group Securities (Canada) Inc. v. The Queen*, 2017 TCC 86 at para 9 [*CIT Group*].
[29] *Kruger Inc. v R.*, 2016 TCC 14 at para 18, rev'd on other grounds 2016 FCA 186.

(d) The Quantum of Costs

[25] This Court can award costs based on the Tariff or in application of subsections 147(4) and 147(7) of the *Rules*, as a lump sum in lieu of, or in addition to, any taxed costs based on the Tariff.[30] The discretion of this Court is quite broad and is not limited to complex matters where a precise calculation of costs would be unnecessarily complicated or burdensome.[31] This Court can award a lump sum amount based on a percentage of actual costs reasonably incurred. This Court can award costs on a full indemnity basis, on a substantial indemnity basis or on a partial indemnity basis.

(1) The Tariff

[26] Tariff B of Schedule II of the *Rules* provides a standardized fee schedule for the services of counsel during a proceeding. In *Univar Holdco Canada ULC v. The Queen*,[32] this Court stated that the Tariff is not a starting point, it is only the default position absent a section 147 determination otherwise being made.[33] The *Rules* do not provide, nor suggest, that the court must follow or make reference to the Tariff.[34] Therefore, the Tariff is a reference point only if the Court so wishes.[35]

(2) Partial Indemnity Costs

[27] Partial indemnity costs is the heading of costs in which the Court has the broadest discretion. As stated by the Federal Court of Appeal in *Consorzio del Prosciutto di Parma v. Maple Leaf Meats Inc*.,[36] "[a]n award of party-party costs is not an exercise in exact science. It is only an estimate of the amount the Court considers appropriate as a contribution towards the successful party's solicitor-client costs (or, in unusual circumstances, the unsuccessful party's solicitor-client costs)."[37]

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[30] *Promised Land, supra* note 10 at para 8; *LeRiche v R.*, 2012 TCC 19 at para 7 [*LeRiche*]; *Velcro Canada Inc. v R.*, 2012 TCC 273 at para 16 [*Velcro*].
[31] *Cameco, supra* note 12 at para 7 citing *Nova Chemicals Corp. v Dow Chemical Co*., 2017 FCA 25 at paras 10-13, leave to appeal to SCC refused, 37274 (20 April 2017).
[32] *Univar Holdco Canada ULC v The Queen*, 2020 TCC 15 [*Univar*].
[33] *Ibid* at para 49.
[34] *Rules, supra* note 7, s 147(4); *Velcro, supra* note 31 at para 16.
[35] *Velcro, supra* note 30 at para 8; *Promised Land, supra* note 10 at paras 4-8; *LeRiche, supra* note 30 at para 7.
[36] *Consorzio del Prosciutto di Parma v. Maple Leaf Meats Inc*., 2002 FCA 417 [*Maple Leaf Meats*].
[37] *Ibid* at para 8.

(i) The Degree of Indemnification—The Range of Solicitor-Client Costs

[28] When determining the quantum of partial indemnity costs, this Court has often cited *Zeller Estate v. The Queen*.[38] In that case, the Court quoted Mark Orkin's *The Law of Costs*[39] as an authority in support of the fact that the traditional degree of indemnification of party-to-party costs has been between 50% and 75% of solicitor-client costs or substantial indemnity costs.[40] However, there is no binding authority under which this Court must award costs within that range. On numerous occasions, this Court has departed from the aforementioned general guidance range.[41] Furthermore, the range of indemnification as stated by Orkin is not unanimously accepted in the civil litigation doctrine. Janet Walker and Lorne Sossin in *Civil Litigation* state that, traditionally, partial indemnity costs lie on the lower end of the scale at 50%.[42] The province of Ontario has a similar approach to partial indemnity costs as this Court. As a rule of thumb, partial indemnity costs awards under section 57.01 of the *Rules of Civil Procedure*[43] range between 40% and 66% of solicitor-client costs.[44]

[29] The only binding direction given to this Court by the Federal Court of Appeal regarding the quantum of cost is that they must be reasonable and determined on a principled basis.[45]

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[38] See *Dickie v. R.*, 2012 TCC 327 at para 27 [*Dickie*], aff'd 2014 FCA 40 at para 6; *Spruce Credit Union v. R.*, 2014 TCC 42 at paras 29-30 [*Spruce Credit*]; *Ford, supra* note 15 at paras 7, 23; *Duffy, supra* note 22 at para 24; *Invesco Canada Ltd. v R*, 2015 TCC 92 at para 5 [*Invesco*].

[39] Orkin, *supra note* 10.

[40] *Zeller Estate*, *supra* note 8 at para 9.

[41] In *Paletta Estate v. The Queen*, 2021 TCC 41, this Court awarded 45% of the appellant's legal fees. In *Damis Properties Inc. v. The Queen*, 2021 TCC 44, this Court awarded 35% of the appellant's legal fees. In *Cameco Corporation v. The Queen*, 2019 TCC 92, this Court 35% of the appellant's legal fees. In *CIT Group Securities (Canada) Inc. v. The Queen*, 2017 TCC 86, this Court awarded approximately 36% of the appellant's legal fees. In *Invesco Canada Ltd. v. R.*, 2015 TCC 92, this Court awarded 40% of the appellant's legal fees. In *Klemen v. R.*, 2014 TCC 369, this Court awarded approximately 30% of the appellant's legal fees.

