



# **Section V**

## **SR&ED Tax Court Strategies**

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Webcast Mar. 25, 2021

Presented by

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# Discussion Topics

- A Potpourri of TCC SR&ED Topics and a Summary of the Department of Finance 2021 Tax Expenditure Analysis, as it relates to SR&ED
- Outline of *TCC Rules (General Procedure) and (Informal Procedure)* on costs and review of all TCC SR&ED decisions from 1996 to date, from the TCC website, that address costs, in whatever fashion, in an attempt to provide guidance to accountants and tax lawyer on how costs are addressed by the TCC in SR&ED matters
- Outline of section 6 of the *TCC Rules (General Procedure)*, a notation of the problems it raises, and how they are addressed
- Review of the recently-released Department of Finance 2021 Tax Expenditure Analysis, as it relates to SR&ED claims

# Topic #1: Costs at the TCC

## *Tax Court of Canada Rules (General Procedure) (SOR/90-688a)*

### **147 - Costs**

147 - [General Principles](#)

148 - [Costs on Discontinuance](#)

149 - [Costs on Settlement](#)

149.1 - [Costs on Failure to Elect under Subsection 18\(1\)](#)

150 - [Taxation of Costs](#)

151 - [Special Provisions](#)

152 - [Liability of Counsel for Costs](#)

152.1 - [Costs in Vexatious Proceedings](#)

# Costs at the TCC

***Tax Court of Canada Rules  
(General Procedure) (SOR/90-688a)***

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# Costs at the TCC

***Tax Court of Canada Rules  
(Informal Procedure) (SOR/90-688b)***

10 - [Costs](#)  
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14.1 - [Costs in Vexatious Proceedings](#)

# Costs at the TCC

## Review of TCC Decisions from TCC Website in SR&ED Matters From 1996 to Date - Breakdown

- See chart in PDF
- A total of 47 TCC decisions address costs in SR&ED matters out of a total of 58 decisions in SR&ED matters:
  - 12 Informal and 35 General
- Number of Informal matters where costs awarded: 2
- Number of General matters where costs awarded: 21

# Costs at the TCC

## Review of TCC Decisions from TCC Website in SR&ED Matters From 1996 to Date – Breakdown of Orders

- Willing to hear submissions from counsel on question of costs or  
counsel asked to make submissions on costs – 2
- Costs awarded in accordance with the Tariff – 2
- If parties are unable to agree on costs, they may make submissions, in writing, not to exceed a certain number of pages – 4
- One party is entitled to costs – 4
- Appeal allowed or dismissed, with costs – 18
- Costs in the lump sum of a certain amount – 1
- Appeal allowed or dismissed, without costs – 9

## Costs at the TCC

**Review of TCC decisions from TCC website in SR&ED matters from**

**1996 to date – Further Breakdown of Orders Made**

- No costs awarded to either party – 5
- Each party shall bear their own costs – 2
- Costs in the cause – 1
- Costs in any event of the cause – 1

\*Note: One decision is placed in three boxes and one is placed in two boxes.



# Costs at the TCC

## Review of TCC decisions from TCC website in SR&ED matters from 1996 to date – One Decision Provides Useful Guidance

### ***Foster v. The Queen*** (2007 TCC 659) [I Matter]

[45] However, the Respondent is asking this Court to order the Appellant Atherton to pay costs by reason of his vexatious conduct at the trial and because he pursued his appeal even though it disclosed no reasonable cause of action. The Respondent also asks the Court to order the Appellant Atherton to pay 10% of all amounts in issue, in accordance with section 179.1 of the Act.

[63] In my opinion, this additional time taken to make his case constitutes an abuse of process. By his unacceptable and reprehensible conduct, the Appellant showed indifference, not only to the Court, with respect to the amount of time that it had to devote to this matter, but also to the opposing party, who had to incur additional expenses to assert her rights.

## Costs at the TCC

### ***Foster v. The Queen*** (2007 TCC 659) [I Matter]

[64] In *Sherman v. Minister of National Revenue*, 2003 FCA 202, the Federal Court of Appeal wrote the following passage about the award of costs:

46. It is now generally accepted that an award of costs may perform more than one function.

Costs under modern rules may serve to regulate, indemnify and deter. They regulate by promoting early settlements and restraint. . . . They seek to compensate, at least in part, the successful party who has incurred, sometimes, large expenses to vindicate its rights.

## Costs at the TCC

### ***Foster v. The Queen* (2007 TCC 659) [I Matter]**

[65] This passage was adopted in *Fournier v. The Queen*, 2005 FCA 131. The Federal Court of Appeal has said that this Court has the inherent power to prevent and control abuses of process by awarding costs.

[66] I am satisfied that the circumstances of the instant case justify the exercise of the discretion conferred upon me, and I order the Appellant Atherton to pay costs to the Respondent in the lump sum of \$3,000.

## Costs at the TCC

### **Why are there so reported few costs' decisions by the TCC in SR&ED matters?**

- Given the length of the hearing, in order to cut down on court time, the court will receive written submissions on costs from the parties and render a separate costs' decision to the parties only
- Such costs' decisions are not reported by the TCC (rarely, if ever), unlike costs' decisions in civil litigation and domestic family matters, where ancillary costs' decisions will be rendered and reported via the online legal research platforms, such as WestlawNext Canada, LexisAdvance Quicklaw, and CanLII.

# Costs at the TCC

## Now What?

In an effort to see how costs were dealt with in a particular TCC decision in a

SR&ED matter, you can:

1. contact the parties or the lawyers directly, to make a request to review a copy of the costs' decision (\*this is the best option) or
2. contact the TCC Registry Office to see if it would provide you with a copy (\*TCC Registry Office would have to obtain consent from the parties in order to release the costs' decision).

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Topic #2: Issue of Recording of Teleconferencing and  
Videoconferencing at the TCC at the Request of the Parties  
in General Procedure Matters

***Tax Court of Canada Rules (General Procedure)***  
**(SOR/90-688a)**

6 - [Hearings by Videoconference or Teleconference](#)

*Only one decision has addressed section 6 and not on a  
substantive basis:*

*James H. Odishaw Professional Corp. v. R., File No. 95-  
2680(IT)G*

***Tax Court of Canada Rules (General Procedure)***  
**(SOR/90-688b)**



Issue of Recording of Teleconferencing and  
Videoconferencing at the TCC at the Request of the Parties  
in General Procedure Matters

Question:

If the parties are arranging teleconferencing or  
videoconferencing of a matter, who is responsible to  
record it?

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Issue of Recording of Teleconferencing and Videoconferencing at the  
TCC at the Request of the Parties  
in General Procedure Matters

**Frequently Asked Questions at TCC Website → After  
the Hearing**

<https://www.tcc-cci.gc.ca/en/pages/frequently-asked-questions>

How do I obtain a copy of a hearing transcript of audio recording?

**Court Reporting and Transcription Fees (\*dated, from  
2016-2017 – current page under construction)**

<https://www.cas-satj.gc.ca/en/operations/fees-2016-17.shtml>

**ASAP Reporting**

<https://www.asapreportingservices.com/services>

# Topic #3: SR&ED Analysis in 2021 Department of Finance Tax Expenditure Report

<https://www.canada.ca/content/dam/fin/publications/taxexp-depfisc/2021/taxexp-depfisc-21-eng.pdf>

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Any Questions and/or Comments?



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Thank You!

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