The Death of the Tariff: A Review of the Tax Court’s Discretionary Approach to Costs Awards

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PRÉCIS

L’attribution des dépens dans les litiges civils généraux avait traditionnellement pour but d’indemniser la partie qui avait eu gain de cause des dépens et autres frais engagés pour défendre une allégation non prouvée ou faire valoir un droit légal. Toutefois, les tribunaux canadiens ont reconnu que la conception traditionnelle des dépens est dépassée, et que l’attribution des dépens sert davantage et de façon plus importante à promouvoir l’administration efficace et ordonnée de la justice.

L’attribution des dépens à la Cour canadienne de l’impôt a généralement suivi une évolution similaire, mais à un rythme plus lent. Historiquement, les dépens étaient accordés uniquement en conformité au tarif annexé aux Règles de la Cour canadienne de l’impôt (procédure générale), sauf en cas de « conduite répréhensible, scandaleuse ou outrageante ». Plus récemment, cependant, les juges de la Cour de l’impôt ont exprimé des inquiétudes quant à l’inadéquation du tarif. Ces préoccupations ont conduit la Cour à adopter une méthode raisonnée à l’égard des dépens, similaire à celle utilisée dans les litiges civils généraux modernes, en appliquant les facteurs donnés énoncés à la règle 147(3) (« les facteurs de la règle 147(3) ») plutôt que de se fier uniquement au tarif.

Cet article passe en revue la jurisprudence récente relative à l’attribution des dépens à la Cour de l’impôt, en mettant particulièrement l’accent sur la manière dont les facteurs de la règle 147(3) ont été interprétés et sur la manière dont l’application de ces facteurs pourrait évoluer pour promouvoir davantage les nouveaux objectifs de l’attribution des dépens reconnus dans le cadre des litiges civils généraux. Les auteurs font valoir que les dépens accordés par la Cour de l’impôt pourraient être utilisés plus efficacement pour promouvoir une administration efficace et ordonnée de la justice en 1) prenant en considération les caractéristiques uniques d’un litige fiscal, et 2) en mettant davantage l’accent sur les objectifs de l’attribution des dépens dans les litiges civils généraux.

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ABSTRACT

The traditional objective of a costs award in general civil litigation was to indemnify the successful party for the legal and other costs incurred to defend an unproven claim or pursue a valid legal right. However, Canadian courts have recognized that the traditional view of costs is outdated and that an additional and more important use of costs awards is promotion of the efficient and orderly administration of justice.

Costs awards at the Tax Court of Canada have generally followed a similar path of development, but at a slower pace. Historically, costs were awarded only in accordance with the tariff annexed to the Tax Court of Canada Rules (General Procedure) unless “reprehensible, scandalous, or outrageous conduct” was present. More recently, however, Tax Court judges have expressed concerns about the inadequacy of the tariff. These concerns have led the court to adopt a “principled” approach to costs, similar to that used in modern general civil litigation, by applying specific factors set out in rule 147(3) (“the 147(3) factors”) rather than relying solely on the tariff.

This article reviews the recent jurisprudence relating to costs awards at the Tax Court, with a particular focus on the manner in which the 147(3) factors have been interpreted and how the application of those factors could evolve to further promote the new objectives of costs awards recognized in general civil litigation. The authors argue that costs awards by the Tax Court could be used more effectively to promote the efficient and orderly administration of justice by (1) taking into consideration the unique features of a tax dispute, and (2) placing additional emphasis on the purposes of costs awards adopted in general civil litigation.

KEYWORDS: COSTS ■ AWARDS ■ TAX COURT OF CANADA ■ TAX LITIGATION ■ CIVIL LITIGATION ■ JURISPRUDENCE

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INTRODUCTION

Traditionally, in a general civil litigation context, costs have been awarded only to partially indemnify a party for legal and other costs incurred to defend an unproven claim or pursue a valid legal right. However, more recently, Canadian courts have recognized that the traditional view of costs is outdated. Instead, in addition to the partial indemnification objective, courts now use costs as a means to influence the way the parties conduct themselves and to promote efficient administration of the justice system by, for example, encouraging settlement and deterring abuse of the court’s process. Modern jurisprudence has recognized that courts generally have broad discretion in awarding costs and that various factors militate in favour of increased awards to achieve these new objectives.

Costs awards at the Tax Court of Canada have generally followed a similar path of development, but at a slower pace. Historically, the Tax Court took a rigid approach to awarding costs. In general, costs were awarded only in accordance with

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1 See, for example, *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCR 71, at paragraphs 19-20; and *Somers v. Fournier*, 2002 CanLII 45001 (ONCA), at paragraphs 16-17.

2 *Okanagan*, supra note 1, at paragraphs 22-26.

3 Ibid., at paragraph 25; and *Somers*, supra note 1, at paragraph 16.
the tariff annexed to the Tax Court of Canada Rules (General Procedure) unless “reprehensible, scandalous, or outrageous conduct” was present. More recently, however, Tax Court judges have expressed concerns about the inadequacy of the tariff. These concerns have led the court to adopt an approach to costs similar to that used in modern general civil litigation. In Velcro, Rossiter ACJ made it clear that exceptional circumstances are not required to justify a deviation from the tariff. Rather, he emphasized the court’s broad authority to award costs, and observed that such awards should be made on a principled basis after consideration of the 11 factors set out in rule 147(3) (“the 147(3) factors”). The tariff is merely a reference point, and the court is under no obligation to refer to it in awarding costs.

With the adoption of this new approach to awarding costs by the Tax Court, the manner in which the 147(3) factors are interpreted and taken into account has become increasingly important. While costs awards are generally fact-dependent, a review of the recent costs awards jurisprudence provides useful guidance on the court’s application of the 147(3) factors and the weight given to those factors.

Despite the development of the Tax Court awarding costs on a principled basis, tax practitioners should consider whether the court’s approach could evolve to further promote the new objectives of costs awards articulated by the Supreme Court of Canada (discussed in the next section). An approach that recognizes the unique aspects of tax litigation could promote the more efficient resolution of tax disputes.

**THE NEW APPROACH TO COSTS AWARDS**

The traditional objective of a costs award was to indemnify the successful party for the legal and other costs incurred to defend an unproven claim or pursue a valid legal right. In Okanagan, the Supreme Court of Canada recognized that the objective of costs awards is no longer focused solely on the indemnification of the successful party, and in some circumstances it is not even the primary purpose. Instead, courts now use costs awards more broadly as an “instrument of policy” to

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4 SOR/90-688a, as amended (herein referred to as “the rules”), schedule II. Unless otherwise stated, references to rules in this article are to these rules.

5 See Velcro Canada Inc. v. The Queen, 2012 TCC 273, at paragraph 6, citing Young v. Young, [1993] 4 SCR 3. See also IPAX Canada Ltd. v. The Queen, 2011 TCC 50.

6 Velcro, supra note 5, at paragraph 6.

7 Ibid., at paragraphs 8-9.

8 Ibid., at paragraph 10.

9 For example, using costs awards to further encourage settlement and to discourage unreasonable conduct.

10 See the discussion below under the heading “The Use of Costs Awards To Move Toward a More Efficient Tax Dispute Resolution System.”

11 Okanagan, supra note 1, at paragraph 22.
promote the “efficient and orderly administration of justice.”  

In particular, costs awards may be used to encourage settlement and to discourage conduct that is unreasonable or vexatious, or that increases the duration and cost of the litigation process.  

The use of costs awards is not limited to achieving the new purposes emphasized in Okanagan. Canadian jurisprudence has held that the principles articulated in Okanagan are not confined to the specific situations referred to in that case and are merely illustrative of the modern approach to costs. In view of this judicial acknowledgment, the new approach to costs is likely to further evolve to advance and encourage the efficient and orderly administration of justice. In the general civil litigation context, arguably there is now an emphasis on using costs as a means to facilitate access to justice by awarding interim costs, taking into consideration any significant disparity of financial resources between the parties, and generally trying to discourage the commencement or continuance of doubtful cases or defences. In the Tax Court context, it is reasonable to expect that the court will continue, or should evolve, to recognize similar policy objectives and also other considerations that exist only in the realm of tax litigation.

THE 147(3) FACTORS

Rule 147(3) sets out 11 factors that the court may consider in awarding costs. In this section, we provide an overview of how each of the 147(3) factors has been interpreted and applied by Tax Court judges in determining whether an award of costs in excess of the tariff is warranted. We also discuss how each factor can be applied to promote the efficient and orderly administration of justice in a tax litigation context.