[42] Walker, *supra* note 10 at 36.

[43] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 at s 57.01.

[44] Linda S. Abrams & Kevin Patrick McGuinness, *Canadian Civil Procedure Law*, 2nd ed (Toronto, Ontario: LexisNexis Canada) at 17.56.

[45] *Guibord, supra* note 24 at para 10: "An appellate court must thus defer to a Tax Court judge's exercise of discretion in determining costs and should only intervene if the judge considered irrelevant factors, failed to consider relevant factors, or reached an unreasonable conclusion." Cited in *Transalta Corp. v. R.*, 2013 FCA 285 at para 13 [*Transalta*], *Marzen Artistic Aluminum Ltd. v. R.*, 2016 FCA 34 at para 59 [*Marzen*].

[30] That being said, for consistency purposes, in my view, the 50% to 75% range of solicitor-client costs should be used unless there are exceptional circumstances.

(ii) The Degree of Indemnification—Factors to Consider

[31] As previously stated, by laying the requirement for a "principled basis", the Federal Court of Appeal makes it clear that this Court is required to explicitly specify the factors that led to its costs award.[46]

[32] As stated above, the factors listed at subsection 147(3) of the *Rules* serve only as a helpful framework for assessing cost awards on a principled basis and are not mandatory in this Court's assessment. However, in *Velcro Canada Inc. v. R.*,[47] this Court highlighted the practical importance of the factors listed at subsection 147(3) of the *Rules* as follows:

> "It is my view that in every case the Judge should consider costs in light of the factors in Rule 147(3) and only after he or she considers those factors on a principled basis should the Court look to Tariff B of Schedule II if the Court chooses to do so."[48]
>
> [emphasis added]

[33] As such, I will discuss only the factors that, in my view, are relevant in the circumstances of this case or those that were addressed by the parties in their submissions.

(3) Substantial Indemnity Costs

[34] Substantial indemnity costs are defined at subsection 147(3.5) of the *Rules* as 80% of solicitor-client costs.[49] This is the default rule once the claimant fulfills the requirements of subsections 147(3.1), 147(3.2) and 147(3.3) of the *Rules*.[50] The main requirements are that a settlement offer was made at least 90 days prior to the hearing, that the settlement offer was rejected and that offer was as favourable as or more favourable than the court's decision. However, subsections 147(3.1) and

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[46] *Lau*, *supra* note 23 at para 5; *Landry*, *supra* note 20 at para 22*; Guibord*, *supra* note 24 at para 10; *Martin FCA*, *supra* note 20 at para 13.
[47] *Velcro*, supra note 30.
[48] *Ibid* at para 17.
[49] *Rules*, supra note 7, s 147(3.5); *Duffy*, *supra* note 22 at para 25.
[50] *Sun Life Assurance Co. of Canada v. R.*, 2015 TCC 171 at para 8 [*Sun Life*].

147(3.2), also make it clear that the Court retains the discretionary power to determine a quantum of substantial indemnity costs despite the definition at subsection 147(3.5).[51] As such, the Court may award substantial indemnity costs above or below the defined percentage of costs, on the condition that the Court exercise its discretion on a principled basis.[52]

[35] Therefore, it is appropriate to consider substantial indemnity costs as something more than partial indemnity costs, but which remains highly discretionary.[53] Although the Court has broad discretion in awarding costs it must nonetheless exercise caution when awarding costs above the substantial indemnity level (80%) since the Court will be inching towards a full indemnity costs award, which generally requires questionable behaviour on the part of the losing party.[54]

(4) Full Indemnity Basis

[36] A full indemnity costs award represents the total amount paid by a party in allowable expenses and services incurred in the proceeding that, in the opinion of the Court, were necessary.[55] Costs on a full indemnity basis can be awarded only in exceptional cases, where a party's behaviour takes the case outside of the ordinary.[56] For tax appeals, such a costs award can be granted when a party has had "reprehensible, scandalous or outrageous" conduct during litigation.[57] This can be the case where the conduct of a party caused undue delay, inappropriately prolonged

