

Federal Court of Appeal



Cour d'appel fédérale

Date: 20230329

Docket: A-367-21

Citation: 2023 FCA 72

**CORAM: STRATAS J.A.
WEBB J.A.
RENNIE J.A.**

BETWEEN:

JEFFREY HULL

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Toronto, Ontario, on March 29, 2023.
Judgment delivered from the Bench at Toronto, Ontario, on March 29, 2023.

REASONS FOR JUDGMENT OF THE COURT BY:

WEBB J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on March 29, 2023).

WEBB J.A.

[1] The parties filed a consent to judgment in the Tax Court of Canada prior to the commencement of the appellant's appeal. A consent judgment was issued on October 20, 2020 reflecting the terms of the settlement agreement. The appellant then brought a motion under Rule 147 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a requesting costs

under Rule 147(3.1) in the amount of \$260,413.27. The appellant's position was that he was entitled to these enhanced costs because the consent judgment was more favourable to the appellant than the offer of settlement he made on March 17, 2017. The appellant's motion was denied by the Tax Court (2021 TCC 87, *per* D'Arcy J). Instead, the appellant was awarded costs of \$4,096.25 plus disbursements of \$10,403.56 (which were reduced by the respondent's cost of the motion, fixed at \$2,500).

[2] This is the appellant's appeal from this Order of the Tax Court.

[3] As noted by this Court in *Marzen Artistic Aluminum Ltd. v. Canada*, 2016 FCA 34:

[59] On the third issue regarding the granting of costs to the respondent, it is a well-established principle that orders granting costs are discretionary and command deference. Rule 147 of the *Tax Court of Canada Rules (General Procedure)* SOR/90-688a, specifies the factors that a judge must consider in awarding costs. An appellate Court should only intervene if the Judge considered irrelevant factors, failed to consider relevant factors, or reached an unreasonable conclusion (see *Guibord v. Canada*, 2011 FCA 346).

[4] This discretion in granting cost awards is maintained in Rule 147(3.1). Rule 147(3.1) provides for enhanced costs when an appellant makes an offer of settlement and obtains a judgment at least as favourable as the settlement offer. The discretion to not apply this Rule is confirmed by the opening words of Rule 147(3.1) – “[u]nless otherwise ordered by the Court...”.

[5] In this case, the Tax Court Judge decided to not apply Rule 147(3.1) as he was entitled to do. There is no merit to the appellant's argument that, as a result of obtaining a more favourable judgment than the settlement offer, he was automatically entitled to “enhanced costs”. This argument overlooks the opening words of Rule 147(3.1) which clearly grant the Tax Court Judge

the discretion to grant an order for costs that does not reflect the enhanced costs as set out in this Rule.

[6] The Tax Court Judge chose to exercise his discretion to not award costs under Rule 147(3.1) as a result of the appellant's failure to comply with the Tax Court Order dated May 8, 2017, noting in particular at paragraph 64 of his reasons:

...[a] party who fails to comply with an order of the Court should not be rewarded by enhanced costs. The Appellant is fortunate to receive any costs at all.

[7] The Order in issue provided that the litigation steps were to be completed by September 29, 2017. The appellant did not complete the undertakings arising from the discovery examination of the appellant until August 19, 2020 (Affidavit of Leonard S. Puterman dated April 9, 2021, at paragraph 23). The appellant has not established that the Tax Court Judge made a palpable and overriding error in finding that he did not comply with this Order.

[8] We do not agree with the appellant's submission that court orders must be enforced by the opposing party before the Court can take into account their breach. A Court can take into account breaches of court orders at any time and on its own motion provided procedural fairness is respected.

[9] Having determined that the appellant's conduct in breaching the Order of the Tax Court was a sufficient basis to not determine costs under Rule 147(3.1), the Tax Court Judge then determined what amount would be appropriate.

[10] The Tax Court Judge again noted the failure to comply with the Court Order and also noted that the significant delay in providing the answers to the undertakings impeded the timely settlement of the matter.

[11] The complexity of the dispute and the amount in issue were also factors. This was not a complex case as the issue was whether certain expenses were incurred and if so, whether the expenses were incurred for the purpose of earning income. The federal tax in issue was \$64,135 while the costs claimed were approximately four times this amount (\$260,413.27).

[12] The Tax Court Judge did not err in exercising his discretion to not apply Rule 147(3.1) as a result of the failure of the appellant to comply with the Tax Court Order or in determining the amount of costs. We agree that the failure of an appellant to comply with an order of the Tax Court can justify the exercise of discretion to not award costs under Rule 147(3.1) and may, in certain situations, also result in a successful party not being awarded any costs (*Asghar v. Canada*, 2023 FCA 62).

[13] While the Tax Court Judge opined that Rule 147(3.1) would only apply where the Tax Court hears an appeal and determines the outcome, he did not dismiss the appellant's motion on this basis. It is still an open question whether a Tax Court Judge could, if the circumstances warrant it, award enhanced costs to an appellant under this Rule even if a settlement is reached before the hearing of the appellant's appeal.

[14] As a result, this appeal will be dismissed with costs fixed in the amount of \$2,500, all inclusive.

"Wyman W. Webb"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-367-21

APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE D'ARCY OF THE TAX COURT OF CANADA DATED NOVEMBER 26, 2021 DOCKET NUMBER 2015-2187(IT)G

STYLE OF CAUSE: JEFFREY HULL v. HIS MAJESTY THE KING

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: MARCH 29, 2023

REASONS FOR JUDGMENT OF THE COURT BY: STRATAS J.A.
WEBB J.A.
RENNIE J.A.

DELIVERED FROM THE BENCH BY: WEBB J.A.

APPEARANCES:

A. Christina Tari FOR THE APPELLANT

Christian Cheong FOR THE RESPONDENT
Craig Maw

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