Docket: 2018-388(IT)G

BETWEEN:

L.F. MANAGEMENT
AND INVESTMENT S.A.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:	Louise R. Summerhill Josh Kumar Monica Carinci
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 $575,000 in respect of legal fees. The amount of the disbursements allowed will be determined by the taxing officer subject to the exclusion of the disbursement for the fee payable to Heuristica Discovery Counsel.

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 75
Date: 20240531
Docket: 2018-388(IT)G

BETWEEN:

L.F. MANAGEMENT
AND INVESTMENT S.A.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. The 5% rate 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 LFMI for tax under Part XIII of the ITA on the portion of the Dividends paid to LFLS at the rate of 15% (the "Assessment") on the theory that a predecessor of LFMI was the beneficial owner of the Dividends paid by Husky to LFLS. LFMI appealed the Assessment.

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

[7] In my judgment, I gave LFMI 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] LFMI asks for a lump sum award of $946,098, which is 50% of the legal fees of $1,573,407 plus disbursements of $159,394.53.[1]

[9] The Respondent's cost submissions in this appeal and in the appeal of HWLH are very similar. The Respondent's general position on costs for LFMI is summarized in the following excerpt:

> 14. Given their interrelated nature, common goal, and shared approach, the appellants ought to have worked together and mitigated their costs. Instead the appellants each chose to have different counsel, which LFMI says made the appeals "more complex and time-consuming." The Crown should not subsidize this waste. Parties that are prepared to "go to the wall" must expect to absorb much of their significant costs. It would be unreasonable to award trial-attendance costs for three lawyers from both HWLH and LFMI.
>
> 15. Considering that the parties shared the same advisors prior to the litigation, it would have been more efficient to continue this practice and share the same counsel for the hearing of the appeals. The only logical conclusion for the appellants selecting seperate [*sic*] counsel was to appear before the Court as independent parties not sharing the same interests. While the appellants have this right, they should expect to absorb much of this expense. From a costs perspective, a total of three trial counsel for HWLH and LFMI (instead of six) is reasonable.[2]

[10] The Respondent submits that LFMI's request for costs is unreasonable. The Respondent submits that LFMI's costs award should be limited to $145,200 for legal

---

[1] LFMI's bill of costs on a full indemnity basis is attached as Exhibit B to the affidavit of Cindy Moniz sworn on March 12, 2024 (the "LFMI Affidavit"), which is Appendix A to LFMI's cost submissions.
[2] Paragraphs 14 and 15 of the Respondent's cost submissions.

fees. The Respondent says that $145,200 is four times the amount stated in LFMI's bill of costs computed in accordance with Schedule II, Tariff B (the "Tariff") of the *Tax Court of Canada Rules (General Procedure)* (the "Rules")[3] for a class C proceeding and approximates 10% of LFMI's bill of costs computed on a full indemnity basis.

[11] The Respondent submits that LMFI's disbursements should be limited to $35,355. The Respondent describes each of its proposed adjustments to LFMI's disbursements in the chart attached as an Appendix to the Respondent's cost submissions titled "LFMI Itemized Summary", which is reproduced in the Appendix to these reasons.

II. **Analysis**

A. **The Approach to Determining Costs**

[12] Section 147 of 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.[4] Indeed, fettering this discretion constitutes an error of law.[5]

[13] The Court's discretion regarding costs is, however, subject to the requirements that the parties be given an opportunity to make submissions on costs[6] and that the discretion be exercised on a principled, rather than an arbitrary, basis.[7]

---

[3] LFMI's bill of costs calculated in accordance with Tariff is attached as Exhibit A to the LFMI Affidavit.

[4] 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.
>
> (5) Notwithstanding any other provision in these rules, **the Court has the discretionary power**,
>
> (a) to award or refuse costs in respect of a particular issue or part of a proceeding,
>
> (b) to award a percentage of taxed costs or award taxed costs up to and for a particular stage of a proceeding, or
>
> (c) to award all or part of the costs on a solicitor and client basis. [Emphasis added.]

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

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

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

[14] 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.[8]

[15] 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.

[16] In this case, neither party suggested that LFMI'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[9] 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 LFMI.

[17] In *Damis Properties Inc. v. R.*,[10] I make the following observations regarding this Court's approach to determining an award of costs on a reasonable basis:

> . . . 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:
>
> > 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

[8] *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.
[9] A multiple of the Tariff is not in accordance with the Tariff.
[10] *Damis Properties Inc. v. R.*, 2021 TCC 44 ("*Damis*").

