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Appeal

Court File No.: A-166-24

FEDERAL COURT OF APPEAL

BETWEEN:

MADISON PACIFIC PROPERTIES INC.

FEDERAL COURT OF APPEAL		COUR D'APPEL FÉDÉRALE	
FILED	MAY 08 2024		DEPOSE
	EVA KAN		
	VANCOUVER, BC Appellant		

- and -

HIS MAJESTY THE KING

Respondent

NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Appellant. The relief claimed by the Appellant appears below.

THIS APPEAL will be heard by the Federal Court of Appeal at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the Appellant. The Appellant requests that this appeal be heard at Vancouver, British Columbia.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the Appellant's solicitor or, if the Appellant is self-represented, on the Appellant, WITHIN 10 DAYS after served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the judgment appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-996-6795) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: MAY 08 2024

Issued by: _____

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TO: Shalene Curtis-Micallef
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c/o Department of Justice Canada
British Columbia Region
National Litigation Sector
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Vancouver, BC V6Z 2S9

Attention: Perry Derksen
Yanick Houle
Eric Brown
Erin Krawchuk

AND TO: Minister of National Revenue

APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the Order and Reasons for Order of Justice David E. Graham of the Tax Court of Canada (the “**TCC**”) dated April 19, 2024 (TCC file no. 2014-3959(IT)G) by which the TCC awarded fixed costs of \$408,833.77 and disbursements of \$43,740.96 to the Respondent (the “**Costs Award**”) in respect of the TCC’s Judgment dated December 27, 2023 (the “**Underlying Judgment**”).

THE APPELLANT ASKS:

1. That the Costs Award be set aside and that this Court award the Appellant its costs in the TCC;
2. In the alternative, that the Respondent’s costs in the TCC be limited to \$109,350, being double the amounts set out in Tariff B (the “**Tariff**”) of Schedule II of the *Tax Court of Canada Rules (General Procedure)* (the “**Rules**”), plus disbursements of \$24,060.96 or, alternatively, reduced from the amount of the Costs Award;
3. That this appeal accordingly be allowed with costs; and
4. That this Court grant such other relief as it considers appropriate.

THE GROUNDS OF APPEAL are as follows:

1. The Appellant has appealed the Underlying Judgment to this Court. Should the Appellant be successful in its appeal of the Underlying Judgment, the Costs Award should be set aside, and the Appellant should be awarded its costs in this Court and in the TCC in respect of the Underlying Appeal as the successful party.
2. The Appellant intends to ask the Court to hold this appeal in abeyance pending the disposition of the Appellant’s separate appeal of the Underlying Judgment in Appeal A-30-24. A separate appeal is required in respect of the Costs Award because the TCC first issued the Underlying Judgment and then, after the Appellant had initiated the Underlying Appeal to this Court, the TCC issued the Costs Award.

3. If the Appellant is successful in its appeal of the Underlying Judgment (Court File No. A-30-24), costs should follow the result. The Appellant should be awarded its costs in the TCC.
4. In the alternative, if the Appellant is unsuccessful in its appeal to this Court of the Underlying Judgment (Appeal A-30-24), the TCC erred in its consideration of the factors outlined in Rule 147 in issuing the Costs Award. The Respondent's costs should be limited to twice the amounts provided in the Tariff or, in the alternative, reduced, for the following reasons:
 - (a) The TCC erred by considering amounts in dispute in separate appeals in the TCC, which amounts were not in dispute in the Underlying Appeal, to be relevant amounts in issue justifying increased costs to the Respondent in respect of the Underlying Appeal;
 - (b) The TCC erred by considering the rapid evolution of the case law throughout the course of the Underlying Appeal to favour an increased costs award to the Respondent on account of both parties having to regularly re-work their arguments and submissions, when this factor should have been considered neutral as it was beyond the parties' control and the increase in work was equally applicable to both parties;
 - (c) The TCC erred by misconstruing the Appellant's position in relation to the creation and use of Class C non-voting shares and by conflating the Appellant's refusal to admit that the series of transactions as a whole was undertaken for a non-tax purpose with the Appellant's position in relation to the Class C non-voting shares, then relying on this misconstrued improper conflation to justify increased costs to the Respondent;
 - (d) The TCC erred by failing to consider the Respondent's failure to amend its Reply to remove unmeritorious technical positions until shortly before trial, after all pre-trial steps had completed and after preparations for trial were well underway;
 - (e) The TCC further erred in this regard by failing to consider that, despite having abandoned its unmeritorious technical positions, the Respondent maintained a particular assumption made by the Minister of National Revenue in respect of those abandoned positions which led to confusion over the Respondent's position for trial and wasted preparation and trial time; and
 - (f) The TCC erred by allowing the Respondent to claim, as a disbursement, expert fees which were not incurred until after the Appellant had confirmed it would not

call expert evidence – such expert evidence having been proposed in relation to the unmeritorious technical arguments which the Respondent maintained until shortly before trial commenced and in respect of which the Respondent maintained the above-noted assumption which served to confuse the issues for trial.

5. The Appellant relies on Rule 147 of the Rules and the Tariff.
6. The Appellant relies on such further and other grounds as counsel may advise and this Honourable Court may permit.

DATED this 8th day of May, 2024.



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