

Costs: The Ignored Remedy

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When Canadian taxpayers are charged with criminal offences such as evasion: §239(1)(d); or false reporting: §239(1)(a) under the *Income Tax Act* (“ITA”); they need skilled legal defence counsel to defend them and protect their interests.

While the process is unquestionably traumatic for anyone charged, it is even more so, if the taxpayer happens to be innocent.

The *Canadian Charter of Rights and Freedoms* guarantees that, “§11. Any person charged with an offence has the right... d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.”

Having a right, however, is not the same as exercising that right. Unless, and until, a taxpayer fights for their rights the presumption of innocence will do them little good; the proverb that “*he who fails to plan, plans to fail*” has never been truer than in criminal litigation.

While exoneration will be a welcome result for any accused, that result will prove insufficient compensation for enduring such a horrific experience.

An innocent taxpayer charged with such offences potentially can recover more, if they structure their affairs properly.

By being able to prove innocence, from the outset, with objective independent evidence provides an accused with a means to potentially recover some part of their economic expenditures – once the charges are dismissed.

Possible Remedies

There are two (2) remedies, which ordinarily can result from unjust criminal charges: a lawsuit against the Crown for the tort of malicious prosecution and an award of costs (e.g., under §24(1) of the *Charter*).

Malicious Prosecution

Irrespective of whether an acquitted accused may have such a claim, any detailed examination of this topic is beyond the scope of this article. Suffice it to say that such lawsuits are expensive, lengthy and difficult to win.

Although the Crown is not entirely immune from such legal proceedings, the cases in which a plaintiff will be able to meet all four criteria necessary to succeed, will be rare: *Nelles v. Ontario*, [1989] 2 S.C.R. 170 Lamer, J. and *Proulx v. Quebec (Attorney General)*, [2001] 3 S.C.R. 9 per Iacobucci and Binnie, JJ.

Costs – Civil Cases

Typically costs are awarded by civil courts to a successful party. Costs awards can cover both legal fees and various out-of-pocket expenses.

What percentage of a successful litigant’s expenses are recoverable will be discretionary with the court; depending on a number of factors unique to each case. Orders for costs can range from zero to one hundred percent (100%).

A particular award will usually cover only a portion of legal fees paid by the successful party and a percentage their out-of-pocket expenses.

In civil matters costs normally follow the cause; that is, a successful party will get some of their costs back from the other party, or parties.

An award of two-thirds of the actual amounts expended is routine, but if unsuccessful party’s conduct warrants it, a higher percentage of recover may be ordered by the judge.

Costs – Criminal Cases

In the majority of criminal cases resulting in an acquittal the accused will not be entitled to costs: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, Lamer, C.J. at §97 quoting *Berry v. British Transport Commission*, [1962] 1 Q.B. 306 (Eng. C.A.), at p. 326, per Devlin L.C.J.

The court does have discretionary authority to grant a request for costs, in appropriate circumstances: *R. v.*

***M. (C.A.), supra* at §97; both in summary conviction cases: *R. v. Trask*, [1987] 2 S.C.R. 304 (costs denied); and in indictable cases: *Olan v. The Queen*, [1978] 2 S.C.R. 1175 (costs allowed).**

The Standard

For a court to exercise its discretionary authority in favour of the applicant (i.e., an accused making the request) there must be a finding of “*oppressive or improper conduct*” against the Crown, something that makes the case remarkable: *Trask, supra* per McIntyre, J. at §7.

This remains true even if the Crown withdraws the charges, provided there exists “*abuse or some other flagrant impropriety on the part of the Crown...*”: *R. v. Fach*, Docket C41070, 2004-11-12 (Ont. C.A.)

Absent a finding, in fact or law, of such abuse by the Crown costs will be denied: *R. v. Morton*, Docket C41069, 2004-11-12 (Ont. C.A.)

It will be up to the court to determine whether, in all of the circumstances, there is anything ‘*remarkable*’ about the defendant’s case, or if there is any ‘*oppressive or improper conduct*’ by the Crown to justify an award of costs: *Trask, supra* at pp. 307-8.

Awards Have Been Made

An award of costs was made against the Crown [Canada Revenue Agency (“CRA”)] by the Ontario Court, General Division in *R. v. Saplys* [1999] O.J. No. 393. In granting a stay of proceedings, under §24(1) of the *Charter*, the court held that CRA’s investigation was so unfair as to contravene fundamental notions of justice. To allow it to proceed would undermine the integrity of the justice system and compromised the accused’s right to a fair trial.

In another unreported case in the Superior Court of Justice (Ontario), the judge gave an order under §24(2) of the *Charter* excluding evidence, plus an award of C\$160,000.00 for costs. CRA has appealed.

What About Other Cases?

This is where the planning comes in.

Since the accused knows, as CRA evidently does not, that they are innocent, they should plan from the outset to establishing a track record.

Defence counsel should write to CRA, the Crown Attorney and the Department of Justice, advising them that the facts do not support a conviction. Telling the Crown that when an acquittal is entered, that the defence will be making an application for costs is key.

Defence counsel must be specific and back up their claims with credible objective evidence to support their contention that a conviction cannot be entered (e.g., the taxpayer acted on legal advice).

By keeping a record of all the letters written, and how they were received or acknowledged, counsel will have a log of opportunities that the Crown had to reconsider its case.

According to the Department of Justice’s (“DOJ”) policies (found in their Federal Prosecution Service Deskbook), “Crown counsel [have an] obligation to ensure the integrity of the prosecution continues throughout the litigation process” (§9.3 ¶3, ll. 7 – 9). In other words, there is a positive duty on the Crown to investigate defence allegations which undermine the integrity of the prosecution: *R. v. Ahluwalia* (2000), 149 C.C.C. (3d) 193 (Ont. C.A.)

Thus, if the defence counsel can establish that the Crown breached its duty to inquire, or investigate – when faced with exculpatory evidence of a probative character – then this greatly improves the prospect for recovering costs upon dismissal of the charge(s).

When the day comes that the charges are to be dismissed, defence counsel can make an application for costs, supported by the various copies of the correspondence to CRA and the Crown.

With evidence that the Crown knew, or ought to have known (from the correspondence given and the evidence provided) that a conviction couldn’t be entered against the accused, they may be able to establish non-compliance with the DOJ’s Deskbook.

If the Crown’s prosecution violated DOJ policy, then arguable it was “oppressive” or an “abuse or some other flagrant impropriety on the part of the Crown.” If the presiding justice is persuaded by the evidence presented, then they than may make an award for costs.

Most acquittals will not merit an award of costs, but for those rare cases where serious Crown misconduct is present and demonstrable, defence counsel will recommend that their clients to make an application for costs. Staff Writer
For Tax Evasion Resources

