Docket: 2017-3776(IT)G

BETWEEN:

HUTCHISON WHAMPOA LUXEMBOURG HOLDINGS S.À.R.L.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Written Submissions Regarding Costs

Before: The Honourable Justice John R. Owen

Participants:

Counsel for the Appellant:	Margaret Nixon Pierre-Louis Le Saunier Zev Smith
Counsel for the Respondent:	Pascal Tétrault Montano Cabezas

AMENDED ORDER

UPON reading the parties' written submissions on costs and disbursements;

IN ACCORDANCE with the attached Reasons for Order the **Appellant** is awarded the amount of $700,000 in respect of legal fees. The disbursements will be determined by the taxing officer subject to the exclusion of all disbursements relating to Mr. Roberts.

This Amended Order is issued in substitution of the Order dated May 23, 2024 to correct a typographical error contained in the original Order.

Signed at Ottawa, Canada, this **31st** day of May 2024.

"J.R. Owen"

Owen J.

Citation: 2024 TCC 74
Date: 20240531
Docket: 2017-3776(IT)G

BETWEEN:

HUTCHISON WHAMPOA LUXEMBOURG HOLDINGS S.À.R.L.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

AMENDED REASONS FOR ORDER

Owen J.

I. **Background**

[1] On October 1, 2003, Husky Energy Inc. ("Husky") paid a quarterly dividend of $0.10 and a special dividend of $1.00 on each of its common shares outstanding at that time (collectively, the "Dividends").

[2] Two of Husky's registered common shareholders at the time the Dividends were paid by Husky were Hutchison Whampoa Europe Investments S.à.r.l. ("HWEI") and L.F. Luxembourg S.à.r.l. ("LFLS"), both of which were resident in Luxembourg. Husky paid each of HWEI and LFLS its proportionate share of the Dividends.

[3] Husky did not pay any portion of the Dividends to Hutchison Whampoa Luxembourg Holdings S.à.r.l. ("HWLH") or to L.F. Management and Investment S.a.r.l. ("LFMI"). Husky did not pay any portion of the Dividends to a predecessor of HWLH or to a predecessor of LFMI.

[4] Husky withheld and remitted tax under Part XIII of the *Income Tax Act* (the "ITA") equal to 5% of the portion of the Dividends paid to HWEI and LFLS, which is the lower of the two rates provided under Article 10(2) of the *Canada-Luxembourg Income Tax Convention* (the "Luxembourg Treaty").

[5] The Minister of National Revenue (the "Minister") assessed HWLH for tax under Part XIII of the ITA on the portion of the Dividends paid to HWEI at the rate of 15% (the "Assessment"). The Assessment was based on the theory that a predecessor of HWLH was the beneficial owner of the Dividends paid by Husky to HWEI or, in the alternative, that Part XIII tax at the rate of 15% was a reasonable tax consequence to HWLH under the General Anti-Avoidance Rule (the "GAAR"). HWLH appealed the Assessment.

[6] HWLH's appeal was heard at the same time as the appeals of Husky and LFMI on common evidence. I allowed the appeal of HWLH with costs to HWLH.

[7] In my judgment, I gave HWLH and the Respondent time to settle on costs failing which each party could make submissions on costs within the stipulated time periods. The parties did not settle on costs, and each party provided submissions to the Court.

[8] HWLH asks for a lump sum award of $1,086,006.87, representing legal fees in the amount of $785,000 and disbursements in the amount of $301,006.87.

[9] The Respondent submits that HWLH's request for costs is unreasonable and that HWLH's costs award should be limited to $475,610.83, which the Respondent says is 35% of all costs and disbursements that should form the basis of the costs award.

[10] The Respondent submits that the total fees that should form the basis of the cost award to HWLH are $1,244,420.95 rather than $1,962,054.99 and that the total disbursements for which HWLH should be reimbursed are $40,063.50 rather than $301,006.87. The Respondent describes each of the proposed adjustments to HWLH's fees and disbursements in a chart titled "HWLH Itemized Summary" attached as an Appendix to the Respondent's costs submissions, which is reproduced in the Appendix to these reasons.

II. **Analysis**

A. **The Approach to Determining Costs**

[11] Section 147 of the *Tax Court of Canada Rules (General Procedure)* (the "Rules") addresses costs in General Procedure income tax appeals. It has long been

accepted that section 147 affords the Tax Court of Canada discretion in awarding costs.[1] Indeed, fettering this discretion constitutes an error of law.[2]

[12] The Court's discretion regarding costs is, however, subject to the requirements that the parties be given an opportunity to make submissions on costs[3] and that the discretion be exercised on a principled, rather than an arbitrary, basis.[4]

[13] Unless the circumstances dictate otherwise, an award of costs is not intended to fully compensate the actual costs incurred by a party, nor is an award of costs intended to punish a party.[5]

[14] A question for the Court in any award of costs is whether the award of costs to the party entitled to costs should be determined in accordance with the Tariff, on a reasonable partial indemnity basis or on a full indemnity basis.

[15] In this case, neither party suggested that HWLH's costs should be determined in accordance with the Tariff or on a full indemnity basis. I agree that neither costs in accordance with the Tariff nor full indemnity-based costs is appropriate in the circumstances. Consequently, the following addresses the determination on a reasonable partial indemnity basis of the costs awarded to HWLH.