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[51] *Ibid* at para 9; *Bank of Montreal v. The Queen*, 2021 TCC 3 at para 5 [*Bank of Montreal]; Ike Enterprises Inc. v R.*, 2017 TCC 160 at para 18 [*Ike*]; *MacDonald v. The Queen*, 2018 TCC 55 at para 48 [*MacDonald*].
[52] *Sun Life, supra* note 50 at paras 9-11; *MacDonald, supra* note 51 at para 48. See also, *Golini v. R.*, 2016 TCC 247 at para 17-19 [*Golini*].
[53] *Ford, supra* note 15 at para 7; *Invesco, supra* note 38 at para 5.
[54] *Repsol Canada Ltd. v. R.*, 2015 TCC 154 at para 10 [*Repsol*], *Jayco, Inc. v. R*, 2018 TCC 239 at para 51-52 [*Jayco*]. See *Hansen v The Queen*, 2021 TCC 39 [*Hansen*]; *ACSIS, supra* note 16 at para 6.
[55] *Apotex Inc. v Egis Pharmaceuticals*, 1991 CarswellOnt 3149, [1991] O.J. No. 1232 at para 13.
[56] *Winters v Legal Services Society (British Columbia)*, [1999] 3 SCR 160 at para 79. See also *Amway Corporation v. The Queen*, 1986 CarswellNat 382, [1986] 2 C.T.C. 339 at para 5.
[57] *Martin FCA, supra* note 20 at para 26; *Merchant v The Queen*, [1998] 3 C.T.C. 2505 at para 58 [*Merchant*], aff'd 2001 FCA 19; *Splane v. The Queen*, 1991 CarswellNat 398, [1991] 1 C.T.C. 406 at para 6; *Bland v. National Capital Commission*, 1992 CarswellNat 162, [1993] 1 F.C. 541 at para 6.

the proceedings or resorted to unnecessary procedural wrangling.[58] There also must be a justification for doing so on the record or in the judge's reasons.[59]

(e) Disbursements

[37] The amount of disbursements to be allowed by this Court is set under section 2 of Tariff B of the *Rules* which states:

> "The amounts that may be allowed for disbursements are all disbursements made under Tariff A of this Schedule and all other disbursements essential for the conduct of the proceeding[...]."[60]
>
> [emphasis added]

[38] Furthermore, the claimed disbursements must be reasonable in the circumstances of the case.[61]

2. The Appellant's Costs Award

[39] This is not a case which warrants full indemnity costs. The behaviour of Counsel for the Respondent was not outside of the ordinary and their conduct during the proceeding was not reprehensible, scandalous or outrageous. There is also no evidence that the Respondent's conduct caused undue delay, inappropriately prolonged the proceedings or that it resulted in unnecessary procedural wrangling.

[40] This is not a case which warrants substantial indemnity costs either. Both parties agree that the Appellant's offer of settlement made on January 6, 2020 does not qualify for substantial indemnity costs under subsection 147(3.1) of the *Rules*. This is because the offer was not served at least 90 days before the commencement of the hearing.[62]

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[58] *Merchant, supra* note 57 at para 59; *Continental Bank of Canada v. R.,* 1994 CarswellNat 2669, [1994] T.C.J. No. 863 at para 10 [*Continental Bank*]. See also, *Young v. Young*, [1993] 4 SCR 3 at p 17; *Baker v. Canada (Minister of Citizenship & Immigration*), [1999] 2 SCR 817 at para 77 [*Baker*]; *Open Window Bakery Ltd., supra* note 27 at para 26.
[59] *Finch, supra* note 19 at para 5; *Kibalian, supra* note 18 at para 17.
[60] *Rules, supra* note 7 at Schedule II, Tariff B.
[61] *Repsol, supra* note 54 at paras 16-21; *Aon Inc. v. The Queen*, 2018 TCC 111 at paras 30-33 [*Aon*].
[62] Written Submissions of the Appellant on the Motion for Cost at para 28 [*Appellant's Submissions*].

[41] In this case, the Appellant is seeking a partial indemnity costs award. The total amount of costs requested by the Appellant is $133,404.92 excluding disbursements. The Appellant is seeking fifty percent (50%) of the legal fees incurred before January 6, 2020, the date of service of her offer of settlement ($33,830.19) and eighty percent (80%) of the legal fees incurred after that date ($99,574.73). Based on the evidence submitted at the motion's hearing, the legal fees incurred by the Appellant did not precede the Court proceeding. None of these fees were incurred before the preparation of the Notice of Appeal.[63]

(a) Application of Schedule II, Tariff B of the *Rules*

[42] The Respondent submits that this Court should award costs based on Schedule II, Tariff B of the *Rules* in application of the factors found in subsection 147(3) of the *Rules* and invites the Court to follow its decision in *Morrison v. The Queen*.[64] The Respondent further submits that the *Morrison* decision is relevant because it relates to a gross negligence penalty assessed against the appellant for his participation in a tax fraud scheme.[65]

[43] I disagree. In *Morrison*, the order for costs was rendered from the bench and there is no indication that the order was rendered in the context of a motion under subsection 147(7) of the *Rules*. In its order, the Court did not make reference to the factors listed at subsection 147(3) of the *Rules*. The Court followed its standard approach when it allows an appeal with costs without further representations and awarded costs in accordance with the Tariff.[66]

[44] The Respondent also submits that the Appellant's conduct, that is her participation in the making of false statements, should not be rewarded by a costs award not based on the Tariff.

[45] I also disagree. As stated previously, the Tariff is only a reference point for a costs award if the Court wishes to base its decision on it. After a review of the factors listed at subsection 147(3) of the *Rules*, I have determined that it is not appropriate

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[63] Matthew Jenkins Affidavit Dated April 1, 2021 at para 4.
[64] *Morrison*, supra note 9.
[65] Respondent's Written Submissions on Costs at para 32 [*Respondent's Submissions*].
[66] *Univar, supra* note 32 at paras 48-49; *CIBC World Markets Inc. v R*, 2019 TCC 201 at para 9 [*CIBC TCC*]; *Velcro, supra* note 30 at para 19, citing *Maple Leaf Meats, supra* note 36 at paras 8-10; *Duffy, supra* note 22 at para 20.

in the circumstances. I also fail to see how a costs award not based on the Tariff could be seen as a "reward" for an appellant.

