Docket: 2009-3506(IT)G

BETWEEN:

JUANITA MARIANO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2009-3516(IT)G

AND BETWEEN:

DOUGLAS MOSHURCHAK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2009-3498(IT)G

AND BETWEEN:

SERGIY BILOBROV,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2009-3503(IT)G

AND BETWEEN:

MELBA LAPUS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2009-3510(IT)G

AND BETWEEN:

MYLYNE SANTOS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2009-3514(IT)G

AND BETWEEN:

THE ESTATE OF PENNY SHARP,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2009-3515(IT)G

AND BETWEEN:

JANICE MOSHURCHAK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

The Honourable Justice F.J. Pizzitelli

AMENDED AMENDED ORDER

UPON reading the costs submissions of the parties;

THIS COURT ORDERS THAT:

1. The amount of costs shall be $491,136.95 as claimed by the Respondent less a reduction for any expert fees and disbursements charged by FTI for the services of Mr. Mizrahi and Mr. Tobias in attending to hear the evidence of any witnesses at trial or in preparing the Respondent's counsel to cross-examine the Appellants' witnesses

claimed in the April 15, 2015 invoices of FTI to the Respondent. The taxing officer will be directed to determine such reduction based on the actual fees charged by such above persons in the said invoice if the parties are not able to agree amongst themselves within 30 days of the date of this Order.

2. Each of the Appellants, Bound Appellants and the Promoter shall be jointly and severally liable for costs but that the maximum amount of costs for which each of the Appellants and Bound Appellants are liable for shall be capped; such that each of their liability for costs shall be limited to the proportion that their total Charitable Tax Credits claimed in respect of the Program for all years under appeal herein is to total of all Charitable Tax Credits claimed by all of them combined with respect to the Program for such years under appeal. There shall be no limit to the Promoter's liability for costs.

For greater clarity, the total Charitable Tax Credits claimed by any of the Appellants or Bound Appellants shall include any Charitable Tax Credits claimed or claimable in respect of their charitable donations claimed for such years under appeal that relate to the Program, including any Charitable Tax Credits transferred to any other person during the years under appeal or claimable or so transferable in future years. To avoid double counting, any Appellant or Bound Appellant, such as Janice Moshurchak, who received a transfer of any Charitable Tax Credit from another party (such as from her husband Douglas Moshurchak) shall not count such transferred Charitable Tax Credits in his or her total Charitable Tax Credit claimed.

This Amended Amended Order and Amended Amended Reasons for Order are issued in substitution of the Amended Order and Amended Reasons for Order dated August 4, 2016.

Signed at **Ottawa, Canada**, this 13th day of August 2016.

"F.J. Pizzitelli"

Pizzitelli J.

Citation: 2016 TCC 161
Date: 201608**XX**
Docket: 2009-3506(IT)G

BETWEEN:

JUANITA MARIANO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2009-3516(IT)G

AND BETWEEN:

DOUGLAS MOSHURCHAK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2009-3498(IT)G

AND BETWEEN:

SERGIY BILOBROV,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2009-3503(IT)G

AND BETWEEN:

MELBA LAPUS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2009-3510(IT)G

AND BETWEEN:

MYLYNE SANTOS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2009-3514(IT)G

AND BETWEEN:

THE ESTATE OF PENNY SHARP,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2009-3515(IT)G

AND BETWEEN:

JANICE MOSHURCHAK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED AMENDED REASONS RESPECTING SUBMISSIONS ON COSTS

Pizzitelli J.

[1] The Respondent was totally successful in the trials of the above matters involving a charitable donation scheme which spanned over 25 days of hearings including one week of oral argument supplemented by detailed written argument given by both sides. The Respondent was awarded costs in the decision with a proviso that if any party disagreed with such order as to costs they were invited to make submissions within 30 days, a period that was extended by the Court upon request.

[2] Based on the order of costs, the Respondent submitted a Bill of Costs seeking Tariff B fees of $41,075 and disbursements in the total amount of $491,136.95, which included expert witness fees of its expert, FTI, in the amount of $422,286.20. It should be noted that both sides gave testimony of one expert witness, after each side was disqualified in attempting to bring the testimony of a second expert witness. In the Bill of Costs above referenced, the Respondent did not include the expenses incurred in connection with JS, the person tendered as its second expert witness whose qualifications were not accepted by the Court.

[3] Notwithstanding that the Respondent has only claimed Tariff costs, the Appellants, in its initial submissions and subsequently in reply submissions, argues that such fees should not be allowed or dramatically reduced on essentially the following basis:

1. That these were "test cases" and hence each party should bear its own costs;

2. That the Promoter should be solely liable for costs, which position was taken only in reply submissions;

3. In the alternative, that the costs be allocated amongst thousands of taxpayers who were similarly assessed under this tax donation scheme or affected by the decisions; including alternatively taxpayers at the objection stage or those at the appeals stage or those who agreed to be bound by this decision under the Court Rules or by agreement with the Respondent at the objection stage; either on a several or joint and several basis.

4. That in any case, the total of fees and disbursements claimed do not reflect the reasonable expectation of the Appellants as to the cost liability in the event of their dismissal; and

5. That the quantum of expert fees should be reduced, notwithstanding the reasonable expectation of the Appellants in 4 above.

[4] The Respondent advised the Court it was satisfied with the costs order in the decision but reserved the right to make submissions if the Appellants disagreed with such costs. Accordingly, the Respondent's submissions essentially contest those of the Appellants and request that the 5 Appellants who agreed to be bound by the decision in this matter, namely in the matters of *Sergiy Bilobrov*, 2009-3498(IT)G, *Melba Lapus*, 2009-3503(IT)G, *Janice Moshurchak*,

2009-3515(IT)G, *Mylyne Santos*, 2009-3510(IT)G and *Penny Sharp*, 2009-3514(IT)G (the "Bound Appellants") be jointly and severally responsible for those costs and in the alternative, that GLGI Inc. (the "Promoter") also be jointly and severally responsible, all of which will be addressed later when discussing who shall be responsible for costs.

[5] It should also be noted that the Bound Appellants were invited by both the Court and the Respondent to make submissions on costs and some of them did so, some more than once, most essentially adopting similar arguments of the Appellants herein, that these involved test cases and so there should be no costs, such costs were not reasonably expected and that it was their understanding the Promoter would be and should be responsible for all costs. Submissions were also made regarding the allocation of costs amongst those potentially liable which I will address in the final provisions of this Order. On these issues my comments pertaining to the Appellants obviously apply to the Bound Appellants as well.

[6] One of the Bound Appellants also argues that as a matter of statutory interpretation the Agreement to be Bound Form 146.1 does not make reference to costs and so a Bound Appellant should not be liable for any or in any event such agreement is ambiguous and/or the result of unequal bargaining power and so the doctrine of contra proferentem should apply to construe the form agreement in favour of such Bound Appellant. The same Bound Appellant also challenges the amount of the legal fees portion of the Respondent's claimed costs on the basis that it should be reduced by the amount of Cost Orders for costs awarded in any event of the cause by the case management judge and myself as the trial management judge to avoid duplication of fees. These arguments will be addressed in my Reasons as well.

[7] Since the Respondent's submissions, together with those of some of the Bound Appellants make reference to the Promoter's responsibility for costs, the Court ordered that the Promoter be notified and given opportunity to make submissions on costs; which Order was served on the Promoter together with the submissions. The Respondent also served copies of its costs submissions on the Promoter as well as its lawyers and some of its officers to maximize chance of receipt thereof. The Promoter did not reply with any costs submissions although in the further reply submissions of the Appellants, prepared by their counsel who was initially retained by the Promoter, the Appellants ask that if costs are to be awarded that they be awarded against only the Promoter as the first alternative.

[8] In essence, all interested or affected persons were given the opportunity to address the issue of costs.

[9] It should be noted that neither of the Appellants nor the Bound Appellants have attacked the reasonableness of the Respondent's legal fees portion of the costs claimed amounting to $41,075 of the total of fees and disbursements claimed in its Bill of Costs above; other than to argue no fees should be payable in test cases or, in the case of one of the Bound Appellants, that such legal fees should be reduced by the amount of pre-trial cost orders totalling $13,000, the latter to be discussed when dealing with quantum issues later on. In fact, none of them have made any representations on the factors to consider in Rules 147(3)(a) to (i.1) of the *Tax Court of Canada Rules (General Procedure)* (the "Rules") applicable to these appeals and focus only on the "other factors" in Rule 147(3)(j) thereof dealing with other matters relevant to the question of costs to support its arguments. The Respondent on the other hand has made reference to all the factors in its submissions which I will address shortly.

I. The Law-Rule 147

[10] There is no dispute that Rule 147 grants the Court complete discretion in determining the amount of costs, their allocation and the persons required to pay them and that Rule 147(3) sets out the factors that the Court may consider in exercising such discretion which must be considered on a principled basis. Having regard to the costs submissions made, the relevant provisions of Rule 147 read as follows:

> 147 (1) The Court may determine the amount of the costs of all parties involved in any proceeding, the allocation of those costs and the persons required to pay them.
>
> …
>
> (3) In exercising its discretionary power pursuant to subsection (1) the Court may consider,
>
> (a) the result of the proceeding,
>
> (b) the amounts in issue,
>
> (c) the importance of the issues,

(d) any offer of settlement made in writing,

(e) the volume of work,

(f) the complexity of the issues,

(g) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding,

(h) the denial or the neglect or refusal of any party to admit anything that should have been admitted,

(i) whether any stage in the proceedings was,

(i) improper, vexatious, or unnecessary, or

(ii) taken through negligence, mistake or excessive caution,

(i.1) whether the expense required to have an expert witness give evidence was justified given

(i) the nature of the proceeding, its public significance and any need to clarify the law,

(ii) the number, complexity or technical nature of the issues in dispute, or

(iii) the amount in dispute; and

(j) any other matter relevant to the question of costs.

