



# TAX COUNSEL

## COSTS IN TAX COURT: A KINDER GENTLER APPROACH?

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*“Strategies  
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Many litigants are of the opinion that the losing party in a court battle ought to pay all of the victor's legal bills and other expenses. This is the case in some jurisdictions, but not in this kinder, gentler corner of the world we call Canada.

This isn't to say that there are no financial ramifications to losing in a Canadian court. "Costs" are generally awarded against the vanquished, partly to compensate the victor and partly to encourage parties to settle. This means the unsuccessful litigant must pay the successful party an amount, usually pre-set by a tariff, in addition to the judgment.

The Tax Court of Canada has its own rules and tariffs in respect of court costs. Both the rules and the tariffs were amended in 1998 and are considerably less gentle than earlier editions.

Not surprisingly, there are also significant differences between the costs rules for informal procedure appeals and general procedure proceedings: In an Informal Procedure case<sup>1</sup>, only the taxpayer - and not the Crown - can recover costs. Ordinarily, for a taxpayer in an informal procedure appeal to be eligible for such costs, the judgment must either reduce the aggregate of all amounts in issue, the amount of interest in issue, or increase the amount of loss in issue, as the case may be, by more than one-half. So, while the taxpayer may be at no risk for payment of costs at the informal level, a major victory must be attained in order for the Crown to become liable.

Ultimately, costs are granted at the discretion of the Tax Court judge, who may take into account previous settlement offers, award costs on a lump sum basis, or allow costs in accordance with a limited tariff found at sections 11 and 12 of the Informal Procedure Rules. A typical one-half day Informal Procedure hearing with legal counsel will result in costs of approximately \$700 plus limited amounts for witness fees.

hearings are a bit more complicated. Both the taxpayer and the Crown are at risk for payment of costs. Costs are generally "in the cause" – paid by the loser to the winner – but, once again, are completely at the discretion of the Tax Court judge. They can be awarded on a "solicitor and client" full indemnity basis, but this is rare. Tax Courts have reserved the solicitor and client scale to exceptional cases of misconduct, delay or procedural wrangling.

Rather, "party and party" costs are the norm. The tariff is found at Schedule II of the General Procedure Rules and provides for three classes of appeals (A to C) based on the amounts of tax or losses in issue. Typical tariff costs for a one-day hearing, including discovery and a status hearing, range from \$1500 for a Class "A" appeal (less than \$50,000 tax in issue) to \$3600 for a Class "C" appeal (more than \$150,000 tax in issue). The winner is also entitled to limited amounts for expert assistance at the hearing.

Costs awards for those not represented by lawyers will be lower. This is because most of the fee portions of costs awards are only applicable when legal counsel are involved. An unrepresented taxpayer or one represented by an agent will likely only recover disbursements.

The 1998 Rules changes did more than just increase the tariff amounts. Strategies can now be applied to increase the amounts at risk well beyond the tariff scales. Will this be effective in forcing CCRA to reconsider unreasonable positions? Only time will tell.

Unfortunately, space permits only a scratch at the surface of this topic. Please contact me through one of the addresses or phone numbers noted on the back page of this publication should you wish to discuss a particular costs issue.

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1. The Informal Procedure is applicable for tax matters involving \$12,000 or less tax or \$24,000 or less losses (*Tax Court of Canada Act*, s.18). The General Procedure Rules are applicable to all other ITA matters and most GST appeals (*Exise Tax Act*, s. 307).

As one might expect, costs in General Procedure

# SOWING THE WIND:

## FAFARD v. THE QUEEN

*“... he treated his examiner to a wave of insults, abuse, intimidation, obscenities, verbal and physical violence as well as unjustified objections and refusals to respond...”*

If one were to investigate a sort of *Letterman's Top Ten* of things not to do before the Tax Court, one needn't look further than the case of *Fafard v. Her Majesty the Queen*. The Federal Court of Appeal forecasts the result by commencing the decision with the proverb *Qui sème le vent récolte la tempête*. Roughly, he who sows the wind reaps the tornado.

Apparently Mr. Fafard was no stranger to disputes with Revenue Canada and, in this case, had appealed a tax assessment. Ultimately, he was required to attend at a pre-trial examination where, according to the Court of Appeal, he treated his examiner to a wave of insults, abuse, intimidation, obscenities, verbal and physical violence as well as unjustified objections and refusals to respond to the questions put to him. Some of the more interesting responses from him were as follows:

- “I don't have the time to confirm that...”
- “you can do whatever you want with your question...”
- “you'll have to discuss that with my guardian angels, I don't know”
- “you have no need to answer that question”
- “No, I won't “check into” anything, I've lost enough time with you guys...”
- “You can shake your own hand...”
- “can't you read?”
- “you're not giving orders to anyone today...”

- “you don't have the brains to understand this, and I'm not going to talk about it anymore...”
- “Laugh then...*tabernacle!* Laugh, you're hardly intelligent ...”
- “if we take a break, I'm going. Ask logical questions.”
- “Christ, you're an imbecile...”
- “Goddamn cretin!”

At an application for dismissal, the trial judge allowed Fafard another chance and told him his past conduct would be overlooked provided he undertook to properly submit himself to the pre-trial examination and to conduct himself with a minimum of civility. You can guess the outcome of the next pre-trial, after which the trial judge granted the Crown's dismissal application.

Fafard had the temerity to appeal the trial judge's decision, and the Court of Appeal, as earlier forecast, sent him on his way.

Fafard's fate was undoubtedly well deserved. He is not a sympathetic character. However, the “Fafards” of this world are likely in need of strong representation more than most. If one crosses your doorstep, don't automatically throw him out. I do suggest however, that you get a very large retainer before acting.



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Donald P. Mallon, BSc LLB, a partner in Prowse Chowne LLP, is a seasoned litigator with over 20 years of experience. Focusing on administrative and tax litigation, he draws upon his courtroom and negotiation skills to effectively represent individual and business taxpayers in disputes with Revenue Canada.



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