[16] In *Damis Properties Inc. v. R.*,[6] I make the following observations regarding this Court's approach to determining an award of costs on a reasonable basis:

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[1] See, for example, *R. v. Lau*, 2004 FCA 10 ("*Lau*") at paragraphs 3 and 5, *R. v. Landry*, 2010 FCA 135 ("*Landry*") at paragraphs 22 and 54 and *Guibord v. R.*, 2011 FCA 346 ("*Guibord*") at paragraphs 9 and 10. The discretion of the Court is reinforced by subsections 147(4) and (5) of the Rules, which state:

> (4) The Court **may** fix all or part of the costs with or without reference to Schedule II, Tariff B and, further, it **may** award a lump sum in lieu of or in addition to any taxed costs.
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> (5) Notwithstanding any other provision in these rules, **the Court has the discretionary power**,
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> (a) to award or refuse costs in respect of a particular issue or part of a proceeding,
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> (b) to award a percentage of taxed costs or award taxed costs up to and for a particular stage of a proceeding, or
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> (c) to award all or part of the costs on a solicitor and client basis. [Emphasis added.]

[2] *R. v. Bowker*, 2023 FCA 133 ("*Bowker*") at paragraph 25.

[3] *Mand v. R.*, 2023 FCA 94 at paragraphs 5 and 6.

[4] *Lau* at paragraph 5, *Landry* at paragraphs 22 and 54, *Guibord* at paragraph 10 and *Bowker* at paragraph 27.

[5] *Consorzio del Prosciutto di Parma v. Maple Leaf Meats Inc.*, 2002 FCA 417 at paragraph 8, *Otteson v. R.*, 2014 TCC 362 at paragraph 17, *Martin v. R.*, 2014 TCC 50 at paragraph 14, *MacDonald v. R.*, 2018 TCC 55 at paragraph 44, *Applewood Holdings Inc. v. R.*, 2019 TCC 34 at paragraph 19 and *Burlington Resources Finance Company v. R.*, 2020 TCC 32 at paragraph 116. For an example of circumstances that dictate otherwise, see *Levy v. R.*, 2021 FCA 93.

[6] *Damis Properties Inc. v. R.*, 2021 TCC 44 ("*Damis*").

> . . . I note with respect to these factors that while it is necessary to address whether and why a relevant factor supports or does not support an award of costs to a particular party, the quantum of the award should be determined based on an assessment of all the relevant factors (including, if necessary, factors not listed) viewed collectively. An individual factor may be a positive or negative influence on the decision to award costs to a party and on the quantum of such award. However, attempting to parse the degree of influence of each factor runs counter to the objectives of saving the parties time and money and securing the just, most expeditious and least expensive determination of proceedings. [Footnote: *Nova Chemicals Corporation v. Dow Chemical Company*, 2017 FCA 25 at paragraphs 10 to 13]. Further, as stated by Rothstein JA (as he then was) in *Consorzio del Prosciutto di Parma v. Maple Leaf Meats Inc. (C.A.)*, 2002 FCA 417 at paragraph 8:
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> > An award of party-party costs is not an exercise in exact science. It is only an estimate of the amount the Court considers appropriate as a contribution towards the successful party's solicitor-client costs (or, in unusual circumstances, the unsuccessful party's solicitor-client costs). . . .
>
> Identifying whether and why a particular factor supports or does not support an award of costs to a particular party is sufficient to make such a determination based on a collective view of the relevant factors.[7]

[17] A similar approach is taken by the Ontario Superior Court of Justice. In *Deluca v. R.*,[8] Justice Dunphy summarized the object and process of determining costs under the Ontario *Rules of Civil Procedure* as follows:

> . . . I do concur with the plaintiff that the process of assessing costs is not confined to a simple mechanical exercise of counting hours and determining the relevant rate to multiply them by. The criteria listed in Rule 57.01 of the Rules of Civil Procedure make this quite clear. **If there is a golden rule in costs it is that the result must be one that appears <u>fair and reasonable in all of the circumstances</u>**. When s. 131 of the CJA places costs in the discretion of the court, that is what is intended. **The criteria in Rule 57.01(1) of the Rules of Civil Procedure are something of a checklist to be reviewed in making <u>that overall assessment</u>**. The reasonable expectations of the losing party are but one of the criteria to be consulted in searching for that elusive answer, albeit an important one.[9]
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> [Emphasis and double emphasis added.]

[7] Ibid., paragraph 6. See, also, *Bowker* at paragraph 31 and *Velcro Canada Inc. v. R.*, 2012 TCC 273.
[8] *Deluca v. R.*, 2016 ONSC 6982 ("*Deluca*").
[9] Ibid. at paragraph 7.

[18] This general approach is also accepted by other Courts and in other contexts. In *Ontario Federation of Anglers and Hunters v Ontario (Minister of Natural Resources and Forestry*,[10] the Registrar of the Supreme Court of Canada states:

> The case law is settled that costs awarded on a solicitor and client scale shall be assessed on the basis of *quantum meruit*: [citations omitted]. A non-exhaustive list of criteria set out in *Cohen v. Kealy & Blaney* (1985), 26 C.P.C. (2d) 211 (Ont. C.A.), cited with approval by this Court in *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1991] 3 S.C.R. 317, constitutes the framework within which *quantum meruit* should be gauged: [citations omitted].[11]

[19] Paragraphs 147(3)(a) to (i.1) of the Rules describe a list of specific factors that the Court may consider when exercising its discretion to award costs. Paragraph 147(3)(j) provides that the Court may also consider any other matter relevant to the question of costs.

[20] Although consideration of the specific factors is itself within the discretion of the Court,[12] no doubt addressing the specific factors and any other factors considered relevant by the Court significantly mitigates the risk that an award of costs would be perceived as arbitrary.

B. **The Submissions of the Parties**

[21] As noted above, the general tenor of the Respondent's costs submissions is that HWLH, LFMI and Husky had a common goal and were working in concert and that when all three appeals are considered together the Respondent was successful. In my view, this argument fails to reflect how the ITA works.