[46] Therefore, I will proceed to review the relevant factors listed at subsection 147(3) of the *Rules* to determine the quantum of costs to be awarded.

(b) Application of the Factors Listed at Subsection 147(3) of the *Rules*

[47] As previously stated, the various factors listed at subsection 147(3) of the *Rules* may be considered by this Court when exercising its discretionary power to award costs. The Court is not limited to these factors and is not required to discuss all of them.

(1) The Result of the Proceeding

[48] The Respondent submits that the result of the proceeding is an appropriate factor to consider only if a taxpayer has had mixed success. The Respondent further submits that if it is not the case, the result of the proceeding is a neutral factor. The Respondent cited comments made by this Court in *Lux Operating Limited Partnership v. The Queen*[67] and in *Univar Holdco Canada ULC v The Queen*[68] in support of these arguments. In *Lux*, this Court stated:

> "[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.
>
> [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

[67] *Lux Operating Limited Partnership v. The Queen*, 2018 TCC 214 [*Lux*].
[68] *Univar*, *supra* note 32.

> 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."[69]

[49] I agree that the result of a proceeding can affect costs in two ways.

[50] As stated previously, the general rule in civil litigation is that the successful party is entitled to receive costs unless there are exceptional circumstances. Hence, in my view, the first way that the result of a proceeding affects costs is that the Court is in a position to determine which party is entitled to costs. Barring exceptional circumstances, the successful party will be entitled to costs regardless of the degree of its overall success.

[51] The second way the result of a proceeding affects costs is when the Court decides to consider the factors listed at subsection 147(3) of the *Rules*. Paragraph 147(3)a) specifically provides that the result of a proceeding may be taken into consideration by this Court. Therefore, at this stage of the analysis, the degree of success of a party is a factor that may be taken into consideration. The greater the success of a party, the greater the losing party's appropriate contribution to the successful party's costs should be. Hence, in my view, whether faced with an "all or nothing" issue, such as a gross negligence penalty, or a case where there is only one issue, the level of success may be taken into consideration by the Court. In a gross negligence penalty case, the winning party's level of success is one hundred percent (100%). In my view, this is the level of success that may be taken into consideration by the Court.

[52] I am of the view that, in this proceeding, the Appellant's success weighs heavily in favour of an increased assessment of costs in her favour.

(2) Amount at Issue in the Proceeding

[53] In my view, this factor is important in this case due to the Appellant's financial standing and means. I agree with counsel for the Appellant when he states that the amount at issue was significant for the Appellant. For the last 10 years before the

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[69] *Lux, supra* note 67 at paras 9-10.

taxation year at issue, the Appellant's average taxable income was $23,499 per year.[70] The Minister assessed a penalty for an amount of $139,032, not including the accrued interest to the date of the reassessment. Hence, the assessed gross negligence penalty represented over 5 years of the Appellant's taxable income.

[54] Therefore, due to the significance of the amounts for the Appellant, this factor weighs heavily in favour of an increased assessment of costs in her favour.

(3) Importance of Issues

[55] In her submissions, the Appellant asserts that her case served as an "involuntary quasi-lead case" due to the significant number of DeMara related assessments on the docket of this Court and, thus, warrants a higher costs award.[71] I agree in part.

[56] I do not agree that the Appellant's case served as an "involuntary quasi-lead case". Either a case is a formal lead case under section 146.1 of the *Rules* or it is not. Therefore, this is not a factor.

[57] As for the importance of the issue, this Court holds that this factor pertains to cases that will be important to the development of tax law, to the public interest or to a broad number of taxpayers.[72] This appeal concerned a gross negligence penalty assessed against the Appellant. Gross negligence penalties are fact-driven and are tied to the specific circumstances of each case. Hence, I am of the view that this decision might not have significant precedential value. That being said, due to the fact that a number of taxpayers have been assessed on the same basis as the Appellant, this case may be considered by some as a development of some significance.

[58] Therefore, this factor weighs in favour of an increased assessment of costs.

(4) Offer of Settlement Made in Writing

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[70] Reply to the Notice of Appeal at para 10(k).
[71] Appellant's Submissions, *supra* note 62 at paras 25-27.
[72] *Aitchison Professional Corporation v The Queen*, 2018 TCC 234 at para 7 [*Aitchison*].

[59] The purpose of paragraph 147(3)d) of the *Rules* is to encourage parties to make offers of settlement and to treat them seriously.[73] This Court has stated that this factor is a very significant factor, if not the most significant factor, in the determination of costs.[74] Although settlement offers should contain an element of compromise, the Court may nonetheless consider a reasonable offer that does not include compromise and award costs.[75] Therefore, depending on the offer and the facts of each case, an offer can be a factor, a significant factor or a very significant factor to take into consideration.