> (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.[11]

[18] A similar approach is taken by the Ontario Superior Court of Justice. In *Deluca v. R.*,[12] 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 fair and reasonable in all of the circumstances**. 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 that overall assessment**. 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.[13]
>
> [Emphasis and double emphasis added.]

[19] 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*,[14] 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.].[15]

---

[11] Ibid., paragraph 6. See, also, *Bowker* at paragraph 31 and *Velcro Canada Inc. v. R.*, 2012 TCC 57 at paragraphs 12 and 13.
[12] *Deluca v. R.*, 2016 ONSC 6982 ("*Deluca*").
[13] *Deluca* at paragraph 7.
[14] *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.
[15] *OFAH* at paragraph 8. See, also, the decision of the Assessment Officer in *Hutton v. Sayat*, 2022 FCA 30.

[20] 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.

[21] Although consideration of the specific factors is itself within the discretion of the Court,[16] 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**

[22] As noted above, the general tenor of the Respondent's cost submissions is that LFMI, HWLH 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.

[23] Under the ITA, assessments are made against taxpayers.[17] Assessments of different taxpayers need not be consistent,[18] and assessments of different taxation years of the same taxpayer need not be consistent unless a statutory rule says otherwise.[19] LFMI and HWLH are separate taxpayers regardless of the ownership structure above these corporations. Each of LFMI and HWLH received a separate assessment under the ITA and each is entitled to appeal that assessment to the Tax Court of Canada.[20] In the circumstances, I see no reason to determine costs on the basis proposed by the Respondent.

[24] I note that the Minister chose the strategy of assessing LFMI and HWLH, two non-resident corporations that were not paid a dividend by Husky, even though

---

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

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

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

[18] *AgraCity* at paragraph 19.

[19] *Landbouwbedrijf Backx B.V. v. R.*, 2019 FCA 310 at paragraph 13.

[20] *Hawkes v. R.*, 1996 CarswellNat 2206 (FCA) at paragraph 9.

Husky, a solvent Canadian resident public company, was assessed as the payor of the Dividends.[21]

[25] I accept that the facts giving rise to the assessments of Husky, HWLH and LFMI share a great deal in common. However, LFMI addressed this "duplication" by agreeing to the content of the PASF and by agreeing with the counsel for Husky and HWLH 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.

[26] 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.

[27] 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".[22] 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".[23]

[28] 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 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.

[29] In *Cameco Corporation v. R.*,[24] I addressed the argument by Cameco, the successful party, that the Respondent should not have pursued a sham argument as follows:

---

[21] 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.

[22] These comments are made in paragraph 3 of the Respondent's cost submissions.

[23] Paragraph 17 and footnote 22 of the Respondent's cost submissions.

[24] *Cameco Corporation v. R.*, 2019 TCC 92 ("*Cameco*")

> … 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.[25]

[30] 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.

[31] 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.[26]

[32] 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.*,[27] 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 issue." Moreover, one of counsel's responsibilities is to build a record which will enable an appellate court to consider all of the issues.[28]

[33] HWLH fully explains the reasons for the position taken by LFMI and HWLH on the tax benefit and tax avoidance transaction issues[29] and I discern nothing unreasonable in the approach taken by LFMI in choosing to adopt this strategy.

[34] 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

---

[25] *Cameco* at paragraph 12.
[26] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paragraph 17.
[27] *RMM Canadian Enterprises Inc. v. R.*, [1997] 3 CTC 2103, 97 DTC 420 (TCC).
[28] Ibid., paragraph 5 CTC and page 421 DTC.
[29] Paragraphs 22 and 23 of HWLH's written submissions on costs ("HWLH's costs submissions").

determined in accordance with the principles set out above rather than on a consolidated basis.

[35] The Respondent was fully entitled to pursue the Minister's assessment of LFMI under the GAAR notwithstanding (i) the decision of the Supreme Court of Canada in *R. v. Alta Energy Luxembourg S.A.R.L.*,[30] (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 LFMI or to a predecessor of LFMI. However, the Respondent must accept the reasonable cost consequences of that strategic decision.

[36] 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

[37] 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 as the inclusion of the latter consideration would amount to double counting.[31]

[38] In other words, once a party's entitlement to costs is determined, the role of this factor is to address situations where the party achieves less than 100% success. In such a case, it is for the Tax Court judge to determine the impact of this factor on the award of costs.

[39] The Respondent accepts that LFMI 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."[32]

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

[30] *R. v. Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49 ("*Alta Energy SCC*").
[31] *Bowker* at paragraphs 33 to 36.
[32] Paragraph 6 of the Respondent's cost submissions.