The Result of the Proceeding (Rule 147(3)(a))

Interpretation of the Factor

In circumstances where a party to a Tax Court proceeding is wholly successful, it would be reasonable to assume that rule 147(3)(a) generally should weigh in favour of an increased award of costs. However, complete success by a party, in and of itself, is not a guarantee of an increased costs award. Some jurisprudence has viewed the

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12 Ibid., at paragraph 25.
13 Ibid., at paragraphs 22-25.
14 Sawridge Band v. Canada, 2006 FC 656, at paragraph 58.
15 See, for example, Okanagan, supra note 1.
16 See, for example, Currie v. Taylor, 2013 BCSC 1071, at paragraphs 65-67.
17 See, for example, Catalyst Paper Corporation v. Companhia de Navegação Norsul, 2009 BCCA 16, at paragraph 16.
18 See, for example, Walsh v. The Queen, 2010 TCC 125, at paragraph 5.
result of the proceeding as justifying an increased award of costs only if the possibil-
ity existed that a party might have had mixed success in the proceeding. That is, if
the proceeding involved only one issue that was black or white, such that there was
no opportunity for partial success, the fact that a party succeeded on that issue
should not justify an increased costs award. However, if a proceeding involved a
number of different issues and a party has mixed results, the degree of the party’s
overall success will be relevant in awarding costs.\footnote{See, for example, \textit{2078970 Ontario Inc. v. The Queen}, 2018 TCC 214, at paragraphs 9–11. The
approach articulated in \textit{2078970 Ontario} was supported in \textit{Loblaw Financial Holdings Inc. v. The
Queen}, 2018 TCC 263, at paragraph 7, and \textit{ Cameco Corporation v. The Queen}, 2019 TCC 92, at
paragraph 11; under appeal to the Federal Court of Appeal.}

Other jurisprudence has instead viewed success in the proceeding “more as a
gatekeeping factor than a significant reason itself for increased costs.”\footnote{\textit{Daishowa-Marubeni International Ltd. v. The Queen}, 2013 TCC 275, at paragraph 7. This
decision was made by the Tax Court following the Supreme Court of Canada’s direction that
the taxpayer was entitled to costs throughout the appeals proceedings from the lowest court up
to and including the highest court, where the taxpayer was wholly successful.} In other
words, success at trial generally is a prerequisite for a litigant to be entitled to costs,
but it is the application of the other 147(3) factors that will determine the quantum
of the costs award. Accordingly, when a litigant is wholly successful, a closer exam-
ination of the other factors in rule 147(3) is required to determine whether an
award in excess of the tariff is justified.\footnote{\textit{Daishowa-Marubeni}, supra note 20, at paragraph 7.}

There can be circumstances where the other 147(3) factors may outweigh a liti-
gant’s success at trial and lead the court to conclude that no costs will be awarded.
For example, in \textit{Benedict},\footnote{\textit{Benedict v. The Queen}, 2012 TCC 174.} the court refused to award costs to the taxpayer, even
though he had been wholly successful at trial, on the basis that the matter in dispute
might have been settled without a hearing if the taxpayer had provided supporting
documentation in a timely manner, rather than shortly before the hearing
commenced.\footnote{ibid., at paragraph 24. See also \textit{Heaney v. The Queen}, 2011 TCC 429, where a taxpayer was
awarded no costs despite being partially successful. The Tax Court was critical of the taxpayer’s
decision to call a witness who purported to remember a payment to the Canada Revenue
Agency (CRA) that clearly had never been made. The court held that such conduct
unnecessarily prolonged the trial and added complexity to the appeal.}

Given the complexities of tax law and the fact-driven nature of most tax appeals,
it is common for multiple issues to be before the court. As a result, parties are often
only partially successful at trial. Case law has considered the threshold of what con-
stitutes “success” and the related costs award consequences. In particular,
jurisprudence related to rule 147(3)(a) has held that success should not be deter-
mained on the basis of the outcome of each individual issue or argument, and costs
should not be allocated on such bases. Rather, in the context of partial success, it is the outcome of the proceeding as it relates to the overall amount in issue that determines whether and how costs will be awarded. If the success of the proceeding is divided, such that one party did not obtain a better outcome than the other relative to the overall amount in issue, an award of costs may not be warranted absent compelling factors in favour of an award.

Alignment with the New Approach

The concept of indemnifying the successful party to a proceeding has traditionally been viewed as the most fundamental principle in the awarding of costs. As the Tax Court’s approach to costs awards evolves, it is possible that the indemnification objective may be given less weight in favour of other more “modern” objectives, such as discouraging unreasonable conduct. However, in our view, the result of the proceeding should remain as the gatekeeper to an award of costs, meaning that this factor should determine a litigant’s entitlement to costs, but it should not affect the quantum of the award. Rather, the amount of the award should be determined on the basis of the other 147(3) factors. In this way, the Tax Court’s approach to costs may be augmented without jeopardizing the traditional objective of indemnifying the successful party.

The Amounts in Issue (Rule 147(3)(b))

Interpretation of the Factor

There appear to be several conflicting interpretations of the amounts in issue factor in the jurisprudence. In some cases, this is considered to be a leading factor in determining costs awards because the amounts in issue often affect the time and resources that a party will dedicate to a tax dispute. In particular, where the amounts in issue are large, the legal issues and facts are often complex and may result in lengthier

24 In Kruger Incorporated v. The Queen, 2016 TCC 14; rev’d 2016 FCA 186, the Tax Court recognized that there was no rule that prohibited the court from distributing costs between the parties on the basis of the outcome of particular arguments; the court therefore awarded costs to each party on a distributive basis reflecting each party’s degree of success. However, the taxpayer was wholly successful on appeal and was awarded costs in respect of both court hearings. The decision of the Federal Court of Appeal in effect reversed the prior distributive costs award; however, the court did not comment on the Tax Court’s distributive approach.

25 See, for example, Rio Tinto Alcan Inc. v. The Queen, 2016 TCC 258, at paragraph 8; Henco Industries Limited v. The Queen, 2014 TCC 278, at paragraph 4; Klemen v. The Queen, 2014 TCC 369, at paragraphs 9-11; Ottevon v. The Queen, 2014 TCC 362, at paragraphs 14-15; SWS Communication Inc. v. The Queen, 2012 TCC 114; and General Electric Capital Canada Inc. v. The Queen, 2010 TCC 490, at paragraph 31.

26 See, for example, Pirart v. The Queen, 2016 TCC 291.

27 Mark Orkin, The Law of Costs, 2d ed., vol. 1 (Aurora, ON: Canada Law Book) (looseleaf), at 2-62.6.
proceedings, thus justifying an increased award. On the other hand, at least one Tax Court decision has held that the amounts in issue are merely one factor to be considered among all of the factors in rule 147(3).

The jurisprudence to date is unclear on how this factor should be interpreted and applied. Some decisions have awarded increased costs solely on the basis of the amounts in issue, whereas other decisions have held that the amounts in issue must be contextualized. For example, in *Daishowa*, Miller J held that the $14 million of tax in issue did not justify an award of increased costs when it was placed in context. That context included the following facts: (1) the amount of tax in issue was approximately 6 percent of the proceeds of the transaction in issue at trial; (2) the tax consequences resulting from the transaction were minimal; and (3) the appellant operated a multimillion-dollar business. In arriving at his conclusion, Miller J expressed his reservations about the application of the amounts in issue factor to large corporations: “So, what is a significant amount in this regard—a small business facing a $100,000 tax bill that could bankrupt it, or a large multi-national organization, bringing a case based on principle, regardless of the numbers?”

Counsel in at least one case subsequent to *Daishowa* has attempted to rely on Miller J’s comments on rule 147(3)(b) to argue that a large corporate taxpayer should not be entitled to increased costs. In *Invesco*, the Crown, citing *Daishowa*, asked Campbell J to take judicial notice of the fact that the amount of goods and services tax (GST), interest, and penalties in issue (a total of approximately $24 million) was nominal compared to the overall revenue and assets of the appellant and, as a result, increased costs were not justified. Relying in part on the interpretation of rule 147(3)(b) in *Daishowa*, he concluded that this factor only slightly favoured increased costs to the taxpayer after the amounts in issue were considered in context. However, he appears to have tempered the *Daishowa* observation about the application of rule 147(3)(b) to large corporations with the following statement: “I do not believe that the size of the corporation alone can be used to completely undermine the significance of an assessment of almost $25,000,000 in GST and approximately

28 See, for example, *Kruger*, supra note 24 (TCC), at paragraphs 14-15.
29 *Otteson*, supra note 25.
30 See, for example, *Repsol Canada Ltd. v. The Queen*, 2015 TCC 154, at paragraph 13; *Standard Life Assurance Company of Canada v. The Queen*, 2015 TCC 138, at paragraph 16; and *General Electric*, supra note 25, at paragraph 32.
31 See, for example, *Alta Energy Luxembourg SARL v. The Queen*, 2018 TCC 235, at paragraphs 16-18, where the court stated that the amount in issue must be contextualized, but that it is not appropriate to contextualize an amount by looking beyond the taxpayer to its investors or shareholders.
32 *Daishowa*, supra note 20.
33 Ibid., at paragraph 8.
34 Ibid.
35 *Invesco Canada Ltd. v. The Queen*, 2015 TCC 92, at paragraph 10.

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$10,000,000 in interest and penalties.”  

Additionally, Campbell J made it clear that if the amounts in issue are of particular importance to a taxpayer, insofar as they influence the manner in which it may conduct its business in the future, then increased costs could be justified under other factors in rule 147(3). 

On the basis of the current jurisprudence, it is unclear how the amounts in issue factor should be interpreted and applied in any given circumstance. Given the conflicting views outlined above, there is an opportunity for a winning party to argue in favour of an increased costs award either solely on the basis of the amount in issue or on the basis of contextualization of the amount in issue relative to the party’s business or circumstances. However, it is arguable that where a large amount is in issue, the more reasonable approach is for the analysis to focus more on other 147(3) factors that are likely to be inherent in such a case. For example, generally a case where a large amount is in issue is likely to involve a greater volume of work than a case where a smaller amount is in dispute. Accordingly, in our view, a submission on costs should not focus too heavily on the amounts in issue in attempting to justify an increased costs award, but instead this factor should be used to inform or complement the application of other 147(3) factors.

Alignment with the New Approach

While the amount in issue in a particular case may support an argument for an increased costs award, placing too much emphasis on this factor may risk alienating the consideration of other 147(3) factors and may undermine the new objectives of costs awards. The amounts in issue should help to inform the application of other 147(3) factors but should not dictate the quantum of a costs award. For example, in a circumstance where the disputed amounts are relatively insignificant, a significant costs award against the losing party should not be precluded if that party engaged in unreasonable conduct. In that regard, costs awards can be a useful policy tool to discourage inappropriate conduct and deter parties from advancing dubious claims.

The Importance of the Issues (Rule 147(3)(c))

Interpretation of the Factor

It is reasonable to assume that a taxpayer who appeals a reassessment to the Tax Court would consider the issues before the court to be of significant importance. However, the court has indicated that a broader perspective is required to determine the application of this factor. In particular, the resolution of the issues must

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36 Ibid., at paragraph 11.
37 Ibid.
38 C. Hunter, “Costs Immunity: Banishing the ‘Bane’ of Costs from Public Interest Litigation” (2013), The Advocate, vol. 7, part 1, at 199. Martin Twigg, “Costs Immunity: Banishing the ‘Bane’ of Costs from Public Interest Litigation” (2013) 36:1 Dalhousie Law Journal 193-238, at 199.
39 Grimes v. The Queen, 2017 TCC 113, at paragraph 28; and Klemen, supra note 25, at paragraph 18.
have some significance to “the development of tax law, to the public interest or to a broad number of people”\textsuperscript{40} for this factor to favour an increased costs award. Where a court considers for the first time the interpretation of a particular provision,\textsuperscript{41} a case from a higher court,\textsuperscript{42} or the application of a legal test in a novel context,\textsuperscript{43} an increased costs award may be justified. Similarly, a high level of interest in a case among stakeholders in a particular industry\textsuperscript{44} or members of the national or international tax community\textsuperscript{45} could favour an increased award. For example, in \textit{General Electric}, Hogan J considered the fact that the trial decision was the subject of a large number of articles published in Canada and around the world to be an indication of the importance of the transfer-pricing issues addressed in the case.\textsuperscript{46}

Other indicators that an issue may be sufficiently important to justify an increased costs award have been held to include the following:

1. The matter in dispute gave the court an opportunity to provide guidance on when an uncommon result may be obtained, such as determining whether an amount is a non-taxable receipt.\textsuperscript{47}
2. The case was concerned with the interpretation of contracts.\textsuperscript{48}
3. The issue warranted a considerable investment of time by counsel in preparing the case.\textsuperscript{49}
4. Novel arguments presented for the court’s consideration were viewed as having precedential value for other similar cases.\textsuperscript{50}

\textsuperscript{40} Wolsey \textit{v. The Queen}, 2017 TCC 34, at paragraph 6. See also MacDonald \textit{v. The Queen}, 2018 TCC 55; rev’d on a substantive issue 2018 FCA 128, leave to appeal to the Supreme Court of Canada granted March 21, 2019. As the Tax Court observed in MacDonald, “[i]mportance is not viewed from the perspective of the Appellant but from a legal point of view”: ibid. (TCC), at paragraph 76.

\textsuperscript{41} Standard Life, supra note 30, at paragraph 16; and \textit{General Electric}, supra note 25, at paragraph 32.

\textsuperscript{42} Invesco, supra note 35, at paragraph 15; and Vékero, supra note 5, at paragraph 24.

\textsuperscript{43} Vékero, supra note 5, at paragraph 24.

\textsuperscript{44} See, for example, \textit{CIT Group Securities (Canada) Inc. v. The Queen}, 2017 TCC 86, at paragraph 12; Invesco, supra note 35, at paragraph 14; \textit{Standard Life}, supra note 30, at paragraph 16; and Daishowa, supra note 20, at paragraph 15.

\textsuperscript{45} Vékero, supra note 5, at paragraph 24.

\textsuperscript{46} General Electric, supra note 25, at paragraph 32.

\textsuperscript{47} See, for example, \textit{Henco}, supra note 25, at paragraph 9. In \textit{Henco}, the court weighed the fact, inter alia, that it is rare for a receipt to qualify as a non-taxable receipt as an indication that the issue in question was important.

\textsuperscript{48} Ibid., at paragraph 10.

\textsuperscript{49} Ibid., at paragraph 11.

\textsuperscript{50} Otteson, supra note 25, at paragraph 21.
5. The case involved the application of the general anti-avoidance rule (GAAR).\textsuperscript{51}

Not surprisingly, a decision that is based primarily on findings of fact generally should not be considered to weigh in favour of an increased costs award.\textsuperscript{52} Similarly, the need to use a textual, contextual, and purposive interpretation to understand complicated provisions of the Income Tax Act,\textsuperscript{53} in and of itself, should not increase the importance of an issue before the court, because “it is the role of [the] Court to interpret complex legislation.”\textsuperscript{54}

\textit{Alignment with the New Approach}

Consideration of the importance of the issue may present the Tax Court with an opportunity to apply broader principles of access to justice. Where the issue is of significance to Canadian taxpayers as whole, the court should consider moving beyond traditional principles in the awarding of costs. This approach has been recognized as important in other litigation contexts, including civil public interest litigation.\textsuperscript{55} The decision on the awarding of costs can be used to ensure that a particular taxpayer does not bear the entire financial burden of litigating an issue of acknowledged societal interest, and can provide some comfort to other taxpayers who may otherwise be deterred from pursuing their claim. The court could rely on this factor, in appropriate circumstances, to award much higher costs to a successful taxpayer or to limit an award of costs against an unsuccessful taxpayer.\textsuperscript{56}

\textit{Any Offer of Settlement Made in Writing (Rule 147(3)(d))}

\textit{Interpretation of the Factor}

Settlement offers play a large role in how costs are awarded. The prospect of settling a tax appeal prior to trial, and consequently reducing the related legal fees, encourages parties to “evaluate the strength of their respective cases and to consider settlement at an early stage.”\textsuperscript{57} Rules 147(3.1) through (8) (“the settlement

\footnotesize{51 \textit{Spruce Credit Union v. The Queen}, 2014 TCC 42, at paragraph 38. GAAR is contained in section 245 of the Income Tax Act, RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as “the ITA”).}

\footnotesize{52 \textit{ACSI EHR (Electronic Health Record) Inc. v. The Queen}, 2016 TCC 50, at paragraph 13.}

\footnotesize{53 ITA, supra note 51.}

\footnotesize{54 \textit{Repsol}, supra note 30, at paragraph 13.}

\footnotesize{55 \textit{Okanagan}, supra note 1, at paragraphs 27-28.}

\footnotesize{56 In \textit{B. (R.) v. Children’s Aid Society of Metropolitan Toronto}, [1995] 1 SCR 315, the Supreme Court of Canada recognized that costs could be ordered against the successful party. This decision was cited with approval in \textit{Okanagan}, supra note 1, at paragraph 30.}

\footnotesize{57 \textit{Ike Enterprises Inc. v. The Queen}, 2017 TCC 160, at paragraph 15.}
rules”) essentially58 establish a default entitlement of substantial indemnity (defined as 80 percent of solicitor and client costs)59 after the date of a settlement offer where the party who has made the offer goes on to obtain a judgment as favourable as, or more favourable than, the terms of the offer. Settlement offers are also considered to be important in the awarding of costs apart from the application of the settlement rules. Generally, settlement offers are given considerable weight in determining to whom and in what quantum costs should be awarded.

Although a settlement offer is one of the more important factors,60 it remains only one among many, and it cannot be considered in isolation. Nevertheless, a settlement offer can be the focal point of a costs award.61 In addition to emphasizing the importance of encouraging settlements, the Tax Court has held that

1. a settlement offer that cannot be agreed to and that contains conditions that are not under appeal should not affect a costs award;62
2. the absence of a settlement offer may operate as a negative factor and result in a lower costs award than may otherwise be granted;63 and
3. a settlement offer must contain an element of compromise.64

Where the settlement rules do not apply, a settlement offer can still be recognized and relied on by the court in awarding costs in excess of the tariff. If a settlement offer is made but is not equal to or better than the result at trial, the court may nevertheless award increased costs to the successful party.65 Further, where the settlement rules are triggered, this factor may remain relevant in determining the costs that should be awarded for the time leading up to the date of the settlement offer.66 That view, however, can be contrasted with Miller J’s comments in Repsol noting that this factor is not relevant where there is a settlement that qualifies for the settlement rules.67 Thus, it is not yet clear how this factor interacts with the settlement rules, but it should remain relevant given the court’s broad discretion in awarding costs.

58 A detailed discussion of the settlement rules is beyond the scope of this article.
59 Rule 147(3.5).
60 Barrington Lane Developments Limited v. The Queen, 2010 TCC 476, at paragraph 13; and Daishowa, supra note 20, at paragraph 18.
61 Potash Corporation of Saskatchewan Inc. v. Canada, 2012 TCC 235, at paragraph 53.
62 Pirart, supra note 26, at paragraphs 15-23. The settlement offer at issue in this case was made on the Thursday prior to the commencement of the trial on the following Monday.
63 Rio Tinto, supra note 25, at paragraph 19. The court acknowledged that this finding did not fall strictly within the settlement rules, which determine the costs consequences where a settlement offer is rejected.
64 McKenzie v. The Queen, 2012 TCC 329, at paragraph 11.
65 Klemen, supra note 25, at paragraphs 20-23.
66 See, for example, Standard Life, supra note 30, at paragraph 16.
67 Repsol, supra note 30, at paragraph 13.
Alignment with the New Approach

When the settlement rules were introduced, rule 147(3)(d) was not removed; accordingly, it is reasonable to assume that this factor continues to be significant and should be given weight when it is appropriate to do so. Despite Miller J’s comments in Repsol, a settlement offer should be a relevant consideration in determining the quantum of a costs award up to the date of the settlement offer (after which the settlement rules may apply). The existence of an offer should weigh in favour of a higher costs award amount for the pre-settlement offer period.

Further, even settlement offers that do not qualify for the settlement rules should play a role in determining costs. Where a settlement offer is made and the offeror ultimately obtains a judgment less favourable than the terms of the offer, in certain circumstances the offer should be taken into account. Consider a situation where the offeror is the successful party at trial but receives a costs award that is slightly less than the proposed settlement amount. Perhaps the difference is such that the resources required to take the matter to trial are not justified. This is a more flexible approach that recognizes the resources and other inputs required for tax litigation in the context of the offer and the outcome. Assume, for example, that the Canada Revenue Agency (CRA) assesses the taxpayer for $1,000 and the taxpayer makes an offer to settle for $100. The Crown does not accept the offer, and the dispute proceeds to trial. At trial, the taxpayer is found liable for $125. In this circumstance, the settlement offer would not result in a substantial indemnity settlement under the settlement rules. However, the offer is much closer to the final result than the amount originally assessed by the CRA. Although the taxpayer will not be entitled to a substantial indemnity, arguably she should not be limited to costs in accordance with the tariff. Such a situation illustrates why settlement offers that fall outside the settlement rules should be relevant in awarding costs. Assessing the merits of a settlement offer is not a science, and where there is a successful outcome relative to the reassessment under appeal, the offeror should, absent other mitigating factors, receive a higher costs award.

The Volume of Work (Rule 147(3)(e))

Interpretation of the Factor

Determining the amount of work that counsel has undertaken in preparing for and engaging in the conduct of the trial is largely a subjective and individualized process.68 There is no regular standard by which a court can assess a party’s level of work. However, there is a limit to the volume of work that one side can expect the other to pay for.69

In determining whether this factor justifies an increased costs award, the jurisprudence indicates that the court generally gauges the volume of work that was

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68 As noted in Henco, supra note 25, at paragraph 13, measuring the volume of work is “more art than science.”

69 Daishowa, supra note 20, at paragraph 22.
“necessary” in the context of the other 147(3) factors as well as additional considerations, including the following:

1. the number of issues before the court;
2. the novelty of the arguments made at trial;
3. the number of documents and authorities produced at trial;
4. the number of taxation periods at issue;
5. the need to translate documents;
6. the use of and need for experts;
7. the interpretation of foreign law;
8. the need to research economic policy and legislative history; and
9. a significant increase in the volume of work owing to the Crown’s reliance on an allegation of sham.

The particular reason or reasons for an increased volume of work can validate or neutralize the weight given to this factor in determining whether increased costs are justified. For example, in Klemen, the volume of work was held not to weigh in favour of increased costs because the amount of work required was increased by the taxpayer’s lack of documentation and poor communication with his counsel. Similarly, in Ford Motor Company, the Crown’s failure to file written submissions, as it had committed to do in a case management conference, caused the taxpayer to be prepared to address all possible arguments that could have resulted from a notice of motion, regardless of the likelihood that those arguments would be raised. The court held that this failure on the part of the Crown lengthened the proceeding and weighed in favour of increased costs.

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70 See, for example, Grimes, supra note 39, at paragraphs 32-38; Repsol, supra note 30, at paragraph 13; and Velero, supra note 5, at paragraph 24.
71 Standard Life, supra note 30, at paragraph 16.
72 Otteson, supra note 25, at paragraph 24.
73 Standard Life, supra note 30, at paragraph 16; and Invesco, supra note 35, at paragraph 17.
74 Invesco, supra note 35, at paragraph 17.
75 Sommerer v. The Queen, 2011 TCC 212, as referenced in Daishowa, supra note 20, at paragraph 23.
76 Grimes, supra note 39, at paragraph 34; Repsol, supra note 30, at paragraph 13; and Sommerer, supra note 75.
77 Sommerer, supra note 75, as referenced in Daishowa, supra note 20, at paragraph 23.
78 Repsol, supra note 30, at paragraph 13.
79 Cameco, supra note 19, at paragraph 26.
80 Klemen, supra note 25, at paragraph 25.
81 Ford Motor Company of Canada Limited v. The Queen, 2015 TCC 185, at paragraphs 18-19.
82 Ibid., at paragraph 19.
However, where the reason for an increased workload is the result of general litigation tactics employed by one side, it is unlikely that such considerations will weigh in favour of increased costs. In *Henco*, the taxpayer argued that the volume of work was significant as a result of the Crown “not agreeing to allow extrinsic evidence, not conducting a more in depth audit, refusing to produce certain documents and refusing to admit press releases.” 83 Such factors were not given any weight in the court’s conclusion that the volume of work was considerable. Instead, the court stated that such tactics “are within the normal thrust and parry of litigation.” 84

**Alignment with the New Approach**

Rule 147(3)(e) cannot be considered in isolation. An increased volume of work logically increases the costs incurred by a litigant. However, placing too much weight on the volume of the workload could result in a litigant being rewarded for redundant or even unnecessary work. Additionally, not all work incurred by a party should favour a higher costs award. Putting undue weight on this factor could result in the court spending more time trying to discern how much of counsel’s work was necessary and not redundant. Such an exercise could impose an additional burden on a judicial system that is already under strain. Ultimately, a particularly large volume of work should inform a costs award, but the decision should be balanced by the court’s understanding of the amount of work that is reasonable in the circumstances.

**The Complexity of the Issues (Rule 147(3)(f))**

**Interpretation of the Factor**

Under the traditional approach, the Tax Court generally gave little, if any, consideration to the complexity of the issues as a factor in the awarding of costs. As Bowman J stated in *Continental Bank of Canada*, complexity and specialization are generally present in any tax litigation. 85 Therefore, there appeared to be no justification for awarding increased costs on this basis.

As noted above, the Tax Court no longer takes such a rigid approach in awarding costs. It now recognizes the impact that the complexity of an issue can have on the costs incurred by a party. 86 This factor acknowledges that complex appeals often involve more documentation, a longer discovery process, and more time to prepare for trial than is typical in simpler tax cases. 87

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83 *Henco*, supra note 25, at paragraph 14.
84 Ibid.
85 *Continental Bank of Canada v. The Queen*, [1994] TCJ no. 863, at paragraph 9.
86 *Blackburn Radio Inc. v. The Queen*, 2013 TCC 98, at paragraphs 14-15.
87 See, for example, *Invesco*, supra note 35, at paragraph 17.
Because tax appeals are often fact-driven, it can be difficult to predict how the Tax Court will characterize the complexity of an issue in a particular circumstance. However, several general principles can be distilled from the jurisprudence. For example, although an issue may be novel or unique, that characterization, in and of itself, does not necessarily mean that the issue is complex. Nevertheless, in the absence of prior precedential decisions on an issue, the court may be inclined to find that the issue is complex. In most cases, the court will look to a number of considerations to determine the complexity of the issue. Issues may be characterized as complex where they require the court to consider the evidence of experts from a variety of specialized fields, the evolution of an area of law or economic policy, or an interpretation of certain legislation that requires a textual, contextual, and purposive analysis. Moreover, even when the issues may not be complex, an increased award of costs may be justified in circumstances where the facts are complex. For example, in Velcro, determining the true beneficial owner of certain royalty payments was a relatively straightforward issue; however, the court gave some weight to this factor because the case involved various complex agreements, all of which contained provisions that could affect the determination of who was the beneficial owner of the royalties.

In recent years, the court has commented on the general degree of complexity of a number of issues, including the following:

1. Capital versus income is not unduly complicated.
2. The family farm partnership rules involve some complexity, even considered in the context of straightforward facts.
3. The characterization of a payment and the determination of the related income tax consequences, such as the deductibility of a dividend, are quite complex.

88 H.B. Barton Trucking Ltd. v. The Queen, 2009 TCC 472, at paragraph 7; and Jolly Farmer Products Inc. v. The Queen, 2008 TCC 693.
89 General Electric, supra note 25, at paragraph 34.
90 Ibid., at paragraph 34.
91 Spruce Credit Union, supra note 51, at paragraph 45.
92 Repsol, supra note 30, at paragraph 13.
93 Standard Life, supra note 30, at paragraph 16.
94 Velcro, supra note 5, at paragraphs 24 and 28.
95 Henco, supra note 25, at paragraph 7.
96 ITA subsections 110.6(1), (2), and (3).
97 Otteson, supra note 25, at paragraphs 25-26.
98 Spruce Credit Union, supra note 51, at paragraph 45. The additional complexity of this issue was partly attributable to the Crown’s argument that an amount legally declared and paid as a dividend was not a dividend for the purposes of the ITA.
4. The interpretation of the regulations governing certain capital cost allowance classes can be complex.  

5. The interpretation of transfer-pricing provisions of the ITA (which had not previously been interpreted) and their application to highly factual circumstances (which resulted in 65 days of evidence and involved the reports and testimony of eight expert witnesses) have been characterized as being complex.

**Alignment with the New Approach**

Complexity of the issues should continue to be given significant weight in awarding costs. Defining complexity will be difficult and subjective unless there is a clearer conceptualization from the Tax Court as to what constitutes a complex legal issue. Until then, complexity will be, to some extent, in the eye of the beholder (notably, the judge hearing the case). It does, however, seem clear that this factor should take into account both complex issues of legal interpretation and complex facts.

**The Conduct of Any Party That Unnecessarily Affected the Duration of the Proceeding (Rule 147(3)(g))**

**Interpretation of the Factor**

Within the overall trend of awarding costs in excess of the tariff on the basis of the 147(3) factors, a general theme appears to have emerged in recent years, as evidenced by cases in which the Tax Court has placed significant weight on the conduct of the parties. The court has specifically acknowledged that costs are “an important tool in the hands of the court to influence the way the parties conduct themselves and to prevent abuse of the court’s process.” However, the court has also acknowledged that a party’s conduct should be clearly unreasonable before this factor is taken into account in the awarding of costs.

While the determination of what is clearly unreasonable depends on the context and the facts of each case, the jurisprudence that has considered this factor has provided some helpful guidance as to what may or may not cross the threshold of reasonability. For example, raising an argument at trial that the court ultimately determines to be unsuccessful generally should not equate to unreasonable conduct, nor should the failure to concede an issue, in and of itself, be unreasonable.

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99 Repsol, supra note 30, at paragraph 13.

100 Cameco, supra note 19, at paragraph 28.

101 See, for example, Ford Motor Company, supra note 81; and Standard Life, supra note 30.

102 See Elbadawi v. The Queen, 2014 TCC 363, at paragraph 9, quoting Orkin, supra note 27, at 2-1; and Douglas Zeller and Leon Paroian Trustees of the Estate of Margorie Zeller v. The Queen, 2009 TCC 135, at paragraph 8.

103 Henco, supra note 25, at paragraph 20.

104 Repsol, supra note 30, at paragraph 13; Invesco, supra note 35, at paragraph 19; and Klemen, supra note 25, at paragraphs 30-31.
Similarly, “procedural wrangling and [common] litigation tactics,” such as bringing a motion at trial, refusing to settle a motion at trial, or refusing to answer certain questions during discovery, may not be viewed as unreasonable conduct resulting in unnecessary delay.

Conduct is, however, likely to cross the reasonability line when it involves deception, obstruction of the other party’s ability to argue its case, or an abuse of power. For example, in *Standard Life*, the taxpayer engaged in window dressing in an attempt to put itself in the position to argue that it met the legal test for carrying on a business. The court held that such conduct is “reprehensible and should be discouraged,” and weighed this factor in favour of increased costs. In *Bekesinski*, although the taxpayer was wholly successful, the court refused to award costs because the taxpayer’s counsel had cherry-picked several excerpts from a case to assert a blatantly incorrect proposition of law.

The court has also used costs awards to express its displeasure with an opportunistic and improper use of a provision against a taxpayer. In *Ford Motor Company*, the court relied, in part, on this factor to justify a costs award of approximately 63 percent of the taxpayer’s legal costs in successfully defending against the Crown’s motion to strike substantial portions of its amended notice of appeal pursuant to the specified corporation rules in the Excise Tax Act. The court justified the costs award in stating that the Crown was attempting to “use the specified corporation rules opportunistically as a sword and not as the protective shield they were intended and designed to be.”

It is well accepted that unreasonable conduct of the parties during a trial will be considered in awarding costs. Pre-trial conduct, on the other hand, may be taken into consideration only in exceptional circumstances when such conduct unduly and unnecessarily prolongs the trial. The determination of what qualifies as an exceptional circumstance is not altogether unclear.

105 *Golini v. The Queen*, 2016 TCC 247, at paragraph 22.
106 *CIT Group Securities*, supra note 44, at paragraph 22.
107 *Golini*, supra note 105, at paragraphs 21-22.
108 *Standard Life*, supra note 30.
109 Ibid., at paragraph 16.
110 *Bekesinski v. The Queen*, 2014 TCC 245.
111 Subsection 301(1.2) of the Excise Tax Act, RSC 1985, c. E-15, as amended (herein referred to as “the ETA”), regarding the contents of a notice of objection. These rules are similar to the large corporation rules in ITA subsection 165(1.11).
112 *Ford Motor Company*, supra note 81, at paragraph 21.
113 See, for example, *E.F. Anthony Merchant v. The Queen*, 2001 FCA 19, at paragraph 7; aff’d 98 DTC 1734 (TCC); *Canada v. Landry*, 2010 FCA 135, at paragraph 24; and *Canada v. Martin*, 2015 FCA 95, at paragraph 18.
Certain cases provide clear examples of pre-trial conduct that qualifies as “exceptional.” For example, in Merchant, the taxpayer refused to cooperate with the CRA auditor and would not provide receipts for expenses. The court held the taxpayer obstructed the CRA’s ability to perform the tax audit to the point that the merit of the taxpayer’s claim could not be properly verified. The result of the taxpayer’s conduct was that a trial that should have lasted one day took seven days, because the court was forced to use much of its time in discussing factual determinations that could easily have been resolved at the audit stage. As a result, the taxpayer’s pre-trial conduct significantly affected the manner in which the trial proceeded.

In Scavuzzo, the court awarded approximately 50 percent of the taxpayer’s legal costs, in part, because the CRA had obtained a jeopardy order prior to trial, authorizing it to collect the amount in dispute, and had used an affidavit that failed to disclose a key material fact that was adverse to the CRA’s position. The court regarded the manner in which this order was obtained as “high handed and oppressive,” stating that “[t]here can be no excuse for putting this elderly sick man [the taxpayer] through hell.”

In rare cases, such as Salaison Lévesque, it has been recognized that incorrect or imprecise tax audit work on the part of the CRA may be considered in awarding costs, particularly when a taxpayer has been cooperative in providing the CRA with all requested documentation. In Salaison Lévesque, the court observed that the quality of the CRA’s audit work must be impeccable because the CRA has significant human and financial resources, as well as the benefit of far-reaching enforcement powers, and the Crown clearly relies on the findings of the CRA auditor’s investigative work. The court went on to add:

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114 Merchant, supra note 113.
115 Scavuzzo v. The Queen, 2006 TCC 90.
116 In a typical situation, an individual taxpayer does not have to pay an amount in dispute when a notice of objection has been filed (ITA subsection 225.1(2)). However, pursuant to ITA subsection 225.2(2), if the CRA believes that its ability to collect the outstanding amounts will be jeopardized by waiting until the matter is resolved, the CRA can apply to the Federal Court, or to a provincial superior court, without notice to the taxpayer, for authorization to take collection action prior to the resolution of the matter if the judge is satisfied that there are reasonable grounds for doing so.
117 Scavuzzo, supra note 115, at paragraph 6.
118 Ibid., at paragraph 9.
119 Salaison Lévesque inc. v. The Queen, 2015 TCC 247. See also, for example, Walsh, supra note 18, at paragraphs 15-16; and Myrdan Investments Inc. v. The Queen, 2013 TCC 168. In Myrdan, the taxpayer went to some effort and expense to make documents relevant to the appeals available to the CRA auditor; however, the auditor chose not to review those materials, despite being aware of their existence, and did not respond to the taxpayer’s requests for guidance with respect to additional documents that could assist in the audit process.
With such authority and powers, it is essential and completely fundamental that the quality of the audit work be impeccable and above reproach. In other words, there is no reason or justification that can explain or support work that is incomplete, botched, or shaped by any kind of bias particularly since any reassessment may be the subject of severe penalties with interest.

A trial must not be a fishing expedition allowing auditors to validate their intuition and/or perception. A tax trial requires exorbitant fees and disbursements. That reality often results in dissuading a reasonable person with limited means from challenging a possibly unjustified assessment.120

Although there is some precedent for the Tax Court to consider unreasonable conduct at the audit stage, this interpretation should be considered in light of the Federal Court of Appeal’s decision in Martin.121 At trial, the Tax Court had awarded costs in excess of the tariff because it found that the CRA auditor had intentionally misled the taxpayer during an audit and had adopted inconsistent positions for different taxation years, and as a result of that conduct, the taxpayer had been forced to incur significant expenses to dispute the matter through the audit, objection, and trial stages.122 On appeal, the Federal Court of Appeal acknowledged that pre-trial conduct can be taken into consideration when such conduct unduly and unnecessarily prolongs the trial. However, the court stated that the discretion to consider pre-trial conduct must be exercised within the context of rule 147, which permits the Tax Court to determine the amount of costs of all parties to a “proceeding.”123 The term “proceeding” is specifically defined in rule 2 to mean “an appeal or reference.” With the context of that definition in mind, the Federal Court of Appeal held that the Tax Court had erred in allowing costs incurred at the objection stage to influence the costs award at trial because such costs were not incurred as part of the proceeding.124

While one might consider that the Martin decision narrows the scope of this factor when considering pre-trial conduct, it is unclear how the decision interacts with the other 147(3) factors that may be considered in awarding costs. In particular, rule 147(3)(j) permits the Tax Court to consider “any other matter relevant to the question of costs,” and, as discussed in further detail below, the related jurisprudence does not limit what the court may consider under that factor.

Alignment with the New Approach

One can expect that conduct of the parties will continue to be a focal point in costs awards. The Tax Court, however, may wish to clarify where the line will be drawn—

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120 Salaison Lévesque, supra note 119, at paragraphs 25-26.
121 Martin, supra note 113.
122 Martin v. The Queen, 2014 TCC 50, at paragraphs 16 and 18.
123 Martin, supra note 113, at paragraph 20.
124 Ibid., at paragraph 22.
for example, by more clearly articulating what constitutes unreasonable behaviour that will justify increased costs. Higher costs awards will not only sanction bad behaviour, but also serve as a deterrent that can be clearly understood by litigants and possibly have a positive influence on the conduct of the parties.

The Denial or the Neglect or Refusal of Any Party To Admit Anything That Should Have Been Admitted (Rule 147(3)(h))

Interpretation of the Factor

For rule 147(3)(h) to weigh in favour of increased costs, a party must have refused to admit something that was, at the time of the request to admit, clearly true. For example, in *Wolsey*, the court awarded costs against the taxpayer in excess of the tariff because the taxpayer denied receiving certain communications that he clearly had received. As a result, the Crown was forced to spend a significant amount of time at trial proving that the taxpayer had received such communications.

Unlike a question of fact, a failure to admit a matter that is a question of mixed fact and law generally should not be considered in determining whether this factor should weigh in favour of increased costs.

From a strategic perspective, a party may not want to admit a statement of fact where the court does not have the benefit of knowing the context in which it occurred. As stated in *RMM Canadian Enterprises*, generally speaking, once a fact is admitted, no additional evidence regarding that fact may be presented. For that reason, a party may believe that it may be more effective to call evidence than to agree to a bare statement of the fact in question. That decision is at the discretion of each party and is not one with which the court desires to interfere unless “the decision is patently unreasonable or made for some improper purpose.”

Alignment with the New Approach

Given the potential for this factor to unfairly prejudice litigants, it follows that it should justify higher costs only where the failure to admit a fact is patently unreasonable. Reducing the threshold for this factor to influence a costs award may result in modifying a litigant’s behaviour in a manner outside the policy rationale for costs. Litigants should continue to be guided by the pursuit of their best interests in the particular tax litigation and should not be expected to make unwarranted concessions out of concern that higher costs may be awarded against them.

125 *CIT Group Securities*, supra note 44, at paragraph 24.
126 *Wolsey*, supra note 40.
127 *CIT Group Securities*, supra note 44, at paragraph 24.
128 *RMM Canadian Enterprises Inc. et al. v. The Queen*, 97 DTC 420, at 421.
129 Ibid.
Whether Any Stage in the Proceeding Was Improper, Vexatious, or Unnecessary, or Taken Through Negligence, Mistake, or Excessive Caution (Rule 147(3)(i))

Interpretation of the Factor

What qualifies as an improper, vexatious, or unnecessary stage in a proceeding will often, but not always, overlap with other factors, such as the conduct of the parties. In *Ford Motor Company*, the Crown’s failure to follow through on its commitments to file written submissions, and its opportunistic use of the specified corporation rules, were considered under the factors in rules 147(3)(c) to (g) and given significant weight in the court’s award of increased costs against the Crown.130

Generally speaking, it should be relatively straightforward to identify a stage in a proceeding that is improper, vexatious, or unnecessary. A failure by a party to properly assess the merits of its case, including its theory of the case and the presence or absence of requisite facts, has been held not to cross the threshold for this factor to apply.131 Filing voluminous submissions and raising “all arguments that counsel reasonably believes may be relevant to the issues”132 also does not cross the required threshold.

Conversely, actions that are of a more egregious nature, or that show a lack of respect for the opposing side, the court, or its processes, may qualify as improper, vexatious, or unnecessary. The Crown’s indifference to compliance with its commitments from the case management conference in *Ford Motor Company* illustrates the kind of conduct that can trigger the application of this factor. Similarly, the taxpayer’s conduct in *Elbadawi* demonstrates the type of egregious conduct that a court will consider as improper, vexatious, or unnecessary.133 In that case, the taxpayer filed his notice of appeal late, missed deadlines to satisfy undertakings, adjourned a settlement conference, and filed a unilateral application for the time and place of hearing before rescheduling the conference. The court found that the taxpayer merely used the proceedings as a means by which he could gather facts to use in his statement of claim in a civil lawsuit against several CRA officials.

Alignment with the New Approach

In awarding costs, courts should consider promoting access to justice. Using costs to condemn improper, vexatious, or unnecessary actions could be an important tool to ensure that the court’s resources are not wasted, thus freeing up time for hearing legitimate appeals. Ensuring access to the Tax Court in a timely manner

130 *Ford Motor Company*, supra note 81. See the discussion in the text above at notes 81–82 and 111–112.

131 *O’Dwyer v. The Queen*, 2014 TCC 90, at paragraphs 22 and 24.

132 *CIT Group Securities*, supra note 44, at paragraph 25.

133 *Elbadawi*, supra note 102, at paragraphs 22 and 26.
breaks down at least one barrier to making the judicial system accessible to taxpayers wishing to assert legitimate challenges of tax reassessments.

**Whether the Expense of Having an Expert Witness Was Justified**

*(Rule 147(3)(i.1))*

**Interpretation of the Factor**

Expert fees may be considered in determining costs where the expert’s testimony is justified. In order for the expert fees to be justified, the work created by the expert must be of value to the court. For example, value to the court should exist where the expert provides assistance that is necessary for the court to determine an outcome, generally because of the complexity of the issues under appeal. However, even when experts add value to a proceeding, the court generally places constraints on how much weight this factor may be given in deciding whether to award increased costs. A successful party cannot expect the other party to contribute to its costs of calling an unjustifiable number of experts. Instead, the jurisprudence has held that the number of experts must be reasonable in the circumstances. Likewise, expert fees must be reasonable. This does not mean that the fees have to be consistent with the initial amount quoted. However, where there is a duplication of efforts by several experts, such fees will be discounted in determining an award of costs.