…

(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.

[11] This matter did not involve any settlement offers to which the provisions of Rules 147(3.1) to (3.8) would be applicable.

[12] I am in agreement with the arguments made by the Respondent with respect to those factors in paragraphs 147(3)(a) to (i.1) which in my opinion would have justified an award of costs higher than the Tariff costs claimed.

[13] Under paragraph (a) of the factors the Respondent was entirely successful on all the various issues in play at trial: on the issue of donative intent, on the validity of the trust for several reasons and on the lack of trust property, on the issue of the Program sham and on the valuation issue of the software donations in kind. These various issues created in my opinion a level of complexity and volume of work within the factors of paragraphs (e) and (f), clearly evidenced by the mass of Exhibits that included 17 plus volumes of Joint Documents, four proposed Expert Witness Reports, a Partial Agreed Statement of Facts respecting some evidence and about 30 separately entered Respondent's Exhibits and a few of the Appellants. The hearing required over 25 sitting days, including one week of oral argument. Written argument was also tendered by both parties in support of their positions. The hearing took place in 3 cities; Vancouver, Toronto and Halifax, (the latter to accommodate the Appellants' witness which included a hearing on a Saturday), during which about a dozen witnesses were called to testify including 6 witnesses called by the Appellants, themselves included.

[14] The Appellants refused to admit various facts under factor (h), including that the Program was promoted on the basis the participants would receive tax credits in excess of cash paid to participate even though the promotional materials in evidence clearly established this. These resulted in an unnecessarily lengthened trial and put the Respondent to substantially increased effort.

[15] There is no doubt in my mind as well that under factor (i.1) the expense required to have an expert witness give evidence was justified by the Respondent. Firstly, its expert witness was necessary to address the expert testimony of the Appellants' expert witness and secondly, the issue of the value of software is a complex, technical and business matter beyond the ability of the Court to address without such assistance.

[16] Under factor (d), "any offer of settlement made in writing", I also take note of the fact that the Appellants and all Bound Appellants in these proceedings were given written settlement offers they ultimately declined to accept notwithstanding several deadline extensions granted to them. Such extensions totalled almost 8 months. The Appellant, Mrs. Juanita Mariano ("Mariano"), in fact initially accepted such offer then changed her mind by which time the offer was no longer in play - too late to change her mind.

[17] Having regard to the above, it is clear the issues in dispute were factually complex pursuant to factor (f), made more complex by the complex structure of the donation program (the “Program”) involving cash and in-kind donations, trusts, the involvement of various administrative, management and supplier parties, including U.S. and offshore entities, allegations of sham, as well as the technical valuations of the Appellants’ expert witness and the 2 valuations by the Promoter’s valuators that formed part of the Program materials. The Respondent was forced to review and consider all these materials and facts.

[18] Counsel for the parties conducted themselves professionally and admirably throughout this trial such that it can be easily said there were no improper, vexatious or unnecessary stages in the actual trial proceedings under factor (i). However, the able, professional and efficient conduct of the Appellants’ counsel in their carriage of these actions does not derogate from the lengthy, complex, and unnecessarily lengthened trial that resulted partially due to the conduct of their clients; both the Appellants, by their refusal to make admissions, and the Promoter of the Program which will be discussed later.

[19] Although the “amount in issue” under factor (b) was not directly addressed by the Appellants’ submissions, it was indirectly addressed in their submissions relating to “other factors” in paragraph (j) in respect to the reasonable expectations of the Appellants, which I will discuss in more detail shortly. For the purposes of this factor (h) however, it is clear the Appellants feel the amount of taxes in issue is not significant – relative to the amount of costs claimed as they state in paragraph 10 of its costs submissions:

> 10. …The cost exposure would have completely outweighed the potential benefit of pursuing the appeals….

[20] The Respondent admits that the amount of tax in dispute, even including the amounts of the Bound Appellants, are not significant however, also points out that the amount of charitable tax credits claimed by the Appellants is significant.

[21] The evidence was also that Mariano made a cash payment of $7,500 and claimed a donation receipt of $45,044 for which she expected to receive a total federal and provincial tax credit of $16,362.99 for 2005. Douglas Moshurchak (“Moshurchak”) made a cash payment of $14,250 in 2004 and claimed a donation receipt of $57,044 for which he expected a combined tax credit of $18,777.76. For 2005, Moshurchak made a net cash payment of $100,000 ($116,000 if you include his $16,000 negotiated kickback from his commissioned adviser who donated same

on his behalf) for which he claimed a donation receipt of $928,052 and expected a combined tax credit of $357,208.44.

[22] Taken together, the total combined federal and provincial tax credits in dispute do not equal the costs claimed, although they came close at about $392,409. However, if one adds the charitable tax credits claimed by the Bound Appellants according to the relevant pleadings, then the total amount of charitable tax credits claimed is very significant relative to costs. If one looks at the amount of the proposed donations claimed giving rise to the tax credits; such amounts are <u>very significant</u> relative to costs; more than double. Having regard to the above, this factor is not determinative either way and so I give little weight to this particular factor in the circumstances.

[23] Moreover, I agree with Hogan, J. in *Otteson v The Queen*, 2014 TCC 362, 2015 DTC 1025, at paragraph 17:

> In my opinion, it is inappropriate to draw a simple straight line between the amount in issue and the actual amount of a costs award. In determining a proper award, it is more appropriate to examine what percentage of the costs incurred by successful parties has been covered by the Court's costs awards. The point of costs awards is to provide compensation for the legal expenses incurred by the successful party.

[24] In my opinion, a review of the above factors alone, before consideration of other factors to consider under paragraph 147(3)(j), would clearly have justified a claim by the Respondent of legal fees well in excess of the Tariff costs claimed and for expenses for an expert witness necessarily incurred, all as suggested by the Respondent herself in argument. However I will now address the other factors to consider under paragraph (j) that form the main basis of the Appellants' arguments to complete the factors analysis including the effect on costs of being a lead case, the parties reasonable expectation of costs and the interpretation issues raised regarding the form and effect of the Agreement to be Bound pursuant to Rule 146.1.

II. <u>Other Factors-Rule 147(3)(j)</u>

A. <u>Lead Cases</u>

[25] Rule 147(3)(j) allows the Court to consider "any other matter relevant to the question of costs".

[26] In *Velcro Canada Inc. v The Queen*, 2012 TCC 273, 2012 DTC 1222, Rossiter A.C.J. (as he was then) clearly stated that such provision allows the Court to consider whatever other factors it deems relevant to the matter of costs on a case by case basis as explained in paragraphs 12 and 13 thereof:

> [12] Rule 147(3) provides factors to be considered in exercising the Court's discretionary power. After enumerating a list of factors, it specifies that the Court may consider "any other matter relevant to the question of costs", thereby providing the Court with even broader discretion to consider other factors it thinks relevant on a case by case basis. Such other factors that may be relevant could include, but are not limited to:
>
> 1. the actual costs incurred by a litigant and their breakdown including the experience of counsel, rates charged, and time spent on the appeal;
>
> 2. the amount of costs an unsuccessful party could reasonably expect to pay in relation to the proceeding for which costs are being fixed; and
>
> 3. whether the expense incurred for an expert witness to give evidence was justified.
>
> [13] The factors to be considered by the Court in exercising its discretionary power to award costs are extremely broad, they are specific to every appeal before the Court and as noted, the Court may consider any other matter relevant to the question of costs.

[27] It should be noted that *Velcro* dealt with the issue of whether costs should be awarded in <u>excess</u> of the Tariff costs. I take note of the fact that the vast majority of submissions in respect of the Rule 147(3) factors deal with cases where costs in excess of Tariff are claimed and more so with the amount of legal fees as opposed to disbursements. While the broad wording of Rule 147(3)(j) and the *Velcro* decision do not preclude a claim for legal fees for less than Tariff, nor an analyses of the justification for the quantum of expert witness fees which it specifically mentions as a possible factor to consider, it should be noted that there is a long history of precedent across all Courts in this country that assumes a successful party is generally entitled to costs on a Tariff basis, subject to special circumstances dictating otherwise, and that the approach to fixing costs on a principled basis is that costs "should be compensatory and contributory, not

punitive nor extravagant" as stated by Boyle J. in *Martin v The Queen*, 2014 TCC 50, 2014 DTC 1072, paragraph 14, who clearly sets out the goal of the cost decision exercise as follows:

> …The proper question is: What should be the losing party's appropriate contribution to the successful party's costs of pursuing the appeal in which his or her position prevailed?

[28] These basic principles were reflected in decisions of the Federal Court of Appeal like *Consorzio del Prosciutto di Parma v Maple Leaf Meats Inc.* 2002 FCA 417 where Rothstein J.A. (as he was then) stated at paragraph 8:

> An award of party-party costs in not an exercise in exact science. It is only an estimate of the amount the Court considers appropriate as a contribution towards a successful party's solicitor-client costs…

[29] The Ontario Court of Appeal in *R v Ciarniello*, 81 OR (3d) 561 (Ont.C.A.) in deciding different considerations applied for awarding costs in criminal cases than in civil cases stated at paragraph 32 that:

> Routine costs awards in favour of the winning party are a feature of civil, not criminal proceedings. Costs awards in civil litigation serve several purposes. Costs in civil cases are awarded on the compensatory principle that it is just to allow the successful civil litigant at least partial indemnity for the costs of the action….

