Dockets: 2009-2430(IT)G
2014-3075(IT)G
2015-1307(IT)G

BETWEEN:

CAMECO CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Written Submissions Regarding Costs

Before: The Honourable Justice John R. Owen

Participants:

Counsel for the Appellant:	Al Meghji, Peter Macdonald and Mark Sheeley
Counsel for the Respondent:	Elizabeth Chasson and Peter Swanstrom

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ORDER

UPON reading the parties' submissions on costs;

In accordance with the attached Reasons for Order it is ordered that:

1. a lump sum is awarded to the Appellant in the amount of $10,250,000 in lieu of taxed costs for counsel fees, and

2. with respect to disbursements, including non-recoverable HST and non-recoverable provincial sales tax, the disbursements claimed by the Appellant will be taxed in accordance with the *Tax Court of Canada Rules (General Procedure)*, with the proviso that no costs shall be awarded to the Appellant in respect of interlocutory motions: number

two, number three, number four, number five, number six, number seven, number eight, number nine and number ten as identified in Appendix "A" of the Respondent's Submissions on Costs.

Signed at Ottawa, Canada, this 29th day of April 2019.

"J.R. Owen"

Owen J.

Citation: 2019 TCC 92
Date: 20190429
Dockets: 2009-2430(IT)G
2014-3075(IT)G
2015-1307(IT)G

BETWEEN:

CAMECO CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Owen J.

[1] Cameco Corporation (the "Appellant") appealed reassessments (the "Reassessments") of its taxation years ending December 31, 2003, December 31, 2005 and December 31, 2006 (collectively, the "Appeals"). The Appeals were heard over 69 days in 2016 and 2017. The Appeals were disposed of by a judgment dated September 26, 2018 wholly in favour of the Appellant.

[2] At the time of my judgment disposing of the Appeals, I gave the parties 60 days to make submissions as to costs, not to exceed 15 pages each. I subsequently extended the 60-day deadline to allow the Respondent to review and respond to the submissions of the Appellant and to allow the Appellant to review and respond to the submissions of the Respondent. The Appellant included a Bill of Costs as Exhibit I to its main submission.

[3] The Appellant is asking for a lump sum costs award for legal fees of $20,503,979 plus disbursements, inclusive of unrecoverable provincial sales tax, of $17,933,178, for a total of $38,437,157. The Appellant states that the amount claimed for legal fees is 70% of the $29,291,398 of fees actually incurred and that this level of costs was foreseeable and was a direct result of the Respondent's actions. The Appellant states that the actual legal fees and disbursements incurred

in connection with the Appeals were about $57 million. However, no claim is made with respect to this amount.

[4] The Respondent submits that the Appellant has failed to establish that it incurred $57 million in costs and that the costs award for the Appellant should be limited to 20% of the total disclosed costs of $48 million, or $9.6 million. The Respondent submits that the award sought by the Appellant is punitive and tantamount to substantial indemnity and that such costs should be awarded only where the conduct of a party has been reprehensible, scandalous or outrageous. The Respondent suggests that the Appellant has included in its total fees dockets for years other than 2003, 2005 and 2006. With respect to this last point, the Appellant concedes that dockets for other years may have been erroneously included but states that the amounts are *de minimis* (less than 21 hours).

I. Analysis

[5] Subsections 147(1) to (3) and (4) to (5) of the *Tax Court of Canada Rules (General Procedure)* (the "Rules") state:

> 147. General Principles — (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.
>
> (2) Costs may be awarded to or against the Crown.
>
> (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.

(5) Notwithstanding any other provision in these rules, the Court has the discretionary power,

(a) to award or refuse costs in respect of a particular issue or part of a proceeding,

(b) to award a percentage of taxed costs or award taxed costs up to and for a particular stage of a proceeding, or

(c) to award all or part of the costs on a solicitor and client basis.

[6] Recently, in *MacDonald v. The Queen*, 2018 TCC 55, Lafleur J. summarized the key principles applicable to the award of costs in this Court as follows at paragraphs 42 to 45:

> Section 147 of the Rules gives the Court a very broad discretion in awarding costs . . . . However, the discretion of the Court must be exercised on a principled basis and should not be exercised in an arbitrary manner (*The Queen v Lau*, 2004 FCA 10 at para 5, [2004] GSTC 5, and *The Queen v Landry*, 2010 FCA 135 at paras 22 and 54, 2010 DTC 5106).
>
> None of the factors listed in subsection 147(3) are determinative and the Court should consider all relevant factors in exercising its discretion (*Velcro Canada Inc v The Queen*, 2012 TCC 273 at paras 12-13, [2012] 6 CTC 2049 [*Velcro*]).
>
> An award of costs is generally not intended to fully compensate the actual costs incurred by a party (*Velcro*, *supra* at para 29). The objectives of an award of costs are compensation and contribution, and not punishment (*Mariano et al v The Queen*, 2016 TCC 161 at paras 23 and 27, 2016 DTC 1146.
>
> As explained by Justice Boyle in *Martin v The Queen*, 2014 TCC 50, 2014 DTC 1072 (para 14):
>
> > 14 . . . 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?
> >
> > . . .
> >
> > [Emphasis added.]