[60] However, offers to settle must be principled offers that the Minister can accept as a matter of law and that are reasonable given the facts at hand.[76] In *Aon Inc. v. The Queen*,[77] this Court wrote:

> "The test, for whether any offer is principled, is whether it is possible to conclude that the tax consequences, presented in the offer and that are to be agreed upon between the parties, will be in compliance with a reasonable interpretation of a tax statute as it applies to the taxpayer's circumstances."[78]

[61] As such, if the Minister is unable to accept a settlement offer, there should not be any adverse cost consequences against her.[79] At issue is whether the Minister was subject to a legal disability under subsection 162(7) of the *ITA*, which reads as follows:

> 162 (7) Every person (other than a registered charity) or partnership who fails
>
> (a) to file an information return as and when required by this Act or the regulations, or
>
> (b) to comply with a duty or obligation imposed by this Act or the regulations
>
> is liable in respect of each such failure, except where another provision of this Act (other than subsection 162(10) or 162(10.1) or 163(2.22)) sets out a penalty for the failure, to a penalty equal to the greater of $100 and the product obtained when $25

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[73] *CIBC World Markets Inc. v R*, 2012 FCA 3 at para 14 [*CIBC FCA*].
[74] *Daishowa-Marubeni International Ltd. v The Queen*, 2013 TCC 275 at para 18 [*Daishowa*].
[75] *SCDA (2005) Inc. v Canada*, 2017 FCA 177 at paras 24-30 [*SCDA*], citing *Allen (Next Friend of) v University Hospitals Board*, 2006 ABCA 101 at para 15.
[76] *CIBC FCA, supra* note 73 at paras 15, 24.
[77] *Aon*, supra note 61.
[78] *Ibid* at para 23.
[79] *CIBC FCA, supra* note 73 at paras 14-15.

> is multiplied by the number of days, not exceeding 100, during which the failure continues.[80]

[62] The Respondent submits that she was precluded under subsection 162(7) of the *ITA* since subsection 163(2) of the *ITA* sets out the penalty related to filing tax returns containing false statements.[81] In the alternative, the Respondent argues that subsection 162(7) of the *ITA* does not apply since there was no failure to comply with a duty or obligation under the *ITA* to prevent the filing of the Amended Income Tax Return.[82]

[63] In this case, the Appellant offered to settle the appeal upon payment of a penalty of $2,500 under paragraph 162(7)b) of the *ITA* in lieu of the gross negligence penalty assessed by the Minister.[83] In her settlement offer, the Appellant recognized having committed a breach in her duty not to make false statements in her tax returns.[84] The Appellant submits that her offer was a principled offer since it rendered her liable for a lesser penalty under paragraph 162(7)b) of the *ITA*.[85] The Appellant further submits that the Respondent was not precluded from accepting that offer under the post-amble of paragraph 162(7)b) since no other penalty applied in this case.[86] Furthermore, the Minister could impose a penalty under subsection 162(7) since the Appellant was in breach of her general duty not to make false statements implicitly included in the filing requirements at subsection 150(1) and section 151 of the *ITA*.[87]

[64] I disagree with the Respondent's submissions. In our self-assessment tax system, every taxpayer must complete their tax returns honestly and with integrity. In *Knox Contracting Ltd. v. Canada*,[88] the Supreme Court of Canada recognized the general and implicit duty of honesty required in filing tax returns:

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[80] *ITA*, *supra* note 3 at s 162(7).
[81] Respondent's Submissions, *supra* note 65 at para 22.
[82] *Ibid* at para 23.
[83] Appellant Submissions, *supra* note 62 at para 29.
[84] *Ibid* at para 30.
[85] *Ibid*.
[86] *Ibid* at para 31.
[87] *Ibid* at para 30.
[88] *Knox Contracting Ltd. v. Canada*, [1990] 2 SCR 338.

> "The entire system of levying and collecting income tax is dependent upon the integrity of the taxpayer in reporting and assessing income. If the system is to work, the returns must be honestly completed."[89]

[65] As stated by the Federal Court of Appeal in *Exida.com Ltd. Liability Co. v. R.*,[90] paragraph 162(7)(b) of the *ITA* "provides for a residual penalty for the failure to comply with an obligation when no other penalty is set out under the *Act*."[91] To my knowledge, there is no provision in the *ITA* that specifically provides for a penalty when a taxpayer is negligent with respect to an income tax return filing.

[66] In her settlement offer, the Appellant stated that she was prepared "to concede that her failure to adequately monitor and make inquiries of an authorized representative could constitute a failure to comply with her duty under the *ITA* not to allow the filing of false statements in a return."[92] The Appellant implicitly admitted that she had been negligent with respect to her income tax return fillings for the 2010 taxation year. In my view, the Appellant's offer could have been accepted by the Respondent and the Appellant's offer to settle was therefore principled. This was a reasonable offer since the Appellant recognized having committed a breach in her duty not to make false statements in her tax returns.

[67] Since the Appellant's settlement offer was more favourable to the Respondent than the result obtained at trial, this weighs in favour of an increased assessment of costs.

