

BETWEEN:

407 INTERNATIONAL INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Motion heard on August 26, 2019 at Toronto, Ontario

Before: The Honourable Justice John R. Owen

Appearances:

Counsel for the Appellant: Martha MacDonald and Michael Steele

Counsel for the Respondent: Jenna Clark and Samantha Hurst

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**ORDER**

UPON reading the Respondent's motion for:

- a) an order requiring that the appeals of 407 International Inc. ("407 International") and 407 ETR Concession Company Limited ("407 ETR") be consolidated or heard at the same time or one immediately after the other;
- b) an order requiring that the consolidated appeals be heard on common evidence;
- c) an order directing that the appeals of 407 International remain in the informal procedure such that the issue raised in those appeals which is not an issue common to those appeals and the appeal of 407 ETR shall be heard under the informal procedure; and
- d) an order directing that, irrespective of the procedure under which the appeals will be heard, the parties shall comply with section 145 of the

*Tax Court of Canada Rules (General Procedure)* (the “General Rules”) with respect to any expert, rebuttal or surrebuttal report; or

- e) in the alternative, an order directing that the appeals of 407 International be held in abeyance pending the determination of a question common to all the appeals, which would be answered at the hearing of the appeal of 407 ETR; and
- f) in any event, an order allowing the Respondent to amend the Reply to the Notice of Appeal in Court file number 2018-2037(IT)I in accordance with the draft provided as Schedule A to the Amended Notice of Motion filed August 13, 2019;

AND UPON hearing the submissions of the parties;

IN ACCORDANCE WITH the attached Reasons for Order, IT IS ORDERED THAT:

- a) the appeal of 407 ETR and the appeals of 407 International shall be heard at the same time on common evidence;
- b) section 145 of the General Rules shall apply to any expert witness of a party to the appeals;
- c) the Respondent shall amend the Reply in accordance with the draft provided as Schedule A to the Amended Notice of Motion filed August 13, 2019; and
- d) each party shall bear its own costs of this motion.

Signed at Ottawa, Canada, this 25<sup>th</sup> day of October 2019.

“J.R. Owen”

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Owen J.

BETWEEN:

407 ETR CONCESSION  
COMPANY LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Motion heard on August 26, 2019 at Toronto, Ontario

Before: The Honourable Justice John R. Owen

Appearances:

Counsel for the Appellant: Martha MacDonald and Michael Steele  
Counsel for the Respondent: Jenna Clark and Samantha Hurst

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**ORDER**

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- d) an order directing that, irrespective of the procedure under which the appeals will be heard, the parties shall comply with section 145 of the *Tax Court of Canada Rules (General Procedure)* (the “General Rules”) with respect to any expert, rebuttal or surrebuttal report; or
- e) in the alternative, an order directing that the appeals of 407 International be held in abeyance pending the determination of a question common to all the appeals, which would be answered at the hearing of the appeal of 407 ETR;

AND UPON hearing the submissions of the parties;

IN ACCORDANCE WITH the attached Reasons for Order, IT IS ORDERED THAT:

- a) the appeal of 407 ETR and the appeals of 407 International shall be heard at the same time on common evidence;
- b) section 145 of the General Rules shall apply to any expert witness of a party to the appeals; and
- c) each party shall bear its own costs of this motion.

Signed at Ottawa, Canada, this 25<sup>th</sup> day of October 2019.

“J.R. Owen”

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Owen J.

Citation: 2019 TCC 245

Date: 20191025

Docket: 2018-2037(IT)I

BETWEEN:

407 INTERNATIONAL INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2018-2038(IT)G

AND BETWEEN:

407 ETR CONCESSION  
COMPANY LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR ORDER**

Owen J.

#### I. Introduction

[1] This is a motion by the Respondent for

- a) an order requiring that the appeals of 407 International Inc. (“407 International”) and 407 ETR Concession Company Limited (“407 ETR”) be consolidated or heard at the same time or one immediately after the other;
- b) an order requiring that the consolidated appeals be heard on common evidence;

- c) an order directing that the appeals of 407 International remain in the informal procedure such that the issue raised in those appeals which is not an issue common to those appeals and the appeal of 407 ETR shall be heard under the informal procedure; and
- d) an order directing that, irrespective of the procedure under which the appeals will be heard, the parties shall comply with section 145 of the *Tax Court of Canada Rules (General Procedure)* (the “General Rules”) with respect to any expert, rebuttal or surrebuttal report; or
- e) in the alternative, an order directing that the appeal of 407 International be held in abeyance pending the determination of a question common to all the appeals which would be answered at the hearing of the appeal of 407 ETR.

[2] In addition, in the case of the appeals of 407 International, the Respondent seeks to amend the Reply in accordance with the draft provided as Schedule A to the Amended Notice of Motion filed August 13, 2019. This motion is not contested.

[3] During oral argument, counsel for the Respondent stated that the Respondent is content to have the appeal of 407 ETR governed by the General Rules and the appeals of 407 International governed by the *Tax Court of Canada Rules (Informal Procedure)* save with respect to the tendering of expert evidence, which the Respondent says should be governed exclusively by the General Rules.

[4] The Appellant did not contest the request for consolidation but did argue that an order for consolidation was tantamount to an order moving the informal procedure appeals of 407 International to the general procedure at the request of the Attorney General of Canada in circumstances where subsections 18.11(3) and (4) of the *Tax Court of Canada Act* (the “TCCA”) do not apply. Accordingly, if an order for consolidation is issued, the Appellant requests an order under subsection 18.11(6) of the TCCA that the Respondent bear all reasonable and proper costs of 407 International.

## II. Facts

[5] 407 ETR is a wholly owned subsidiary of 407 International. 407 ETR is appealing the assessment of its 2011 taxation year and 407 International is

appealing the assessment of its 2010 and 2011 taxation years. 407 International elected in its Notice of Appeal to have sections 18.1 to 18.28 of the TCCA apply to its appeals.

[6] The issue raised in the appeal of 407 ETR's 2011 taxation year is the characterization of a \$2,549,206 loss incurred on the disposition of so-called master asset vehicles ("MAVs") acquired by 407 ETR as a result of the restructuring of previously acquired asset-backed commercial paper following the collapse of the market for that paper in 2007. 407 ETR reported the loss as a business loss but the Minister of National Revenue (the "Minister") assessed the loss as a capital loss.

[7] The same issue is raised in the appeals of 407 International's 2010 and 2011 taxation years except that the amount of the loss in issue for each of those years is \$1,721,213 and \$34,886,436 respectively. In addition, 407 International appeals the disallowance of a \$1,381,774<sup>1</sup> interest expense deducted for its 2011 taxation year.

[8] Notwithstanding the significant amount of the adjustments for 407 International's 2010 and 2011 taxation years, because of the application by 407 International of non-capital losses from other taxation years, the tax assessed for the taxation years at issue is \$40.07 and \$58.69 respectively. No determination of loss was issued by the Minister for 407 International's 2010 and 2011 taxation years.

[9] By order of the Chief Justice of the Tax Court of Canada dated November 5, 2018, the appeals of 407 ETR and 407 International are subject to case management by me under section 126 of the General Rules.

### III. Analysis

#### A. Application of the Informal Procedure to 407 International

[10] 407 International appeals the Minister's assessments of tax for its 2010 and 2011 taxation years and relies upon paragraph 18(1)(a) of the TCCA to have the Court's informal procedure apply to those appeals.

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<sup>1</sup> The Amended Notice of Motion states \$1,381,744 in paragraph 6 but paragraph 10 and the balance of the filings state \$1,381,774.

[11] Under section 18.12 of the TCCA, if it appears to the Court that the aggregate of all amounts in issue is greater than \$25,000, the Court shall order that the general procedure apply unless the appellant elects to limit the aggregate of all amounts in issue to \$25,000. In light of this rule and the significant adjustments made by the Minister in assessing 407 International's 2010 and 2011 taxation years, I asked the parties for written submissions addressing the question of whether the aggregate of all amounts in issue for each of the two taxation years of 407 International under appeal was equal to or less than \$25,000.

[12] In their submissions, both parties took the position that the aggregate of all amounts in issue for each of the two taxation years of 407 International under appeal was equal to or less than \$25,000. The crux of the submissions is that according to the clear and unambiguous wording of the relevant provisions of the TCCA as interpreted in the jurisprudence the phrase "the aggregate of all amounts in issue" includes only amounts assessed or determined by the Minister under the *Income Tax Act* (other than an amount of interest or any amount of a loss determined by the Minister) and does not include adjustments such as the application of non-capital losses that factor into the computation of the amounts so assessed or determined.

[13] After careful consideration I have concluded that, for the reasons given in the submissions of the parties, the aggregate of all amounts in issue for each of the two taxation years of 407 International under appeal is less than \$25,000. Accordingly, under section 18 of the TCCA sections 18.1 to 18.28 of the TCCA apply to those appeals.

#### B. Orders Requested by the Respondent

[14] The General Rules do not apply to the appeals of 407 International.<sup>2</sup> The question raised, therefore, is whether the Court nonetheless has jurisdiction to apply the General Rules (or certain of them) to the appeals of 407 International. In my view, the Court does have such jurisdiction and the application by the Chief Justice of the case management rule to the appeals of 407 International is an example of the exercise of that jurisdiction. I will endeavour to explain the basis for this conclusion.

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<sup>2</sup> Section 17 of the TCCA and section 3 of the General Rules.



[15] The Tax Court of Canada is a superior court of record created by statute<sup>3</sup> under the authority granted to Parliament by section 101 of the *Constitution Act, 1867*.<sup>4</sup> A statutory superior court is not the same as a provincial superior court in that a statutory superior court does not have inherent jurisdiction.<sup>5</sup> The use of the word “superior” in the TCCA refers to the fact that the Tax Court has supervisory jurisdiction in the areas of law over which the TCCA confers jurisdiction.<sup>6</sup>

[16] Although the Tax Court of Canada does not have inherent jurisdiction, by implication it has all powers that are reasonably necessary to accomplish its mandate.<sup>7</sup> This includes the implied jurisdiction to manage and control the proceedings conducted before the Court so as to ensure that the machinery of the Court functions in an orderly and effective manner and to ensure the integrity of the justice system.<sup>8</sup>

[17] Section 20 of the TCCA provides for the creation of rules for regulating the pleadings, practice and procedure in the Court. In most cases, the rules created under section 20 of the TCCA will indeed regulate the pleadings, practice and procedure in the Court. However, the implied jurisdiction of the Court allows the Court to ensure the integrity of the justice system and to manage and control the proceedings conducted before the Court so as to ensure that the machinery of the Court functions in an orderly and effective manner that is fair to the parties.<sup>9</sup> In so doing the implied jurisdiction necessarily provides the Court with flexibility regarding how and to what extent the rules created under section 20 of the TCCA are applied to a particular circumstance, subject to the requirement that the implied jurisdiction be exercised in a deferential manner.<sup>10</sup>

[18] The Respondent submits that the appeals have in common a question of law or fact or mixed law and fact arising out of one and the same transaction or

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<sup>3</sup> Section 3 of the TCCA.

<sup>4</sup> *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617 (“*Windsor*”) at paragraph 31. The Supreme Court is addressing the jurisdiction of the Federal Court, but the dictum is equally applicable to the jurisdiction of the Tax Court of Canada.

<sup>5</sup> *Windsor* at paragraph 33.

<sup>6</sup> *Commonwealth of Puerto Rico v. Hernandez*, [1975] 1 S.C.R. 228 at pages 232 to 233 and *Windsor* at paragraph 33 (footnote 2).

<sup>7</sup> *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575 at paragraph 70.

<sup>8</sup> *Windsor* at paragraph 33 (footnote 1), *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331 at paragraphs 18 and 19, *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167 at paragraph 58 and *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26, [2017] 1 S.C.R. 478, (“*Jodoin*”) at paragraphs 16 and 17.

<sup>9</sup> Section 4 of the General Rules imparts a similar mandate in the context of the interpretation of the General Rules.

<sup>10</sup> *Jodoin* at paragraph 16.

occurrence or series of transactions or occurrences and asks that the appeals be consolidated or that they be heard at the same time or one immediately after the other on common evidence. The Respondent further asks that the General Rules respecting experts apply to all the appeals.<sup>11</sup>

[19] Only the General Rules address the consolidation of appeals and the hearing of appeals at the same time or one immediately after the other. Section 26 of the General Rules states:

26. Where two or more proceedings are pending in the Court and

- (a) they have in common a question of law or fact or mixed law and fact arising out of one and the same transaction or occurrence or series of transactions or occurrences, or
- (b) for any other reason, a direction ought to be made under this section,

the Court may direct that,

- (c) the proceedings be consolidated or heard at the same time or one immediately after the other, or
- (d) any of the proceedings be stayed until the determination of any other of them.<sup>12</sup>

[20] Paragraph 126(3)(b) of the General Rules states:

(3) The case management judge may deal with all issues that arise prior to the hearing of the appeal, including by

...

- (b) giving any directions that are necessary for the just, most expeditious and least expensive determination of the appeal on its merits, including consolidating two or more appeals or parts of appeals that raise common issues or deal with common facts.

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<sup>11</sup> The Respondent also requests that the rules of evidence apply to all the appeals, but as that is a matter for the trial judge to determine I will not address that request.

<sup>12</sup> Under section 27 of the General Rules, the judge at the hearing of the appeals has the discretion to direct otherwise. In other words, any order I give under section 26 of the General Rules is not binding on the trial judge.

[21] In *3488063 Canada Inc. v. The Queen*, 2016 FCA 233 (“3488063”), Webb J.A. explained the effect of consolidation under section 26 of the General Rules:

As noted above, each assessment that is under appeal to the Tax Court of Canada retains its separate identity throughout the Tax Court process with respect to the merits of the assessment. Because each assessment retains its separate identity, it would seem to me that each appeal of a particular assessment would also retain its identity as a separate appeal with respect to the merits of the appeal. Since the *Act* provides that an appeal relates to a particular assessment, this one to one relationship of an appeal to an assessment with respect to the merits of such assessment or appeal cannot be altered by the *Rules*.

However, the *Rules* can operate to consolidate or merge the appeals in relation to the procedural steps that will be applicable to all of the appeals that are the subject of a consolidation order. As a result, any appeals that are consolidated will proceed as if they are one appeal for the purposes of the *Rules* and each procedural step under the *Rules* will apply equally to each appeal that is part of the consolidated proceedings so that, for example, one list of documents would apply to all of those appeals.

However, the underlying assessments are not consolidated. Therefore, each appeal of a particular assessment (or reassessment) remains as a separate appeal in relation to the merits of the assessment (or reassessment), although the procedural steps, as provided in the *Rules*, apply concurrently to all of the appeals that are consolidated.<sup>13</sup>

[22] Although it is not expressly provided for in the rules enacted under section 20 of the TCCA, in my view the Court has the implied jurisdiction to order that an appeal under the informal procedure and an appeal under the general procedure be consolidated or heard at the same time or one immediately after the other where the appeals have in common a question of law or fact or mixed law and fact arising out of one and the same transaction or occurrence or series of transactions or occurrences and the order would not bring the administration of justice into disrepute. In this case, such an order is entirely consistent with the Court’s implied jurisdiction to manage and control the proceedings conducted before the Court so as to ensure that the machinery of the Court functions in an orderly and effective manner.

[23] Given the comments of Webb J.A. in *3488063*, I agree with the Appellant that an order for the consolidation of appeals under the informal procedure with an

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<sup>13</sup> Paragraphs 51 to 53.

appeal under the general procedure is tantamount to an order that the appeals under the informal procedure be moved to the general procedure. However, an order that the appeals be heard together on common evidence is not equivalent to an order that the appeals under the informal procedure be moved to the general procedure. Since I propose to order the latter, I see no reason to apply the costs rule in subsection 18.11(6) of the TCCA.

[24] The pleadings show that the appeals of 407 International and 407 ETR do have in common a question of mixed law and fact arising out of one and the same transaction or occurrence or series of transactions or occurrences. In addition, 407 ETR is a wholly owned subsidiary of 407 International, which implies a common interest in the outcome of the appeals as they relate to the disposition of the MAVs. As a result, I am of the view that this is an appropriate circumstance in which to order that the appeals be heard at the same time on common evidence.

[25] The fact that 407 International has raised a second issue involving the deduction of interest for its 2011 taxation year does not alter my conclusion. Considering the magnitude of the loss incurred by 407 International in 2011, the interest issue can reasonably be viewed as ancillary and the hearing of that issue concurrently with the appeal of 407 ETR does not impose any additional burden on 407 International or 407 ETR.

[26] The hearing of the appeals at the same time on common evidence may have the effect of delaying the hearing of 407 International's appeals. While the informal procedure is no doubt intended to facilitate the timely hearing of appeals governed by that procedure, I do not believe that any delay in this case will prejudice 407 International in any material way. The hearing of the appeals at the same time should however reduce the amount of time and effort required to address all the appeals since there will be one hearing rather than two. A single hearing of the appeals is also a more efficient and productive use of the Court's time.

[27] The availability of discovery in the appeal of 407 ETR should ensure that the evidence relevant to the characterization of the losses on the MAVs is known before the hearing of the appeals, thereby promoting a full and fair hearing and avoiding any issue of trial by ambush. While 407 International may not see this as a tactical advantage, in my view, the interests of justice are served by the availability, prior to the hearing, of discovery addressing the loss issue common to all the appeals.

[28] With respect to expert evidence, in my view, the request by the Respondent that section 145 of the General Rules apply with respect to any expert witness of a party is reasonable in the circumstances, promotes fairness, avoids trial by ambush and does not place any undue hardship on the Appellants, one of which would in any event be required to comply with those rules.

[29] For the foregoing reasons, the motion of the Respondent is granted, and it is ordered that:

- a) the appeal of 407 ETR and the appeals of 407 International shall be heard at the same time on common evidence;
- b) section 145 of the General Rules shall apply to any expert witness of a party to the appeals; and
- c) the Respondent shall amend the Reply in accordance with the draft provided as Schedule A to the Amended Notice of Motion filed August 13, 2019.

[30] In light of the somewhat novel issues raised in the motion, each party shall bear its own costs of this motion.

Signed at Ottawa, Canada, this 25<sup>th</sup> day of October 2019.

“J.R. Owen”

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Owen J.

CITATION: 2019 TCC 245

COURT FILE NOS.: 2018-2037(IT)I and 2018-2038(IT)G

STYLES OF CAUSE: 407 INTERNATIONAL INC. v. THE QUEEN  
407 ETR CONCESSION COMPANY LIMITED v. THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: August 26, 2019

REASONS FOR ORDER BY: The Honourable Justice John R. Owen

DATE OF ORDER: October 25, 2019

APPEARANCES:

Counsel for the Appellants: Martha MacDonald and Michael Steele  
Counsel for the Respondent: Jenna Clark and Samantha Hurst

COUNSEL OF RECORD:

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