

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20111216**

**Dockets: A-103-11  
A-106-11  
A-104-11  
A-105-11  
A-102-11**

**Citation: 2011 FCA 346**

**CORAM: DAWSON J.A.  
TRUDEL J.A.  
MAINVILLE J.A.**

**Docket: A-103-11**

**BETWEEN:**

**MICHEL GUIBORD**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

**Docket: A-106-11**

**BETWEEN:**

**MEI GUIBORD**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

**Docket: A-104-11**

**BETWEEN:**

**GEORGE S. SZETO INVESTMENTS LTD.**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

**Docket: A-105-11**

**BETWEEN:**

**GEORGE S. SZETO**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

**Docket: A-102-11**

**BETWEEN:**

**GEORGE S. SZETO INVESTMENTS LTD.**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Ottawa, Ontario, on December 7, 2011.

Judgment delivered at Ottawa, Ontario, on December 16, 2011.

REASONS FOR JUDGMENT BY:

DAWSON J.A.

CONCURRED IN BY:

TRUDEL J.A.  
MAINVILLE J.A.

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20111216**

**Dockets: A-103-11  
A-106-11  
A-104-11  
A-105-11  
A-102-11**

**Citation: 2011 FCA 346**

**CORAM: DAWSON J.A.  
TRUDEL J.A.  
MAINVILLE J.A.**

**Docket: A-103-11**

**BETWEEN:**

**MICHEL GUIBORD**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

**Docket: A-106-11**

**BETWEEN:**

**MEI GUIBORD**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

**Docket: A-104-11**

**BETWEEN:**

**GEORGE S. SZETO INVESTMENTS LTD.**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

**Docket: A-105-11**

**BETWEEN:**

**GEORGE S. SZETO**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

**Docket: A-102-11**

**BETWEEN:**

**GEORGE S. SZETO INVESTMENTS LTD.**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

## REASONS FOR JUDGMENT

### DAWSON J.A.

[1] Michel Guibord, Mei Guibord and George S. Szeto appealed to the Tax Court of Canada in respect to reassessments issued by the Minister of National Revenue (Minister) under the *Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.). George S. Szeto Investments Ltd. appealed reassessments issued by the Minister under the *Income Tax Act* and the *Excise Tax Act*, R.S.C. 1985, c. E-15. George S. Szeto Investments Ltd. owns and operates the Ruby King Restaurant and shall be referred to in these reasons as “Ruby King”.

[2] The appeals of the reassessments – which were based on the net worth method - were decided on common evidence following thirteen days of hearings before V. A. Miller J. of the Tax Court of Canada (Judge). The appellants were partially successful before the Tax Court of Canada. The Judge was satisfied that the Minister was justified in opening the three statute-barred taxation years for all the appellants because she found that they had made misrepresentations relating to their income which, at minimum, were attributable to neglect and carelessness. The Judge went on to make various corrections to the appellants’ net worth statements. She then set aside the penalties imposed upon the individual appellants while confirming the penalties assessed on Ruby King. The issue of costs was reserved. After receiving written submissions on costs, the Judge issued reasons and an order with respect to costs.

[3] The appellants appealed to this Court on the merits and with respect to costs. Their appeals to this Court on the merits have all been dismissed in judgments issued on December 14, 2011.

These reasons concern their appeals of the costs order, which appeals were all consolidated by order of this Court dated May 19, 2011.

[4] The appellants sought costs in the Tax Court of Canada, either on a substantial indemnity basis or on a lump sum basis. Together, they sought \$340,640.06 on a substantial indemnity basis or \$227,093.37 on a lump sum basis. They calculated their costs based upon the tariff to the *Tax Court of Canada Rules (General Procedures)*, SOR/90-688a (Rules) to be \$65,007.41.

[5] The respondent also requested costs in the Tax Court of Canada as a lump sum award in the amount of \$255,721.10 or, in the alternative, that costs be calculated in accordance with the tariff in a total amount of \$98,693.65.

[6] For reasons cited as 2011 TCC 53, the Judge determined that the appellants should not be awarded costs in excess of the tariff. Taking into account the factors under subsection 147(3) of the Rules, she ordered that the appellants receive one set of costs in the total amount of \$50,000. These appeals are from that order.

[7] The appellants raised two grounds of appeal in this Court: (a) the Judge failed to consider their submission that the Minister improperly refused to concede that the amounts identified in the financial statements as “Due to shareholders” were in fact unreported sales of Ruby King, thus prolonging the proceedings and impeding possible settlements; (b) the Judge erred in fact by

confusing the appellants' party and party costs totalling \$257,982 with the appellants' tariff costs of \$65,007.41.

[8] At the hearing before our Court and after questioning from the bench, the appellants' counsel acknowledged that Tariff B of Schedule II to the Rules provides that the tariff costs are party and party costs, and consequently further acknowledged that the Judge had thus not confused the appellants' party and party costs and tariff costs. This ground of appeal was therefore withdrawn by counsel, leaving only the first ground to consider.

[9] An award of costs in the Tax Court of Canada is governed by section 147 the Rules. That section vests the Tax Court with discretionary power over costs. Criteria for the exercise of that discretion are set forth in subsection 147(3). Subsection 147(4) confers an additional power which includes the awarding of costs without reference to Schedule II, Tariff B or by way of lump sum.