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

[41] LFMI says that the total amount in issue for LFMI was more than $25,000,000 and that the amount favours an enhanced award.[33] The Respondent does not explicitly address the amount in issue.

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

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

[43] LFMI submits that this factor supports its claim for costs. LFMI states:

> 20. The appeal raised novel questions about the interpretation and application of Article X(2) of the *Canada–Barbados Income Tax Convention* (the "**Barbados Treaty**") and Article 10(2) of the *Canada–Luxembourg Income Tax Convention* (the "**Luxembourg Treaty**"), specifically in the context of share-lending arrangements.
>
> 21. While the concept of "beneficial owner" had been considered by the Tax Court and Federal Court of Appeal in the prior decisions of *Prévost Car Inc. v. R.* and *Velcro Canada Inc. v. R.*, those cases involved different (albeit similar) treaty provisions between different treaty partners and entirely different factual matrixes.
>
> 22. The issue of the application of the GAAR to the facts also raised novel questions about the object, spirit and purpose of Article X(2) of the Barbados Treaty and Article 10(2) of the Luxembourg Treaty and the application of the GAAR to share lending arrangements.[34]

[44] The Respondent did not explicitly address the importance of the issues.

[45] 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

---

[33] Paragraph 18 of LFMI's cost submissions.
[34] Paragraphs 20 to 22 of LFMI's cost submissions.

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.

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

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

[47] The parties agree that there were no settlement offers. 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

[48] 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 LFMI's legal fees.

[49] As with my reasons addressing HWLH's costs, I have addressed these two factors together. In this case, it is because LFMI submits that the issues were complex and that this in turn leads to a greater volume of work. LFMI states:

> 23. In *Alta Energy*, the Tax Court held that the application of a particular treaty provision and whether an "avoidance transaction" gave rise to an "abuse" or "misuse" of the Act and the Luxemborug [*sic*] Treaty are complex issues that support an increased award of costs.
>
> 24. LFMI's appeal involved the application of the Act, the Barbados Treaty, the Luxembourg Treaty and the GAAR, which are complex issues that favour an enhanced award.
>
> 25. An analysis of the issues in LFMI's appeal was also complicated by the Minister's choice to assess an entity that did not receive the dividend that was the subject of the assessment. […]
>
> 26. Where an appeal involves complex issues, this generally signifies that the facts are more complicated and that the documents and evidence to be reviewed are lengthy, resulting in lengthy examinations and preparation for trial. The Tax Court

> has also recognized that this means counsel must also work hard at distilling complex facts in such a way as to facilitate the Court's appreciation of the matter, and that where parties spend a substantial amount of time preparing a Partial Agreed Statement of Facts and affixed agreed documents, enhanced costs may be awarded.
>
> 27. LFMI's appeal was heard on common evidence with two other appellants (HWLH and Husky) over a three-week period. The logistics of the trial, including the drafting of a Partial Agreed Statement of Facts with affixed agreed documents and agreeing to the order of witnesses and oral argument, were made more complex and time-consuming by the involvement of three sets of appellant counsel. The appellants expended additional resources to promote the efficient use of judicial resources and to provide further assistance to the Court to address complex issues that affected multiple parties. This further justifies the payment of the actual fees incurred by LFMI.
>
> 28. LFMI's appeal was made more complex and costly by the Respondent's insistence on full disclosure under section 82 of the *Tax Court Rules*. Additional time was required in the circumstances, as the full disclosure procedure required a detailed review of documents and communications that were prepared in 2003, which was over 15 years before the list of documents was served on December 19, 2018. The Tax Court has recognized that the preparation of a full disclosure list of documents requires a substantial amount of work from the appellant in relation to document review and examinations for discovery, and therefore, favours an appropriate cost award.
>
> 29. Furthermore, LFMI spent additional time on the admissibility and substance of the Respondent's expert evidence, which ultimately did not factor into the final determination of LFMI's appeal (nor the appeals of HWLH and Husky). This additional time supports an enhanced cost award.[35]

[50] I accept that the volume of work required for LFMI's appeal was substantial and that the complexity of the issues involved fully supports this conclusion. This volume of work was required because LFMI faced an assessment of tax under Part XIII of the ITA of more than $25 million in circumstances that, to my knowledge, have not previously been considered by the Tax Court of Canada.

[51] I note that the volume of work for LFMI was increased by certain strategic 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

[35] Paragraphs 23 to 29 of LFMI's cost submissions. I have omitted the citations.

was fully entitled to make these choices but must accept the reasonable cost consequences of such decisions.