[7] In *Nova Chemicals Corporation v. Dow Chemical Company*, 2017 FCA 25 at paragraphs 10 to 13, the Federal Court of Appeal provided guidance regarding lump sum awards under subsections 400(1) and (4) of the *Federal Courts Rules*, which are similar to subsections 147(1) and (4) of the Rules:

> Rule 400(1) of the *Federal Courts Rules* gives the Court **"full discretionary power over the amount and allocation of costs"**. This has been described to be the **"first principle in the adjudication of costs"**: *Consorzio del prosciutto di Parma v. Maple Leaf Meats Inc.*, 2002 FCA 417, [2003] 2 F.C.R. 451, at para. 9 [*Consorzio*].

> Rule 400(4) expressly contemplates an award of costs in a lump sum in lieu of an assessment of costs pursuant to Tariff B:
>
> > 400(4) The Court may fix all or part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, any assessed costs.
>
> Lump sum awards have found increasing favour with courts, and for good reason. They save the parties time and money. Lump sum costs awards further the objective of the *Federal Courts Rules* of securing **"the just, most expeditious and least expensive determination"** of proceedings (Rule 3). When a court can award costs on a lump sum basis, granular analyses are avoided and the costs hearing does not become an exercise in accounting.
>
> Lump sum awards may be appropriate in circumstances ranging from relatively simple matters to particularly complex matters where a precise calculation of costs would be unnecessarily complicated and burdensome: *Mugesera v. Canada (Minister of Citizenship & Immigration)*, 2004 FCA 157, at para. 11.
>
> As demonstrated by the facts of this case, there are circumstances in which costs generated even at the high end of Column V of Tariff B bear little relationship to the objective of making a reasonable contribution to the costs of litigation. The Tariff amounts have been described as inadequate in this respect, although this may be a significant understatement in complex litigation conducted by sophisticated parties in the Federal Courts. Nevertheless, an increased costs award cannot be justified solely on the basis that a successful party's actual fees are significantly higher than the Tariff amounts: *Wihksne v. Canada (Attorney General)*, 2002 FCA 356, at para. 11. The burden is on the party seeking increased costs to demonstrate why their particular circumstances warrant an increased award.

[8] To this I would add the observation of the Federal Court of Appeal in *Consorzio del prosciutto di Parma v. Maple Leaf Meats*, 2002 FCA 417 at paragraph 8:

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

[9] The parties have helpfully addressed in their submissions the factors listed in subsection 147(3) of the Rules and I will in turn review those factors here.

A. The Result of the Proceeding

[10] The Appellant submits that it was wholly successful and that this factor weighs in favour of an award of significantly elevated costs. The Respondent agrees that success does warrant costs in favour of the Appellant but submits that success alone does not support an award of significantly elevated costs.

[11] Recently, in *2078970 Ontario Inc. v. The Queen*, 2018 TCC 214, Graham J. observed at paragraphs 9 and 10:

> The result of a proceeding can affect costs in two ways. The degree of a party's overall success is an important factor in determining whether costs should be awarded to a party. Once a court decides to award costs to a party, the degree of the party's overall success may also be a factor in determining the quantum of those costs.
>
> In my view, when determining the quantum of costs to be awarded, the result of the proceeding is only an appropriate factor to consider if it is possible for a party to have had mixed success in the proceeding. If a proceeding involves a number of different issues and a party has been completely successful on all of those issues, that will argue in favour of higher costs. If a proceeding involves a number of different issues and a party has had mixed success on those issues, the degree of the party's overall success will be relevant when determining the quantum of costs. If a proceeding involves a single issue over which there are a number of different potential outcomes (e.g. a valuation issue), the degree of a party's success on that issue will be relevant to the quantum of costs. However, when the only issue before the Court is a black-or-white issue on which there is no potential for partial success, the fact that a party succeeded on that issue should not, in my view, affect the quantum of costs awarded. The party achieved success. That success was no better or worse than what the party could have hoped to achieve and thus neither argues for higher nor lower costs.

[12] To this I would add that the merit of the Respondent's case is not relevant to the Court's consideration of the result. The rationale for costs is not to punish the losing party based on an *ex post facto* analysis of the relative merit of the positions taken. I also note that paragraph 147(3)(i) of the Rules addresses vexatious behaviour by either party.

[13] The issues in the Appeals were manifold and could potentially give rise to a wide range of possible outcomes. The Appellant was however wholly successful in

contesting these issues. The Appellant's success in the Appeals favours an appropriate award of costs to the Appellant.

B. The Amounts in Issue

[14] The Appellant states that the transfer pricing income adjustments reassessed for the three years under appeal were $483,430,713 in aggregate and that this amount justifies a significantly elevated costs award. The Appellant further submits that the transfer pricing income adjustments for years subsequent to 2006 should also be considered. The Respondent acknowledges that the amounts in issue in the years under appeal were substantial but that since the result of the Appeals did not bind future years the amounts reassessed in those years should not be considered.

[15] I find that the amounts in issue for the years under appeal were substantial and that this factor favours an appropriate award of costs to the Appellant. In my view, since the result of the Appeals does not bind future years, the amounts reassessed for years after 2006 are not relevant.

C. The Importance of the Issues

[16] The Appellant states that the decision of this Court provides detailed and precise articulations of the legal principles applicable to five issues raised in the Appeals and that this justifies a significantly elevated costs award. The Respondent states that the Court's decision is likely to have significant precedential and jurisprudential value on the application of the transfer pricing provisions and on the application of the sham doctrine. However, the Respondent does not accept that the importance of the issues justifies a significantly elevated costs award.

[17] I find that this factor favours an appropriate award of costs to the Appellant.

D. Any Offer of Settlement Made in Writing

[18] The Appellant states that it made two written settlement offers to the Respondent—one pre-trial and one post-trial—that represented real compromise but that the Respondent rejected the offers out of hand rather than engaging in

settlement discussions. The Appellant does not suggest that the offers triggered the application of the rules in subsections 147(3.1) and (3.2) of the Rules.[1]

[19] The Respondent submits that the pre-trial offer was made less than 30 days before the commencement of the trial and that neither offer reflected a true compromise or resulted in additional taxable income to the Appellant for the years addressed in the Appeals. The Respondent submits that the Appellant should not be better off than it would have been had the pre-trial offer satisfied the conditions of subsection 147(3.1) of the Rules, which would require party to party costs until the date of the offer and substantial indemnity costs thereafter. The Respondent notes that the second offer was made after all the costs of the Appeals had already been incurred.

[20] The offers address all the Appellant's taxation years from 2003 through 2015. However, in my view, only the offers for the taxation years addressed in the Appeals are relevant to the issue of costs in respect of the Appeals. As stated by the Respondent, the offers for those years result in $32 million of additional taxable earnings in 2006 but no additional tax in any of the three years under appeal.

[21] Given the *de minimis* nature of the compromise, I find that the two offers are neutral with respect to costs.

E. The Volume of Work

[22] The Appellant submits that the volume of work in respect of the Appeals was exceptionally high and provides details of the work involved, including production of 200,000 documents, documentary discovery of 135,000 documents, oral discovery over 29 days encompassing close to 10,000 questions and a 69-day trial.[2] The Appellant sets out a timeline of selected events in Exhibit H to its written submissions.

[23] The Respondent acknowledges that the volume of work was considerable for both parties. However, the Respondent observes that the Appellant expended

[1] Neither offer was made at least 90 days before the hearing of the Appeals and therefore the offers do not meet the condition in paragraph 147(3.3)(b) of the Rules. Consequently, subsections 147(3.1) and (3.2) of the Rules do not apply.
[2] The details are in paragraphs 28 through 34 of the Cameco Written Submissions Regarding Costs.

considerably greater resources than the Respondent in docketing 11,784 more hours.

[24] The Appellant counters that the additional hours were attributable to the 200,000 documents that had to be produced (versus 12,000 for the Respondent), the preparation of the Appellant's nominee for discovery in light of this volume of documents and the Respondent's reliance on sham, which required the Appellant to address "minute administrative details of how it and its subsidiaries carried on business".[3]

[25] The Respondent also observes that 21% of its dockets were for lower cost staff compared to 4.4% for the Appellant. The Appellant counters that the large number of counsel working on the Appellant's file reflected its attempt to use junior associates and students to review documents.

