Docket: 2014-2454(IT)G

BETWEEN:

J.G. GUY SIMARD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on November 19, 2014 at Montréal, Québec.

Before: The Honourable Justice Gerald J. Rip

Appearances:

Counsel for the Appellant:	Guy DuPont, Ad.E. Michael H. Lubetsky Mouna Aber
Counsel for the Respondent:	Louis L'Heureux

ORDER

Whereas an order was issued on November 21, 2014 in this matter allowing the appellant's motion pursuant to Rules 53(1)(*a*), (*b*) and (*c*) of the *Tax Court of Canada Rules* (*General Procedure*), to strike paragraph 76 of the respondent's reply to the notice of appeal;

And whereas counsel for the appellant requested that costs on a solicitor-and-client basis be awarded to the appellant in the matter;

And whereas counsel for the parties have made submissions with respect to the appellant's counsel's request for costs on a solicitor-and-client basis;

And having considered the parties' submissions;

It is ordered that the appellant be awarded costs on a solicitor-and-client basis for one counsel and party and party costs for any other counsel who would normally be entitled to costs.

Signed at Ottawa, Canada, this 6th day of January 2015.

"Gerald J. Rip"

Rip J.

Citation: 2015 TCC 2
Date: 20150106
Docket: 2014-2454(IT)G

BETWEEN:

J.G. GUY SIMARD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Rip J.

[1] The appellant has requested costs in this motion on solicitor-client basis. The appellant had made a motion to strike paragraph 76 of the respondent's reply to the notice of appeal pursuant to Rules 53(1)(*a*) and (*c*) of the *Tax Court of Canada Rules* (*General Procedure*) ("*Rules*").

[2] Paragraph 76 of the reply read as follows:

> 76. The Deputy Attorney General relies on the following additional facts:
>
> a) in April 2014, as a result of an investigation of the XXX Tax Shelter by the Royal Canadian Mounted Police ("RCMP"), principals and representatives of XXX and ABC (…) were charged with the following offences in relation to their activities in connection with the XXX Tax Shelter:
>
> - fraud over $5,000.00 contrary to paragraph 380(1)(*a*) of the *Ciminal Code*;
>
> - conspiracy to commit fraud over $5,000.00 contrary to paragraph 465(1)(*c*) of the *Criminal Code*;
>
> - laundering proceeds of crime contrary to subsection 462.31(1) of the *Ciminal Code*; and

- commission of an offence for the benefit for a criminal organization contrary to section 467.12 of the *Criminal Code*.

[3] The charges listed in Bullets 2 and 3 were not in fact laid against the individuals and representatives of XXX.

[4] I granted the appellant's motion to strike paragraph 76 from the respondent's pleadings on the basis the paragraph's contents were scandalous and an abuse of the process of the Court: Rules 53(1)(*b*) and (*c*), as well as potentially prejudicing or delaying the fair hearing of the trial: Rule 53(1)(*a*) of the *Rules*.

[5] In short, the persons referred to in paragraph 76 of the reply were charged with offences under the *Criminal Code* but not convicted of any charges. In the event the charges against the principals of XXX and ABC proceed to trial and the persons are found not guilty, the allegations in paragraph 76 would not be true. And the fact the allegations were made, as far as I can determine, could only serve to colour or taint the evidence to the respondent's favour.

[6] Respondent's counsel submitted that the allegations in paragraph 76 followed statements contained in an affidavit sworn by Wayne Vanderlaan, "a senior investigator who had been seconded to work with the Royal Canadian Mounted Police ("RCMP") for the sole purpose of assisting the RCMP in respect of the investigation" of the alleged tax scheme.

[7] Respondent's counsel also submits that once he was aware that the charges listed in bullets 2 and 3 of paragraph 76 were not laid against the individuals, he communicated with appellant's counsel and the Court to advise of same and consent to have those bullets struck out of paragraph 76.

[8] Counsel also stated he was unaware of the basis for an assertion in Mr. Vanderlaan's affidavit that the charges were sworn on April 16, 2014; the information provided by an RCMP officer indicates the charges were sworn on March 24, 2014.

[9] The reply to the notice of appeal was filed on September 19, 2014. The appellant's motion to strike was filed on October 17, 2014. It was on November 14, 2014, the same day I struck out paragraph 76 of the reply to the notice of appeal, that Sarah Escoffery, a Legal Assistant with the Department of Justice, swore an

affidavit attaching a copy of the information for criminal charges against the individuals sent to her by a Corporal Wong of the RCMP and a copy of a press release from the RCMP dated March 26, 2014, which Corporal Wong confirmed to her on November 14, 2014 that the information in the press release was correct. The charges in bullets 2 and 3 of paragraph 76 were not included in the press release.

[10] In an affidavit dated December 4, 2014 Ms. Candida Garisto-Cardillo, also a Legal Assistant with the Department of Justice, swore an affidavit stating, among other things, that on July 10, 2014 she had requested a process server to attend at the Ontario Superior Court of Justice to obtain a copy of an Application Record dated June 10, 2014 in respect of an application made by the Ontario Securities Commission under subsection 490(15) of the *Criminal Code* to obtain materials seized by the RCMP during the course of the investigation of the XXX tax scheme.

[11] The Application Record contained Mr. Vanderlaan's affidavit which the respondent, believing it contained no inaccuracies, adopted in paragraph 76 of the reply to the notice of appeal. It was only on November 14, 2014, the day the appellant's motion to strike was heard, that respondent's counsel realized the charges in bullets 2 and 3 of paragraph 76 were not in fact laid and communicated with appellant's counsel.

[12] I agree with respondent's counsel that an award of costs on a solicitor-client basis is ordered only in rare and exceptional cases and generally only where there has been reprehensible, scandalous or outrageous conduct on the part of the parties. I had earlier stated that in my view the contents of paragraph 76 were scandalous, even if bullets 2 and 3 were to be deleted by consent. To allege in a pleading that a person is charged with a criminal offence, but the charge has not been proven, serves no legitimate purpose. If, prior to the hearing of this appeal, the individuals are found guilty of the charges, then the respondent may consider amending her reply accordingly.

[13] Unfounded allegations of a criminal matter have influenced the courts to award costs. In *Hamilton v. Open Window Bakery Ltd.*[1] the Supreme Court of

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[1] 2004 SCC 9, [2004] 1 S.C.R. 303, at par. 26.

Canada referred to the comments of McLaughlin J. (as she then was) in *Young v. Young*[2] that solicitor and client costs:

> … are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties. …

[14] The Court added:

> … An unsuccessful attempt to prove fraud or dishonesty on a balance of probabilities does not lead inexorably to the conclusion that the unsuccessful party should be held liable for solicitor-client costs, since not all such attempts will be correctly considered to amount to "reprehensible, scandalous or outrageous conduct". However, allegations of fraud and dishonesty are serious and potentially very damaging to those accused of deception. When, as here, a party makes such allegations unsuccessfully at trial and with access to information sufficient to conclude that the other party was merely negligent and neither dishonest nor fraudulent (as Wilkins J. found), costs on a solicitor-and-client scale are appropriate: see generally, M.M. Orkin, *The Law of Costs* (2nd ed. (loose-leaf), at para. 219.

[15] This is not a matter of counsel engaging in slander or the Crown defaming anyone. What we have here is unfounded allegations of a criminal matter based on affidavit evidence that have caused the appellant to incur unnecessary costs in making the motion to strike. Counsel, in preparing pleadings, should be cautious and avoid making allegations that are not accurate (with respect to bullets 2 and 3) and that may be highly prejudicial, whether based on affidavit evidence or otherwise.

[16] I have found the pleadings in paragraph 76 of the reply to the notice of appeal scandalous. As I mentioned to counsel at the hearing of the motion, I was shocked reading paragraph 76 for the first time, comparing it to accusations of the 1950s by U.S. Senator Joseph McCarthy of Wisconsin.

[17] I grant the appellant costs on a solicitor-and-client basis for one counsel and party and party costs for any other counsel who would normally be entitled to costs. This is reasonable in the circumstances in my view.

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[2] 1993 CanLII 34 (S.C.C.), [1993] 4 S.C.R. 3, at p. 134.

Signed at Ottawa, Canada, this 6th day of January 2015.

"Gerald J. Rip"

Rip J.

CITATION:	2015 TCC 2
COURT FILE NO.:	2014-2454(IT)G
STYLE OF CAUSE:	J.G. GUY SIMARD AND THE QUEEN
PLACE OF HEARING:	Montréal, Québec
DATE OF HEARING:	November 19, 2014
REASONS FOR ORDER BY:	The Honourable Justice Gerald J. Rip
DATE OF ORDER:	January 6, 2015

APPEARANCES:

Counsel for the Appellant:	Guy DuPont, Ad.E. Michael H. Lubetsky Mouna Aber
Counsel for the Respondent:	Louis L'Heureux

COUNSEL OF RECORD:

For the Appellant:

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For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada