Docket: 2010-1413(IT)G
2010-1414(IT)G
2010-1640(IT)G
2010-2864(IT)G

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on March 28, 2011 at Toronto, Ontario
By: The Honourable E. P. Rossiter, Associate Chief Justice

Appearances:

Counsel for the Appellant:	Al Meghji and Joseph M. Steiner
Counsel for the Respondent:	Gordon Bourgard and John Shipley

ORDER

Upon motion by the Appellant for an Order striking the Respondent's Replies, and in accordance with the Reasons for Order attached hereto, IT IS ORDERED THAT the motion is granted to the extent that:

1. The particular text in the Reply on appeal number 2010-1414(IT)G as set out in the attached Schedule to the Reasons for Order is struck. The strikes to the Respondent's Reply in appeal 2010-1414(IT)G should be applied *mutatis mutandis* to appeals 2010-1413(IT)G; 2010-1640(IT)G and 2010-2864(IT)G.

2. The Respondent shall provide to the Appellant and the Court, within 60 days of the date of this Order, draft Amended Replies. The Court shall review the draft Amended Replies to determine if they comply with the provisions of this Order

and issue a further Order, if and when required, with respect to formally filing the Amended Replies.

3. No costs are awarded.

Signed at Ottawa, Canada, this 21st day of December, 2011.

"E.P. Rossiter"

Rossiter A.C.J.

Citation: 2011TCC568
Date: 20111221
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2010-2864(IT)G

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REASONS FOR ORDER

Rossiter A.C.J.

Introduction:

[1] The Appellant entered into a number of transactions with Enron some of which involved the sale of assets by Enron to special purpose entities. Enron filed for Chapter 11 Bankruptcy Protection. Litigation known as the Newby Litigation and MegaClaim Litigation were commenced against the Appellant and others alleging in part that the Appellant improperly participated in transactions with Enron involving the sales of assets to special purpose entities, knowing they were improperly accounted for on Enron's financial statements.

[2] The Newby and MegaClaim Litigations were each settled by the Appellant paying a total of approximately U.S. $2.65 billion plus interest and legal expenses. The Appellant treated these payments as expenses. The Minister of National Revenue denied the deductions. The Appellant appealed and the Respondent filed a reply some 80 plus pages in length; the Appellant now brings a motion to strike the reply pursuant to Rule 53 of the *Tax Court of Canada Rules* (*General Procedure*).

Factual Background:

[3] The appeals are essentially all the same in the sense that they raise the issue of whether or not settlement amounts, interest and legal expenses paid in what are known as the Newby and MegaClaim Litigation were properly deductible by the Appellant in computing its income for the 2005 or 2006 taxation year.

[4] The Respondent asserts that certain entities affiliated with the Appellant, participated pre-October, 2001 in a number of financing transactions for Enron to create the false appearance of asset sales and equity contributions which facilitated Enron's overstatement of its profits and concealment of the true extent of its borrowings. It is alleged that Enron defrauded the investment public, creditors and others by its intentional violation of certain financial accounting standards and that these foreign affiliates of the Appellant acted in concert with Enron in order to achieve Enron's fraudulent purpose of falsifying its reported financial results.

[5] Enron Corporation and certain of its affiliates voluntarily filed for Chapter 11 Bankruptcy Protection under the U.S. Bankruptcy Code. Numerous investigations related to Enron's activities in the years leading up to and including Enron's bankruptcy undertaking were commenced, with these investigations exploring, among other things, transactions involving Enron and the accounting treatment accorded to these transactions. As a result, litigation arose in this context including claims against the Appellant relating to its dealings with Enron.

[6] During the taxation year ending October 31, 2005, the Appellant settled:

> (a) Enron class action litigation known as the "Newby Litigation" for U.S. $2.4 billion (the "Newby Settlement Amount"); and
> (b) Enron bankruptcy litigation known as the "MegaClaim Litigation" for U.S. $250 million (the "MegaClaim Settlement Amount").

These settlements enabled the CIBC to avoid the possibility of joint and several liability with numerous other defendants in the litigation as well as the adverse effects of the ongoing litigation.

[7] In its taxation returns for 2005 and 2006 CIBC sought to deduct from its income tax certain settlement amounts, interest and legal expenses. The issue in the appeals is whether such amounts were properly deductible in computing CIBC's income for the 2005 and 2006 taxation years, as the case may be. As noted the Appellant moved to strike all or portions of the Respondent's Replies.

Appellant's Position on Motion to Strike:

[8] The Appellant has three arguments with respect to its motion:

(a) The “egregious or repulsive” concept does not exist as some sort of freestanding test for deductibility pursuant to section 9 or paragraph 18(1)(*a*) of the *Income Tax Act* and therefore, if the income earning purpose is established or it is admitted as alleged, there is no public policy override by the Minister of National Revenue to prevent the deductibility pursuant to section 9 and paragraph 18(1)(*a*) of the *Income Tax Act*.

(b) If the answer to (a) is that there is some "egregious or repulsive" concept that is freestanding in terms of deductibility pursuant to section 9 or paragraph 18(1)(*a*) of the *Income Tax Act*, then the “egregious or repulsive” concept does not apply to settlement payments in litigation between private parties where there has never been an adjudication on the facts or consequences.

(c) Further, in the alternative, if the position of the Appellant is in error in paragraph (a) and (b), the assumptions as pleaded are not assumptions of fact or are not assumptions of fact within the taxpayer’s knowledge and therefore should be struck or treated as ordinary allegations.

[9] The Appellant also takes the position that because of the manner in which the Replies were structured, it is impossible to strike out parts as to do so would result in incoherent pleadings and therefore the Replies must be struck out in their entirety with leave to file Amended Replies and with directions that new Replies should not refer to the “egregious and repulsive” conduct or anything of that nature.

Respondent's Position on Motion to Strike:

[10] The Respondent asserts that the "egregious or repulsive" concept is a legal test and not an evidentiary test and that in dealing with the following questions, the answer to those questions are not so plain and obvious that it is beyond doubt that the Respondent has no hope of success:

(a) Is it fully settled in jurisprudence that the “egregious and repulsive” test forms part of the prohibition on deductibility under paragraph 18(1)(*a*) of the *Income Tax Act*?

(b) Is it fully settled in jurisprudence that the "egregious and repulsive" test would trump paragraph 18(1)(*a*) of the *Income Tax Act* in the required circumstances?

(c) Is it fully settled in jurisprudence that the "egregious and repulsive" test does not apply to settlement payments?

(d) Is it fully settled in jurisprudence that the "egregious and repulsive" tests are restrictions to the extent that the Tax Court of Canada can examine a settlement transaction and make findings as to what the transactions were for in terms of the purpose of deciding an income tax appeal?

Analysis:

(i) Egregious or Repulsive Concept:

[11] Is it plain and obvious that it is beyond doubt that the Respondent has no hope of success on its "egregious and repulsive" test argument?

(a) Rule 53:

[12] The motion brings into play Rule 53 of the *Tax Court of Canada Rules (General Procedure)* which states as follows:

> 53. The Court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,
> (*a*) may prejudice or delay the fair hearing of the action,
> (*b*) is scandalous, frivolous or vexatious, or
> (*c*) is an abuse of the process of the Court.

(b) Applicable Test:

[13] Both the Appellant and the Respondent refer to *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959. Justice Wilson stated in part, at page 980, as follows:

> … assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable case of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it

> contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

[14] Bowman C.J. in *Sentinel Hill Productions (1999) Corporation v. Her Majesty the Queen*, 2007 TCC 742 in dealing with Rule 53 of the *Tax Court of Canada Rules (General Procedure)* stated in part as follows:

> [4] I shall begin by outlining what I believe are the principles to be applied on a motion to strike under Rule 53. There are many cases in which the matter has been considered both in this court and the Federal Court of Appeal. It is not necessary to quote from them all as the principles are well established.
>
> (a) The facts as alleged in the impugned pleading must be taken as true subject to the limitations stated in *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441 at 455. It is not open to a party attacking a pleading under Rule 53 to challenge assertions of fact.
>
> (b) To strike out a pleading or part of a pleading under Rule 53 it must be plain and obvious that the position has no hope of succeeding. The test is a stringent one and the power to strike out a pleading must be exercised with great care.
>
> (c) A motions judge should avoid usurping the function of the trial judge in making determinations of fact or relevancy. Such matters should be left to the judge who hears the evidence.
>
> (d) Rule 53 and not Rule 58, is the appropriate rule on a motion to strike.

[15] Chief Justice Bowman then went on to quote from *Hunt v. Carey*, supra, as noted above, and then stated as follows:

> [11] … However much jurisprudence may surround the words "scandalous, frivolous or vexatious, or abuse of the process of the Court", they are nonetheless strong, emotionally charged and derogatory expressions denoting pleading that is patently and flagrantly without merit. Their application should be reserved for the plainest and most egregiously senseless assertions. …

[16] The Supreme Court of Canada considered the applicable test and its application as recently as February 24, 2011 in *R. v. Imperial Tobacco Limited*, 2011 SCC 42. In that case, Chief Justice McLachlin stated, in part:

> **17** The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the B.C. *Supreme*

> *Court Rules*. This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: … Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: …

[17] The Supreme Court of Canada then commented on the purpose of the test and its application and the fact that it promotes efficiency in the conduct of litigation and correct results as follows:

> **22** A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455. No evidence is admissible on such a motion: … It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.
>
> …
>
> **25** … The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. Rather, it operates on the assumption that the claim will proceed through the court system in the usual way -- in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in *the context of the law and the litigation process*, the claim has no reasonable chance of succeeding.

[18] The Supreme Court of Canada in *Imperial Tobacco Canada* simply confirmed the test in *Hunt v. Carey* and given it a little bit more definition.

[19] As noted, neither the length nor complexity of the issues, the novelty of the cause of action or the potential for a party to present a strong case should prevent the party from proceeding with his or her case. Only if the position taken in the Reply is certain to fail because it contains a radical defect should the relevant portions of the Respondent's Reply be struck. Rule 53 speaks of the ability to strike pleadings that prejudice or delay of a fair hearing of an action; are

scandalous, frivolous or vexatious; or are an abuse of process of the Court. Striking pleadings under Rule 53(b) "should be reserved for the plainest, and most egregious, senseless assertions", as stated by Chief Justice Bowman in *Sentinel Hill* at paragraph [11].

[20] Having heard all the arguments and read the authorities presented, it has been shown that it is not plain and obvious that the Respondent's Reply has no reasonable chance of success in terms of the "egregious and repulsive" concept, or put another way, there is a chance that the Respondent might succeed on the "egregious and repulsive" concept.

[21] The Appellant argues that the "egregious and repulsive" concept does not apply to section 18 of the *Income Tax Act* and is one of evidence only. The Appellant states that the "egregious and repulsive" concept comes out of what is commonly known as the *BC Eggs* case, *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804. In that case, Iacobucci J. noted that the appeal concerned the language of paragraph 18(1)(*a*) of the *Income Tax Act*. In discussing whether or not a fine or penalty could be deducted, Iacobucci J., at paragraph [69], stated as follows:

> [69] Finally, at para. 17, my colleague states that penal fines are not, in the legal sense, incurred for the purpose of gaining income. It is true that s. 18(1)(*a*) expressly authorizes the deduction of expenses incurred for the purpose of gaining or producing income from that business. But it is equally true that if the taxpayer cannot establish that the fine was in fact incurred for the purpose of gaining or producing income, then the fine or penalty cannot be deducted and the analysis stops here. It is conceivable that a breach could be so egregious or repulsive that the fine subsequently imposed could not be justified as being incurred for the purpose of producing income. However, such a situation would likely be rare and requires no further consideration in the context of this case, especially given that Parliament itself may choose to delineate such fines and penalties, as it has with fines imposed by the *Income Tax Act*. To repeat, Parliament may well be motivated to respond promptly and comprehensively to prohibit clearly and directly the deduction of all such fines and penalties, if Parliament so chooses.
>
> [Emphasis added.]

[22] It is to be noted that Iacobucci J. was dealing only with fines or penalties, not damages or settlement sums.

[23] The Appellant also referred to *McNeill v. Canada*, [2000] 4 F.C. 132. The issue before the Federal Court of Appeal was the deduction of a court ordered

award of damages for breach of contract. The Federal Court of Appeal pointed out that if a fine or penalty for breach of contract is deductible because nothing in paragraph 18(1)(*a*) of the *Income Tax Act* precluded it, a Court order for damages for breach of contract should also be deductible. The Federal Court of Appeal then stated in part as follows:

> [15] It may be that in respect of a civic damage award that the wrongful action may be so egregious or repulsive that the damages could not be justified as being incurred for the purpose of gaining or producing income and in such rare cases deductibility would properly be disallowed. Although in the case at bar, the learned Tax Court Judge referred to the appellant's actions as reprehensible, he also found they were for the purpose of keeping his clients and his business. We are satisfied that they were incurred for the purpose of producing income.
>
> [16] Accordingly, we conclude that the finding of the Supreme Court of Canada in 65302 British Columbia Ltd. is determinative of the present appeal. In coming to this conclusion, we acknowledge that there may be policy reasons against allowing the deductibility of damages as an expense when they arise from "reprehensible" conduct of a taxpayer. Be that as it may, 65302 British Columbia Ltd. instructs that such policy questions are to be left to Parliament. If it so wishes, Parliament may legislate against the deductibility of damage awards in those circumstances.
>
> [Emphasis added.]

[24] The Appellant argues that the egregious and repulsive concept goes only to evidence that the conduct was for the purpose of gaining or producing income and therefore it is not a separate policy override issue, but one of evidence only.