[52] The Bill of Costs attached as Exhibit B to LFMI's Affidavit states the number of hours spent by each person involved in the file and the hourly rate charged by each such person for those hours based on the year in which the work was performed. This Bill of Costs indicates that LFMI's counsel recorded a total of 3,207.5 hours on LFMI's file of which 691 hours are attributed to students-at-law. If I subtract the hours attributed to the students-at-law, the total lawyers' hours are 2516.3.

[53] The total legal fees charged by counsel to LFMI is $1,573,407. I note that if the hours stated in the Bill of Costs is multiplied by the applicable hourly rates, the total is $1,745,159[36] indicating that LFMI's counsel discounted the amount charged to LFMI.

[54] The Respondent takes issue with the full indemnity Bill of Costs provided by LFMI. I will address the Respondent's position on this Bill of Costs and the quantum of counsel's fees under my review of other relevant factors.

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

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

[56] LFMI and the Respondent did not make submissions regarding this factor.

[57] The efforts of all counsel to shorten the proceedings by agreeing to the PASF are commendable but since these efforts benefitted all parties, they are 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

[36] Of this greater amount, $191,169 is attributed to students-at-law.

[58] LFMI and the Respondent did not make submissions regarding this factor. I am not aware of anything that suggests this factor is relevant to an award of costs in this appeal.

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

[59] LFMI and the Respondent did not make submissions regarding this factor. I am not aware of anything that suggests this factor is relevant to an award of costs in this appeal.

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

[60] LFMI did not submit an expert report to the Court and did not seek reimbursement for the cost of an expert witness. Consequently, this factor is not relevant to an award of costs in this appeal.

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

[61] The Respondent challenges the legal fees incurred by LFMI and the disbursements claimed by LFMI.

[62] With respect to the legal fees, the Respondent states:

> 21. A description of costs incurred must provide some precision as to what was done, by whom, and when. LFMI's full indemnity bill of costs (Exhibit B) provides no such particulars: the fee description is a single sentence of 157 words that confuses more than it reveals. We have no idea who did what legal work, nor when the work took place. This description is inadequate. The Court should limit legal fees to a lump sump because of the impossibility to consider and evaluate LFMI's legal fees.
>
> 22. LFMI's bill of costs states that the Class C Tariff amount is $36,300.26 The total legal fees claimed are $1,573,407. The Crown accepts that the Rule 147(3) factors of amounts in issue, importance of the issues, the volume of work, and the complexity of the issues weigh in favour of an amount above tariff.

> 23. Here, four times the Class C Tariff, $145,200, is an appropriate lump sum award in light of the applicable Rule 147(3) factors. This approximates 10% of the legal fees claimed in LFMI's bill of costs.[37]

[63] I agree that the information provided by counsel for LFMI in the full indemnity Bill of Costs is lacking and that the approach taken by counsel for HWLH in its Bill of Costs is considerably more informative. However, I note that if I remove the 691 hours attributed to students-at-law, the total hours of the lawyers who worked on the file is 2,516.3. This number is comparable to the 2,319.4 hours docketed by the lawyers who worked on HWLH's appeal and to the 2,200 hours docketed by the Department of Justice lawyers.

[64] As well, if I deduct from the total fees of $1,573,407 the dollar value attributed to the work performed by the students-at-law, the total fees are reduced to $1,382,238[38] and the average hourly rate for counsel's hours is approximately $549 (i.e., $1,382,238 divided by 2,516.3).

[65] In light of the fact that there is nothing to suggest that counsel for LFMI's overall numbers are incorrect and in light of the similar number of hours spent on the appeals by the lawyers for the other parties, I believe it is fair and reasonable to adjust for the lack of detail in LFMI's Bill of Costs by using $1,382,238 as the base for determining the award of costs to LFMI. I expressly reject the Respondent's submission that four times the amount computed under the Tariff is reasonable in the circumstances of this appeal.

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

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

[67] The Respondent challenges certain of LFMI's disbursements.[39] With the exception of the disbursement for the fee payable to Heuristica Discovery Counsel of $77,678.29, which I disallow, I remit the disbursements claimed by LFMI to this Court's taxing officer for determination.

[68] With respect to the disbursement for the fee payable to Heuristica Discovery Counsel, I agree with the Respondent that it is not appropriate to embed legal fees

---

[37] Paragraphs 21 to 23 of the Respondent's cost submissions.
[38] I am deducting the full dollar amount attributed to students-at-law.
[39] Paragraphs 24 to 34 of the Respondent's cost submissions.

in a claim for disbursements particularly when there is no description of the services provided for these fees or explanation of why counsel needed to incur these fees.