[30] Farrar J.A. of the Nova Scotia Court of Appeal confirmed the deeply established principles of awarding costs to a successful litigant in *Cherubini Metal Works Ltd. v Nova Scotia (A.G.)*, 2011 NSCA 43 at paragraph 113:

> The general rule is that costs should follow the event. While a trial judge has the discretion to depart from the general rule, it is an error in principle not to award a successful party costs unless there are sound reasons for doing so.

[31] The Appellants argue that these cases are "test cases", the other factor to consider, that constitutes sound reason for departing from the general rule of costs following the event. The Appellants argue that the Appellants were chosen as lead cases on an involuntary basis and that there were 16,000 taxpayers who participated in the GLGI program in the 2004 and 2005 years whose objections were not confirmed and that only about 25 taxpayers had launched actual appeals by mid-2015, including the Appellants and 5 other Appellants represented by the

same counsel as the Appellants herein who agreed to be bound by this decision, while there were 27,000 additional donors by such later date whose appeals were still at the objection stage. The Appellants' lead case argument is clearly set out in paragraph 21 of its initial written submissions which reads as follows:

> 21. It is submitted that, in the context of a Lead Appeal, it would be reasonable for a Lead Appellant (whose case would be used to dispose of potentially thousands of cases) to expect that he/she would not be forced to pay costs any greater than his/her pro-rata share of the costs. Also, it is further submitted that, if Lead Appellants were burdened with the full liability of the costs of a Lead Appeal, then no one would agree to be a Lead Appellant. To impose such a liability, in the context of a Lead Appeal would be punitive and would run contrary to the object and spirit of the Lead Cases provisions in Rule 146.1.

[32] The Appellants analogize lead cases chosen under this Court's lead case Rule 146.1 as "akin" to the test cases referenced in *Law Society of British Columbia v Mangat,* [1997] BCJ No. 2694 and *Vennell v Barnado's*, 73 OR (3d) 13, where the courts did not order costs against the unsuccessful parties therein. Each party bore their own costs.

[33] With respect to the Appellants, the *Mangat's* cost decision was not decided on the basis that the defendants were singled out as a test case from among several potential defendants, although it was a factor, but rather specifically because the defendants were forced to seek injunctive relief to be able to continue their immigration consulting and other activities from which they earned their living during the previous 15 years before the province considered them to fall under the *Legal Professions Act*. Injunctive relief was granted because "of a far less than clear legislative scheme set out in the Immigration Act", an issue of statutory interpretation, in the context of the federal government having failed to implement the licensing scheme for such consultants contemplated by that *Act*. The case at hand involved no serious statutory interpretation issues nor large public policy elements; but dealt with factual issues in the context of what I would consider well established law on both donative intent and trust law.

[34] Likewise, *Vennell* was not decided on the basis it was a test case either. It involved a motion to turn a class action proceeding into an individual proceeding against the defendant therein for damages for its alleged negligence as an agency that facilitated child immigration from the UK during the last world war to Canada after which such immigrant children were alleged to have been mistreated and abused. The court granted the motion and refused to award costs in favour of the

successful party against whom the class action was discontinued. No costs were awarded on the basis that the individual case, although not found to be a test case that would bind others, was still of public interest and concern for two reasons. At paragraphs 44 and 45 thereof Cullity J. described how it would have been in the public interest, as well as in the interests of the surviving children, their descendants and descendants of deceased children:

> [44] … for such matters to receive judicial and public attention. Public recognition of past wrongs is, in itself, a form of redress and it can be the first step to a consideration of whether further measures are appropriate.
>
> [45] The other respect in which the public interest would have been engaged by a class proceeding arises from the fact that the issues raised concerned the exploitation and abuse of children by those to whom they were entrusted. There is ample evidence on the public record that this is a subject that is a continuing cause of public concern. The public has an interest in the welfare of its children -- including those under the supervision of agencies that receive government support -- and the formulation of public policy with respect to their welfare in the future. The enquiry should not be undertaken in ignorance of the history of child migration to this country if there are lessons that might be learned from it….

[35] Moreover, the decision of Cullity J. in *Vennell* clearly defines a test case in paragraph 25 thereof as one where a party to a test case is involved with the other cases and there is agreement to be bound:

> …A test case, as I understand it, ordinarily refers to a proceeding that will determine the issues that will arise in other cases that are pending or, at least, contemplated. Most commonly, I think, a party to a test case will also be involved in the other cases and will have agreed to accept the decision in the test case for the purposes of them. That has, for example, happened where, instead of proceeding to a trial of common issues under the CPA, an individual action has been commenced as a test case that will bind the defendant for the purposes of the claims of other members of a class in which the individual plaintiff is included.

[36] Rule 146.1 does not bind either the Minister of National Revenue (the "Minister") or any taxpayer if the taxpayer does not agree to be bound to such lead case decision under said Rule. The Appellants are simply incorrect in stating in paragraph 15 of its written submissions that:

> …This definition of a "test case' is akin to the Appellant's situation as Lead Appellants and the thousands of other appellants who will be bound by the Honourable Court's judgment.

[37] There is no doubt that a lead case may also be a test case in circumstances where all Appellants that could be affected by the decision agree to be bound, but in the case at hand, as with any lead case designated under Rule 146.1, only taxpayers, who are at the appeal stage and who agree to be bound are so bound. The thousands of taxpayers at the objection stage are not bound by the decision in this case and have the right to appeal which will not be extinguished by the decision herein, unless of course they have entered into an agreement to be bound with the Minister outside any Rules.

[38] A decision in a lead case can of course have weighty precedential value that may practically determine the results in subsequent cases, however as Rip J. stated in *Brown v The Queen*, [2002] TCJ No. 204, 2002 DTC 1925, at paragraph 20:

> …That the decision of a Court in a tax appeal may help settle other assessments and reduce the Crown's expenses are not reasons for the Crown to absorb costs of the appeal.

[39] In fact, this Court has stated that where an appeal has precedential value, the successful party, is entitled to an award "beyond, but not greatly beyond, the Tariff….". See *Otteson* at paragraph 21. Notwithstanding this, the Appellants are only asking for essentially a Tariff award. In like vein, this Court found in *Teelucksingh v The Queen*, 2011 TCC 253 that in a lead case where thousands of other taxpayers may be affected, the quantum of tax payable was exponentially greater than the tax in question in that particular appeal and same is a factor that would justify greater than Tariff cost awards, not lower as one of the Bound Appellants seems to suggest in its submissions.

[40] Notwithstanding the above, the fact that the Appellants' appeals may be lead cases or have precedential value is a factor that can be considered by a Court under the Rule 147(3)(j) "other factors" category, however, the Courts have made clear that in order to constitute special or sound reasons not to follow the practice of costs following the result, the issues before the Court must transcend the interest of the litigants and be of public interest or there must be misconduct by the successful party. See *David Polowin Real Estate Ltd. v Dominion of Canada General Insurance Co.*, 93 OR (3d) 257. In *Brown*, Rip J. addressed this issue in the context of a similar argument by the appellant therein that due to the large number of appeals held in abeyance and cases at the objections stage that could all exceed 3,000, that their case, as the first case to be heard, should be considered a test case and the Crown should absorb its own costs, at paragraph 20:

> …I cannot agree. This was not a test case. Simply because a provision of the Act is considered by a Court for the first time and may affect other taxpayers does not colour that appeal with the character of a test case. The normal income tax appeal-which this appeal was-is not a matter of public policy (as in Lachine General Hospital Corp. v. A.G. of Quebec) or touch on constitutional principles and in the public interest (as in Singh v. the Queen). It is simply a dispute between a taxpayer and the Crown as to whether the taxpayer was properly assessed tax. The principle purpose of these appeals was to settle a dispute between the parties, not necessarily to settle a point of law….

[41] In the case at hand there was no important issue of statutory interpretation, constitutional issue or serious matter of public interest in play. The law of trusts, sham, and donative intent applicable herein were well established. While the public always has a general interest in ensuring all laws are complied with and taxpayers pay their required taxes, this general interest existent in all tax cases does not elevate each case to that level of importance contemplated above. The Appellants have not established that these matters fall within the category of cases of *Polowin*, *Vennell* and *Mangat* above or those referred to by Rip J. in *Brown* above.

[42] I must also agree with the Respondent that the fact the Minister had thousands of cases at the objection stage that were not confirmed does not constitute special circumstances that justify departure from the usual costs rule. It would be administratively impossible for the Minister to confirm all cases in line on similar matters before any case should proceed, especially in cases like this one where donors participated in this Program over a span of several years, resulting in long delays in anyone getting to trial if the Minister were to be put to this task and the long list of complaints that would arise from taxpayers who want their day in Court, something I take judicial notice of the fact occurs frequently. Simply put, someone has to go first and a taxpayer who files an appeal must obviously do so with a view to getting his or her case heard in a reasonable period of time. I agree with the Respondent's reasoning that if the Minister were required to confirm all objections at the same time or all before proceeding to trial, aside from administrative feasibility, the Minister would be put in the absurd position of practically never being entitled to costs.

B. Expectations of Costs

[43] As a further "other factor" to consider, the Appellants argue that the costs of the Respondent should be significantly reduced to reflect the reasonable expectation of the Appellants as to their cost liability in the event their lead cases

were dismissed. In paragraphs 5 and 10 of their written submissions the Appellants state:

> 5. …At no time did the Appellants have a reasonable expectation that they would face a cost exposure in excess of $500,000 should this Honourable Court dismiss the Lead Appeals.
>
> …
>
> 10. Had the Appellants reasonably expected that such a cost award as is sought could be made against them, they would have never pursued their appeals. They would have discontinued them. The cost exposure would have completely outweighed the potential benefit of pursuing the appeals. In effect, their access to the court would have been prevented by such potential liability. While the appeals of the Appellants ultimately failed, such exposure would, it is submitted, deter any appellant from pursuing an appeal which might otherwise be destined for success.

