

BETWEEN:

MADISON PACIFIC PROPERTIES INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Motion determined by Written Submissions / Order as to Costs

Before: The Honourable Justice David E. Graham

Participants:

Counsel for the Appellant: David Davies
S. Natasha Kisilevsky
Tyler Berg

Counsel for the Respondent: Perry Derksen
Yanick Houle
Eric Brown
Erin Krawchuk

ORDER

Fixed costs of \$408,833.77 and disbursements of \$43,740.96 are awarded to the Respondent in respect of the appeal.

Signed at Ottawa, Canada, this 19th day of April 2024.

“David E. Graham”

Graham J.

Citation: 2024 TCC 47
Date: 20240419
Docket: 2014-3959(IT)G

BETWEEN:

MADISON PACIFIC PROPERTIES INC.

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR ORDER

Graham J.

[1] In my Judgment dated December 27, 2023, I dismissed the Appellant’s appeal (the “Appeal”) with costs to the Respondent. I provided the parties with time to reach an agreement on costs, failing which the parties were to make written submissions regarding costs. The parties were unable to reach an agreement and have now made written submissions.

[2] The Respondent is requesting lump sum costs of \$408,833.77, being 35% of its actual legal costs. The Respondent is also seeking reimbursement of disbursements of \$43,740.96.

[3] The Appellant is requesting lump sum costs of \$109,350, being double the Respondent’s costs under the tariff. The Appellant accepts that the Respondent is entitled to all but \$19,680 of the disbursements the Respondent has claimed.

[4] Subsection 147(3) of the *Tax Court of Canada Rules (General Procedure)* sets out the following factors that the Court may consider in awarding costs.

Result of the Proceeding

[5] The Respondent was totally successful in the Appeal. However, since it was an all-or-nothing appeal, the Respondent accepts that this factor should be neutral. I agree (*2078970 Ontario Inc. v. The Queen*, 2018 TCC 214).

Amounts in Issue

[6] There was \$2,188,839 in federal tax in issue in the Appeal. The Appellant has two other tax years in issue that are currently sitting at CRA Appeals involving the same losses. In addition, there is a further \$10 million in federal tax in dispute in a number of related appeals.¹

[7] The Respondent submits that the additional tax from these disputes should be taken into account as the outcome of the Appeal will have a significant impact on the related appeals. I agree. This factor argues for increased costs.

Importance of the Issues

[8] The Respondent submits that GAAR-related litigation is always important. I agree that that is generally the case. However, the Appeal proceeded in the shadow of *Deans Knight Income Corporation*. The Tax Court decision in *Deans Knight* (2019 TCC 76) was issued before the trial in the Appeal began. The Federal Court of Appeal decision (2021 FCA 160) was issued between the first half of the trial and the second half. Leave to appeal to the Supreme Court of Canada was granted during the second half of the trial. I reserved my decision until after the Supreme Court of Canada issued its decision (2023 SCC 16) and allowed the parties to make additional submissions.

[9] There is no question that *Deans Knight* was a significant case that dealt with important issues. However, in my view, the same cannot be said of the Appeal. The Appeal involved, by and large, the application of the law in *Deans Knight* to a different set of facts.

[10] While the Appeal was the first loss-trading decision from this Court after *Deans Knight*, it was preceded by the Federal Court of Appeal's decision in *MMV Capital Partners Inc. v. The King* (2023 FCA 234) and was quickly followed by Justice Pizzitelli's decision in *Total Entergy Services Inc. v. The King* (2024 TCC 12).

¹ Appeal numbers 2013-3885(IT)G, 2013-3888(IT)G and 2018-540(IT)G).

[11] The Respondent submits that my interlocutory ruling on the admissibility of a letter from the Canada Revenue Agency to the Department of Finance was an important evidentiary point. I accept that that ruling advanced the law, but the ruling involved little more than a couple of hours of trial time and is not, in itself, a reason to award higher costs.

[12] The Respondent also submits that the “group of persons” issue advanced the law. While that may be the case, again, I do not see this as justifying higher costs.

[13] Based on all of the foregoing, I do not think that the Appeal was of particular importance to the development of tax law, to the public’s interest or to a broad number of people. At the same time, it cannot be said that the Appeal was purely a private matter involving a routine application of the law and of no interest to anyone other than the parties. Accordingly, I find that this factor is neutral.

Complexity of the Issues

[14] GAAR appeals are, by their nature, legally complex. The Appeal also had significant factual complexity. While the legal issues were less important because of *Deans Knight*, the fact that the law was constantly changing as that appeal worked its way to the Supreme Court of Canada meant that the parties regularly had to re-work their arguments and submissions.

[15] Based on all of the foregoing, I find that the complexity of the issues argues for higher costs.

Volume of Work

[16] The volume of work involved in the Appeal was significant both in terms of documents, preparation and trial time. That said, I will treat this factor as neutral. The fees charged already reflect that volume and, since I intend to award the Respondent a percentage of those fees, awarding a higher percentage because of the volume would result in double counting.