[22] Under the ITA, assessments are made against taxpayers.[13] Assessments of different taxpayers need not be consistent,[14] and assessments of different taxation years of the same taxpayer need not be consistent unless a statutory rule says

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[10] *Ontario Federation of Anglers and Hunters v. Ontario (Minister of Natural Resources and Forestry*, [2017] SCCA No. 369 ("*OFAH*"), which addresses the taxation of costs in the Supreme Court of Canada.

[11] *OFAH* at paragraph 8. See, also, the decision of the Assessment Officer in *Hutton v. Sayat*, 2022 FCA 30.

[12] The introductory words of subsection 147(3) state:

> In exercising its discretionary power pursuant to subsection (1) the Court **may** consider … [Emphasis added.]

[13] *AgraCity Ltd. v. R.*, 2015 FCA 288 ("*AgraCity*") at paragraph 19.

[14] *AgraCity* at paragraph 19.

otherwise.[15] HWLH and LFMI are separate taxpayers regardless of the ownership structure above these corporations. Each of HWLH and LFMI received a separate assessment under the ITA and each is entitled to appeal that assessment to the Tax Court of Canada.[16] In the circumstances, I see no reason to determine costs on the basis proposed by the Respondent.

[23] I note that the Minister chose the strategy of assessing HWLH and LFMI, two non-resident corporations that were not paid a dividend by Husky, even though Husky, a solvent Canadian resident public company, was assessed as the payor of the Dividends.[17]

[24] I accept that the facts giving rise to the assessments of Husky, HWLHI and LFMI share a great deal in common. However, HWLH addressed this "duplication" by agreeing to the content of the Partial Agreed Statement of Facts (the "PASF") and by agreeing with the counsel for Husky and LFMI on a strategy at the hearing of the three appeals that minimized duplication and the consumption of time. It is not at all clear to me what other steps the appellants could have taken to limit legal fees when each needed to address its own multi-million dollar assessment of tax.

[25] The Respondent submits that "[t]he convocation of nine lawyers for the appellants during the entire three weeks of trial was unnecessary. The costs award should be discounted for this waste." I will address this point, which relates to consideration of the volume of work and the costs associated with that work, later in these reasons.

[26] The Respondent submits that LFMI and HWLH pursued an "unnecessarily aggressive trial strategy" and that "[t]he costs award should be reduced because tax benefit and avoidance transactions ought to have been admitted".[18] The Respondent also states that "[t]he GAAR issues could have been heard with admissions on the tax benefit and avoidance issue questions, which occurs frequently".[19]

[27] In a case involving the application of the GAAR, the appellant is entitled to dispute all three elements of the GAAR (i.e., tax benefit, avoidance transaction and

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[15] *Landbouwbedrijf Backx B.V. v. R.*, 2019 FCA 310 at paragraph 13.
[16] *Hawkes v. R.*, 1996 CarswellNat 2206 (FCA) at paragraph 9.
[17] See, generally, paragraphs 19 and 21 of *3792391 Canada Inc. v. R.*, 2023 TCC 37, in which my colleague, Justice St-Hilaire, identifies the collection regime in Part XIII of the ITA and explains the reason why a Canadian resident payor is required to withhold the tax imposed by Part XIII.
[18] These comments are made in paragraph 3 of the Respondent's costs submissions.
[19] Paragraph 17 and footnote 22 of the Respondent's costs submissions.

abuse). The fact that other appellants have conceded the first two elements is indicative of nothing more than the judgment of the appellant and their counsel in such other cases.

[28] In *Cameco Corporation v. R.*,[20] I addressed the argument by Cameco, the successful party, that the Respondent should not have pursued a sham argument as follows:

> . . . the merit of the Respondent's case is not relevant to the Court's consideration of the result. The rationale for costs is not to punish the losing party based on an *ex post facto* analysis of the relative merit of the positions taken.[21]

[29] Similarly, the rationale for costs is not to parse *ex post facto* the merits of the case put forward by a successful appellant. An appellant is entitled to put all reasonable arguments in favour of the appellant's position to the Court for determination.

[30] The position that a party may pursue all reasonable arguments is consistent with the case law addressing pleadings, which limits the striking of pleadings to situations where it is plain and obvious, assuming the facts to be true, that the pleading discloses no reasonable cause of action or has no reasonable prospect of success.[22]

[31] The decision whether or not and how to pursue a particular position at trial is a strategic decision and it is not the role of this Court to second guess counsel's judgment on such matters in an award of costs. In *RMM Canadian Enterprises Inc. v. R.*,[23] Judge Bowman (as he then was) observed:

> . . . It frequently happens in litigation that arguments are advanced in support of positions that, with the benefit of hindsight, turn out to have been unnecessary. Unless such arguments are plainly frivolous or untenable, I do not think that a litigant should be penalized in costs simply because its counsel decides to pull out all the stops, nor do I think that it is my place to second guess counsel's judgment, after the event, and say, in effect[:]"If you had had the prescience to realize how I was going to decide we could have saved a lot of time by confining the case to one

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[20] *Cameco Corporation v. R.*, 2019 TCC 92 ("*Cameco*")
[21] *Cameco* at paragraph 12.
[22] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paragraph 17.
[23] *RMM Canadian Enterprises Inc. v. R.*, [1997] 3 CTC 2103, 97 DTC 420 (TCC).

> issue." Moreover, one of counsel's responsibilities is to build a record which will enable an appellate court to consider all of the issues.[24]

[32] HWLH fully explains the reasons for the position taken by HWLH and LFMI on the tax benefit and tax avoidance transaction issues[25] and I discern nothing unreasonable in the approach taken by HWLH in choosing to adopt this strategy.

