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# Arbitrary Costs Awards in the Tax Court of Canada

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Lately, I've been thinking about costs awards in the Tax Court of Canada, given Cameco Corporation's recent costs award of $10,250,000. This reminded me of a conversation I had once comparing the Court's "traditional" approach to costs awards, based on the Tariff in the Court's rules, with the Court's new approach to costs, based on its broad discretion and the factors listed in rule 147(3) of the Tax Court's rules. I kept going back to this conversation, particularly a debate about whether the results under the new approach are arbitrary.

One aspect of the new approach that taxpayers and commentators cheer is the significantly larger costs amounts being awarded to successful litigants. It is certainly true that in recent years, successful litigants in the Tax Court have won costs awards that dwarf what their peers received only a few years earlier. For example, in 2018, Alta Energy Luxembourg S.A.R.L. was awarded costs (all figures are in respect of fees and do not include disbursements) of $816,384, and Jayco, Inc. was awarded costs of $367,856.80. In 2017, CIT Group Securities (Canada) Inc. was awarded costs of $1,100,000. In 2014, in one of the earlier large costs awards, Henco Industries was awarded more than $540,000 in costs, and, of course, Cameco Corporation was recently awarded costs of $10,250,000 after winning its transfer pricing dispute.

Large costs awards were not always available after a successful Tax Court trial as the Tax Court was traditionally hesitant to award costs greater than the amounts listed in the Tariff to the Tax Court's rules. Even though the Tariff amounts were ludicrously low (for example, where total tax at issue in an appeal is over $150,000, the Tariff currently awards $700 for all services prior to discovery, and $950 for preparation for hearing), the Court held that the Tariff amounts were to be respected unless one or both of the parties engaged in misconduct, unnecessary procedural wrangling, or inappropriately prolonged the proceedings.

This approach, which reflected the longstanding view that costs awards are not actually meant to fully compensate the successful litigant, had benefits and drawbacks. On the one hand, following the Tariff in all but exceptional cases promoted certainty, in that taxpayers would have a rough understanding of the costs amount that could be awarded to or against them. The amount awarded to the successful litigant in any appeal was low but relatively consistent. On the other hand, the Tariff was not amended to keep pace with the times, and this failure to reflect the soaring size, complexity and legal costs of tax appeals resulted in unreasonably low cost awards. This soon drew judicial scorn, as many Court decisions from the mid 1990s and early 2000s expressed frustration with the general approach to costs as well as the Tariff amounts, specifically.

Given this context, it is perhaps not surprising that the Tax Court eventually took a far more expansive view of its jurisdiction

to award costs. One of the earlier cases that fully set out the Court's new approach to costs is *Velcro Canada Inc. v. The Queen*, a 2012 decision of (as he was then) Associate Chief Justice Rossiter. In *Velcro*, the Court (i) described the amounts set out in the Tariff as "paltry" and "insignificant", (ii) held that the Tariff amounts were a reference point only, and (iii) even then, the amounts were a reference only when the Court chose to use them as such. Slavish adherence to the Tariff was replaced with the recognition that rule 147(3) gives the Court a list of factors to consider and broad discretion to determine an appropriate amount of costs.

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This increase in judicial discretion, however, carried the risk of unprincipled or arbitrary costs awards. To prevent this, the case law developed such that judges needed review the factors in rule 147(3) to determine if they support an award of enhanced costs for a litigant. While this standard process removes the risk of a decision being unprincipled, it did not in my view make costs awards any less arbitrary.

The decision awarding Cameco Corporation costs of $10,250,000 is a good example of the process now routinely followed in the Tax Court. After winning its tax appeal on its merits, Cameco Corporation asked the Court for a $20,500,000 lump-sum costs award in respect of its legal fees. The Court noted it had broad discretion over costs and it examined the factors listed in rule 147(3). The Court found that the appellant's complete success in the appeal, the amounts in issue, the importance of the issues, the volume of work (particularly the work needed to respond to the Crown's reliance on the sham doctrine), and the complexity of the issues all supported an "appropriate" award of costs. The Court then determined that an appropriate costs award with respect to legal fees was $10,250,000.

It seems apparent, at least to me, that the above process still results in an "arbitrary" award of costs. The Court could have awarded $15,000,000 or $12,500,000, or even $5,000,000. There is absolutely nothing in the Court's decision to demonstrate that $10,250,000 is "more" appropriate than any other amount. Indeed, the point is not that any of these amounts are more appropriate than the others, but that the analysis set out in the decision can support any of these figures equally. $10,250,000 is simply a number that the Court chose, seemingly from the ether. It is in arbitrary amount. While the traditional method awarded costs based on outdated figures inserted into the Tariff years ago, the new approach bases cost awards on a single judge's consideration of a list of factors and that judge's subsequent choice of an "appropriate" figure.

While this is not intended as a critique, given that basing awards off the present state of the Tariff is unjust, the crux of the issue, to me, is to devise a solution that removes arbitrariness and provides meaningful costs awards. One suggestion I support that continues to re-appear is to amend the Tariff by adding additional classifications for appeals and increasing the amounts set out in the Tariff, markedly, in some cases. It makes little sense to me to treat a tax appeal where the amount at issue is over a billion dollars the same as an appeal where the amount at issue is $150,001. While I and other practitioners appreciate the opportunity for taxpayers to receive large costs awards after a successful appeal, it will be interesting to see whether or, more likely, for how long, the enthusiasm endures once the Crown wins a billion dollar tax appeal, and asks for its $10,000,000 costs award too. ■