[26] I find that the Appeals required a substantial amount of work on the part of the Appellant and that the volume of work was significantly increased by the Respondent's reliance on sham. While the Respondent was perfectly entitled to rely on sham to support the Reassessments, having done so, it cannot now complain about the costs incurred by the Appellant in defending against the allegation of deceit integral to the doctrine of sham. Accordingly, this factor favours an appropriate award of costs to the Appellant.

F. The Complexity of the Issues

[27] The Appellant and Respondent agree that the facts and issues in the Appeals were complex. The Appellant submits that this complexity favours a significant costs award. The Respondent submits that while this complexity favours an award of costs to the Appellant, such an award "should be only of reasonable partial indemnity".[4]

[28] The Appeals involved the interpretation of provisions of the *Income Tax Act* that had not previously been interpreted and the application of that interpretation to the facts drawn from roughly 65 days of evidence which included the reports and testimony of eight expert witnesses. In the circumstances, I am of the view that the

[3] Paragraph 7 of the Cameco Reply Submissions Regarding Costs.
[4] Paragraph 26 of the Respondent's Submissions on Costs.

issues addressed in the Appeals were complex and favour an appropriate award of costs to the Appellant.

G. The Conduct of Any Party

[29] The Appellant submits, no doubt relying on paragraph 603 of my judgment, that the Crown's ill-conceived sham allegations were based on a fundamental misunderstanding of the concept of sham. However, my comment in that paragraph was not addressing the Respondent's right to make its sham argument. Nor was it suggesting that the Respondent's behaviour in pursing the sham argument was inappropriate or frivolous.

[30] I agree with the characterization of the Respondent that this is a case in which "[t]he Crown took a position that the Court ultimately disagreed with".[5] I am not aware of any conduct by either party that tended to shorten or to lengthen unnecessarily the duration of the proceedings. Notwithstanding the length of the trial, neither party acted unreasonably, and each party conducted the litigation so as "to represent their respective client's best interest as keenly as possible".[6]

[31] In the circumstances, I find that this factor is neutral with respect to costs.

H. The Denial or the Neglect or Refusal to Admit Anything

[32] I agree with the parties that this factor is neutral with respect to costs.

I. Improper, Vexatious or Unnecessary Stages in the Proceeding

[33] I have seen no evidence of conduct, by either party, of the type described in paragraph 147(3)(i) of the Rules.

[34] I do not agree with the Appellant that the Respondent's decision to vigorously pursue its sham argument is relevant under this factor. The Respondent led extensive evidence in support of its sham argument. I simply did not agree with the Respondent's position that this evidence supported a finding of sham based on my findings of fact and the legal test for sham developed in the jurisprudence.

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[5] Paragraph 31 of the Respondent's Submissions on Costs.
[6] *Henco Industries Limited v. The Queen*, 2014 TCC 278 at paragraph 20.

[35] I also do not agree with the Respondent that Cameco's motion under the *Canada Evidence Act* to call more than five expert witnesses is relevant to this factor because only five experts testified for the Appellant. I made clear in my reasons for granting the motion that my decision did not automatically mean that the expert evidence of more than five expert witnesses would be admitted at trial.

[36] I find that this factor is neutral with respect to costs.

J. The Expense of an Expert Witness

[37] I agree with the Appellant and Respondent that this was an appropriate case for expert evidence. I note that the Appellant has not requested costs for expert witnesses who prepared expert reports but who were not qualified as such or whose evidence was not tendered at trial.

K. Any Other Matter Relevant to the Question of Costs

[38] The Respondent submits that two additional factors should be considered in determining the Appellant's costs award: (i) the reasonable expectations of the Respondent; and (ii) costs claimed by Cameco with respect to pre-trial motions.

[39] With respect to the first factor, the Respondent submits that its reasonable expectations regarding the Appellant's costs determined with reference to its own costs is a relevant factor. The Respondent states that it incurred total costs of $13,278,930.86, of which approximately $6.5 million was for fees.[7] The Respondent submits that given its own costs, it could not reasonably have foreseen that the Appellant would incur $48 million in costs. The Respondent states:

> . . . An unsuccessful party who actively participates in litigation cannot reasonably expect to be burdened with a partial indemnity costs award which exceeds 100% of its actual costs. Nor should it expect to fund, at 70%, an opposing party's decision to incur an extra 11,784 counsel hours.[8]

[40] The Respondent goes on to state that the costs sought by the Appellant are extravagant, representing approximately three times more than the Respondent's costs, and that costs awards should not be extravagant.