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

[69] The factors in favour of an award of costs to LFMI **are** the success of LFMI, 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.

[70] The total legal fees incurred by LFMI that I have determined are a reasonable basis for determining LFMI's award for costs are $1,382,238.

[71] I have considered the positive factors in the context of the appeal as a whole and the quantum of legal fees claimed by LFMI and I conclude that a reasonable and fair contribution to the legal fees of LFMI is the amount of $575,000. The amount of the disbursements allowed will be determined by the taxing officer subject to the exclusion of the disbursement for the fee payable to Heuristica Discovery Counsel.

This Amended Reasons for Order is issued in substitution of the Reasons for Order dated May 23, 2024 to correct a typographical omission contained in paragraph 69 of the original Reasons for Order.

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

"J.R. Owen"

Owen J.

APPENDIX

LFMI ITEMIZED SUMMARY

LFMI's lump sum for legal fees should be $145,200, which is four times the Class C Tariff. This approximates 10% of the legal fees claimed in LFMI's bill of costs.

LFMI's compensation for disbursements should be $35,355 taking into account the following discounts:

LFMI disbursement	Amount claimed	Amount for costs	Description
Searches	$466.00	$0	Overhead; no particulars
Reproduction Services	$12,876.69	$6438.35	Duplication: discounted by 50%
Administration Fee	$498.05	$0	Overhead; no particulars
Photocopies	$9,590.93	$4795.47	Duplication: discounted by 50%
Long Distance Charges	$16.96	$0	Overhead; no particulars
Fax Charges	$98.50	$0	Overhead; no particulars
Photocopies/Scanning	$622.77	$311.39	Duplication: discounted by 50%
Binding and Tabs	$900.99	$450.50	Duplication: discounted by 50%
ACL – Litigation	$100.00	$0	No particulars
Deliveries	$915.37	$0	Overhead; no particulars
Notice of Appeal	$550.00	$550.00	No change
Postage	$23.60	$0	Overhead; no particulars

LFMI disbursement	Amount claimed	Amount for costs	Description
Heuristica Discovery Counsel Fee	$77,678.29	$0	Improper expense (outside counsel)
Travelling Expenses	$123.61	$0	Overhead; no particulars
Miscellaneous HST Exempt	$10.00	$0	Overhead; no particulars
Business meal & Entertainment	$103.20	$0	Overhead; no particulars
Retrieval Charges	$150.00	$0	Overhead; no particulars
Service of Documents	$90.00	$0	$0
Transcripts	$356.00	$356.00	No change
Trial Transcripts	$3,184.03	$3,184.03	No change
Other Expenses	$1,085.11	$0	No particulars
Subpoena Fees	$2,800.00	$2800	No change
Professional Fees for Commission	$447.43	$447.43	No change
Travel Expenses for Wai Ying Fung to attend Examinations	$14,395.78	Airfare & Taxis: $3,300 Hotel & per diem: $1,813.41	Economy class airfare; government hotel rate and per diems for five days
Professional Fees for Commission	$447.71	$447.71	No change
Travel Expenses for Wai Ying Fung to attend Examinations	$11,301.83	Airfare & Taxis: $3,300 Hotel & per diem: $1,813.41	Economy class airfare; government hotel rate and per diems for five days
Travel Expenses for Wai Ying Fung to attend trial	$19,953.55	Airfare & Taxis: $3,300	Economy class airfare; government

LFMI disbursement	Amount claimed	Amount for costs	Description
		Hotel & per diem: $1,813.41	hotel rate and per diems for five days
Professional Fees for Commission	$528.11	$0	No reimbursement for piecemeal document production
Professional Fees for Commission	$527.73	$0	No reimbursement for piecemeal document production
Total	**$159,394,53**[35]	**$35,355**	

[35] The amount claimed by LFMI seems erroneous. Our calculation shows the total claimed is $159,842.24.

CITATION:	2024 TCC 75
COURT FILE NO:	2018-388(IT)G
STYLE OF CAUSE:	L.F. MANAGEMENT AND INVESTMENT S.A.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:	LouGise R. Summerhill Josh Kumar Monica Carinci
Counsel for the Respondent:	Pascal Tétrault Montano Cabezas

COUNSEL OF RECORD:

For the Appellant:

Name:	Louise R. Summerhill Josh Kumar and Monica Carinci
Firm:	Aird & Berlis LLP Toronto, Ontario

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