(5) Conduct of the Parties Affecting the Duration of the Proceeding

[68] The Appellant submits that the Respondent unduly lengthened the hearing by failing to produce the original copy of the Amended Income Tax Return and due to multiple attempts by her to introduce affidavit evidence with limited notice.[93]

[69] The Respondent submits that the Appellant lengthened the proceeding by refusing to answer questions during her discovery and by failing to fulfill certain

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[89] *Ibid* at 350. See also *Jarvis v R.*, 2002 SCC 73 at paras 49-51; *Sledge v. R.*, 2016 TCC 100 paras 18-20 [*Sledge*].
[90] *Exida.com Ltd. Liability Co. v. R.*, 2010 FCA 159 [*Exida*].
[91] *Ibid* at paras 21, 36.
[92] Barbara Stephen Affidavit Dated April 1, 2021 at p 8.
[93] Appellant's Submissions, *supra* note 62 at para 45.

undertakings, resulting in the Respondent bringing a motion under section 95 of the *Rules*.[94]

[70] Procedural wrangling and litigation tactics used to zealously represent clients' rights should not be viewed as warranting an increase in costs.[95] The determination of costs should not be awarded on the basis of hindsight.[96] I do not believe that the conduct of the parties, as describe above, affected the duration of the proceeding.

[71] The parties did not overzealously defend their interests. Therefore, this does not weigh in this Court's determination of the quantum of costs awarded.

[72] The Appellant also submits that this Court should give weight to the fact that the Respondent had the opportunity to complete a full oral examination for discovery of the Appellant, which she did, and that her testimony was consistent with that at trial and was held to be credible.[97] As such, the fact that the Respondent proceeded to trial having had the full benefit of testing the Appellant's story and credibility warrants this Court's consideration. Having done so, the Appellant submits that the Respondent overzealously defended the Minister's assessing position by continuing to advance her case on the basis that the Appellant had knowingly made false statements and by not engaging in any settlement discussions with the Appellant.[98]

[73] Finally, the Appellant submits that, in view of the findings of this Court that the Appellant did not know that she was participating in the making of the false statement in the Return and was not wilfully blind or grossly negligent in respect thereof, the Appellant should be compensated for the legal fees she incurred to have the assessment vacated.[99]

[74] I disagree with these submissions. Counsel for the Respondent did not overzealously defend the Minister's assessing position by continuing to advance her case after having the benefit of her examination before trial. The credibility of a taxpayer in a gross negligence penalty case is very important and often crucial. Counsel for the Respondent assessed the strengths and weaknesses of their case and

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[94] Respondent's Submissions, *supra* note 65 at para 30.
[95] *Golini*, *supra* note 52 at paras 19-23.
[96] *Klemen v R.*, 2014 TCC 369 at para 31.
[97] Appellant's Submissions, *supra* note 62 at para 48.
[98] *Ibid* at para 52.
[99] *Ibid*.

made their own assessment of the evidence, including an assessment of the Appellant's credibility. Obviously, in this case, counsel for the Respondent came to the same conclusion as the Minister after having examined the Appellant before trial. I can only assume that they believed that the Respondent had a strong case and determined that it should go to trial.

[75] The conduct of the Respondent's counsel is not at fault. Therefore, this does not weigh in this Court's determination of the quantum of costs awarded.

(6) Other Matters Relevant to the Question of Costs

(i) The Appellant's Conduct Before the Commencement of the Proceeding

[76] In my Reasons for Judgment, I found that the Appellant had participated in the making of false statements and was negligent. Hence, the Respondent submits that the Appellant should not be awarded enhanced costs despite her success in the appeal.

[77] The Court can only look at the Appellant's conduct prior to the Notice of Appeal if that conduct unduly and unnecessarily prolonged the proceeding.[100] This is not the case here. The fact that the Appellant was negligent did not unduly or unnecessarily prolong the length of the proceeding. Her conduct led to her 2010 taxation year being reassessed by the CRA, nothing more.

(ii) The Minister's Conduct Before the Commencement of the Proceeding

[78] The Federal Court of Appeal has stated that in exceptional circumstances, a Court can consider a party's conduct prior to a proceeding if that conduct unduly and unnecessarily lengthen the proceeding.[101]

[79] The appeal concerned a gross negligence penalty assessed against the Appellant. A gross negligence penalty should not be imposed lightly by the Minister.

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[100] See *Rules*, *supra* note 7 at ss 147(3)(g), 147(3)(j); See also *Martin FCA*, *supra* note 20 at paras 18-20, citing *Merchant v. R.*, 2001 FCA 19 at para 7 and *Landry*, *supra* note 20 at para 25; *Myrdan Investments Inc. v. R.*, 2013 TCC 168 at paras 15-20.

[101] *Martin FCA*, *supra* note 20 at para 21.

Gross negligence is a serious allegation that must meet the high threshold of subsection 163(2) of the *ITA* and of the case law. A gross negligence penalty should only be applied in exceptional circumstances.[102]

[80] Under subsection 163(3) of the *ITA*, the Minister has the burden of proving the facts that justify the imposition of a penalty. By confirming the Appellant's reassessment, the Minister forced the Appellant to take the matter before the Court. This has significant financial consequences for any taxpayer.