[33] The Respondent submits that "a global approach to costs considering the three appeals heard on common evidence would be in the interests of justice." In my view, justice is served only if each party entitled to costs is awarded costs that are determined in accordance with the principles set out above rather than on a consolidated basis.

[34] The Respondent was fully entitled to pursue the Minister's assessment of HWLH under the GAAR notwithstanding (i) the decision of the Supreme Court of Canada in *R. v. Alta Energy Luxembourg S.A.R.L.*,[26] (ii) the Minister was assessing the payor of the Dividends under the provisions in the ITA intended to facilitate the collection of Part XIII tax, and (iii) Husky did not pay a dividend to HWLH or to a predecessor of HWLH. However, the Respondent must accept the reasonable cost consequences of that strategic decision.

[35] The following addresses the specific factors in paragraphs 147(3)(a) to (i.1) of the Rules.

1. Paragraph 147(3)(a) - The Result of the Proceeding

[36] In *Bowker*, the Federal Court of Appeal held that in a case where there are only two possible outcomes (i.e., success or failure) this factor could be taken into consideration by the Court only on the issue of a party's entitlement to costs and not on the issue of the quantum of costs.[27]

[37] In other words, once a party's entitlement to an award of costs is determined, the role of this factor is to address situations where the party achieves less than 100%

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[24] Ibid., paragraph 5 CTC and page 421 DTC.
[25] Paragraphs 22 and 23 of HWLH's written submissions on costs ("HWLH's costs submissions").
[26] *R. v. Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49 ("*Alta Energy SCC*").
[27] *Bowker* at paragraphs 33 to 36.

success. In such a case, it is for the Tax Court judge to determine the impact of this factor on the award of costs.

[38] The Respondent accepts that HWLH was successful but submits that this success must be considered in the context of the overall success of the Respondent. The Respondent submits that "the combined total of the costs awards in the HWLH and LFMI appeals should approximate the Crown's costs award in the Husky appeal."

[39] I disagree with this submission. The success of HWLH warrants an appropriate award of costs to HWLH as determined by consideration of all other factors relevant to the quantum of costs in HWLH's appeal just as the award of costs to the Respondent in Husky's appeal was determined by consideration of all other factors relevant to the quantum of costs in that appeal.

2. Paragraph 147(3)(b) - The Amounts in Issue

[40] HWLH says that the total amount in issue for HWLH was $39,987,127.27, of which $24,180,541.50 was Part XIII tax and $15,716,585.77 was interest.[28] The Respondent does not explicitly address the amount in issue.

[41] In my view, the amount in issue was substantial and, therefore, this factor supports an appropriate award of costs to HWLH.

3. Paragraph 147(3)(c) - The Importance of the Issues

[42] HWLH submits that the issues in HWLH's appeal were important and novel. HWLH states:

> 11. . . . Until the Judgment, no prior decision had considered: (a) subsection 212(2) and the role of the identity of the non-resident recipient of a dividend; (b) the beneficial ownership of dividends in a securities lending arrangement; (c) the object, spirit and purpose of Article X of the Barbados Treaty; (d) the object, spirit and purpose of Article 10(2) of the Luxembourg Treaty; or (e) the application of the Supreme Court of Canada's decision in *Canada v. Alta Energy Luxembourg S.A.R.L.* in the treaty context.

[28] The amount of the assessment and the breakdown of that amount is stated in paragraph 1 of HWLH costs submissions and in paragraph 8 of the affidavit affirmed by Margaret Nixon on March 12, 2024 (the "HWLH Affidavit")

> 12. The beneficial ownership issue in the Appeal is of broad importance to the Canadian financial markets. The Court noted that securities lending arrangements are not unusual. The Court also cited a 2019 Bank of Canada publication stating that "[s]ecurities lending plays an important role in Canadian financial markets" and is "one of Canada's core funding markets".
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> 13. Given the ubiquity and significance of securities lending arrangements in capital markets in Canada, the Judgment has important withholding tax implications for Canadian dividend payers and withholding agents when payments are made to non-resident shareholders. The beneficial ownership issue is also relevant to the interpretation and application of Articles 11 (interest) and 12 (royalties) of Canada's tax treaties, which also contain a beneficial ownership requirement.
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> 14. The Court's analysis of the GAAR will also have broad ramifications for taxpayers in both the treaty and non-treaty context. The Judgment is one of the first decisions to apply the Supreme Court of Canada's decision in *Deans Knight*. In *Deans Knight*, the Court clarified that the rationale of a provision may be fully captured by its text, but this must be confirmed by following the approach to statutory interpretation that is applicable to the GAAR. In contrast to the provision at issue in *Deans Knight*, the Court found that the rationale of Article 10(2) of the Luxembourg Treaty is fully reflected in the explicit requirements of the Article, i.e., residence, beneficial ownership and voting power.[29]

[43] The Respondent does not explicitly address the importance of the issues.

[44] I accept that reasons for judgment addressing, both generally and in the context of the GAAR, the fundamental elements of the regime in Part XIII of the ITA and the dividend articles of OECD based tax treaties that modify the application of that regime may be important to corporations resident in Canada that pay or credit (or are deemed to pay or credit) dividends to non-resident persons, as well as to the non-resident persons to which such dividends are paid. Such reasons for judgment may also be of importance to persons that enter securities lending arrangements in respect of shares issued by corporations resident in Canada.

[45] Accordingly, I find that this factor supports an appropriate award of costs to HWLH.

4. Paragraph 147(3)(d) - Any Offer of Settlement Made in Writing

[29] Paragraphs 11 to 14 of HWLH's costs submissions. I have omitted the footnotes.

