

BETWEEN:

CANADIAN WESTERN TRUST COMPANY AS TRUSTEE  
OF THE FAREED AHAMED TFSA,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

---

Costs Order decided by Written Submissions

Before: The Honourable Justice David E. Spiro

Appearances:

Counsel for the Appellant: Timothy W. Clarke  
Counsel for the Respondent: Perry Derksen, Jamie Hansen and  
Heidi Lee

---

**ORDER**

The Respondent's motion for enhanced costs is granted. The Respondent is entitled to costs in the amount of \$95,980.38, payable no later than 30 days from the date of this Order.

Signed at Ottawa, Canada, this 21st day of December 2023.

“David E. Spiro”

---

Spiro J.

Citation: 2023 TCC 177  
Date: 20231221  
Docket: 2015-4080(IT)G

BETWEEN:

CANADIAN WESTERN TRUST COMPANY AS TRUSTEE  
OF THE FAREED AHAMED TFSA,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

### **REASONS FOR ORDER**

Spiro J.

[1] The question in this appeal was a relatively straightforward issue of statutory interpretation. At the hearing of the appeal, the Appellant argued that taxpayers do not incur tax under the *Income Tax Act* (the “Act”) when they carry on a business of trading qualified securities within their tax-free savings account (“TFSA”). The Respondent argued that taxpayers do incur tax under the Act when they carry on a business of trading qualified securities within their TFSA.

[2] After hearing all the arguments and reviewing the text, context, and purpose of the provisions at issue, I concluded that the Respondent’s position was correct in law.<sup>1</sup> After releasing my decision, I provided the parties with an opportunity to make written submissions on costs.

#### **The Appellant’s Position**

[3] The Appellant contends that costs may be awarded to the Respondent, but only in accordance with the relatively modest amounts set out in Tariff B of Schedule II of the *Tax Court of Canada Rules (General Procedure)* (the “Rules”).

## **The Respondent's Position**

[4] The Respondent seeks costs beyond the Tariff amounts (“enhanced costs”) in a lump sum of \$118,340. This includes \$115,087.76 in counsel and paralegal fees and \$3,251.96 in disbursements. All in all, this reflects an average of 43% of total costs.<sup>2</sup>

## **Analysis**

[5] My analysis will proceed in two steps. I will first review the factors listed in section 147 of the Rules. If my consideration of those factors leads me to conclude that enhanced costs should be awarded, I will then consider the appropriate percentage.

### **Step 1: The Rule 147 Factors**

[6] Subsection 147(3) of the Rules provides a non-exhaustive list of factors for the Court to consider in exercising its discretionary power to award costs beyond the Tariff amounts:

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.

147(2) Costs may be awarded to or against the Crown.

147(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.

### The result of the proceeding

[7] The Appellant lost and the Respondent won. This is a neutral factor in this type of appeal where one party must win and the other must lose.

### The amount in issue

[8] The Minister of National Revenue (the “Minister”) reassessed to add \$569,481 to the Appellant’s income across all taxation years at issue. This amount is not insignificant, but not exceptionally large. This is a neutral factor.

The importance of the issue

[9] How important was it to determine whether taxpayers incur tax when carrying on a business of trading qualified securities within their TFSA? The issue had been contentious within the financial community since the establishment of the TFSA. It was particularly important to resolve for at least two groups in the financial community:

- Traders who used their TFSAs in the same way as they used their RRSPs – to carry on a business of trading qualified securities; and
- TFSA trustees who were potentially jointly and severally liable for the tax payable.

[10] The number of commentaries published suggests that the issue was of some importance for the general public and the tax community as well.<sup>3</sup>

[11] This factor favours an award of costs beyond the Tariff.

The volume of work

[12] Preparing for and conducting this appeal involved a great deal of work for both parties. The hearing took a full sitting week. The volume of work required by Respondent's counsel was onerous in light of the Appellant's conduct that I will touch on later.

[13] As I do not wish to double count what I will consider later, I will treat this factor as neutral.

The complexity of the issue

[14] The issue in this appeal was one of law, not of fact. Although it did require a review of the text, context and purpose of several statutory provisions, it was relatively straightforward. This is a neutral factor.

The conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding

[15] At almost every turn, the Appellant took positions that unnecessarily lengthened the proceedings. For example, the Court dismissed a time-consuming and ill-conceived interlocutory motion by the Appellant.<sup>4</sup> On appeal, the Federal Court of Appeal arrived at the same conclusion.<sup>5</sup> By the time these interlocutory proceedings came to an end, the trial had been delayed significantly.

[16] The Court was obliged to hold a number of trial management conferences to address the Appellant's desire to introduce documents and call witnesses notwithstanding the absence of any factual issue between the parties. The Court was obliged to convene the last of those trial management conferences just days before trial.

[17] Finally, during the trial, the Appellant made an unnecessary motion to adduce evidence which it later withdrew but not before squandering a considerable amount of valuable court time.

[18] This factor favours an award of costs beyond the Tariff.

The denial or the neglect or refusal of any party to admit anything that should have been admitted

[19] The Appellant muddied the waters by failing to concede until the last minute that no facts were in issue. In particular, the Appellant refused to admit until the eve of trial that the trading activity carried on within the TFSA at issue constituted "carrying on a business".

[20] This factor favours an award of costs beyond the Tariff.

Whether any stage in the proceedings was improper, vexatious, or unnecessary, or taken through negligence, mistake or excessive caution

[21] I will treat this factor as neutral as I have already considered it in my earlier discussion.

**Step 2: The Percentage of Costs**

[22] I have considered the percentage of costs awarded by the Court, including the following:

<b>Enhanced Costs Award</b>	<b>Case</b>
20%	<i>General Electric Capital Canada Inc. v The Queen</i> , 2010 TCC 490
20% (and 60%)	<i>Grenon v The Queen</i> , 2021 TCC 89
30%	<i>Klemen v R</i> , 2014 TCC 369
35%	<i>Cameco Corporation v The Queen</i> , 2019 TCC 92
35%	<i>Damis Properties Inc. v The Queen</i> , 2021 TCC 44
36%	<i>CIT Group Securities (Canada) Inc. v The Queen</i> , 2017 TCC 86
39%	<i>Chad v The King</i> , 2023 TCC 76
40%	<i>Invesco Canada Ltd. v R</i> , 2015 TCC 92
45%	<i>Paletta Estate v The Queen</i> , 2021 TCC 41
50%	<i>Univar Holdco Canada ULC v The Queen</i> , 2020 TCC 15

### **Conclusion**

[23] In light of my consideration of the factors set out in subsection 147(3) of the Rules, and my review of the Court’s costs decisions, 35% of total costs strikes me as an appropriate award for the Respondent.

[24] This amounts to a fixed cost award of \$92,728.42. The Respondent is also entitled to recover disbursements of \$3,251.96 for a total award of \$95,980.38.

Signed at Ottawa, Canada, this 21st day of December 2023.

“David E. Spiro”

---

Spiro J.

CITATION: 2023 TCC 177

COURT FILE NO.: 2015-4080(IT)G

STYLE OF CAUSE: CANADIAN WESTERN TRUST  
COMPANY AS TRUSTEE OF THE  
FAREED AHAMED TFSA AND HIS  
MAJESTY THE KING

PLACE OF HEARING: N/A

DATE OF HEARING: N/A

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

DATE OF ORDER: December 21, 2023

APPEARANCES:

Counsel for the Appellant: Timothy W. Clarke  
Counsel for the Respondent: Perry Derksen, Jamie Hansen and  
Heidi Lee

COUNSEL OF RECORD:

For the Appellant:

Name: Timothy W. Clarke

Firm: QED Tax Law Corporation  
Vancouver, British Columbia

For the Respondent:

Shalene Curtis-Micallef  
Deputy Attorney General of Canada  
Ottawa, Canada



---

<sup>1</sup> The Court's decision is reported at 2023 TCC 17 as *Canadian Western Trust Company v The King*. It is under appeal to the Federal Court of Appeal as file A-69-23.

<sup>2</sup> The Respondent requested 35% of costs incurred throughout the course of litigation with the exception of 50% of costs incurred between September 23, 2022 and December 12, 2022 – a period in respect of which the Respondent requested additional costs based on the Appellant's conduct.

<sup>3</sup> See Jamie Golombek, "CRA actively looking for people who day trade investments in their TFSAs", *Financial Post* (13 February 2023); Clare O'Hara "Investors who day trade inside TFSAs to face tax bills after ruling", *The Globe and Mail* (12 April 2023); Josh Rubin, "Day trader ordered to pay taxes on TFSA investments after holdings grow to more than \$600,000", *Toronto Star* (12 April 2023); Brian J. Arnold, "Carrying on Business in a Tax-Free Savings Account is a No-No", *The Arnold Report No. 263* (27 July, 2023) Canadian Tax Foundation.

<sup>4</sup> 2019 TCC 121.

<sup>5</sup> *Ahamed v Canada*, 2020 FCA 213.