[44] It should be noted that part of the Appellants' arguments, and those of the Bound Appellants who made submissions, regarding reasonable expectation are couched in their fairness position that it would be reasonable for a lead Appellant to only expect to pay a *pro-rata* portion of costs having regard to the thousands of taxpayers affected, and that to be burdened with full liability in the context of a lead Appellant would be punitive, a hardship, and dissuade taxpayers from being lead Appellants and run contrary to the object and spirit of the lead case rules in Rule 146.1. I will discuss these arguments later as well.

[45] There is no doubt however that if a Court does not consider costs reasonable or within the reasonable expectations of the unsuccessful parties that the costs claimed would have been spent that the Court may reduce costs, including disbursements as set out in *Balasundaram v Alex Irvine Motors Ltd.* [2012] OJ No. 6323. In the case at hand, however, I have some difficulty in accepting the Appellants' general arguments without some indication as to what they consider reasonable and why. The Appellants' argument does attack the quantum of the Respondent's expert witness fees as being unreasonable via the Respondent's own expectations, but does not address why it considers the Respondent's claimed costs totaling about $491,000, and specifically the expert witness fees claimed of $422,000 to which it primarily objects, to be beyond what expectations they had as to what costs might be expended by the Respondent.

[46] The Appellants have not directly attacked the quantum of legal fees claimed by the Respondent on the Tariff basis as being unreasonable. The Appellants attack, in reality, the Respondent's claim for expert witnesses as not being reasonably expected. Frankly, I see no merit to the Appellants' argument that such level of expert fees were unexpected for several reasons:

1. The Appellants submitted 2 expert reports and witnesses for trial. The issues are well set out in both pleadings and it is clear the Appellants expected to and did utilize expert witnesses to substantiate their own claim for values of the licences in issue, being the in-kind portion of the purported gift. Their positions and actions, including using expert witnesses, was what necessitated the Respondent's need for expert witnesses, to effectively rebut their own, which was done with great success.

2. The Appellants have not provided information as to the amounts either they expended or had expended on their behalf for expert witnesses, making a comparison of expert fees impossible and their submissions as to the Respondent's quantum somewhat meaningless. In *Hague v Liberty Mutual Insurance Co.* [2005] OJ No. 1660, cited in *The Law of Costs*, Second Edition, Volume 1, Mark M. Orkin, at pages 2-37 and 2-38, the Court stated:

   > One might fairly ask how the expectation of the parties is to be found out as part of the costs process. In my view, it is not to be obtained directly from the parties through, say, affidavits being filed. Any such affidavit evidence would inevitably be completely self-serving and of no assistance to the court. Rather, it would appear that the expectation of the parties will fall to be determined in one of two ways. It may be determined by the unsuccessful party revealing what his/her/its costs were on the same matter as some measure of what was to be expected. The unsuccessful party is, of course, not required to reveal that information but, if they choose not to do so, they may impair their ability to make any meaningful submissions on this aspect of the process….

3. The Appellants were represented at different times by three sets of experienced tax litigation counsel and the pleadings, particularly the Respondent's Reply, were long and detailed such that the Appellants and their counsel knew the case they had to meet and the several issues to be addressed, including the valuation of software licence issues necessitating expert witness. I find it incredulous the Appellants

were not aware or were not told this would be expensive and time consuming litigation that was initially set down for 8 weeks over two cities, Vancouver and Toronto, notwithstanding the Court travelled to Halifax to hear the Appellants' own witness, at their request. As so clearly expressed in *155569 Canada Ltd. v 248524 Alberta Ltd*., [1999] AJ No. 623 (ACQB) at paragraph 48:

> …The common law's approach to costs is structured and cohesive. It is understood that a party to litigation knows or should know that, other than in exceptional cases, if it loses the lawsuit, it will have to pay not only its own costs, but a hefty proportion of those of the party opposite as well….

I agree with the Respondent that if it is the Appellants' contention that it was not fully appraised of such risks, then that is a matter between the Appellants and their counsel.

4. The Appellants executed a Direction as part of the Program documentation that specifically referred to the contribution of 3 percent of the cash donations made to the Program foundation up to a maximum of $750,000 to a legal defense fund to pay legal fees in the event of a reassessment by the Canada Revenue Agency ("CRA"). The existence of a $750,000 legal defense fund is certainly evidence that the costs of litigating would be very large.

   I do not accept that the Appellants did not reasonably expect such a level of costs in the circumstances. Rather, it is clear that the Appellants expected the costs of litigation to be very high in these matters and should have known that that the risk of success was unclear, if not even low, due to the many recent decisions of the Federal Court of Appeal on the issue of donative intent.

   I also do not agree with the Appellants' contention that even the Respondent did not reasonably expect its costs of litigation to be so high. The Appellants of course take this position only with respect to the Respondent's claimed expert witness fees, arguing that the proposal given by FTI to the Respondent, dated June 20, 2011, for a range of between $235,000 and $325,000, was exceeded as obviously the final invoices totalled $422,000. The Appellants' submissions note that actual proposal rates were lower than actual rates charged. For instance, the expert witness, Mr. Neil Mizrahi's rate was quoted at

> $400 per hour in the 2011 proposal but actual rates charged on the invoices ranged between $400-500 per hour. Frankly, as the Respondent has argued, the proposal was dated in June of 2011 at which time the trial was, according to such proposal, scheduled for between November 21 to December 2, 2011. We know that the trial was later scheduled for June, 2012 but the Appellants requested two adjournments which pushed the ultimate trial date to March of 2015 and so it is not unexpected that fees rates would rise over a four year period. Moreover, the proposal is clear that fees would be charged on the basis of actual time spent in conducting the engagement based on its hourly rates, for which 2011 rates were listed and that the proposal only gave an estimate of total fees to be charged. In any event, there is no basis in law argued to suggest the Respondent's actual disbursements should not be used as the basis for its claim, subject to the Appellants rights to challenge its reasonableness and quantum.

[47] The Appellants have not provided any evidence as to what its own expert witness, particularly Mr. Dobner, quoted and charged so it is not possible to weigh the reasonableness of the Respondent's witness fees relative to their own or whether their final bills exceeded proposal estimates as a comparison.

[48] I am not prepared to find that the expert witness fees of the Respondent were not reasonably expected by the Appellants nor the Respondent herself based on the Appellants' arguments. I will address the Appellants' arguments regarding the quantum of the Respondent's claimed expert fees shortly.

[49] What is clear to me however is not that the Appellants did not reasonably expect legal fees and disbursements to be at the level of those claimed by the Respondent, but rather that the Appellants, like the Bound Appellants, expected the Promoter of the Program to pay them. This is clear from the evidence at trial of the Directions signed by the Appellants referencing the defense fund and the evidence the Appellants' expert witness fees were paid for by the Promoter who engaged its services. It is also clear from the Appellant Mariano's letter to this Court dated February 22, 2016 on costs where she stated "I had been under the premise that GLGI would finance the cost of litigation". It is further evidenced by the admissions in argument that the Promoter paid the Appellants' counsel fees whom it engaged, as well as the submissions of some of the Bound Appellants. I will discuss this matter in more detail when addressing the issue of what persons should pay the costs as contemplated by Rule 147(1) above.

C. <u>Spirit, Intent and Interpretation of Rule 146.1</u>

[50] I should also like to address the Appellants' argument that to charge a lead Appellant full costs for an unsuccessful action runs contrary to the spirit and intention of the lead case rule in Rule 146.1 and would discourage appellants from volunteering to be lead appellants. Rule 146.1 reads as follows:

> 146.1 (1) This section applies if
>
> > (a) two or more appeals have been filed before the Court;
> >
> > (b) the Court has not made a decision disposing of any of the appeals; and
> >
> > (c) the appeals give rise to one or more common or related issues of fact or law.
>
> (2) The Court may give a direction
>
> > (a) specifying one or more of the appeals referred to in subsection (1) as a lead case or lead cases; and
> >
> > (b) staying the related appeals.
>
> (3) If the Court gives a direction, each party in a related appeal who agrees to be bound, in whole or in part, by the decision in the lead case shall, within 10 days, file Form 146.1 with the Court.
>
> (4) If a party does not agree to be bound by the decision in the lead case, in whole or in part, or does not file Form 146.1 with the Court, the Court shall give a direction that the appeal is no longer stayed.
>
> (5) The Court may, on its own initiative or at the request of a party, give directions with respect to the related appeals, provide for their disposal or take further steps with respect to those appeals.
>
> (6) If a lead case or lead cases are withdrawn or disposed of before the Court makes a decision in relation to the common or related issues, the Court shall give directions as to
>
> > (a) whether another appeal or other appeals are to be heard as the lead case or lead cases; and

> (b) whether any direction affecting the related appeals should be set aside or amended.

[51] As is evident from the above Rule, no reference is made therein to any special rule on costs pertaining to them. Clearly, the issue on costs is intended to be dealt with under the very next rule, Rule 147, which gives the Court the broad and discretionary powers earlier discussed, including considering other factors, such as to whether the matter is a lead case, in awarding costs, its quantum and who pays same.

[52] As stated above, the mere fact that specific appeals before the Court may be lead cases does not excuse the Appellants from paying costs. I agree however with the Appellants' position that being a lead case is a factor that can be considered under factor (j) as earlier alluded to, in determining and allocating costs and is a factor that must be considered on a principled basis like all other factors.

[53] Clearly, the wording in Rule 146.1 allows the Court to give directions that certain appeals will be designated as lead cases while others are stayed. The spirit and intention of the lead case rule is self-evident. The Court, in controlling its process, is able to utilize this rule to prevent being swamped by potentially thousands of like cases, and the costs and resources applicable thereto, by hearing select cases chosen presumably with a view to having strong precedential value that may hopefully resolve at least the majority of all potential appeals, if not all.