[81] CRA's Appeals Division, which confirms assessments, was aware of the following facts before acting:

- In 2011, the Appellant was in her late sixties;
- The Appellant had used the services of a Certified General Accounting firm to prepare and submit her original 2010 tax return;
- For the last 10 years before the 2010 taxation year, the Appellant's average taxable income was $23,499 per year;
- DeMara was the subject of an investigation by CRA's Criminal Investigations Division;
- On March 21st, 2012, CRA's Criminal Investigations Division had executed search warrants at DeMara's office and at the residences of two of DeMara's managers;
- On March 26, 2012, the Appellant's Amended Income Tax Return was filed by DeMara;
- The Appellant's Amended Income Tax Return was not signed by the Appellant;
- DeMara had filed false returns for numerous taxpayers claiming large amounts of personal expenses as business expenses. It also claimed large amounts that were not even expenses as business expenses;

[102] *O'Dea v. The Queen*, 2009 TCC 295 at para 112.

- Returns of other taxpayers, also filed by DeMara, were under review by CRA's Audit Division;

- On March 18, 2013, the Appellant wrote a letter to the audit officer in charge of her file in which she tried to explain her situation. She explained that she had mistakenly placed her tax affairs under the care of DeMara, a sophisticated criminal, following the advice of a person of utmost trust, her husband. She was seeking to fix DeMara's wrong. The Appellant sought to revert to the tax position she took in her original tax return, that is the return she filed before DeMara's involvement. She wanted to pay the remainder of the taxes still owing under the Minister's initial assessment. Although the letter included some so called "de-taxer language", it is clear that the Appellant was totally disassociating herself from the illegal acts of DeMara and in no way wished to challenge her obligation to pay the taxes owing under the initial return filed for 2010 and her newly corrected 2011 return;

- On March 18, 2014, the Appellant filed her Notice of Objection to the Minister's reassessment. In her letter, the Appellant repeated her story in a clear and concise manner, without any "de-taxer language" this time. The Appellant's explanations were clear and credible. In her letter, she stated that:

    - She did not participate in the making of a false statement or omission in her return. She stated having filed returns for over 50 years, and having willingly paid the assessed income tax.

    - She was approached by an acquaintance who suggested that a tax preparer was making a presentation on legitimately minimizing income taxes and encouraged her to participate in a weekly telephone conference call that would explain the procedure.

    - The presenter, Donna Marie Stancer, who claimed to be an ordained minister, and an individual who understood income tax law and in fact had worked at CRA, made a very credible presentation.

    - Exercising due diligence, including online searches and investigation into the background of both Ms. Stancer and her company, DeMara Consulting, both she and her husband had decided to visit the DeMara offices in Vernon, BC and talk to Ms. Stancer in person. They were

convinced that the tax strategy she was invoking was legitimate, and that she was a person they could trust to obtain legitimate tax refunds.

- Because of her lack of understanding of tax law and her belief that Ms. Stancer was credible in what she was saying, she agreed to allow her to prepare her income tax returns and provided the material requested, believing that those amounts would be legitimate deductions.

- Since she lived in Abbotsford and Ms. Stancer's tax practice was in Vernon, British Columbia, she did not think it was unusual that Ms. Stancer seek authorization to file the tax returns on her behalf.

- Since DeMara insisted that she should not answer CRA letters directly, she continued to forward all CRA correspondence to them.

- When it came to light that what Ms. Stancer was doing was most likely tax evasion, she immediately disassociated herself from Ms. Stancer advising CRA that she no longer was authorized to represent her and asking CRA to withdraw her 2010 tax return as prepared by Ms. Stancer. Furthermore, she immediately began the process of refiling the 2010 return as it was originally accepted by CRA.

- Due to her line of work, she was not versed in income tax law and so, unfortunately, she was misled by an individual who held herself out as knowledgeable in such tax matters.

- She did not believe or understand that the deductions Ms. Stancer was claiming on her behalf were not legitimate. If she had understood the potential illegality of the tax strategy, she would have asked Ms. Stancer not to proceed with claiming those amounts.

- She wrote this letter to help the Appeals Division agent in understanding the process by which she used DeMara’s services.

[82] After having received these letters, the Appeals Division agent determined that the Appellant had knowingly or in a grossly negligent manner (amounting to wilful blindness) been involved in the making of false statements and filing of her amended 2010 tax return. The agent came to this conclusion without ever meeting the Appellant or speaking to her. The right to an oral hearing such as an interview is

not a general requirement under procedural fairness.[103] Therefore, the Minister is not required in every case to interview a taxpayer before it confirms an assessment or reassessment. However, in my view, in certain circumstances, the failure to conduct such an interview can have an impact on a costs award if the Minister is unsuccessful in Court. As stated above, in its assessment of the quantum of costs to be awarded, this Court can look at the conduct of the parties that unduly and unnecessarily prolonged the proceeding, even if such conduct preceded the Notice of Appeal.[104] I believe it is the case here.

[83] In the circumstances of this case, based on the facts set out at paragraph 81 and the Respondent's position at trial, I am of the opinion that the failure to speak to the Appellant prior to the confirmation of the reassessment unnecessarily prolonged the proceeding considering the legal test that was applied by the Appeals Division agent in confirming the reassessment. The test laid out in *Torres v. The Queen*[105] (the "*Torres* Test") can only be applied if key facts are clearly established. These facts are specific to each case.

