

Federal Court of Appeal



Cour d'appel fédérale

Date: 20260513

Docket: A-183-24

Citation: 2026 FCA 96

**CORAM: DE MONTIGNY C.J.
HECKMAN J.A.
WALKER J.A.**

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

MARINE ATLANTIC

Respondent

Heard at Vancouver, British Columbia, on June 19, 2025.

Judgment delivered at Ottawa, Ontario, on May 13, 2026.

REASONS FOR JUDGMENT BY:

HECKMAN J.A.

CONCURRED IN BY:

**DE MONTIGNY C.J.
WALKER J.A.**

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REASONS FOR JUDGMENT

HECKMAN J.A.

[1] The Crown appeals a costs order issued by the Tax Court of Canada (*Marine Atlantic Inc. v. The King*, 2024 TCC 51, 2024 A.C.W.S. 2022 [the Costs Decision]) following a judgment on the merits of two tax appeals in favour of the respondent (*Marine Atlantic Inc. v. The King*, 2023 TCC 95, 2023 A.C.W.S. 3319 [the Merits Decision]).

[2] In the Costs Decision, the Tax Court awarded Marine Atlantic enhanced costs of 60% of its legal fees based largely on the Crown's conduct in two instances. First, the Tax Court found that the Crown had failed to promptly live up to its agreement to be bound by the Tax Court's findings in *British Columbia Ferry Services Inc. v. The Queen*, 2014 TCC 305, 249 A.C.W.S. (3d) 894 [*BC Ferries*], a case raising common issues, and had refused to reconsider its position in light of those findings until approximately 10 months before the oral hearing, causing Marine Atlantic to expend unnecessary time and money to prepare for the appeals. Second, the Tax Court held that the Crown's last-minute filing of an affidavit was a blatant attempt at trial by ambush that resulted in lost trial days, additional written submissions and additional days of hearings, ultimately lengthening the trial.

[3] The tax appeals were decided in somewhat unusual circumstances. The presiding judge rendered the Merits Decision based on evidence adduced and submissions made before a different judge [the hearing judge] who retired from the Tax Court shortly after the conclusion of the hearing. Upon agreement of the parties, the presiding judge was appointed to decide the appeals based on the transcripts, the documentary evidence and the written submissions filed by the parties and following an appearance by the parties before the presiding judge to summarize their arguments and answer questions.

[4] The Crown appeals the Costs Decision on three grounds. First, it submits that, since the affidavit was authorized by the *Tax Court of Canada Rules (General Procedure)*, S.O.R./90-688a [the Rules] and was admitted into evidence by the hearing judge, the Tax Court erred in law when it found that the Crown's conduct in proffering the affidavit favoured a

substantial enhanced costs award. Relatedly, it argues that the Tax Court failed to exercise its discretion to award costs in a principled manner because it sought to punish the Crown for its approach to the use of affidavit evidence in unrelated cases. Second, the Crown claims that the Tax Court erred in finding that the Crown agreed to be bound by the Tax Court's findings in *BC Ferries*. Finally, the Crown argues that the Tax Court erred in determining the quantum of costs without referring to past awards in similar cases.

[5] The Crown has not convinced me that there are grounds to interfere with the Costs Decision. For the following reasons, I would dismiss the appeal with costs.

[6] Before considering the Crown's arguments, I describe the statutory and jurisprudential framework for costs awards by the Tax Court, the relevant background, including the Costs Decision and salient facts and reasoning from the Merits Decision, and the applicable standard of review.

I. The Statutory and Jurisprudential Framework for Costs Awards

[7] Decisions on costs are highly discretionary. Subsection 147(1) of the Rules provides that the Tax Court "may determine the amount of the costs of all parties involved in any proceeding, the allocation of those costs and the persons required to pay them." Subsection 147(3) sets out considerations relevant to the Tax Court's exercise of its considerable discretion with regards to costs:

Costs**General Principles**

...

147(3) In exercising its discretionary power pursuant to subsection (1) the Court may consider,

- (a)** the result of the proceeding,
- (b)** the amounts in issue,
- (c)** the importance of the issues,
- (d)** any offer of settlement made in writing,
- (e)** the volume of work,
- (f)** the complexity of the issues,
- (g)** the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding,
- (h)** the denial or the neglect or refusal of any party to admit anything that should have been admitted,
- (i)** whether any stage in the proceedings was,
 - (i)** improper, vexatious, or unnecessary, or
 - (ii)** taken through negligence, mistake or excessive caution,
 - (i.1)** whether the expense required to have an expert

Frais et dépens**Règles générales**

...

147(3) En exerçant sa discrétion conformément au paragraphe (1), la Cour peut tenir compte :

- a)** du résultat de l'instance;
- b)** des sommes en cause;
- c)** de l'importance des questions en litige;
- d)** de toute offre de règlement présentée par écrit;
- e)** de la charge de travail;
- f)** de la complexité des questions en litige;
- g)** de la conduite d'une partie qui aurait abrégé ou prolongé inutilement la durée de l'instance;
- h)** de la dénégation d'un fait par une partie ou de sa négligence ou de son refus de l'admettre, lorsque ce fait aurait dû être admis;
- i)** de la question de savoir si une étape de l'instance,
 - (i)** était inappropriée, vexatoire ou inutile,
 - (ii)** a été accomplie de manière négligente, par erreur ou avec trop de circonspection;
 - i.1)** de la question de savoir si les dépenses engagées pour la

witness give evidence was justified given

déposition d'un témoin expert étaient justifiées compte tenu de l'un ou l'autre des facteurs suivants:

(i) the nature of the proceeding, its public significance and any need to clarify the law,

(i) la nature du litige, son importance pour le public et la nécessité de clarifier le droit,

(ii) the number, complexity or technical nature of the issues in dispute, or

(ii) le nombre, la complexité ou la nature des questions en litige,

(iii) the amount in dispute; and

(iii) la somme en litige;

(j) any other matter relevant to the question of costs.

j) de toute autre question pouvant influencer sur la détermination des dépens.

[8] None of the subsection 147(3) factors are determinative; the Tax Court should consider all relevant factors in exercising its discretion (*MacDonald v. The Queen*, 2018 TCC 55, 289 A.C.W.S. (3d) 662 at para. 43 [*MacDonald*]).

[9] The Tax Court's exercise of its statutory discretion to determine the amount of costs is informed by the principles set out in the jurisprudence, several of which are particularly relevant in the circumstances of this case. The Tax Court must exercise its discretion according to established principles relevant to the purpose of costs awards and not in an arbitrary manner (*Canada v. Landry*, 2010 FCA 135, 191 A.C.W.S. (3d) 327 at para. 54; *Canada v. Bowker*, 2023 FCA 133, 2023 A.C.W.S. 2499 at para. 27 [*Bowker*]; *MacDonald* at para. 42). Further, an award of costs is generally not intended to fully compensate the actual costs incurred by a party (*Consorzio del Prosciutto di Parma v. Maple Leaf Meats Inc.*, 2002 FCA 417, 118

A.C.W.S. (3d) 59 at para. 8 [*Maple Leaf Meats*]; *MacDonald* at para. 44). Its objectives are compensation and contribution, not punishment (*Maple Leaf Meats* at para. 7; *MacDonald* at para. 44; *Hillcore Financial Corporation v. The King*, 2023 TCC 144, 2023 A.C.W.S. 4818 at para. 8). Finally, the proper question in assessing costs is: what should be the losing party's appropriate contribution to the successful party's incurred costs in pursuing the appeal in which their position prevailed? (*Maple Leaf Meats* at para. 8; *MacDonald* at para. 45, citing *Martin v. The Queen*, 2014 TCC 50, 237 A.C.W.S. (3d) 346 at para. 14, rev'd on other grounds 2015 FCA 95).

II. Background

[10] The respondent, Marine Atlantic, a federal Crown corporation, provides a constitutionally mandated passenger and commercial marine transportation system between the provinces of Newfoundland and Labrador and Nova Scotia. It sought to claim input tax credits with respect to the GST/HST that it paid on goods and services required in the course of its business of providing its ferry service [taxable supplies].

[11] These taxable supplies included the provision of passenger cabins, sleeper dorms and reserved seating [upgraded accommodations] and the sale of goods, food and beverage. Marine Atlantic also made one supply – the supply of a ferry service – deemed by the *Excise Tax Act*, R.S.C. 1985, c. E-15 [the *GST Act*] to be an exempt supply for which input credits may not be claimed (*GST Act*, Schedule V, Part VIII, s. 1; Merits Decision at para. 66).

[12] Since Marine Atlantic made both taxable and exempt supplies, it was required to develop an allocation method to determine the extent to which each of its individual direct and indirect costs was acquired, imported, or brought into a participating province for consumption, use or supply in the course of its commercial activities (Merits Decision at para. 122).

[13] Marine Atlantic decided that the allocation between taxable and exempt supplies could be calculated by taking the total area of its vessels used exclusively in making taxable supplies, such as the passenger cabins and restaurants, and dividing that figure by the sum of the total area of the vessels used exclusively in making taxable supplies and the total area of the vessels used exclusively in making exempt supplies, including the passenger vehicle decks and general seating area (Merits Decision at para. 132). Under this method, common areas used in making both taxable and exempt supplies did not need to be measured (Merits Decision at para. 133).

[14] The Crown accepted that while Marine Atlantic's measurement-based allocation method was a fair and reasonable method to determine the extent to which Marine Atlantic acquired property and services, other than fuel, for consumption or use in its commercial activities, it claimed that Marine Atlantic had not consistently applied this method to the totality of its operations, and thus in "a fair and reasonable or consistent manner" (Merits Decision at paras. 169–172). In particular, it argued that Marine Atlantic should not have treated the ferry terminals in Nova Scotia and Newfoundland and Labrador and its ferries' exterior deck area as common areas, but as areas used substantially for the making of exempt supplies (Merits Decision at para. 185). With regards to fuel, the Crown claimed that the fuel used to propel Marine Atlantic's

ferries related to the making of exempt supplies, whereas the fuel used to supply electricity, heat and hot water did not.