[54] Taxpayers at the appeals stage who agree to be bound may likewise avoid the risk of increased costs of joining in the appeal as a group as well as the time and effort of so joining. Taxpayers not at the appeals stage can evaluate the ultimate decision and decide for themselves whether they can distinguish themselves from such precedent and proceed to trial with the inherent risk of success and costs or not. The taxpayers chosen as lead appellants can proceed to the determination of their appeals faster and without the complications and time requirements of being heard as part of a larger group.

[55] Her Majesty as well, can, relying on the precedent from the lead case decision, decide whether to continue the action via other taxpayers or discontinue or reassess, thus not only benefiting from such precedential value but availing herself of potentially large savings in costs and resources from having to continue all potential appeals.

[56] In essence, the lead case rules are designed to potentially benefit and may benefit all interested players – the Court, the Crown, the appellants and the taxpayers at large. Then again, they may not as no non-appellant can be forced to be bound by the resulting decision and may proceed to a hearing as a matter of right, just as the Appellants in these lead cases did. It is then in my opinion fundamentally incorrect to suggest, as one of the Bound Appellants did in its submissions, that as a matter of contract law an agreement to be bound under such rule is not enforceable on the basis a party so agreeing receives no consideration for doing so. Ironically, such Bound Appellant seems to agree the consideration received by the Respondent would be the savings in time, effort and costs of litigating multiple cases yet ignores the like benefit received by those appellants who agree to be bound. In any event, such Bound Appellant also mischaracterizes the nature of the Agreement to be Bound as a bilateral agreement requiring consideration in which the parties negotiate an outcome. This is simply incorrect in my view which will be discussed shortly.

[57] In designating the lead cases, the Court considers the representations of counsel for both sides. The decision of the Court is not taken in a vacuum. Generally, as was the case in these matters, the Court is provided with one or more groups of appeals and attempts to obtain consensus on who the lead cases will be if possible, after input by the parties, and directs lead cases that hopefully represent the widest band of similar issues. In some cases the ultimate appellants volunteer to be the lead cases and in others do not and make the case for exclusion therefrom. Without the lead case rule however, it is clear that each taxpayer who files an appeal would be proceeding to trial in any event unless he or she discontinues the action or manages to reach a settlement with the Respondent.

[58] It seems appropriate at this juncture to address the submissions of one of the Bound Appellants who argued that the failure of the Form 146.1 - Agreement to be Bound - to mention any costs and its nature as a take it or leave it contract with the Respondent that creates a situation of unbalanced bargaining power, both justify the application of the doctrine of contra proferentem. There is no dispute that such doctrine works in the case of ambiguity of a contract term to interpret a contract term against the party who drafted it, particularly in the case of unequal bargaining positions between the two as set out in cases relied upon by the said Bound Appellant in *Ironside v Smith*, 1998 ABCA 366, a decision of the Alberta Court of Appeal dealing with a dispute over a securities trading fees agreement and in *Non-Marine Underwriters, Lloyd's London v Scalera*, [1997] B.C.J. No. 2481 which dealt with an insurance contract dispute. Frankly, I find this submission to be without any merit.

[59] The agreement to be bound which an appellant may execute in Form 146.1 of the Rules is however not a bilateral agreement negotiated between an appellant and the CRA or Minister of Justice on its behalf. There is no negotiation or any input whatsoever by the Respondent in the content or filing of this Form by an appellant. Only an appellant, presumably with the advice of his counsel, can decide to file the Form under the Rule above discussed, created by the Rules Committee of the Tax Court of Canada to assist the Court in managing and governing its processes under its statutory power to create and amend rules subject only to Governor in Council approval. Accordingly, there can be no imbalance of bargaining power where no bargaining can exist and where no bargain is sought in the conventional sense. It may well be a take it or leave it agreement, but one that no appellant can be forced to sign and one that is only in the nature of an agreement pertaining to a court process with the Court. Any appellant can choose to have its day in Court if it chooses not to sign. To suggest otherwise would be to suggest any Court rules could be unenforceable simply because the litigant did not negotiate the rule; an absurd result totally ignoring the purpose and benefit of having procedural rules for the benefit of all potential litigants and not just for the Minister. Procedural Rules of a Court simply cannot be seen as bilateral contractual terms between parties in the commercial sense.

[60] I also do not agree that the Rule is ambiguous as to costs. The Rule speaks to an agreement to be bound by a decision in the lead case. Simply put, a decision includes an order as to Costs as an integral part thereof. The language of the very first sentence of Rule 147 evidences this by allowing the Court to "determine the amount of the costs of all parties involved in any proceeding…."

[61] I would also like to comment on the submission of the Bound Appellant, Penny Sharp ("Sharp"), that she did not volunteer to execute the Agreement to be Bound but rather was ordered to do so by this Court; in particular by myself pursuant to my Order of September 11, 2014 wherein she was given 10 days to file such Agreement to be Bound or have her appeal dismissed. The said Order was drafted by counsel for the Bound Appellants and was pursuant to a pre-trial motion to, *inter alia*, dismiss Sharp's appeal for failure to obey this Court's Order to answer written discovery questions by a certain date. Sharp and her other Bound Appellants were represented by able and reputable counsel and it was her counsel who suggested that there was no need to consider the motion to dismiss her appeal as her client was willing to execute an Agreement to be Bound. Since counsel did not have such Agreement yet signed he asked that his client be given the aforementioned period to sign and file such Agreement failing which her appeal would be dismissed and the Court granted such request. Consequently, her counsel

filed the said Agreement Form on her behalf. To suggest she was ordered by the Court to involuntarily execute the Form to be bound and therefore she should not be liable for costs is both factually dishonest and unprincipled, in my view, in the circumstances.

[62] In conclusion, after analysing all of the Rule 147(3) factors above, I find that the Appellants are not entitled to an order of no costs and are subject to an order for costs which shall include legal fees and disbursements based on the quantum that I will next determine.

III. Quantum and Reasonableness of Fees and Disbursements

A. Quantum of Legal Fees

[63] Only one of the Bound Appellants has questioned the quantum of the legal fees claimed by the Respondent in the amount of $41,075 based on Class A action in Tariff B on the basis that the Respondent has not provided evidence of its legal fees and that in any event, same should be reduced by the quantum of pre-trial cost orders totalling $13,000 to avoid duplication of fees.

[64] I would agree that the Respondent, in claiming a quantum of costs based on Tariff has not provided a breakdown of its actual fees incurred including counsel rates and time spent on the appeal. In *Velcro*, Rossiter ACJ, as he then was, considered these actual costs and their breakdown as a relevant other factor the Court could consider, if it chose to. The *Velcro* decision together with *Spruce Credit Union v The Queen,* 2014 TCC 42, 2014 DTC 1063, decisions speak to the total discretion of this Court to consider costs with or without making reference to the Tariff as the judge, on a case by case basis, so determines. I am therefore neither required, nor do I deem it necessary in the circumstances of this case, to evaluate the amount of actual legal fees incurred by the Respondent nor their breakdown in terms of hours spent, hourly rates and counsel experience for a few very convincing reasons. I am strongly convinced the Respondent's legal fees were far in excess of the Tariff fees claimed.

[65] Firstly, from my analyses of the Rule 147(3) factors, the Respondent had a very strong case to seek costs much in excess of Tariff claimed if it had so chosen as I have alluded to earlier and frankly I consider the Appellants and Bound Appellants lucky the Respondent chose not to do so.

[66] Secondly, it is overwhelmingly clear by simple mathematics that in a 25 day trial, conservatively assuming counsel worked only 8 hour days, that for 5 counsel

a total of 1,640 hours would have been spent thus resulting in an average hourly rate of $41.00. Even if only fees for one counsel were to have been allowed, and I can say unequivocally that I would not have been so restrictive, the total hours would have amounted to 200 hours for a resulting average hourly rate of about $200. I must agree with counsel for the Respondent that "common sense" dictates that its legal fees exceeded the amount of fees claimed in its Bill of Costs.

[67] In the circumstances, I do not feel it necessary for the Respondent to have made submissions on the number of hours spent on the matter and their hourly rates and submissions on experience when, unlike in *Velcro*, the winner is not seeking costs in excess of Tariff which the Court clearly acknowledged "was not intended to compensate a litigant fully for legal expenses incurred in an appeal"(paragraph 9).

[68] I also do not agree that the Respondent's claimed costs should be reduced by the cost awards totalling $13,000 in any event of the cause against the Appellants. Boyle J. awarded costs of $5,000 during a case management against the Appellants on the basis of a further delay in the trial caused by the Appellants' late in the day production of documents. These costs go to the conduct of the Appellants. I awarded costs of $8,000 against the Appellants pursuant to a motion of the Respondent to dismiss the appeals of certain Appellants and Bound Appellants for failure to comply with previous Court Orders regarding written discovery answers without explanation and in the context of a new counsel requesting yet another adjournment which was granted, as well as changes to the lead Appellants. The motion materials were voluminous and included several affidavits, book of authorities and the requirement to deal with multiple issues. These costs went to the conduct of the Appellants rather than rewarding the Respondent for their extra time spent and to be spent in repreparing for the trial and for which the Respondent sought costs of $10,000 - $20,000. I have no doubt that if my award of costs was to reimburse the Respondent for its extra time and expenses incurred or to be incurred due to the Appellants' abuses of process resulting in delays to the trial I would have likely awarded the Respondent costs on a substantial indemnity basis as claimed. Instead, I refused to do so and determined they should be addressed in the cause for such extra time.