**Alignment with the New Approach**

One possible simple approach to this factor would be for the court to include a lump sum for all of the reasonable costs incurred for all necessary expert witnesses. This would align with the Tax Court’s approach to expert evidence—namely, that the role of the expert is to provide assistance to the court. Further, this would allow any unreasonable charges, such as first-class flights, to be discounted.

**Any Other Matter Relevant to Costs (Rule 147(3)(j))**

**Interpretation of the Factor**

Consistent with the court’s broad discretion to award costs in excess of the tariff, the court may consider any other matter relevant to the question of costs in making this determination. While there does not appear to be any limit to other considerations that the court may take into account in awarding costs, provided that the particular consideration is relevant to the appeal before the court, the recent jurisprudence

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134 Grimes, supra note 39, at paragraph 49.
135 Ibid., at paragraph 50.
136 CIT Group Securities, supra note 44, at paragraphs 29 and 33.
137 See Repsol, supra note 30, at paragraph 20, where Miller J disallowed almost 80 percent of the cost claimed by the appellants (more than $9,200) for a business-class flight for a witness called to give evidence at the trial.
illustrates the range and nature of matters that the court has taken into account under this factor.

In *Velcro*, the court recognized that this factor provides the court with broad discretion to consider any other facts that may be relevant to a costs award in a given case. In this regard, the court provided three examples of considerations that could be relevant:

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.138

The breakdown of the actual costs incurred by a litigant can affect the quantum of costs awarded. In *Invesco*, the court took into account the fact that “the Bill of Costs contained legal fees for five counsel although only two were present in Court.”139 While this is not an uncommon scenario, the Crown in *Invesco* relied on this fact to argue that there was likely a duplication of efforts that should not be part of a costs award.140

An unsuccessful party should provide the court with an indication as to what costs it considers reasonable, and why they are reasonable, if it hopes to successfully argue that a costs award claimed by the opposing party otherwise would exceed the unsuccessful party’s expectations. Without this indication, the losing party will face greater risk of being subject to a higher costs award.141 As part of the indemnification purpose of costs, it is well recognized that, other than in exceptional cases, a losing party will have to pay not only its own costs but also a significant proportion of the opposing party’s costs.142

138 *Velcro*, supra note 5, at paragraph 12. These examples identified in *Velcro* were also referred to by the court in *Mariano v. The Queen*, 2016 TCC 161, at paragraph 26. In *Mariano*, the appellant argued that because the appeal was brought under rule 146.1, even though the appellant was not successful at trial each party should bear its own costs. The court held that the fact that an appeal is a lead case (see rule 146.1) can be considered by a court under rule 147(3)(j). However, “in order to constitute special or sounds 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”: ibid., at paragraph 40.

139 *Invesco*, supra note 35, at paragraph 23.

140 Ibid.

141 *Mariano*, supra note 138, at paragraphs 43-49.

142 155569 Canada Limited v. 248524 Alberta Ltd., 1999 ABQB 394, at paragraph 48 as cited in *Mariano*, supra note 138, at paragraph 46.

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The significant power imbalance between litigants in a tax appeal has been considered under this factor. In *Walsh*, the court relied in part on the recognition of this power imbalance in *Jolly Farmer Products* in its decision to award significant costs against the Crown. In *Walsh*, the taxpayer had made his position clear from the outset of the tax dispute process, and he had provided the CRA with all of the documentation to support his claim. The CRA had performed its own investigation during the audit, and the Crown conducted discoveries once the matter proceeded to the notice of appeal stage. However, at trial, the credibility of the taxpayer and his accountant was not challenged, no new facts were discovered, and no novel arguments were made. As a result, the court held that much of the proceeding could have been avoided if the CRA had paid more attention to the taxpayer’s file.

Further, a litigant should be able to demonstrate that the cost claimed is essential to the conduct of the proceedings. Recently, in *Jayco*, the taxpayer argued that the interest that it paid on a letter of credit provided to secure its unpaid GST/HST (harmonized sales tax), arising from the assessment, should be recoverable under rule 147(3)(j). The court held that the interest expense was related to the GST/HST that the taxpayer owed and was not related the taxpayer’s appeal (for example, was not a cost of the proceedings before the court). The court also held that the minister’s exercise of discretion in respect of collection action is not relevant in determining costs under rule 147(3)(j).

The court concluded that the interest could not be recovered as a disbursement because it was not directly connected and essential to the conduct of the proceedings:

> The Rules are clear that disbursements will only be awarded if they are essential to the conduct of the proceedings. A party has to establish that the disbursements have arisen inherently and directly from the issues in the appeal. That is not the case here. The interest was not paid by Jayco to establish that the Minister’s assessment was incorrect and therefore did not arise from the appeal filed before this Court.

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143 *Jolly Farmer Products*, supra note 88.
144 *Walsh*, supra note 18, at paragraph 15.
145 Ibid., at paragraph 16.
146 *Jayco, Inc. v. The Queen*, 2018 TCC 239.
147 Ibid., at paragraphs 33-34.
148 For example, in this case, the minister required a letter of credit from the appellant rather than forgoing collection action.
149 *Jayco*, supra note 146, at paragraphs 37-41.
150 Ibid., at paragraph 44.

Electronic copy available at: https://ssrn.com/abstract=3642718
The court found support for this conclusion in decisions of provincial courts of appeal holding that interest incurred on amounts borrowed to fund litigation is not a disbursement.

Alignment with the New Approach

The power imbalance recognized in *Jolly Farmer Products* and *Walsh* should continue to inform costs awards, and arguably should do so more frequently. Costs remain one of the few tools available to constrain the CRA and influence the Crown’s behaviour. The court should be mindful, as it was in *Jolly Farmer Products* and *Walsh*, that the Crown is not a private party and may have forced the taxpayer to go to court.

Awarding costs more aggressively against the Crown may be the only way to limit this power imbalance and put parties on a more level playing field. This concept is discussed in more detail below under the heading “Recognizing the Uniqueness of Tax Litigation.”

**SUMMARY OF THE COURT’S RECENT APPROACH TO COSTS AWARDS**

The recent jurisprudence reveals a trend toward higher costs awards by the Tax Court. However, perhaps not surprisingly, some inconsistencies and exceptions in the developing case law remain. Because new approach to awards, while principled, remains fact-driven, it is not always possible to reconcile the court’s costs awards decisions. The benefit of this new principled approach is that costs awards are no longer formulaic; as a result, the party that is entitled to costs has an opportunity, in appropriate circumstances, to receive a higher award than it would be allowed strictly according to the tariff. The tradeoff is that this individualized and discretionary approach, which requires an analysis of the 147(3) factors in light of the specific facts, results in some greater uncertainty for tax litigants as to the costs that they may be entitled to receive or obligated to pay.

The Tax Court is increasingly recognizing the complexities inherent in tax litigation and is now more often awarding higher costs to help alleviate the accompanying financial burden. Further, the proper use of the court’s resources, in the litigating of tax appeals, is continually underscored as a focal point of costs awards, whether through the encouragement of settlement or the penalizing of a party’s conduct where it unnecessarily lengthened or complicated the litigation process.

151 Ibid., at paragraph 46, relying on *MacKenzie v. Rogalsky*, 2014 BCCA 446, and *Do v. Sheffer*, 2010 ABQB 422.

152 For example, recently in *Cameco*, supra note 19, the Tax Court awarded the taxpayer $10.25 million in costs plus disbursements. The quantum itself, relative to other costs awards, seems staggeringly high. However, in our view, the award in *Cameco* aligns with the new approach taken by the Tax Court in applying the 147(3) factors.
In pursuing an award of costs, an emphasis on these two elements is recommended when appropriate.

Ultimately, parties now can expect a greater likelihood of a costs award in excess of the tariff. However, parties to a tax appeal should be prepared to highlight the facts applicable in respect of each of the relevant 147(3) factors to support a departure from the tariff.

THE USE OF COSTS AWARDS TO MOVE TOWARD A MORE EFFICIENT TAX DISPUTE RESOLUTION SYSTEM

A Better Approach

The recent shift in costs awards at the Tax Court is a positive development in bringing the court's approach more closely into line with the progressive and modern policies applied in general civil litigation, as articulated by the Supreme Court of Canada. However, it is arguable that costs awards at the Tax Court could be used more effectively to promote the efficient and orderly administration of justice by (1) taking into consideration the unique features of a tax dispute, and (2) placing additional emphasis on the new purposes of costs awards adopted in general civil litigation.

Recognizing the Uniqueness of Tax Litigation

There are several unique aspects of a tax dispute in Canada that should shape the Tax Court's approach in future decisions on costs awards. For example, in contrast to general civil litigation, where the initiating party (for example, the plaintiff) must prove the facts of its case, the CRA has broad scope to assume facts in issuing an assessment or reassessment of a taxpayer. The taxpayer must then disprove the assumptions of fact in order to defeat the assessment or reassessment. While this reverse onus allows Canada's self-assessment tax system to function properly, it can create a formidable hurdle for taxpayers, the financial consequences of which can be significant, particularly when a CRA auditor or appeals officer has adopted a patently unreasonable position.

Another unique aspect of tax litigation is that there is a significant disparity between the average taxpayer and the CRA in terms of knowledge of Canada's tax laws, availability of time and financial resources to dispute a tax matter, and the general effect of the outcome of the dispute. Despite the notorious complexities of Canada's tax legislation, every taxpayer is presumed to know the law in all of its exacting detail, even though it is nearly impossible for the average taxpayer to satisfy this

153 The onus is on a taxpayer to disprove the CRA's assessment: Johnson v. MNR (1948), 3 DTC 1182.
154 See, for example, VR Interactive Corp. v. Canada (Customs and Revenue Agency), 2005 FC 273, at paragraph 15; Goar v. The Queen, [1999] 1 CTC 2784 (TCC) (available on Knotia); and Winsor v. The Queen, 97 DTC 1510 (TCC), at 1510.
presumption.\textsuperscript{155} In contrast, the CRA, as the government agency with the delegated authority to administer and enforce the ITA, the ETA, and the related regulations, has intricate and detailed knowledge of Canadian tax laws, and employs staff with expertise in specialized areas of the law. Because of this knowledge imbalance, taxpayers must often rely on tax advisers to assist them in complying with the law and to settle tax disputes with the CRA.\textsuperscript{156} However, not every taxpayer is in a position to be represented by a tax adviser. This constraint can create opportunities for a misuse of power by the CRA and for a biased or prejudicial application of the law to such disadvantaged taxpayers. Additionally, the CRA’s access to virtually unlimited financial and human resources\textsuperscript{157} can create further inequities for taxpayers, particularly those with limited time and financial resources to dispute a tax matter through the CRA’s administrative dispute resolution process and at the Tax Court if necessary.

Finally, the general effect of the outcome of a tax dispute can be disproportionate as between taxpayers and the CRA. For example, even if a taxpayer is successful in resolving a tax dispute with the CRA, arriving at that result may subject the taxpayer to significant stress, financial hardship, and the diversion of time, energy, and resources away from family or business-related activities. Representatives of the CRA are generally not subject to the same potentially negative personal or financial consequences, even if the basis of a tax reassessment is found to be without merit.\textsuperscript{158}

Collectively, the unique features of a tax dispute identified above result in a significant power imbalance between taxpayers and the CRA. As discussed above, this imbalance has been acknowledged by the Tax Court on several occasions. For example, in \textit{Salaison Lévesque}, the court stated that, given the CRA’s significant authority and power, tax audits carried out by the CRA must be accurate and cannot be substandard, notwithstanding that the reverse onus is on the taxpayer.\textsuperscript{159} Likewise, in \textit{Jolly Farmer Products}, the court acknowledged that the CRA can effectively force a taxpayer to go to court, even if the basis for the reassessment is without merit. In that regard, the court stated:

There are perhaps some arguments and some cases that the Canada Revenue Agency just should not pursue. The Crown is not a private party. By reassessing a taxpayer and

\textsuperscript{155} Even tax professionals may hesitate to claim detailed knowledge of all of the rules in Canada’s various tax statutes and regulations, along with the case law relating to their application.

\textsuperscript{156} In \textit{Guindon v. Canada}, 2015 SCC 41, at paragraph 1, the Supreme Court of Canada recognized the complexities of tax legislation and the need for taxpayers to rely on tax advisers to help them to comply with tax laws.

\textsuperscript{157} \textit{Salaison Lévesque}, supra note 119, at paragraph 40.

\textsuperscript{158} All public monies of the government of Canada are held on deposit in the consolidated revenue fund managed by the minister of finance. Accordingly, litigants for the Crown arguably do not have any skin in the game in relation to the outcome of a tax proceeding.

\textsuperscript{159} See, for example, \textit{Salaison Lévesque}, supra note 119, at paragraphs 25-26 (quoted in the text above at note 120); and \textit{Walsh}, supra note 18, at paragraphs 15-16 (discussed in the text above at notes 144-145).
failing to resolve its objection, the Crown is forcing its citizen/taxpayers to take it to Court. If the Crown’s position does not have a reasonable degree of sustainability, and is in fact entirely rejected, it is entirely appropriate that the Crown should be aware it is proceeding subject to the risk of a possibly increased award of costs against it if it is unsuccessful. The Crown is not a private party and tax litigation is not a dispute like others between two Canadians. This is the government effectively pursuing one of its citizens.\(^{160}\)

**Emphasizing the New Purposes of Costs Awards**

By taking into consideration the power imbalance present in tax disputes, the Tax Court may be able to better promote the efficient and orderly administration of justice. This may be accomplished if the court’s approach to costs awards continues to evolve to focus more on the modern purpose of discouraging conduct that is unreasonable or vexatious, or that increases the duration and cost of litigation. In particular, an emphasis on pre-trial conduct in awarding costs could be an appropriate deterrent to the CRA’s adopting unreasonable or meritless bases when issuing or confirming notices of assessment or reassessment against a taxpayer.\(^{161}\) Under the current tax dispute resolution system, there are minimal, or no, repercussions for the CRA when its officials engage in such conduct. It seems clear that this apparent immunity does not promote the efficient and orderly administration of justice. In *Salaison Lévesque*, the court recognized the effect that costs awards can have in adding balance to the Canadian tax system. In that decision, the court stated:

> The possibility of obtaining higher costs than those provided for in the tariff is an effective action that can re-establish the balance between the opposing forces in a tax dispute. That possibility may be a very helpful tool for sanctioning abuses of authority by tax authorities.\(^{162}\)

Arguably, costs awards will influence the pre-trial behaviour of the CRA and taxpayers only if the threshold of unreasonable conduct and the quantum of the related potential costs award deterrent are relatively clear and predictable. However, the current jurisprudence on whether pre-trial conduct can or should be taken into

160 *Jolly Farmer Products*, supra note 88, at paragraph 26.

161 In the general civil litigation context, costs awards have been recognized as an appropriate deterrent to doubtful cases proceeding to trial. For example, in *Catalyst Paper*, supra note 17, at paragraph 16, the BC Court of Appeal stated, “It seems to me that the trend of recent authorities is to the effect that the costs rules should be utilized to have a winnowing function in the litigation process. The costs rules require litigants to make careful assessments of the strength or lack thereof of their cases at commencement and throughout the course of litigation. The rules should discourage the continuance of doubtful cases or defences. This of course imposes burdens on counsel to carefully consider the strengths and weaknesses of particular fact situations. Such considerations should, among other things, encourage reasonable settlements.”

162 *Salaison Lévesque*, supra note 119, at paragraph 33.
account in awarding costs is ambiguous. The common-law test generally requires the existence of exceptional circumstances that unduly and unnecessarily prolong the trial before pre-trial conduct can be considered.\(^\text{163}\) While the interpretation of what is exceptional is often uncertain, it is worth considering whether additional emphasis should be placed on the work of the CRA at the audit and objection stages of the dispute process. More often than not, imprecise tax audit work or the adoption of a meritless basis for issuing a reassessment will not be conduct that is considered to unduly and unnecessarily prolong a trial in the traditional sense, particularly in light of the *Martin* decision.\(^\text{164}\) However, with the new purposes of costs awards in mind, there may be value in taking into consideration the fact that such conduct (for example, patently flawed tax audit work or positions) may be the very reason why a particular matter must proceed to trial; unreasonable tax audit conduct by the CRA arguably prolongs a trial that would not have been required had a reasonable approach been taken in the first place.

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\(^{163}\) This principle was recently reiterated in *Grimes*, supra note 39, at paragraph 41, where the court relied on *Martin*, supra note 113, at paragraphs 18-21; *Merchant*, supra note 113, at paragraph 7; and *Landry*, supra note 113, at paragraph 25.

\(^{164}\) In *Martin*, supra note 113, the Federal Court of Appeal held that the Tax Court had erred in awarding costs in excess of the tariff to include expenses incurred at the objection stage, on the basis that the objection stage is not a “proceeding,” as defined in section 2 of the rules. See *ibid.*, at paragraphs 21-22, and the discussion of this case in the text above at note 121 and following.