[46] HWLH states that no settlement offers were exchanged and the Respondent does not suggest otherwise. Consequently, this factor plays no role in the award of costs.

5. Paragraph 147(3)(e) - The Volume of Work and Paragraph 147(3)(f) – Complexity of the Issues

[47] The Respondent made no explicit submissions on the volume of work and the complexity of the issues although as I note in the discussion of other factors the Respondent does attempt to address the volume of work indirectly through an adjustment to HWLH's legal fees.

[48] HWLH addresses the volume of the work and the complexity of the issues in its submission addressing paragraph 147(3)(e) and then adds a short statement about paragraph 147(3)(f). Given this approach, for clarity, I will address these two factors together.

[49] HWLH submits that the volume of work was high commensurate with the complexity of the issues. HWLH states:

> 20. The volume of work was considerable due to the need to address the interpretation and application of beneficial ownership in a securities lending arrangement, Article X of the Barbados Treaty and Article 10(2) of the Luxembourg Treaty, as well as whether the GAAR applied to deny the tax benefit to the Appellant. With respect to the GAAR, the Appellant had to address, among other things, whether the series of transactions resulted in a misuse or abuse of any of the eight provisions that the Respondent alleged had been misused or abused (i.e., subsections 212(2), 215(1) and 215(6) of the Act, subsection 10(6) of the Income Tax Application Rules, Article X of the Barbados Treaty and Articles 1, 4 and 10 of the Luxembourg Treaty).
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> 21. The volume of work for the Appellant was also high due to:
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> > (a) *Full disclosure of documents by all parties* – the Respondent obtained an order in the Appeal and the Related Appeals for full disclosure of documents under section 82 of the Rules, which required the Appellant to collect and review thousands of documents and produce approximately 1,000 documents. Of the documents produced, only a small number of them that were not already in the possession of the Respondent were referred to in the PASF or used at the hearing.

(b) *Length of discoveries* – the Respondent examined Donald J. Roberts, the Appellant's discovery nominee, on two separate occasions in Toronto, even though Mr. Roberts lives in Hong Kong. Mr. Roberts was not an employee of the Appellant at the time of the examinations or the hearing and, therefore, was not under the control of the Appellant. As a non-resident of Canada, Mr. Roberts could also not be subpoenaed to testify at trial. Consequently, the Appellant compensated Mr. Roberts for the time he spent reviewing the Appellant's and the Respondent's documents and preparing for and acting as a witness at examinations for discovery and at trial. The Appellant also reimbursed Mr. Roberts for his reasonable travel expenses. The volume of work required for Mr. Roberts to review the documents and prepare to give evidence was considerable and compounded by the fact that the relevant transactions took place in 2003.

(c) *Amendments to the Reply* – the Respondent amended its Reply in July 2021 to raise as a new argument that the transactions resulted in a misuse or abuse of Article X of the Barbados Treaty. The Court rejected this argument and held that the role of the Barbados Treaty was solely to reduce Part XIII tax from 25% to 15% prior to the securities lending arrangement. The Court found no basis for concluding that there was an abuse of the Barbados Treaty, regardless of the rationale of Article X.

(d) *Number of witnesses and duration of the Appeal* – The Appeal and the Related Appeals involved a ten-day hearing with each party represented by three lawyers. The parties filed a Partial Agreed Statement of Facts ("**PASF**"), two volumes of documents referred to in the PASF and two volumes of a joint book of documents. The Appellants called six witnesses and the Respondent called two witnesses, including one expert witness. Although the Appeal was heard on common evidence with the Related Appeals, this did not increase the Appellant's costs or the length of the hearing. To avoid duplication, only one of the Appellants examined each of the eight witnesses. The Appellant examined Mr. Roberts and cross-examined both of the Respondent's witnesses, namely, the Respondent's proposed expert, Werner Haslehner, and the Respondent's only fact witness, Bing Zhang. The Appellant also argued the *voir dire* in respect of the admissibility of the proposed expert report of Mr. Haslehner. In addition, the Appellant was the only one of the Appellants who needed to rely upon evidence from all of the material witnesses at trial, including Neil McGee, Mr. Roberts and W.Y. Fung. Consequently, even if the Appeal had been heard on its own rather than with the Related Appeals, the hearing would not have been materially shorter. All of the foregoing evidence would have been adduced in the Appeal, whether or not the Appeal was heard with the Related Appeals on common evidence. Having the Appeal and the Related Appeals heard together on common evidence

> resulted in the efficiencies noted above, which resulted in time and cost savings for the Appellant and the Court.
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> (e) *The Respondent's expert evidence was not fully admissible* – The Respondent adduced an expert report opining on domestic Luxembourg law, only a small part of which was admitted into evidence because the full report did not satisfy the criteria of relevance and necessity. The Appellant had to consider the entire report, assess whether to adduce a responding report, review the foreign legal authorities and laws that were cited by the proposed expert, many of which were in German and for which the Respondent did not provide an English or French translation, prepare a cross-examination of the Respondent's proposed expert and prepare written and oral submissions on the admissibility of the expert report, all of which significantly increased the Appellant's costs.
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> (f) *Confusing legal position with respect to beneficial ownership* – At the time the Assessment was issued, the Minister concluded that HWEI was the beneficial owner of the Dividend and, consequently, the GAAR was the sole basis for the Assessment. In its Reply, the Respondent raised for the first time in support of the Assessment the argument that UF Barbados was the beneficial owner of the Dividend, such that the applicable rate of withholding tax was 15% pursuant to Article X of the Barbados Treaty. The Court found that by adopting the position that UF Barbados was the beneficial owner of the Dividend, the Respondent "significantly confuse[d] the issue" and "unnecessarily lengthene[d] and complicate[d] the analysis".
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> . . .
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> 25. The issues in the Appeal were complex given that the Appeal was the first judicial consideration of beneficial ownership in a securities lending arrangement, Article X of the Barbados Treaty and Article 10(2) of the Luxembourg Treaty, and the first application of the principles from Alta Energy in the treaty context.[30]

[50] I accept that the volume of work required for HWLH's appeal was substantial and that the complexity of the issues involved fully supports this conclusion.