[69] Costs awarded in any event of the cause are generally those awarded having regard to the conduct of the parties in order to assist the Court in controlling its processes and should not be automatically deducted from costs in the cause unless the party objecting to same can demonstrate a clear duplication of costs for the actual time and expense incurred by the other party in the context where abuse of

process is not the main underlying reason for such costs. In any event, in the case at hand, the Respondent, in its Bill of Costs, only claimed Tariff fees of $350 for the September 11, 2014 motion before me that can be said to be a possible duplication of fees for the same matter. As I said, the Respondent was put to the task of bringing a motion to enforce a Court Order that certain Appellants involved, including the Bound Appellant, Sharp, failed to comply with without explanation. The motion also involved other matters such as confirming the lead Appellants yet again and adjourning yet again the scheduled trial and setting new trial dates in multiple cities. In the circumstances, I am not prepared to reduce the Respondent's fees by the $350 claimed for the motion as the other matters dealt with would have clearly exceeded that amount.

[70] There will be no deduction from the Costs of $41,075 claimed by the Respondent for legal fees in this matter.

B. Quantum of Expert Witness fees

[71] I have already determined that the Respondent's costs were not unreasonably expected and that the Respondent has the right to claim costs based on actual disbursements. Moreover, I have found that actual rates charged that exceeded initial quotes are not necessarily unreasonable having regard to the passage of time when rates can be expected to increase. The Appellants however are entitled to and do object to the quantum and reasonableness of the Respondent's expert witness fees totalling $422,000 on several basis. There is no dispute as to other disbursements.

[72] Firstly, the Appellants purport to argue the hourly rate charged by the experts are excessive as they state in paragraph 23 of their submissions that "…they must not be excessive and extravagant, and rates charged must not get "out of hand":" and rely on *Eli Lilly Canada Inc. v Novopharm Ltd.*, 2007 FC 708, at paragraph 10, where the Federal Court stated:

> As to fees changed by such experts they should be reasonable and be the lesser of actual fees charged or the rate that was charged by Novopharm's senior counsel for services for the same period of time as spent by the experts. Expert rates should not get out of hand. Disbursements must be reasonable and not extravagant.

[73] Unfortunately, the Appellants made no submissions as to what reasonable actual rates should have been charged, if applicable, so the Court is left to the decision by other means.

[74] Unlike in *Eli Lilly* above where two private litigants can avail themselves of and compare competitive senior counsel rates, the case at hand involves the Respondent using Department of Justice lawyers whose rates to another department of government are not comparable to market rates. A more reasonable approach would be to compare expert witness rates on the open market or use the Appellants' senior counsel's rate to gauge the reasonableness of expert witness rates in the open market. As earlier discussed, the Appellants have chosen not to provide evidence of the expert witness rates charged by its expert witness, a competitor to the Respondent's expert witness, FTI Consulting Canada, nor of the fees charged by counsel for the Appellants in these matters so no comparison is possible to determine the reasonableness on those basis either.

[75] The hourly rates charge by FTI was based on a scale of rates for its staff ranging from $700-$740 for Mr. Howard Rosen, the Senior Managing Director of FTI and from $400-$500 for Mr. Mizrahi and $240 for Mr. Eddie Tobias, a junior assistant to Mr. Mizrahi, amongst others whose fees are not opposed. Aside from the Appellants' earlier argument that hourly rates charged exceeded rates quoted and thus were not reasonably expected, which I found unconvincing, the Appellants do not directly attack the hourly rate of these persons whose time was reflected on the various invoices per se, but rather whether their time was necessary or reimbursable, so I cannot find such hourly rates to be unreasonable in the circumstances. Moreover, case law seems to suggest that all of such rates are within the limits of rates accepted by the courts in other matters. In *Canada Trustco Mortgage Co. v The Queen*, 2007 TCC 500, the Court allowed $1,000 and $874 hourly rates for two highly qualified expert witness in the area of asset securitization. This case involved valuing software licensing which to me was a highly complex asset to value as well. Moreover, I take judicial notice of the fact that rates charged by senior counsel in tax litigation matters are comparable or even higher than the expert rates charged by FTI staff above.

[76] Secondly, the Appellants object to the fees charged by Mr. Mizrahi and Mr. Tobias in attending at trial to listen to the testimony of the Appellants' expert witness, Mr. Dobner, as well as the general witnesses called by the Appellants during the opening 7 days of trial and relies on *GlaxoSmithKline Inc. v Pharmascience Inc.*, 2008 FC 849, where the Court gave specific instructions to the taxing officer at paragraph 6 that:

> …Any time spent by Pharmascience's witnesses in preparing Pharmascience's counsel to examine GSK's expert witnesses or in attending the examination of any other witness shall not be recoverable.

[77] The Respondent argues that the serious deficiencies in the Appellants' expert witness report made it necessary for its own expert witness to attend such portion of the hearings in order to assist it to more effectively cross-examine the expert witness. Frankly, the expert witness report and any deficiencies were available to the Respondent before the trial and the testimony of the Appellants' expert witness generally consisted of presenting its expert report to the Court. I am not only convinced such attendance was not necessary for the Respondent's able counsel to properly cross-examine the Appellants' expert witness, I am also convinced the Appellants' counsel would not have consented to the Respondent's uncommon request to allow its expert witness to sit in on other testimony if the Respondent had indicated at the time it would be seeking to claim costs for such accommodation.

[78] Accordingly, any fees and disbursements charged by Mr. Mizrahi and Mr. Tobias in attending to hear the evidence of any witnesses at trial or in preparing the Respondent's counsel to cross-examine the Appellants' witnesses shall not be permitted. While a copy of the April 15, 2015 invoice covering the time during these events was attached to the Appellants' cost submissions such invoice does not set out the details to assist the Court to determine such reduction in expert witness fee. Therefore the taxing officer will be directed to determine such reduction based on the actual fees charged by such above persons in the said invoice if the parties are not able to agree amongst themselves within 30 days of the date of this Order.

[79] Thirdly, the Appellants dispute the claim of expert fees for Mr. Rosen amounting to $51,916 excluding HST based on an hourly rate ranging from $700 -$740 for a total of $71.2 hours on the basis he did not provide any report and there was no indication he contributed to the reports filed with the Court by Mr. Mizrahi. I note however that reference to Mr. Rosen's participation was contemplated by the June 2011 proposal submitted by FTI to the Respondent and that various invoices detail the number of hours claimed throughout the engagement. I have no difficulty with senior as well as junior staff claiming fees for their services and contribution to assisting in the preparation and supervision of the report and advising their client prior to trial. As senior consultant to the file, Mr. Rosen's total hours are a small part of the overall services provided by FTI mainly through the services of Mr. Mizrahi and I see no basis for exempting or doubting his efforts.

[80] Likewise, the Appellants object to paying for the cost of Mr. Tobias' 88.5 hours of preparatory time in assisting Mr. Mizrahi in the July 31, 2015 invoice of FTI. However, the use of junior staff to assist in preparation is common to all professions and acceptable. As the Respondent has pointed out, Mr. Dobner also referred to assistance received from his staff in providing his services and it is equally reasonable to assume the Respondent's expert witness would do the same and expect to be compensated. His hours are openly listed on the invoices provided by the Respondent in its cost submissions and there shall be no reduction in his claimed fees as a result.

[81] The Respondent has generally been quite reasonable in its approach to costs in this matter, particularly in its request for only legal fees based on Tariff. It has quite properly not sought any fees for the proposed expert witness, Mr. J.C., who was not accepted by the Court as an expert witness. Having regard to all the circumstances of this case and the consideration of all the factors to weigh in determining costs pursuant to Rule 147(3) I award total costs as claimed by the Respondent less a reduction for any expert fees and disbursements charged by FTI for the services of Mr. Mizrahi and Mr. Tobias in attending to hear the evidence of any witnesses at trial or in preparing the Respondent's counsel to cross-examine the Appellants' witnesses claimed in the April 15, 2015 invoices of FTI to the Respondent.

[82] I will next determine what persons should be liable for costs as addressed by both parties in their argument; and the allocation of costs amongst parties found to be liable for costs.

IV. Persons to Pay Costs

[83] I will now turn my attention to the issue of who pays the costs, including whether any other person is responsible therefore and on what basis.

[84] As stated earlier, Rule 147(1) gives the Court broad discretion to determine what persons will pay the costs of the parties involved in any proceeding and the allocation of same. The plain wording of such Rule makes it clear that the Court can assess non-parties to a proceeding with costs as both the Appellants and Respondent have argued. As I earlier referred to as well, the exercise of such discretion by the Court must be made on a principled basis.

[85] The Appellants argue in paragraph 6.b. of its submissions that if costs are to be awarded they should be assessed on a proportionate basis amongst the 16,000 or so taxpayers who participated in the Program:

> 6.b. In the alternative to a. above, that the costs of the Appeals be fixed on the basis that the Appellants be liable for only their proportionate share of the reasonable costs of the Appeals in relation to the 16,000 taxpayers affected by the decision in these Lead Appeals, or in such other proportion as this Court deems just;

[86] At paragraph 18 of their submissions, the Appellants also make reference to correspondence from the Department of Justice making reference to "…27,000 additional donors whose cases are still at the objection stage."

[87] Regardless of the actual number of affected taxpayers, it is clear the Appellants are suggesting the Minister could have easily brought such objectors into the appeals stage by issuing Notices of Confirmation for them.