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[7] A detailed description of the Respondent's costs is set out in the Respondent's Affidavit on Costs.
[8] Paragraph 42 of the Respondent's Submissions on Costs.

[41] The Appellant counters that the average hourly rate used by the Respondent to calculate its fees ($192) does not reflect (i.e., is significantly lower than) the hourly rates charged in the private sector for complex tax litigation.

[42] With respect to the second additional factor, the Respondent states:

> Cameco has failed to establish that it is not double-claiming costs which have already been addressed by this Court during pre-trial motions. Ten pre-trial motions were heard in this proceeding. Four were brought by Cameco and six by the Crown. Attached is a chart detailing the costs awards made in these motions. Cameco should not receive costs relating to motions where the Crown was successful, where costs were awarded to the Crown, where costs have already been set, where the Court declined to order costs or where an Order was made requiring parties to bear their own costs.[9]

[43] The Appellant agrees that the Court did not award costs in respect of certain motions and in one case declined to award costs. The Appellant submits, however, that with the exception of the motions identified as number two and number five in Appendix "A" to the Respondent's Submissions on Costs, the motions represent a part of the litigation and the Appellant is entitled to its costs. The Appellant estimates that the costs of motions number two and number five are approximately $280,000.

[44] I note that in addition to these two motions, with respect to motions number three, number six and number seven, the Respondent was successful and with respect to motion number eight I expressly declined to award costs to the Appellant because of the late date of the motion. I have factored this into my determination of costs below.

II. Conclusion

[45] I have carefully considered each of the factors described above and I have concluded that an award to the Appellant of a lump sum in lieu of taxed costs for counsel fees is appropriate in the circumstances. However, I am not willing to accept the Appellant's suggestion of an award of costs for counsel fees in the amount of $20,503,979. Nor do I accept the Respondent's proposal of total costs of $9.6 million.

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[9] Paragraph 45 of the Respondent's Submissions on Costs. Appendix "A" describes the ten pre-trial motions.

[46] In my view, the factors discussed above collectively justify a lump sum award to the Appellant in the amount of $10,250,000 in lieu of taxed costs for counsel fees. This amount is approximately 35% of the counsel fees of $29.3 million incurred by the Appellant. I believe that in the circumstances this award of costs appropriately reflects the success of the Appellant, the amounts in issue and the complexity of the issues and appropriately contributes to the costs incurred by the Appellant for counsel fees without being either extravagant or punitive to the Respondent.[10]

[47] While I recognize that the absolute quantum of the costs for counsel fees is high, this amount reflects the very significant volume of work required to contest the Reassessments, in particular, the allegation of sham. As I stated in *CIT Group Securities (Canada) Inc. v. The Queen*, 2017 TCC 86, in the absence of obvious excess, it is not the role of the Court to second-guess counsel's judgment regarding the work required to fully prepare for an appeal. However, I also observed that, in circumstances involving significant stakes for the appellant, efficiency and frugality may take a back seat to thoroughness. In my view, compensating the Appellant for 35% of counsel's fees adequately addresses the latter observation.

[48] I do not accept the Respondent's submission that it could not have anticipated the costs incurred by the Appellant given the Respondent's vigorous pursuit of the allegation of sham. I also do not accept the Respondent's submission that the Respondent's counsel fees place a "reasonableness" cap on the partial indemnity costs that may be awarded to the Appellant. As stated at the outset, costs are to be determined on a principled basis having regard to all relevant factors and no single factor is determinative of costs.

[49] With respect to disbursements, since the parties cannot agree on the Appellant's disbursements, I order that the disbursements claimed by the Appellant be taxed in accordance with the Rules, with the proviso that no costs shall be awarded to the Appellant in respect of interlocutory motions: number two, number three, number four, number five, number six, number seven, number eight, number nine and number ten as identified in Appendix "A" of the Respondent's Submissions on Costs.

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[10] *Martin v. The Queen*, 2014 TCC 50 at paragraph 14, appeal allowed at 2015 FCA 95.

Signed at Ottawa, Canada, this 29th day of April 2019.

"J.R. Owen"

Owen J.

CITATION:	2019 TCC 92
COURT FILE NOs.:	2009-2430(IT)G, 2014-3075(IT)G and 2015-1307(IT)G
STYLE OF CAUSE:	CAMECO CORPORATION v. HER MAJESTY THE QUEEN
REASONS FOR COSTS ORDER BY:	The Honourable Justice John R. Owen
DATE OF COSTS ORDER:	April 29, 2019

PARTICIPANTS:

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