[51] I note that the volume of work was increased by certain choices made by the Respondent such as the choice to seek full discovery of documents and the choice to amend the Reply following discovery. The Respondent was fully entitled to make these choices.

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[30] Paragraphs 19 to 21 and paragraph 25 of HWLH's costs submissions. I have omitted the footnotes.

[52] The Bill of Costs attached as Exhibit "A" to HWLH's Affidavit indicates that HWLH's counsel spent 2319.4 hours on the appeal and accumulated total legal fees of $1,962,054.99. This corresponds to an average hourly rate of $846.

[53] The Respondent takes issue with the quantum of the legal fees and submits that a cost award should be based on total legal fees of $1,244,420.95. As stated in paragraph 10 of these reasons, the quantum of each adjustment proposed by the Respondent and the reason for each such adjustment are stated in the Appendix to the Respondent's costs submissions, which is reproduced in the Appendix to these reasons. I will address the Respondent's position on the quantum of the fees under my review of other relevant factors.

[54] In conclusion, the volume of work and the complexity of the issues both support an appropriate award of costs to HWLH.

6. Paragraph 147(3)(g) - The Conduct of any Party that Tended to Shorten or to Lengthen Unnecessarily the Duration of the Proceeding

[55] HWLH submits that the Respondent's decision to pursue the Minister's application of the GAAR to HWLH in the face of the decision of the Supreme Court of Canada in *Alta Energy SCC* warrants a finding that this factor is in favour of costs to HWLH.

[56] I disagree. This factor is not intended to penalize the Respondent for a decision to pursue an assessing position of the Minister. Nor is it intended to penalize an appellant for deciding to appeal an assessment.

[57] The application of the decision in *Alta Energy SCC* to HWLH's facts involved questions of law, questions of mixed law and fact and questions of fact. The Respondent was fully entitled to have these questions decided by the Tax Court of Canada.

[58] The efforts of counsel for HWLH and counsel for the Respondent to shorten the proceedings by agreeing to the PASF are commendable but since such efforts benefitted all parties, it is not a factor in the awarding of costs in this appeal.

7. Paragraph 147(3)(h) - The Denial or the Neglect or Refusal of any Party to Admit Anything that should have been Admitted

[59] Neither party made submissions regarding this factor, and I am not aware of anything that suggests that this factor is relevant to an award of costs to HWLH.

8. Paragraph 147(3)(i) - Whether any Stage in the Proceedings was Improper, Vexatious, or Unnecessary, or Taken through Negligence, Mistake or Excessive Caution

[60] Neither party made submissions regarding this factor, and I am not aware of anything that suggests that this factor is relevant to an award of costs to HWLH.

9. Paragraph 147(3)(i.1) - Whether the Expense Required to have an Expert Witness give Evidence was Justified

[61] Neither party made submissions regarding this factor, and I am not aware of anything that suggests that this factor is relevant to an award of costs to HWLH.[31]

10. Paragraph 147(3)(j) - Any Other Matter Relevant to the Question of Costs

[62] The Respondent challenges the legal fees incurred by HWLH and the disbursements claimed by HWLH.

[63] With respect to the legal fees, the Respondent's costs submissions provide reasons for the adjustments stated in the chart in the Appendix to those submissions that addresses legal fees (the "fee chart"). These reasons may be summarized as follows:

1. The GAAR issues could have been heard with admissions on the tax benefit and avoidance issue questions.[32] The fee chart identifies a total reduction of $571,057.98 that falls under this category. The description in the fee chart of the three amounts that comprise this total are as follows:

[31] HWLH did comment on the implications of the expert evidence under the "volume of work" factor in paragraph 147(3)(e).
[32] The full submissions are found in paragraphs 17 to 20 of the Respondent's costs submissions.

i. HWLH legal fee for consideration, preparation and negotiation of PASF and Joint Book; *etc*. Reduction of 50% because of duplication with LFMI: $88,950.17;

ii. HWLH legal fee for preparation for trial; Consideration of evidentiary issues; *etc*. Reduction of 50% because of duplication with LFMI: $292,523.91; and

iii. HWLH legal fee for attendance at trial including additional preparation during trial reduction by 50%. Three counsel total for both HWLH and LFMI: $189,583.90

2. HWLH's unnecessary *voir dire* of the Respondent's expert witness. The fee chart identifies a total reduction of $30,580.51 that falls under this category.

3. The inclusion of fees for the preparation of HWLH's costs submissions. The fee chart identifies a total reduction of $32,547.56 that falls under this category.

4. The inclusion of fees for David Weekes who the Respondent says acted for Husky. The fee chart identifies a total reduction of $83,448 that falls under this category.

[64] I note that two of the three fee amounts identified for David Weekes ($38,190 and $24,282) are not reflected in the Cost award column of the fee chart and that even when these amounts are deducted the total of the numbers in the "Cost award" column is $1,249,420.95 rather than the total stated in that column of $1,244,420.95.