[88] At paragraph 19 of the Appellants' submissions, the Appellants argue "…that there are <u>at least</u> 25 GLGI appeals currently within the jurisdiction of the Tax Court, …" and that "[I]f the costs claimed by the Respondent of $532,211.95 (<u>ignoring all other submissions contained herein</u>) were apportioned equally amongst only the 25 appeals of which the Appellants are aware (the 23 referred to in paragraph 18 above [which includes the Bound Appellants] plus the Appeals of Mr. Moshurchak and Ms. Mariano), the pro-rata liability of each appellant would be $21,288,48, an amount more closely reflecting the reasonable expectation of the Appellants."

[89] The Appellants are obviously casting a wide net of persons to be responsible for costs, including the Bound Appellants, any other taxpayer at the appeals stage and even any taxpayer still at the objection stage, although I note the Appellants initial submissions made no specific reference to the Promoter being liable for costs but did so in Reply submissions; all in the context of their arguments that such allocation would be more in line with the Appellants' reasonable expectation of costs and the unfairness of the Appellants funding the litigation for the benefit of all those affected, the latter essentially being the argument used earlier in support of its position that there should be no costs in lead cases.

[90] I have already addressed the issue of the parties expectation of costs and the no-cost submissions for lead cases of the Appellants earlier and need not revisit

this here other than to reiterate that I do not agree with the Appellants' submissions in those regards.

[91] As to the issue of the scope of persons the Court may assess costs of the Appellants against, I must agree with the Respondent that there is simply no basis in law for allocating costs to taxpayers simply because they are at the objection stage nor to taxpayers at the appeals stage who did not agree to be bound by the decision herein. It is trite law that this Court has no jurisdiction over taxpayers who have not filed a Notice of Appeal, as confirmed by Little J. in *Caputo v The Queen*, 2011 TCC 364, 2011 DTC 1268, nor is there any power bestowed on the Court to force the Minister to issue notice of confirmations to any taxpayer, which power falls within the administrative power of the Minister, the reasonableness of which is not reviewable by this Court. Moreover, as the Respondent has pointed out, section 241 of the *Income Tax Act* provides that the names of such taxpayers and other information pertaining to them is confidential and so the Court would not even be in a position to know who they are.

[92] Section 241 reads as follows:

> **241. (1) Provision of information** - Except as authorized by this section, no official or other representative of a government entity shall
>
> > (a) knowingly provide, or knowingly allow to be provided, to any person any taxpayer information;
> >
> > (b) knowingly allow any person to have access to any taxpayer information; or
> >
> > (c) knowingly use any taxpayer information otherwise than in the course of the administration or enforcement of this Act, the *Canada Pension Plan*, the *Unemployment Insurance Act* or the *Employment Insurance Act* or for the purpose for which it was provided under this section.
>
> **(2) Evidence relating to taxpayer information** - Notwithstanding any other Act of Parliament or other law, no official or other representative of a government entity shall be required, in connection with any legal proceedings, to give or produce evidence relating to any taxpayer information.
>
> **(3) Communication where proceedings have been commenced** - Subsections (1) and (2) do not apply in respect of

> (a) criminal proceedings, either by indictment or on summary conviction, that have been commenced by the laying of an information or the preferring of an indictment, under an Act of Parliament; or
>
> (b) any legal proceedings relating to the administration or enforcement of this Act, the *Canada Pension Plan*, the *Unemployment Insurance Act* or the *Employment Insurance Act* or any other Act of Parliament or law of a province that provides for the imposition or collection of a tax or duty.

[93] It is obvious there is no exception for accessing such confidential information for the purposes of allocating costs above.

[94] More fundamental however, is the principle that persons who have no ability to influence the conduct of an appeal cannot be liable for costs. This I submit is the common sense corollary to the common law rules that a Court has the inherent jurisdiction, if not the statutory one, to hold non-parties liable for costs in certain circumstances, such as funding or maintaining a lawsuit or conducting the action from the sidelines which I will discuss in more detail. See *155569 Canada Ltd.* and *Richards v Minister of National Revenue* [2005] FCJ No. 21, 2005 DTC 5155. There is simply no evidence to suggest any taxpayer at the objection stage or those even at the appeals stage who did not agree to be bound, had any participation, influence, control or other role in the appeals in question.

[95] In contrast, the Bound Appellants should also be responsible for any costs herein, both on the basis they agreed pursuant to Rule 146.1 to be bound in whole by the decision in these appeals, which decision obviously includes any costs awarded, and on the basis such Bound Appellants were part of the same group of appeals, were represented at all times by the same counsel, three sets in all throughout the proceedings, and filed pleadings almost identical in nature to those of the Appellants in this case; save for identification and amounts in issue differences. These Bound Appellants were fully engaged in the group of appeals and obviously had the ability to influence their counsel or these proceedings if they chose to do so. They stood to benefit from any successes and likewise must be bound by the costs of an unsuccessful action they agreed to be bound by. Accordingly, I do not agree that the Bound Appellants should be taxed on a separate basis from the Appellants as suggested in the submissions of one of the Bound Appellants.

[96] At this point it is important to make an important distinction between the Bound Appellants and any taxpayers at the objection stage who may have entered into an agreement with the CRA to be bound by the lead cases. The Appellants' in

their follow up Reply submissions suggest these objectors should also be treated as Bound Appellants and be severally or jointly and severally responsible for costs. I cannot agree to this. As mentioned earlier, the Court has no jurisdiction to deal with such objectors whose affairs are confidential and who clearly had no ability to influence the lead appeals nor to involve themselves in the administrative dealings of the Minister in making such offers or agreements. Furthermore, in the sample offer to settle or agreement to be bound that the Appellants submitted as an exhibit to their Reply submissions, the agreement to be bound with the lead cases makes reference to only taxes, interest and penalties and not costs so there is no basis for arguing there is an agreement to pay costs. The Bound Appellants however executed a Form 146.1 agreeing to be wholly bound by the decision in the lead cases without limit, which decision includes any decision as to costs.

[97] I will now address whether the Promoter should be liable for costs.

[98] The *155569 Canada Ltd.* and *Richards* cases referred to above, decisions of the Alberta and Federal Courts respectively, confirm a superior court of record's inherent jurisdiction to assess costs against non-parties to an action. In *155569 Canada Ltd.*, Veit J., in addressing whether limited partners of a limited partnership who invested funds in order to fund and maintain the partnership's lawsuit in return for an additional return on its investment, summarized the law on when non-parties may be liable for costs at paragraphs 35 - 37:

> **35** The law establishes that non-parties may, in exceptional circumstances, be liable for costs. Canadian law takes the view that the authority to make such orders comes within the court's inherent jurisdiction. British law is currently of the view that the equivalent of our Judicature Act gives this right to the courts as a statutory power. In the result, by whatever reasoning is employed, it is clear that Canadian courts can impose the obligation to pay costs on non-parties. The issue in this case is, therefore, whether the court should exercise its jurisdiction and discretion to order certain non-parties, in particular certain limited partners who have funded the law suit, to pay costs.
>
> **36** While acknowledging that they have funded the lawsuit, some limited partners have said that they have done none of the other things mentioned in cases such as Symphony Group plc. For example, they argue, they have not
>
> - initiated the proceedings: McColeman;
>
> - counselled commencement of the action: Alexanian;

> - solicited parties to carry on the litigation: Canadian Tire;
>
> - created the partnership to carry on the litigation and thereby avoid liability for costs: Tradewinds;
>
> - promoted themselves as the "real litigants": Canadian Tire;
>
> - conducted the action from the sidelines; Alexanian.
>
> **37** The simple answer to that argument is that, in order to be made liable to pay the costs of a lawsuit, it is not necessary to have done more than to have maintained, or financed, that lawsuit: Singh. There are other ways in which non-parties can be liable for costs - as for example by conducting the lawsuit from the sidelines - but these are independent from the issue of financing the lawsuit.

[99] In the above decision, Veit J. found that the limited partners essentially were offered and did buy an interest in a lawsuit that constituted maintenance or something akin to it and hence were potentially liable for costs but found in the circumstances of that case such limited partners had no notice of the claim for costs against them. At paragraph 62, Viet J. stated:

> **62** In summary then, although limited partners who fund lawsuits in circumstances similar to these are potentially liable to pay costs of the proceedings, no award of costs is made here because the plaintiff did not give the targeted limited partners adequate notice of its claim against them. When the claim is raised for the first time only after the lawsuit is finished, as in this case, the limited partners are powerless to change anything in the conduct of the proceedings. It is unfair to impose costs on them at this stage. The situation might be otherwise if, from the outset of the proceedings, it were clear that, as a matter of law some limited partners were liable to costs even though no explicit claim for costs were made: Rule 120. But the legal and factual framework for the claim, perhaps in all limited partnership cases, but certainly in this case, was not obvious.

[100] What is clearly evident from the above decision is that the limited partners who funded the lawsuit did so only qua "investors" and had no influence or control over the conduct of the proceedings and thus could not be held liable for costs without adequate advance notice. The case at hand is far from similar.

[101] I share the Respondent's opinion expressed in paragraph 134 of its costs submissions:

> It is difficult to conceive of a fact pattern more supportive of an order of costs against the non-party Promoter than the one in these appeals….

[102] The Promoter not only funded the action herein but conducted the action from the sidelines if not directly from on-field. I take note of the following:

1. The Promoter prepared and arranged for the Appellants and in fact all participants in the Program to execute a Direction as part of the transactional documents wherein the Appellant, Mariano, as an example, agreed:

    > Global Learning Group Inc.("Promoter") will establish a legal fund equal to 3% of the amount of cash raised for the Foundation (to a maximum of $750,000) to pay legal fees in the event of a reassessment by the Canada Revenue Agency. To avail itself of the defense fund, the undersigned must consent to carriage of its appeal by the Promoter on behalf of the undersigned, with legal counsel of the Promoter's choice, by way of binding test case, at Promoter's option.