[84] In this case, the *Torres* Test was applied without establishing certain key facts. These facts were later obtained by the Respondent during the course of the proceeding. Here are some examples of relevant facts and information that could have been obtained by the CRA prior to the confirmation of the reassessment:

- The extent of Mr. Bowker's involvement in the preparation of the Appellant's tax return;
- Information provided to the Appellant by Mr. Bowker with respect to DeMara's services and the Amended Income Tax Return;
- The content of the presentation made to the Appellant by DeMara;
- The number of DeMara's presentations that the Appellant participated in;
- Details of the Appellant's due diligence of DeMara's activities;
- Details on the individual who suggested that the Appellant use DeMara's services;

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[103] *Baker*, *supra* note 58 at paras 22, 30-34; *Barron v. Minister of National Revenue*, 1997 CarswellNat 7, [1997] 2 C.T.C. 198 at para 6.
[104] *Supra* note 101.
[105] *Torres v. The Queen*, 2013 TCC 380 [*Torres*].

- Details on the Appellant's thought process in using DeMara's services;
- Details on the presentation made to Mr. Bowker by DeMara;
- Information on the Appellant's knowledge of tax matters;
- Information with respect to the Appellant's personal characteristics.

[85] A request for further specific information, either orally or by letter, would have allowed the Minister to properly gather the necessary facts in order to apply correctly the *Torres* Test. Importantly, for example, Mr. Bowker's role could have been established by the CRA before the Respondent got involved in the case. Notably, to my knowledge, neither the CRA nor the Respondent spoke to Mr. Bowker to gather evidence on his involvement in the conduct that was alleged against Mrs. Bowker. Besides the Appellant's testimony, no other evidence was presented regarding DeMara's communications to convince Mr. Bowker to use its services or what Mr. Bowker told the Appellant on the matter. This is at odds with the Respondent's recognition that Mr. Bowker played a central role with respect to Mrs. Bowker's involvement with DeMara.[106] Whether the result would have been the same had this been done is irrelevant. It might well be the case. What is relevant to this costs award is that the failure to do so had an impact on the length of the proceeding by requiring the Respondent to obtain the information in the course of the proceeding. While it is always expected that the Respondent will establish or confirm facts during the proceeding, it should not have been done to this extent.

[86] Lastly, I am of the view that in this case, they were numerous facts that should have prompted the CRA to interview the Appellant. Considering the nature of the reassessment, the amount of the gross negligence penalty and the ongoing CRA cases with DeMara, it was necessary to proceed with caution in order not to unduly and unnecessarily prolong the proceeding. This made establishing key facts even more important in order to determine whether the Appellant had simply been negligent or grossly negligent.

[87] The Minister's conduct prior to the beginning of the proceeding weighs in favour of an increased assessment of costs.

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[106] *Bowker*, *supra* note 1 at para 62.

VI. CONCLUSION

[88] As previously mentioned, I am of the opinion that unless there are exceptional circumstances, a lump sum costs award on a partial indemnity basis should be equal to an amount representing 50% to 75% of the legal fees incurred by a taxpayer during the proceeding. The motion before me does not raise any exceptional circumstances. Therefore, the 50% to 75% range is appropriate in this case.

[89] In determining the quantum of costs, I have considered the written submissions of the parties. I have considered the factors listed at subsection 147(3) of the *Rules*, weighing their relative importance, and determined the quantum of costs payable by the Respondent based on their cumulative effect.

[90] In this case, the success of the Appellant at trial and the importance of the amount at issue for the Appellant weigh heavily in favour of an award of costs at the upper-limit of the partial indemnity costs range mentioned above.

[91] Furthermore, the importance of the issue decided by the Court, the offer to settle made by the Appellant and the conduct of the Minister before the commencement of the proceeding all favour an increased partial indemnity costs award. Based on their cumulative effect, I have determined that the Respondent should pay the Appellant what is in my view the maximum amount of costs allowable within the applicable range, that is 75% of her incurred legal fees.

[92] Therefore, the Appellant is awarded a total of $149,842.22 in costs comprised of the following amounts:

- $144,096.59, which represents 75% of the Appellant's legal fees for the Appeal ($192,128.79, including of PST and HST)[107];
- $3,245.63 for her disbursements for the Appeal;
- $2,500 for this motion.

[107] Matthew Jenkins Affidavit Dated April 1, 2021 at para 7.

[93] For all these reasons, the motion is allowed.

Signed at Ottawa, Canada, this 8th day of April 2022.

"Sylvain Ouimet"

Ouimet J.

CITATION:	2022TCC43
COURT FILE NO.:	2016-1686(IT)G
STYLE OF CAUSE:	MARGO DIANNE BOWKER AND THE QUEEN
PLACE OF HEARING:	Ottawa, Canada
DATE OF HEARING:	October 7, 2021
REASONS FOR ORDER BY:	The Honourable Justice Sylvain Ouimet
DATE OF ORDER:	April 8, 2022

APPEARANCES:

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