[65] With respect to the first category of adjustments totalling $571,057.98, I do not accept the proposition that there was duplication because LFMI faced the same issues as HWLH. HWLH, LFMI and Husky were each fully entitled to the benefit of their own counsel and the hearing of the three appeals was conducted in a manner that, to the greatest extent practicable, avoided duplication of counsel's efforts.[33]

[33] In that regard, I agree with the description in subparagraph 21(d) of HWLH's costs submissions.

[66] As for the time spent by counsel for HWLH, I observed the following in *CIT Group Securities (Canada) Inc. v. R.*:[34]

> 16. The Respondent suggests that the Appellant's counsel may have significantly over-prepared his presentation. In my view, that is somewhat difficult to gauge in circumstances involving complex legal and factual issues that have not before been the subject of consideration by the Tax Court of Canada. Certainly, in the absence of obvious excess, it is not the role of the Court to second-guess counsel's judgment regarding the work required to fully prepare for such a case. However, I accept that in circumstances involving such significant stakes for the Appellant, efficiency and frugality may have taken a back seat to thoroughness.
>
> 17 In any event, it is important to recognize that the volume of work is merely one factor that may be considered in assessing whether and to what extent costs should be awarded to a party. The consideration of this factor must not be confused with the ultimate determination of the amount of costs, if any, that are awarded to a party. That determination is to be made on a principled basis, having regard to all relevant factors, which, in addition to the factors identified in subsection 147(3) of the Rules, include any other matter relevant to the question of costs.[35]

[67] In the second category, the Respondent asks that I remove a portion of HWLH's legal fees associated with the *voir dire* of the expert witness because it was inappropriate to challenge the admission of the expert evidence.

[68] In my view, the Respondent misapprehends the purpose of a *voir dire* regarding the admission of expert evidence. Such a *voir dire* is required so that the Tax Court judge may determine that the expert evidence satisfies the criteria for such evidence stipulated by the Supreme Court of Canada in *R. v. Mohan*[36] and *White Burgess Langille Inman v. Abbott and Haliburton Co.*[37].

[69] In this case, I conducted a *voir dire* following which I admitted only a portion of the expert's report into evidence. Since counsel was successful in arguing for the exclusion of a significant portion of the expert report, I fail to see a reason for reducing HWLH's legal fees for the purpose of determining the quantum of the award for costs.

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[34] *CIT Group Securities (Canada) Inc. v. R.*, 2017 TCC 86 ("*CIT*").
[35] *CIT* at paragraphs 16 and 17.
[36] *R. v. Mohan*, [1994] 2 SCR 9.
[37] *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23.

[70] I accept that counsel for HWLH was somewhat overzealous in the pursuit of a bias argument. However, that argument was open to counsel and the pursuit of that argument did not materially add to the time taken for the *voir dire*. I note that as soon as counsel overstepped the reasonable bounds of questioning in support of that argument, I put an immediate stop to counsel's questioning. I also put an immediate stop to an attempt by counsel to revisit the issue after my ruling.

[71] In the third category, the Respondent asks that I remove the legal fees of HWLH incurred for its submissions on costs, which total $32,547.56. I agree with the Respondent that such fees should not factor into this determination of the award for costs but rather should be determined in accordance with the Tariff and I will remove them from the total legal fees of HWLH for the purpose of my determination of the cost award. However, I leave it open to HWLH to make a separate claim for these fees in accordance with the Tariff.

[72] The fourth category addresses fees for time spent on HWLH's appeal by David Weekes. I agree with the Respondent that David Weekes advised Husky regarding the securities lending arrangements as his opinion to Husky was admitted in evidence at the hearing. However, that does not preclude Mr. Weekes from providing advice to HWLH in respect of this appeal, which took place 15 to 20 years after he issued his opinion to Husky. Presumably, if there was still a conflict after all that time, Mr. Weekes would have obtained Husky's consent to act for HWLH. I therefore decline to deduct the fees attributed to Mr. Weekes.

[73] I am not aware of any other factor that requires consideration.

III. **The Disbursements Challenged by the Respondent**

[74] The Respondent challenges certain disbursements of HWLH With the exception of the disbursements associated with Mr. Roberts, a witness called by HWLH, I will remit the disbursements claimed by HWLH for taxation.

[75] As for the disbursements associated with Mr. Roberts, which are itemized in the chart addressing disbursements included in the Appendix to the Respondent's costs submissions[38], it was HWLH's choice to put Mr. Roberts forward as HWLH's nominee for discovery and as a witness at the hearing of the appeal notwithstanding he was no longer employed by a corporation related to the predecessor of HWLH.

[38] Which is reproduced in the Appendix of these reasons.

In the circumstances, I fail to see why the Respondent should compensate HWLH for these costs and I therefore disallow these disbursements.

IV. **Conclusion Regarding the Award of Costs**

[76] The factors in favour of an award of costs to **HWLH** are the success of HWLH, the importance of the issues, the material amounts in issue, the volume of work and the complexity of the issues. There are no factors suggesting a reduction in the costs that would otherwise be awarded but for those factors. I note that the success of the Respondent in Husky's appeal has no bearing on the determination of the award of costs to HWLH.

[77] The total legal fees incurred by HWLH after the deduction of the $32,547.56 of legal fees for preparing HWLH's costs submissions are $1,929,507.43. I therefore conclude that a reasonable contribution to the costs of the Respondent should be based on the total legal fees incurred by HWLH of $1,929,507.43.

[78] I have considered the positive factors in the context of the appeal as a whole and the quantum of legal fees claimed by HWLH and conclude that a reasonable and fair contribution to the legal fees of HWLH is the amount of $700,000. The amount of the disbursements allowed will be determined by the taxing officer subject to the exclusion of all disbursements relating to Mr. Roberts.

This Amended Reasons for Order is issued in substitution of the Reasons for Order dated May 23, 2024 to correct a typographical error contained in paragraph 76 of the original Reasons for Order.