    The Direction signed by the Appellant, Moshurchak, made no reference "by way of binding test case, at Promoter's option" but I note in the Promoter's promotional material entered into evidence that the Promoter advised participants that if they are reassessed by the CRA "a lead case would be chosen and the entire program would be tested on that one case."

2. It is absolutely clear from the above and from other evidence during the trial that the Promoter created a defense fund in anticipation of a challenge by the CRA, promoted the fact there might be a challenge as well as a test case, had full carriage of the action, had the right and did appoint and pay for the solicitors who conducted the action on behalf of the Appellants as test cases and was directly involved in instructing not only its solicitors but actually, through its representative, attended pre-trial conferences.

3. The Promoter hired the expert witnesses tendered by the Appellants at trial and paid for the Dobner report. The Promoter, through its principal, Mr. Robert Lewis, signed the engagement letter retaining PricewaterhouseCoopers to prepare the expert report and agreed to be solely responsible for payment of their services. At trial, it was clear that the expert, Dobner, who prepared the report received instructions

from the Promoter or its representatives and not from the Appellants who seem to have had absolutely no role in the process.

4. The Promoter not only paid all the legal fees of the solicitors engaged to conduct the lead case but paid the costs assessed against the various Appellants by Boyle J. during case management conferences and well as those assessed by myself during the trial management conference which were agreed to in principle but not amount by its counsel at the time.

5. Although the Appellants' costs submissions suggest there was no agreement on the part of the Promoter to pay any costs award, this is contrary to the positions taken by the Appellant, Mariano, in her letter to the Court advising that her expectation was that the Promoter was to pay same, as well as the position taken by various Bound Appellants, who in their submissions confirmed their understanding that the Promoter was to pay same and direct the action. Frankly, I find it rather incongruent to suggest that there was no legal obligation for the Promoter to pay costs in this matter when one considers the wide wording of the Direction creating the defence fund above to pay legal fees that did not restrict same to only legal fees of its own counsel nor in light of the promotional materials which talked of dealing with the matters by lead cases. Not only does this suggest strong *prima facie* evidence that the Promoter represented and agreed it would cover all costs associated with the "defense" but as indicated it actually did pay the cost awards earlier referred to in satisfaction of that obligation.

6. The Promoter clearly controlled all aspects of the Program, from negotiating master licences, arranging and paying for the valuations and legal opinions it utilized as part of its Program materials, hiring parties to administer the Program and collect funds, issue tax receipts and administer the Trust it was instrumental in instructing its solicitors to create, paying for all experts and lawyers involved and even preparing and making available templates for participants to use to file notices of objection with the CRA, which were utilized by both of the Appellants in this case as well as funded the lead case litigation. It controlled all aspects of the Program and it controlled the litigation that resulted therefrom. Frankly, the Appellants' testimony was essentially relevant and substantially limited to the issue of donative intent and their understanding of the Program. The Appellants had

> realistically no role to play in dealing with the other issues in this trial; including in preparing and defending any of the valuations, expert reports, validity of the Trust and of the Program itself which I found to be a sham nor were they the source of the evidence tendered in support thereof including some fraudulent customs invoices tendered to substantiate the conversions of licences into CD's. In short, the Promoter had far more participation and influence in the action than did the Appellants themselves.

[103] Having regard to the above, I am of the view that the Promoter should also be responsible for costs in this matter. Even without reference to such aforesaid third-party cost precedents I would have arrived at the same conclusion pursuant to the broad discretion Rule 147 gives me. Finally, I will address the allocation of costs amongst those parties responsible therefore.

V. Allocation of Costs

[104] I find that the Appellants, the Bound Appellants and the Promoter shall be responsible for the costs of the Respondent as earlier calculated. While I appreciate the Promoter may bear the direct responsibility for the sham it has perpetrated on the Appellants and the Canadian public at large and benefited to the extent of millions of dollars in cash contributions, the Appellants and Bound Appellants did blindly or willingly jump on the Program train in expectation of receiving a net cash advantage from their donation. As I indicated in paragraph 88 of my Reasons in this matter:

> ..When otherwise good people turn a blind eye to the obvious reality surrounding them, they cannot lay blame on others for the consequences that follow from the fraud or sham of others. They certainly should not expect the Canadian public to fund their losses.

Accordingly, I am not prepared to limit liability for costs solely to the Promoter as requested by the Appellants and Bound Appellants.

[105] The usual rule of allocating costs is that of joint and several liability for those found to be responsible for costs. See *Makuz v The Queen*, [2007] 1 CTC 2370, 2006 DTC 3464, at paragraph 3.

[106] In the circumstances however, an award of simple joint and several liability amongst all of the above parties would in my opinion offend the principle

enunciated by Boyle J. in *Martin* above that the approach to fixing costs on a principled basis is that costs “should be compensatory and contributory, not punitive nor extravagant”. The Appellants and Bound Appellants had significantly different contributions to the Program and significantly different tax risks associated with it. As indicated above, Mariano contributed in one year only a sum of $7,500 in cash while Moshurchak contributed over two years for a total cash contribution of at least over $114,000. The Bound Appellants made contributions of sums in between the range of the Appellants. Moreover, even though the Appellants and Bound Appellants participated in the same Program, they received different allocations of software licences, ranging from 3 times to 8 times the cash contribution made; with at least the Appellant Moshurchak having negotiated a larger allocation for his second time larger cash donation. Thus charitable receipts were calculated on different basis. To hold all such persons to the same degree of cost liability would in my opinion be punitive to some and inadequately contributory from others.

[107] Accordingly, aware of the reality Rothstein J.A (as he was them) alluded to in *Consorzio* above, that an award of costs is not a scientific exercise, I find that each of the Appellants, Bound Appellants and the Promoter shall be jointly and severally liable for costs as earlier determined but that the maximum amount of costs for which each of the Appellants and Bound Appellants are liable for shall be capped; such that each of their liability for costs shall be limited to the proportion that their total Charitable Tax Credits claimed in respect of the Program for all years under appeal herein is to total of all Charitable Tax Credits claimed by all of them combined with respect to the Program for such years under appeal. **For greater clarity, the total Charitable Tax Credits claimed by any of the Appellants or Bound Appellants shall include any Charitable Tax Credits claimed or claimable in respect of their charitable donations claimed for such years under appeal that relate to the Program, including any Charitable Tax Credits transferred to any other person during the years under appeal or claimable or so transferable in future years. To avoid double counting, any Appellant or Bound Appellant, such as Janice Moshurchak, who received a transfer of any Charitable Tax Credit from another party (such as from her husband Douglas Moshurchak) shall not count such transferred Charitable Tax Credits in his or her total Charitable Tax Credit claimed.** There shall be no limit to the Promoter’s liability for costs. This has the effect of treating the Appellants and Bound Appellants differently amongst themselves to avoid punishing any of them and permitting a fair contribution to costs but also treating them as a group who together with the Promoter will be responsible for the full amount of costs on a joint and several basis.

VI. Conclusion

[108] As earlier determined the amount of costs shall be $491,136.95 as claimed by the Respondent less a reduction for any expert fees and disbursements charged by FTI for the services of Mr. Mizrahi and Mr. Tobias in attending to hear the evidence of any witnesses at trial or in preparing the Respondent's counsel to cross-examine the Appellants' witnesses claimed in the April 15, 2015 invoice of FTI to the Respondent. The taxing officer will be directed to determine such reduction based on the actual fees charged by such above persons in the said invoice if the parties are not able to agree amongst themselves within 30 days of the date of this Order. These Costs shall be allocated in accordance with paragraph [107] above.

This Amended Amended Order and Amended Amended Reasons for Order are issued in substitution of the Amended Order and Amended Reasons for Order dated August 4, 2016.

Signed at **Ottawa**, **Canada**, this 13th day of August 2016.

"F.J. Pizzitelli"

Pizzitelli J.

CITATION:	2016 TCC 161
COURT FILE NOs.:	2009-3506(IT)G 2009-3516(IT)G 2009-3498(IT)G 2009-3503(IT)G 2009-3510(IT)G 2009-3514(IT)G 2009-3515(IT)G
STYLES OF CAUSE:	JUANITA MARIANO and HER MAJESTY THE QUEEN DOUGLAS MOSHURCHAK and HER MAJESTY THE QUEEN SERGIY BILOBROV and HER MAJESTY THE QUEEN MELBA LAPUS and HER MAJESTY THE QUEEN MYLYNE SANTOS and HER MAJESTY THE QUEEN THE ESTATE OF PENNY SHARP and HER MAJESTY THE QUEEN JANICE MOSHURCHAK and HER MAJESTY THE QUEEN
PLACES OF HEARING:	Toronto, Ontario; Halifax, Nova Scotia; Vancouver, British Columbia
DATES OF HEARING:	April 7, 8, 9, 10, 13, 14, 2015, at Toronto, Ontario, May 8 and 9, 2015 at Halifax, Nova Scotia, May 25, 26, 27, 28, 29, June 15, 16, 17, 22, 23, 24, 25, September 14, 15, 16, 17, and 18, 2015 at Vancouver, British Columbia
AMENDED AMENDED REASONS RESPECTING SUBMISSIONS ON COSTS:	The Honourable Justice F.J. Pizzitelli

DATE OF **AMENDED AMENDED** REASONS RESPECTING SUBMISSIONS ON COSTS:	August **13**, 2016

APPEARANCES:

Counsel for the Appellant:	Howard Winkler Rahul Shastri
Counsel for the Respondent:	Gordon Bourgard Lynn Burch Matthew Turnell Zachary Froese Selena Sit

COUNSEL OF RECORD:

For the Appellant:

Name:	Howard Winkler
Firm:	Winkler Law Toronto, Ontario

For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada