

Swain v The Queen, 2012 TCC 323

Things that can cause a judge to grant above tariff costs!

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At issue was whether a lump sum costs award significantly above tariff rates was appropriate in the circumstances.

Boyle J for the TCC felt that in this case, and only because of the existence of the settlement offer, costs as requested were warranted and reasonable.

FACTS

The Appellant was unsuccessful in their appeal, and the end result would have been better if a settlement offer out forth by the MNR would have been accepted.

The MNR, on the basis of the rejected settlement offer, sought costs of \$25,000, being over 3x the tariff rate. The Appellants didn't suggest that costs after the date of the settlement offer don't warrant being awarded on substantial indemnity basis, but argued that the amount requested was unreasonable

ANALYSIS

The Court recalled that the appeal involved the appellant seeking to deduct certain losses on income account as related to their law practice. The court noted that "[t]he Appellants position at trial was remarkable, inconsistent, and very incomplete notwithstanding that the Appellants were successful lawyers represented by very capable tax counsel." (para 2).

The fact that there was insufficient evidence presented to support any loss position, that the story the court held was controlled by the appellant, that the court felt that only part of the story was conveyed, and that its it was hard "not to think of the apocryphal courtroom story of the bold and cheeky accused who, when charged with murdering his parents, threw himself on the mercy of the court on the basis that he was an orphan" (para 4), combined with the long history of judicial and legislative encouragement for litigant to settle with their adversaries, the court held that but for the settlement offer costs would have been awarded at tariff rates.

But, in this case the court felt this was a case appropriate for fixing costs above tariff rates, and the court had "no reason to doubt that the \$25,000 amount requested does not reflect significantly more than costs on a substantial indemnity basis after a reasonable period following the date of the Respondent's settlement offer and tariff costs prior thereto" - the amount was granted as requested.