[17] The Appellant submits that the Respondent used more counsel at trial than the Appellant (four as opposed to three). I do not think that four counsel was inappropriate for the volume of work involved.

[18] The Appellant also argues that various counsel for the Respondent changed a number of times over the course of the litigation which resulted in unnecessary duplication as new counsel was brought up to speed. It is not surprising that there would have been a number of changes of counsel on the Respondent’s side given

that the Appeal took place over almost 10 years. I do not find these changes sufficiently significant to affect costs.

[19] I also note in passing that the Respondent's legal costs are calculated using rates so remarkably out of line with the rates that law firms charge for lawyers of comparable experience and skill that the Appellant has already effectively received a massive discount.

Denial or Refusal to Admit

[20] The Respondent points to a number of facts that the Appellant refused to admit and says that this factor argues for higher costs. I find this factor to be a significant factor but for different reasons.

[21] A great deal of trial time was spent hearing evidence about the purpose of the series of transactions. The Appellant maintained that the series was undertaken primarily for *bona fide* purposes other than to obtain a tax benefit. It was only during oral argument that the Appellant conceded that the sole purpose of the creation and use of the Class C non-voting shares was to preserve the losses.

[22] I recognize that parties do not know in advance how witnesses will perform on the stand or what weight the judge will give to their evidence. However, where the weakness of the evidence in support of an argument are as apparent as they were in this case,² it is appropriate to deal with the pursuit of that argument through costs. Significant trial time (in particular, significant time spent preparing for and conducting cross-examinations) could have been saved had the Appellant conceded this issue up front.

[23] The Appellant points to some issues that the Respondent should have conceded earlier in the process and to the resulting costs that the Appellant was forced to incur preparing for trial. These arguments have merit but do not outweigh the foregoing.

[24] Based on the foregoing, I find that this factor argues for significantly higher costs.

Conduct Affecting the Duration of the Proceeding

[25] I find this factor to be neutral. The Appellant points to a witness that counsel for the Respondent had indicated the Respondent would be calling but who the

² See my comments at paras. 127 to 133 of my Reasons for Judgment.

Respondent ultimately decided not to call and argues that the Appellant wasted time preparing to cross-examine that witness.

[26] I was not surprised by the Respondent's decision not to call the witness. The Appellant's witnesses were so clearly lacking in credibility that the Respondent did not need evidence to counter their assertions. If anything, the Respondent's decision led to a shorter trial.

Improper, Vexatious or Unnecessary Stages

[27] There was no evidence that would suggest that any stage in the Appeal was improper, vexatious or unnecessary.

Stages Taken Through Negligence, Mistake or Excessive Caution

[28] There was no evidence that would suggest that any stage in the Appeal was taken through negligence, mistake or excessive caution.

Settlement Offers

[29] This factor is not applicable.

Other Relevant Matters

[30] The Respondent has not sought costs for counsel's travel time, the Appellant's motion to compel or work related to the Appellant's interlocutory appeal to the Federal Court of Appeal.

Analysis

[31] As set out above, the Respondent is requesting lump sum costs of \$408,833.77, being 35% of its actual legal costs of \$1,168,096. This 35% figure is in line with costs awarded in similar appeals.³

[32] I awarded that same percentage in *Bank of Montreal v. The Queen* (2021 TCC 3). In that appeal, I did not have the same concerns that I have here regarding the Appellant's refusal to concede a losing issue. Because of that factor, I would have been inclined to award costs closer to 40% had the Respondent requested them.

³ See Justice Spiro's helpful summary of cost awards in *Fareed Ahamed TFSA v. The King*, 2023 TCC 177.

[33] Based on all of the foregoing, I find the Respondent's requested costs to be appropriate.

[34] The Respondent also seeks disbursements of \$43,740,96. The largest disbursement is the \$19,680 that the Respondent incurred consulting with an expert that the Respondent anticipated using as an expert witness. That is the only disbursement that the Appellant disputes. The Appellant asserts that the expert was unnecessary.

[35] I am satisfied that given the way that the case progressed and, in particular, the tax purpose issue described above, it was appropriate for the Respondent to retain the expert at the time that the expert was retained. I therefore find that this was an appropriate disbursement.

Conclusion

[36] Based on all of the foregoing, fixed costs of \$408,833.77 and disbursements of \$43,740,96 are awarded to the Respondent.

Signed at Ottawa, Canada, this 19th day of April 2024.

“David E. Graham”

Graham J.

CITATION: 2024 TCC 47

COURT FILE NO.: 2014-3959(IT)G

STYLE OF CAUSE: MADISON PACIFIC PROPERTIES INC.,
v. HIS MAJESTY THE KING

DATE OF HEARING: Motion determined by Written
Submissions

REASONS FOR ORDER BY: The Honourable Justice David E. Graham

DATE OF ORDER: April 19, 2024

PARTICIPANTS:

For the Appellant: David Davies
S. Natasha Kisilevsky
Tyer Berg

Counsel for the Respondent: Perry Derksen
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