[15] The Tax Court found that Marine Atlantic had applied its allocation formula in “a fair and reasonable or consistent manner.” It agreed with Marine Atlantic that the terminal facilities and exterior deck area were properly considered as common areas. Finally, the Tax Court found that, since it was impossible to separately measure the fuel consumed by the engines for propulsion and that consumed to produce electricity, heat and hot water, Marine Atlantic’s allocation method could also be used for fuel. Since Marine Atlantic was successful on all issues, the Tax Court allowed the tax appeals.

[16] Following written representations from the parties, the Tax Court exercised its discretion to determine the amount and allocation of costs under subsection 147(1) of the Rules. It awarded Marine Atlantic enhanced costs representing 60% of its legal fees. In coming to this decision, the Tax Court considered each of the factors set out in subsection 147(3) of the Rules that were in its view relevant to an award of costs. It also reviewed some of the key principles to be followed when considering the awarding of costs, described above in the previous section.

[17] Reviewing the applicable subsection 147(3) factors, the Tax Court held that the importance and complexity of the issues were neutral factors. Based mainly on factual findings, the decision was not precedential (Costs Decision at para. 23). The operation of the applicable provision of the *GST Act*, while complex, had been explained in previous decisions (Costs Decision at paras. 29–30). However, the Tax Court found that the result of the proceeding, the

amounts in issue, and (to a lesser extent) the volume of work favoured an award of enhanced costs. The appeals had raised multiple issues, and Marine Atlantic was successful on all of them (Costs Decision at para. 13). The amount at issue in the appeals, somewhere between \$19.7 million and \$21.8 million, was significant to Marine Atlantic (Costs Decision at para. 19). In these fact-dependant appeals, the volume of work was above average (Costs Decision at para. 26). In sum, the Tax Court decided that the preceding factors supported awarding enhanced costs to Marine Atlantic.

[18] The parties agreed that Marine Atlantic should be awarded enhanced costs. However, while the Crown submitted that the enhanced costs should not exceed 30% of reasonable legal fees, plus all supported reasonable and necessary disbursements, Marine Atlantic sought a substantially higher percentage. The Tax Court decided that a costs award of 60% of Marine Atlantic's legal fees was justified by another subsection 147(3) factor: the Crown's conduct.

[19] The primary issues with respect to the Crown's conduct considered by the Tax Court were its "substantial delay in following existing jurisprudence" and the circumstances of its filing of an affidavit sworn by a CRA tax appeals case specialist (the Shimizu affidavit).

[20] With regards to the first issue, the Tax Court held that the Crown and Marine Atlantic had in 2013 agreed to be bound by the decision of the Tax Court in *BC Ferries* with respect to the following three common issues (the Agreement):

- whether the passenger cabins, sleeper dorms and reserved seating (the “Upgraded Accommodations”) were used exclusively in taxable activities or exclusively in exempt activities;
- whether the vessels’ infrastructure comprised of engine rooms, crew and officers’ quarters and navigational bridge decks are part of the common areas that are used in both taxable and exempt activities or part of the areas that are used exclusively in exempt activity; and
- whether fuel that is used for the propulsion of the vessels is used in both taxable and exempt activities or used exclusively in exempt activity.

(Costs Decision at para. 34)

[21] The Tax Court noted that *BC Ferries*, released on October 14, 2014, had concluded that the upgraded accommodations were used exclusively in taxable activities, and that the vessels’ infrastructure was part of the common areas used in both taxable and exempt activities (Costs Decision at para. 35).

[22] The Tax Court concluded that, despite repeated requests by Marine Atlantic, beginning in December 2014, that the Crown accept the findings in *BC Ferries*, the Crown maintained until November 2020 its position that the upgraded accommodations and noted infrastructure were used exclusively in exempt activities, and waited until September 2021, just before the beginning of the oral hearing in the appeals, to file a concession letter. In that letter, the Crown conceded that Marine Atlantic used its upgraded accommodations exclusively in taxable activities and that its ferries’ infrastructure was part of the common areas used to make taxable and exempt supplies.

[23] The Tax Court found that the Crown’s delay in acknowledging the *BC Ferries* decision caused Marine Atlantic to needlessly incur substantial costs in large part to satisfy undertakings

to obtain measurements of the common areas of the vessel which were not required under the allocation method ultimately upheld by the Tax Court as fair and reasonable:

[41] I have concluded, based on the detailed submissions provided by the Appellant, that the Appellant would have avoided substantial costs if the Respondent had fulfilled his obligation under the agreement to be bound and admitted in late 2014 that the infrastructure was part of the common areas of the vessels and the Upgraded Accommodations were used exclusively in taxable activities.

[42] The Respondent's conduct with respect to the Upgraded Accommodations and the common areas supports a finding of enhanced costs of substantially more than 30%.

[24] The Tax Court found that enhanced costs were also supported by the Crown's conduct with respect to the Shimizu affidavit. Immediately after Marine Atlantic had closed the evidentiary portion of its case, the Crown sought to enter an affidavit, sworn nine days earlier, by a CRA tax appeals case specialist relating to Marine Atlantic's ability to claim input tax credits for GST paid on fuel. Attached to the Shimizu affidavit were ninety pages of documents that were not mentioned in the pleadings and had not been provided by the Crown in discovery or informally shared with Marine Atlantic before it had closed the evidentiary portion of its case (Merits Decision at paras. 23 and 26).

[25] Marine Atlantic's counsel strenuously objected to the admissibility of the Shimizu affidavit. The hearing was adjourned to allow her to consult with her client and the parties filed written submissions on the affidavit's admissibility. Before the hearing judge decided the question of admissibility, the parties reached an agreement by which Marine Atlantic withdrew its objection to the affidavit in exchange for the right to recall witnesses to testify regarding the

matters dealt with in the affidavit. Accordingly, the hearing judge admitted the affidavit into evidence (Merits Decision at paras. 28 and 52–53).

[26] In the Merits Decision, the Tax Court decided that, irrespective of the fact the Shimizu affidavit was eventually admitted by the hearing judge, the Crown’s conduct amounted to “a blatant attempt at trial by ambush in respect of a key issue in the appeals” that “defeated the purpose of discovery” (Merits Decision at paras. 29–30). Since the Tax Court’s treatment of this issue in the Costs Decision was the focus of much of the parties’ arguments before this Court, I reproduce it here in its entirety:

[49] I discussed the filing of the affidavit at length in paragraphs 23 to 56 of my reasons for judgment. I made the following findings:

- The Respondent’s actions in filing the affidavit was a blatant attempt at trial by ambush in respect of a key issue in the appeals.
- An affidavit, such as the Shimizu Affidavit, has no place in a trial where the facts are in issue, such as the trial before the Court.
- The Respondent’s actions in filing the Shimizu Affidavit resulted in trial days being thrown away, additional written submissions having to be prepared and filed and an additional day of testimony by two witnesses. Further, argument was delayed from October 1, 2021 to January 2022.

[50] I also stated the following, at paragraphs 40 and 41 of my reasons for judgment, with respect to the Respondent’s recent practice of not calling witnesses at the hearings of taxpayers’ appeals:

The Respondent’s actions in these appeals are consistent with a troubling trend of the Respondent not bringing witnesses to the hearings of taxpayers’ appeals and then attempting to enter evidence through affidavits. Recently, the Court has seen this happen frequently in informal proceedings. The Respondent now appears to be attempting to use the same ill-advised approach in general proceedings.

In my view, this conduct must stop. The Court issues judgments based on the evidence before it. If the Respondent wishes to rely on facts that he cannot obtain through cross-examination of the Appellant's witnesses, then he needs to bring witnesses. Considering the vast resources of the CRA, this should not be an issue.

[51] In summary, I found that the Respondent's conduct in regards to the affidavit was improper.

[52] The Appellant argues that the Respondent's conduct regarding the Shimizu Affidavit was reprehensible, scandalous and outrageous.

[53] While the Respondent admits that his conduct regarding the Shimizu Affidavit favours an enhanced cost award since it lengthened the duration of the proceeding, he argues that the conduct was not improper, vexatious or unnecessary, nor taken through negligence, mistake or excessive caution. The Respondent states, at paragraph 30 of his written submissions, "On the contrary, the Affidavit, including the testimony and argument with respect to its contents, was essential to provide much-needed context for the Minister's fuel assumptions".

[54] The Respondent then argues at paragraph 34 of his submissions that the timing of the Shimizu Affidavit disclosure was not improper. He states, "Both the text of s. 89(1) of the Rules and the Court's jurisprudence demonstrates that s. 89 is not complete bar to adducing affidavits under s. 335(5) of the Act (and its sister provision s. 244(9) of the Income Tax Act) without notice at the hearing."

[55] The Respondent is, in effect, challenging my finding that his conduct resulted in a trial by ambush and the Shimizu Affidavit had no place in a trial such as the one before the Court. This is improper; a party should never use cost submissions to question a finding made by the Court in the related appeal.

[56] Further, the Respondent's submissions indicate that he is prepared to engage in similar offensive behaviour in the future.

[57] I find that the Respondent's improper actions in attempting a trial by ambush, combined with the factors previously discussed, supports a finding of enhanced costs of more than 30%. I find that his belief that he did nothing wrong and that he can engage in similar improper conduct in the future supports an award of substantial enhanced costs. It appears that this is the only way to discourage him from engaging in such behaviour in the future.

[27] The Tax Court also noted that the Crown had in its costs submissions challenged a determination, made in the Merits Decision, that the Crown had improperly used the threat of gross negligence penalties to force Marine Atlantic to accept a percentage mandated by the CRA to calculate its input tax credits rather than its own allocation formula (Costs Decision at paras. 58–68). The Tax Court concluded that these submissions improperly challenged a factual finding and, in doing so, raised issues that were not relevant to the costs award, were based in alleged facts not on the record and did not appear to be well-founded (Costs Decision at para. 68).

[28] The Tax Court justified its final costs award as follows:

[69] After considering all of the relevant factors, particularly the Respondent's improper conduct with respect to his delay in following the Court's decision in *BC Ferries*, his attempt at a trial by ambush and his written submissions that indicate that he may pursue this improper behavior in the future, I have concluded that the Respondent's conduct must be discouraged by a significant cost award. Therefore, I award the Appellant costs of 60% of its legal fees.

III. Issues

[29] This appeal raises three issues:

1. Did the Tax Court err when it found that the Crown's conduct in relation to the Shimizu affidavit justified enhanced costs? In doing so, did it err in awarding enhanced costs as a punitive or deterrent measure?
2. Did the Tax Court err when it awarded costs based on its finding that the Crown had agreed to be bound by the findings in the *BC Ferries* decision?

3. Did the Tax Court err by failing to refer to costs awards in like cases to justify its decision to award enhanced costs of 60% of Marine Atlantic's legal fees?

IV. Standard of review

[30] I agree with the parties that appellate standards of review apply on an appeal to this Court of a costs award by the Tax Court. The scope of the factors defined by subsection 147(3) of the Rules as relevant to the Tax Court's discretionary power to award costs are determinations of law reviewed for correctness, but the application of these factors to the facts of the case (absent an extricable question of law) are findings of mixed fact and law subject to the deferential standard of palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Bowker* at paras. 13–15). “Palpable” means an error that is obvious, and “overriding” means an error that goes to the very core of the outcome of the case (*Canada v. South Yukon Forest Corporation*, 2012 FCA 165 at para. 46).

V. Analysis

[31] Having already set out the statutory provisions and legal principles guiding costs awards by the Tax Court, I now turn to the merits of each of the three issues raised on this appeal.

A. *The Crown's conduct in relation to the Shimizu affidavit*

[32] The Crown made key concessions regarding this issue. First, it acknowledges that its last-minute filing of the Shimizu affidavit prolonged the trial and led to further expenses and costs. Second, at the hearing before this Court, it conceded that it was appropriate for the Tax Court to seek, through its costs award, to deter a repetition of such conduct. The Crown was right to concede that the deterrence of a party's conduct, particularly where that conduct increases the duration and expense of litigation, is one of the legitimate purposes of a costs award (*British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371 at paras. 24–25; *Fournier v. Canada*, 2005 FCA 131, 148 A.C.W.S. (3d) 160 at para. 12, citing *Sherman v. Canada (Minister of National Revenue)*, 2003 FCA 202, [2003] 4 FC 865 at para. 46).

[33] However, the Crown submits that the Tax Court's reasons indicate that it was seeking to deter not only the late filing of affidavits, but the Crown's use of affidavits in general to introduce evidence in taxpayers' appeals where there are contested facts. In its view, the Tax Court erred in law by considering factors extraneous to the appeals before it as a basis to award an increased quantum of cost. The Crown noted the Tax Court's reference to a "troubling trend" that it had observed in unrelated appeals with regards to the use of affidavits and its observation that, in its submissions on costs, the Crown had improperly challenged the factual findings it had made in the Merits Decision. The Crown also argues that, through its enhanced costs award, the Tax Court punished it for proffering an affidavit when this was allowed by the Rules and despite the hearing judge's ruling admitting the Shimizu affidavit into evidence.

[34] For its part, Marine Atlantic argues that the Tax Court properly sought, through its enhanced costs order, to deter the Crown from repeating the conduct it exhibited in late filing the Shimizu affidavit, which amounted to an attempt at trial by ambush.

[35] I agree with the Crown that, were the Tax Court found to have considered factors irrelevant to a costs award under the Rules or to have failed to properly interpret the scope of the factors set out in subsection 147(3) of the Rules, these would be errors of law reviewable by this Court on a correctness standard.

[36] However, I am satisfied that, on a fair reading of the Tax Court's reasons, its decision to award enhanced costs was grounded in the Crown's conduct with regards to the last-minute filing of the Shimizu affidavit, which the Tax Court found to be a blatant attempt at trial by ambush. I find that by awarding enhanced costs, the Tax Court was seeking both to compensate Marine Atlantic for the additional costs resulting from the Crown's conduct (Merits Decision at para. 56; Rule 147(3)(g)) and to deter similar conduct in the future (Costs Decision at para. 57; Rules 147(3)(g) and (i)).

[37] It is true that the Tax Court also expressed general concerns about the propriety of using affidavit evidence, rather than witnesses, to prove contentious facts and opined that, in its experience, the Crown frequently sought to enter evidence through affidavits. Judges may occasionally be tempted to share general views on perceived trends in litigation practices or even to signal reservations about conduct they have witnessed in other proceedings. In my view, they should refrain from doing so in reasons for judgment, which should reflect the Court's findings

of fact based on the evidence before it, the legal principles that apply to the issues in dispute and the Court's disposition of these issues by applying the law to the facts.

[38] Despite its general comments on the Crown's use of affidavits in taxpayer appeals, however, the Tax Court's focus remained on the Crown's conduct in the case before it. In the Costs Decision, the Tax Court stated that its findings regarding the Crown's conduct in relation to the Shimizu affidavit were set out at paragraphs 23 to 56 of the Merits Decision (Costs Decision at para. 49). I find that this part of the Merits Decision is clearly focused on the Tax Court's finding that, in seeking to introduce the Shimizu affidavit in the manner that it did, the Crown attempted trial by ambush (Merits Decision at paras. 29–34). Moreover, the final paragraph of this section of the Merits Decision confirms the Tax Court's intention to focus the Costs Decision on the Crown's actions in the Marine Atlantic litigation specifically:

The Respondent's actions resulted in trial days being thrown away, additional written submissions having to be prepared and filed, and an additional day of testimony by two witnesses. Further, argument was delayed from October 1, 2021 to January 2022. I will deal with the Respondent's actions in my cost award.

(Merits Decision at para. 56, emphasis added)

[39] At the hearing before this Court, the Crown claimed that the Tax Court's reference to "trial by ambush" included its objections both to the timing of the Crown's attempt to file the Shimizu affidavit and to the use of affidavits generally. I disagree. The Tax Court's explanation of its finding that the Crown engaged in trial by ambush in the Merits Decision precedes its discussion of the Crown's general practice relating to the use of affidavits, which begins with the introductory phrase "I also have a serious concern..." (Merits Decision at para. 35, emphasis

added). In my opinion, on a fair reading of the Merits Decision, the Tax Court's views on the general use of affidavits, properly characterized as *obiter*, are distinct from its finding that the Crown's conduct on the appeals constituted an attempt to engage in trial by ambush.

[40] I am satisfied that, when read together with the Merits Decision, the "improper conduct" identified in the Tax Court's conclusion that the Crown's "belief that [it] did nothing wrong and that [it] can engage in similar improper conduct in the future supports an award of substantial costs" (Costs Decision at para. 57) also relates to the actions characterized by the Tax Court as an attempt at trial by ambush. Indeed, the Tax Court takes exception to the Crown's claim in its submissions on costs that the timing of its disclosure of the Shimizu affidavit and its actions in adducing that affidavit without notice at the hearing were allowed by the Rules, finding that these submissions, which directly dispute the Tax Court's finding of trial by ambush, "indicated that [the Crown] is prepared to engage in similar offensive behaviour in the future" (Costs Decision at paras. 54 and 56). That the Tax Court was deterring the Crown's "improper conduct" in the Marine Atlantic litigation is again supported by the Tax Court's summary of its rationale for ordering enhanced costs:

After considering all of the relevant factors, particularly the Respondent's improper conduct with respect to his delay in following the Court's decision in *BC Ferries*, his attempt at a trial by ambush and his written submissions that indicate that he may pursue this improper behavior in the future, I have concluded that the Respondent's conduct must be discouraged by a significant cost award. Therefore, I award the Appellant costs of 60% of its legal fees.

(Costs Decision at para. 69, emphasis added)

This key paragraph confirms that the “improper behaviour” that attracted enhanced costs is the Crown’s attempt at a trial by ambush, which is worthy of deterrence, not a general concern regarding the Crown’s use of affidavits in taxpayer appeals before the Tax Court nor an intent to punish the Crown.

[41] I note that while the Tax Court, in its Costs Decision, did remark on several occasions that it believed that the Crown’s costs submissions improperly challenged factual determinations made in the Merits Decision (Costs Decision at paras. 55, 60, 62, 63 and 68), the Crown has not convinced me that these findings motivated the Tax Court’s award of enhanced costs.

[42] I therefore reject the appellant’s contention that the Tax Court pursued punitive objectives when it awarded enhanced costs, that it relied on extraneous factors unrelated to the Marine Atlantic litigation, or that its treatment of the Crown’s conduct in relation to the Shimizu affidavit otherwise disclosed errors of law or palpable and overriding errors that would warrant this Court’s intervention.

B. *The Crown’s delay in acknowledging BC Ferries*

[43] The Tax Court decided that in the 2013 Agreement, the Crown had agreed to be bound by the forthcoming decision in *BC Ferries*, which involved certain questions also raised in the Marine Atlantic litigation. That decision, delivered in October 2014, concluded that the ferries’ infrastructure was part of the common areas and that their upgraded accommodations were used exclusively for taxable supplies. The Tax Court found that, despite Marine Atlantic’s frequent

requests for the Crown to accept *BC Ferries*' findings, the Crown maintained its position that the upgraded accommodations and the vessels' infrastructure were used exclusively in exempt activities until approximately 10 months before the start of the oral hearing. The Crown also waited until September 2021, just before the start of the oral hearing, to make admissions consistent with these findings. The Tax Court found that the Crown's delay in acknowledging the findings in *BC Ferries* caused Marine Atlantic to carry out the expensive, time-consuming and ultimately unnecessary work of measuring its vessels' common areas. It concluded that if the Crown had fulfilled its obligation under the Agreement and made its admissions in late 2014, Marine Atlantic could have avoided these substantial costs.

[44] The parties agree that whether the Tax Court erred in relying on a finding that the Crown had agreed to be bound by *BC Ferries* as a basis for awarding Marine Atlantic enhanced costs is a question of mixed fact and law; this Court can intervene only where the Tax Court has committed a palpable and overriding error.

[45] The Crown submits that it was a palpable and overriding error for the Tax Court to conclude that its conduct supported a finding of enhanced costs, because the Crown had not in fact agreed to be bound by *BC Ferries*. In support of its claim, the Crown points to two letters exchanged between counsel for the parties that in its view set out the terms of the Agreement. In particular, the Crown emphasizes that the letters contain language to the effect that, in return for the Crown's agreement to hold the Marine Atlantic appeals in abeyance, Marine Atlantic had agreed to be bound to the Tax Court's decision in *BC Ferries* on the three common issues summarized by the Tax Court and which bear reproducing again for the sake of clarity:

- whether the passenger cabins, sleeper dorms and reserved seating (the “Upgraded Accommodations”) were used exclusively in taxable activities or exclusively in exempt activities;
- whether the vessels’ infrastructure comprised of engine rooms, crew and officers’ quarters and navigational bridge decks are part of the common areas that are used in both taxable and exempt activities or part of the areas that are used exclusively in exempt activity; and
- whether fuel that is used for the propulsion of the vessels is used in both taxable and exempt activities or used exclusively in exempt activity.

(Costs Decision at para. 34)

[46] I disagree with the Crown. In making its Costs Decision, the Tax Court had before it a previous decision, *Marine Atlantic Inc. v. Her Majesty the Queen*, 2016 TCC 46, 263 A.C.W.S. (3d) 524 [the Fuel ITCs Motion Decision], in which it had interpreted the Agreement. The Crown had sought an order that Marine Atlantic was bound by the Agreement to accept the Tax Court’s determination in *BC Ferries* with regards to the common issue of whether fuel was a common input to both taxable and exempt supplies, the third common issue as summarized above. The Tax Court dismissed the motion. It found that in deciding this issue in *BC Ferries*, the Tax Court had been constrained by admissions made by British Columbia Ferry Services Inc. that Marine Atlantic refused to make and that, as a result, *BC Ferries* had not fully resolved that narrow issue in the Marine Atlantic litigation.

[47] Significantly, in coming to this conclusion, the Tax Court had first determined what the Crown and Marine Atlantic had agreed to in the Agreement. Examining the words used in the Agreement in light of “the surrounding circumstances (that is, objective evidence of background facts when the contract was signed) which were prevalent at the time” (Fuel ITCs Motion Decision at para. 16), it found as follows:

In considering the wording of the Agreement and contextual circumstances, I find that the parties' intention was to be bound by the decision in the [*BC Ferries*] appeal on the three issues common in both appeals.

(Fuel ITCs Motion Decision at para. 18, emphasis added)

[48] The Crown did not appeal the Fuel ITCs Motion Decision.

[49] In my view, the question before this Court is whether, given the clear finding in the Fuel ITCs Motion Decision, it was a palpable and overriding error for the Tax Court to conclude, in the Costs Decision, that the parties had agreed to be bound by the findings of the Tax Court in *BC Ferries* with regards to the first two common issues, that is whether the upgraded accommodations were used exclusively in taxable activities and whether the vessels' infrastructure was part of the common areas used in both taxable and exempt activities.

[50] The Crown invites us to conclude that there is a palpable and overriding error based on the words used in the letters exchanged by counsel, which do not state that the Crown intended to be bound by the findings in *BC Ferries*. However, in the Fuel ITCs Motion Decision, the Tax Court founded its interpretation of the Agreement not only on counsels' letters but on its assessment of the contextual circumstances.

[51] As a result, the Crown has not persuaded me that it was a palpable, or obvious, error for the Tax Court to find, on the basis of the record before it, including the Fuel ITCs Motion Decision, that the Crown had agreed to be bound by the Tax Court's findings on the common issues in *BC Ferries*. Nor has it identified a palpable and overriding error in the Tax Court's conclusion that the Crown's failure to acknowledge, in a timely manner, the findings in

BC Ferries that the ferries’ infrastructure was part of these vessels’ common areas and their upgraded accommodations were used exclusively in taxable activities resulted in Marine Atlantic needlessly expending time and money on satisfying undertakings relating to the measurement of the common areas of its vessel. The Crown’s argument that it could not be faulted for wanting to “explore the entirety of the factual matrix” before making the concessions it eventually made in September 2021 is really an invitation to this Court to substitute its own assessment of the evidence and its own exercise of discretion for that of the Tax Court – something we cannot do absent demonstration of a palpable and overriding error.

[52] I therefore find no reason for this Court to interfere with the Tax Court’s conclusion that the Crown’s tardy acknowledgement of the findings in *BC Ferries* supported a finding of enhanced costs.

C. *The Tax Court’s justification for the quantum of costs*

[53] The final issue in this appeal concerns whether the Tax Court erred in failing to sufficiently justify the quantum of the enhanced costs awarded to Marine Atlantic. The Crown relies on the decision of this Court in *Bowker* for the proposition that the Tax Court erred in law by deciding the costs award without “referring to its own jurisprudence” to justify why a level of costs of 60% of Marine Atlantic’s legal fees was appropriate.

[54] The question of whether an award of enhanced costs in a specific case is “unprincipled” unless it is based on a comparison with costs awards in other cases with similar facts is a question of law reviewable for correctness.

[55] In *Bowker*, the Tax Court decided that “for consistency purposes”, it would assess costs between 50% and 75% of solicitor-client costs, a range suggested by one legal textbook on costs but contradicted by two other legal textbooks. Citing a number of Tax Court cases that awarded costs below its chosen range, the Tax Court acknowledged that this range was not universally accepted. The Tax Court then reviewed the factors set out in subsection 147(3) of the Rules and found that they favoured costs at the upper end of its chosen range, that is at 75% of the incurred legal fees.

[56] This Court found that, by limiting the range of costs to 50%-75% of solicitor-client costs, the Tax Court fettered its discretion, since a review of like cases might have pointed to the possibility of a lower range. While accepting that consistency was a sound basis upon which to base an award of costs, the Court observed that the ranges considered by the Tax Court in arriving at its chosen 50%-75% range were neither specific to the Tax Court nor consistent. Given that the Tax Court was pursuing consistency as the basis of its costs award, it had “erred in principle in not addressing the [Tax] Court’s own jurisprudence and setting a range of possible awards” (*Bowker* at para. 29). In sum, if the Tax Court’s aim was to set a range of costs awards to achieve consistency and avoid arbitrary results, it should have defined that range based on costs awards decided by the Tax Court in like cases, rather than selecting a contested range not specific to the Tax Court, thereby fettering its discretion.

[57] Significantly, this Court signalled that it was not setting down a hard and fast rule regarding how the Tax Court should make principled costs awards:

This is not to say that a judge awarding costs on a lump sum basis must conduct a statistically sound review of prior costs awards to arrive at an appropriate amount. It simply means that a decision as to an appropriate award of costs must be grounded in the Court's past practice and jurisprudence... In the case at bar, an analysis of, or reference to, cases with comparable facts would have provided useful guidance on an appropriate level of costs.

It is important to note that this approach is simply a means by which the broad discretion available to judges in awarding costs can be exercised in a principled, non-arbitrary manner.

(*Bowker* at paras. 31–32, emphasis added)

[58] In my view, the Court's observations, including that referring to cases with comparable facts would have provided "useful guidance" and that this comparative approach was simply "a means" by which the Tax Court could exercise its broad discretion in awarding costs, belies the appellant's claim that it was a reviewable error for the Tax Court not to support its costs award of 60% of Marine Atlantic's legal fees with an examination of comparable cases. Accordingly, I am of the view that the Tax Court did not err in law in failing to conduct such a comparison.

[59] There is no dispute that, in fixing costs at 60% of Marine Atlantic's legal fees, the Tax Court considered the factors set out in subsection 147(3) of the Rules. Moreover, the appellant concedes that the approximate historical range of departure from the tariff lies between 10% and 60% of solicitor-client costs. While the Crown argues that its conduct did not warrant a quantum of 60% of its legal fees, absent an extricable error of law, the Tax Court's decision as to the quantum of costs is only reviewable for palpable and overriding error. I see nothing unprincipled

in how the Tax Court applied the relevant factors to the facts before it. In the circumstances, the appellant has not convinced me that the Tax Court committed a reviewable error in awarding Marine Atlantic a costs award of 60% of its legal fees.

[60] For the foregoing reasons, I would dismiss the appeal with costs in the all-inclusive amount of \$3,020, as was agreed by the parties.

"Gerald Heckman"

J.A.

"I agree.
Yves de Montigny C.J."

"I agree.
Elizabeth Walker J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-183-24
STYLE OF CAUSE:	HIS MAJESTY THE KING v. MARINE ATLANTIC
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JUNE 19, 2025
REASONS FOR JUDGMENT BY:	HECKMAN J.A.
CONCURRED IN BY:	DE MONTIGNY C.J. WALKER J.A.
DATED:	MAY 13, 2026

APPEARANCES:

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