Signed at Ottawa, Canada, this **31st** day of May 2024.

"J.R. Owen"

Owen J.

APPENDIX

HWLH ITEMIZED SUMMARY

HWLH's legal fees of $1,244,420.95 should be paid at 35% after the discounts listed below, for a total lump sum indemnity of $435,547.33.

HWLH legal fee	Amount claimed	Cost award	Description
Notice of Appeal	$18,924	$18,924	No change
Review and analysis of Amended Reply; etc.	$71,601.98	$50,625.98	Removing $20,976 charged by David Weekes
Communications internally and with Appellant and third parties; Collection of documents for production purposes; etc.	$159,960.05	$159,960.05	Removing $38,190 charged by David Weekes
Review and analysis of Rule 82 productions of the Respondent; etc.	$180,847.42	$180,847.42	Removing $24,282 charged by David Weekes
Review of transcripts from examinations for discovery; Preparation of answers to undertakings; etc.	$131,325.82	$131,325.82	No change
Review and analysis of draft Further Amended Reply; etc.	$98,115.05	$98,115.05	No change
Consideration, preparation and negotiation of PASF and Joint Book; etc.	$177,900.33	$88,950.17	Reduction of 50% because of duplication with LFMI
Review and analysis of Respondent's expert report etc. (including expert cross-exam)	$91,741.51	$61,161	Reduction of one third due to wasteful voir dire and allegations of bias
Preparation for trial; Consideration of evidentiary issues; etc.	$585,047.82	$292,523.91	Reduction of 50% because of duplication with LFMI

HWLH legal fee	Amount claimed	Cost award	Description
Attendance at trial including additional preparation during trial	$379,167.80	$189,583.90	Reduction by 50%. Three counsel total for both HWLH and LFMI
Preparation of post-trial written submissions regarding Deans Knight; preparation of costs submissions	$67,423.21	$34,875.65	Removes costs submissions
Total	**$1,962,054.99**	**$1,244,420.95**	
Recommended award	**$785,000**	**$435,547.33**	35% of discounted legal fees

HWLH's compensation for disbursements should be $40,063.50 taking into account the following discounts:

HWLH disbursement	Amount claimed	Cost award	Description
Transcripts	$3,597.05	$3,597.05	No change
Faxes/Postage/Courier	$795.40	$795.40	No change
Photocopying/Binding	$6,215.09	$6,215.09	No change
Sanning/Data Management/E-Discovery	$7,296.40	$7,296.40	No change
Court Reporter	$463.00	$463.00	No change
Consultant re: Expert Report and Luxembourg Law (Loyens & Loeff)	$6,122.81	$6,122.81	No change
Witness Fees: First Examination for Discovery (2019) (D. Roberts)	Airfare & Taxis: $10,302.63 Hotel: $5,924.13 Doc. Review & Preparation: $42,917.55 Examination: $3,555.30	Airfare & Taxis: $3,300 Hotel & per diem: $1,891.25	Removing compensation for document review, preparation, and attendance Economy class airfare; government hotel rate and per diems for five days
Witness Fees: Second Examination for Discovery (2019) (D. Roberts)	Airfare & Taxis: $8,906.42 Hotel: $4,883.00 Doc. Review & Preparation: $33,521.40 Examination: $3,047.40	Airfare & Taxis: $3,300 Hotel & per diem: $1,891.25	Removing compensation for document review, preparation, and attendance Economy class airfare; government hotel rate and per diems for five days
Witness Fees: Trial (2022 & 2023) (D. Roberts)	Airfare & Taxis (2023): $13,590.98 Hotel (2023): $5,582.74	Airfare & Taxis: $3,300	Removing compensation for document review, preparation, and attendance

HWLH disbursement	Amount claimed	Cost award	Description
	Doc. Review & Prep. (2022 & 2023): $117,739.95 Testimony (2023): $7,240.80	Hotel & per diem: $1,891.25	Economy class airfare; government hotel rate and per diems for five days
Counsel: First Examination for Discovery (D. Weekes)	Airfare & Taxis: $2,742.15 Hotel: $2,020.80	$0	No costs for national firm's staffing preferences Amounts unreasonable / no receipt provided
Counsel: Second Examination for Discovery (D. Weekes)	Airfare and Taxis: $2,393.06 Hotel: $1,813.41	$0	No costs for national firm's staffing preferences Amounts unreasonable / no receipt provided
Counsel: Trial (P-L Le Saunier)	Airfare and Taxis: $2,912.73 Hotel: $7,422.67	$0	No costs for national firm's staffing preferences Amounts unreasonable / no receipt provided
Total	**$301,006.87**	**$40,063.50**	

CITATION:	2024 TCC 74
COURT FILE NO:	2017-3776(IT)G
STYLE OF CAUSE:	HUTCHISON WHAMPOA LUXEMBOURG HOLDINGS S.À.R.L. AND HIS MAJESTY THE KING
AMENDED REASONS FOR COSTS ORDER BY:	The Honourable Justice John R. Owen
DATE OF **AMENDED** COSTS ORDER:	May **31**, 2024

PARTICIPANTS:

Counsel for the Appellant:	Margaret Nixon Pierre-Louis Le Saunier and Zev Smith
Counsel for the Respondent:	Pascal Tétrault and Montano Cabezas

COUNSEL OF RECORD:

For the Appellant:

Name:	Margaret Nixon Pierre-Louis Le Saunier and Zev Smith
Firm:	Stikeman Elliott LLP Toronto, Ontario

For the Respondent:	Shalene Curtis-Micallef Deputy Attorney General of Canada Ottawa, Canada