[10] Such costs awards are largely at the discretion of a Tax Court judge because that judge is in the best position to determine which party should pay costs and the quantum of such costs. Though these costs awards are highly discretionary, that discretion must be exercised on a principled basis: *Lau v. Canada*, 2004 FCA 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.



[11] The appellants contend that the Judge failed to consider a relevant factor. They assert they submitted to the Judge that the Minister refused to concede that the amounts identified as “Due to shareholders” in the financial statements of Ruby King were in fact unreported sales of Ruby King. The appellants add that this refusal unduly lengthened the trial by a few days. The appellants further assert that the Minister’s refusal to make the concession was unreasonable in light of the Canada Revenue Agency auditor’s testimony in cross-examination, referred to at paragraph 33 of the Judge’s reasons on the merits of their appeals reported as 2010 TCC 420.

[12] There was some discussion at the hearing before this Court as to whether or not this issue had indeed been raised before the Judge. This Court thus requested that the parties submit to it the written representations they had made before the Judge on the issue of costs and which were not in the appeal record. After reading these submissions, it is not clear that the issue was squarely raised before the Judge. It follows that the Judge did not err by failing to consider an issue not directly raised before her.

[13] I would therefore dismiss the appeals with one set of costs to the respondent in respect of all five appeals from the costs order.

“Eleanor R. Dawson”

---

J.A.

“I agree.  
Johanne Trudel J.A.”

“I agree.  
Robert M. Mainville J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-103-11

**APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE VALERIE MILLER,  
DATED JANUARY 27, 2011.**

**STYLE OF CAUSE:** Michel Guibord v. Her Majesty  
The Queen

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** December 7, 2011

**REASONS FOR JUDGMENT BY:** DAWSON J.A.

**CONCURRED IN BY:** TRUDEL J.A.  
MAINVILLE J.A.

**DATED:** December 16, 2011

**APPEARANCES:**

Charles Gibson  
Ian Houle

FOR THE APPELLANT

Josée Tremblay  
Natasha Wallace

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Vincent Dagenais Gibson  
Ottawa, Ontario

FOR THE APPELLANT

Myles J. Kirvan  
Deputy Attorney General of Canada

FOR THE RESPONDENT

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-106-11

**APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE VALERIE MILLER,  
DATED JANUARY 27, 2011.**

**STYLE OF CAUSE:** Mei Guibord v. Her Majesty The  
Queen

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** December 7, 2011

**REASONS FOR JUDGMENT BY:** DAWSON J.A.

**CONCURRED IN BY:** TRUDEL J.A.  
MAINVILLE J.A.

**DATED:** December 16, 2011

**APPEARANCES:**

Charles Gibson  
Ian Houle

FOR THE APPELLANT

Josée Tremblay  
Natasha Wallace

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Vincent Dagenais Gibson  
Ottawa, Ontario

FOR THE APPELLANT

Myles J. Kirvan  
Deputy Attorney General of Canada

FOR THE RESPONDENT

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-104-11

**APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE VALERIE MILLER,  
DATED JANUARY 27, 2011.**

**STYLE OF CAUSE:** George S. Szeto Investments Ltd.  
v. Her Majesty The Queen

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** December 7, 2011

**REASONS FOR JUDGMENT BY:** DAWSON J.A.

**CONCURRED IN BY:** TRUDEL J.A.  
MAINVILLE J.A.

**DATED:** December 16, 2011

**APPEARANCES:**

Charles Gibson  
Ian Houle

FOR THE APPELLANT

Josée Tremblay  
Natasha Wallace

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Vincent Dagenais Gibson  
Ottawa, Ontario

FOR THE APPELLANT

Myles J. Kirvan  
Deputy Attorney General of Canada

FOR THE RESPONDENT

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-105-11

**APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE VALERIE MILLER,  
DATED JANUARY 27, 2011.**

**STYLE OF CAUSE:** George S. Szeto v. Her Majesty  
The Queen

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** December 7, 2011

**REASONS FOR JUDGMENT BY:** DAWSON J.A.

**CONCURRED IN BY:** TRUDEL J.A.  
MAINVILLE J.A.

**DATED:** December 16, 2011

**APPEARANCES:**

Charles Gibson  
Ian Houle

FOR THE APPELLANT

Josée Tremblay  
Natasha Wallace

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Vincent Dagenais Gibson  
Ottawa, Ontario

FOR THE APPELLANT

Myles J. Kirvan  
Deputy Attorney General of Canada

FOR THE RESPONDENT

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-102-11

**APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE VALERIE MILLER,  
DATED JANUARY 27, 2011.**

**STYLE OF CAUSE:** George S. Szeto Investments Ltd.  
v. Her Majesty The Queen

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** December 7, 2011

**REASONS FOR JUDGMENT BY:** DAWSON J.A.

**CONCURRED IN BY:** TRUDEL J.A.  
MAINVILLE J.A.

**DATED:** December 16, 2011

**APPEARANCES:**

Charles Gibson  
Ian Houle

FOR THE APPELLANT

Josée Tremblay  
Natasha Wallace

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Vincent Dagenais Gibson  
Ottawa, Ontario

FOR THE APPELLANT

Myles J. Kirvan  
Deputy Attorney General of Canada

FOR THE RESPONDENT