[25] These statements from *BC Eggs* and *McNeill* might be somewhat confusing in terms of exactly what the Supreme Court of Canada or Federal Court of Appeal intended with respect to the "egregious and repulsive" concept. Taking the one sentence from Iacobucci J.'s decision at paragraph [69] in the *B.C. Eggs* case,

> … It is conceivable that a breach could be so egregious or repulsive that the fine subsequently imposed could not be justified as being incurred for the purpose of producing income. …

could lead one to believe that there is some "egregious or repulsive" conduct which is an override to section 18 of the *Income Tax Act* in terms of deductibility. On the other hand, Iacobucci J. points out that such situations are rare and require no further consideration or comments on that case, "especially given that Parliament itself may choose to delineate such fines and penalties, as it has with fines imposed

by the *Income Tax Act*". Iacobucci J. appears to invite Parliament to be more specific on this particular point while the Federal Court of Appeal seems to think that Iacobucci J. was instructing that such policy questions are to be left with Parliament – I would not go that far in the assessment of Iacobucci J.'s comments – I do not take them as an instruction but rather a nudge to clarify the situation.

[26] Chief Justice Rip in *Bains v. R.*, 2003 TCC 211 appears to have considered that the "egregious and repulsive" breach in that case could be such that the actions of the Appellant would not be justified as being incurred for the purpose of producing income. At paragraph [29] Chief Justice Rip stated in part:

> I have found that the damages paid by Mr. Bains were not incurred to gain or produce income. However, even if I erred in so concluding, the actions of Mr. Bains in usurping money out of Mr. Bhandar is the egregious or repulsive breach that Iacobucci J. states could not be justified as being incurred for the purpose of producing income.

[27] Also, Webb J. in *Douthwright v. R.*, 2007 TCC 560 stated at paragraph [27] as follows:

> In this case, the amounts payable by the Appellant to BMO Nesbitt Burns are not repulsive or egregious as they simply were incurred as a consequence of the Appellant choosing to work for a different firm. The Agreement does not prohibit the Appellant from working for a competing firm, it simply sets out the consequences if he should choose to do so.

It would appear that Justice Webb was of the view, after referring to *McNeill*, *supra*, that there was such a concept which could trump deductibility.

[28] From Justice Woods, in *Ferguson-Neudorf Glass Inc.v. R.*, 2008 TCC 684, it appears the "egregious and repulsive" concept was also recognized but not applied.

[29] The Appellant states that CRA takes the position that public policy over-rides the *Income Tax Act*, but the Appellant counters that such policy considerations are solely an issue for Parliament, and that the "egregious and repulsive" concept is nothing more than an evidentiary issue on income earning purpose. To support this proposition, they refer to:

(a) the 2000 CTF paper, Judicial Administrative Development, on giving an explanation with respect to the CRA having tax policy concerns that arose

out of the decision of the Supreme Court of Canada in 65302 British *Columbia Ltd. v. Canada*;

(b) correspondence of the Director of Business and Partnerships Division, Income Tax Rulings Directorate, on April 6, 2001, on the deductibility of fines and penalties;

(c) the round table on Federal Taxation at the APFF 2001 Conference;

(d) IT104R3 on August 9, 2002; and

(e) IT-467R2 on November 13, 2002 in terms of damages.

[30] These references plus the authorities referred to above lead me to believe, however, that it is not plain and obvious that the Respondent's Reply has no reasonable chance of success in terms of the "egregious and repulsive" concept. Also, I am equally of the view that the application of the "egregious and repulsive" concept to settlement payments is equally unclear. If the concept applies to fines, penalties or damages why wouldn't it apply to settlement payments? It follows that if the concept of "egregious and repulsive" is in issue then so too is its application to settlement payments.

(ii) The Reply:

[31] A most significant aspect of the motion is in terms of the Reply itself and its content, separate and apart from the parties disagreement on the application or interpretation of the "egregious or repulsive" concept.

(a) Position of the Parties:

[32] The Appellant wants the entire Reply to be struck, because to strike out only parts would result in incoherent pleadings and they wish to have the Respondent have leave to amend the Replies with direction that the new Replies should not refer to "egregious or repulsive" conduct or anything of that nature.

[33] The Appellant takes this position based upon what they see as three separate problems:

(a) The litigation cannot commence with the Minister of National Revenue making an assumption of fact that the Appellant engaged in misconduct and breached the laws of the United States and now it is up to the Appellant to show on the balance of probabilities to prove otherwise. This is not an assumption of fact but rather an assumption and conclusion of law which is not permitted in pleadings.

(b) Assumptions by the Minister of National Revenue that when the assessment was raised the Minister of National Revenue assumed as a fact that all of the allegations made by complainants in the legal actions in the United States are true, and the burden is upon the Appellant to prove otherwise.

(c) Finally, the assumptions of fact that relate to third parties should not be allowed as these are not about the Appellant's business and the facts are not within the knowledge of the Appellant but are within the knowledge of the third party.

[34] The position of the Respondent is basically that:

(a) Where a scheme that involves a third party is alleged to prevent the deductibility of an expense, the Minister of National Revenue is entitled to rely upon all aspects of the scheme. Further, it is the Court's responsibility to make determinations which are questions of fact, i.e., whether or not there was a settlement and the reason and basis behind the settlement.
(b) As well, the Court has jurisdiction to decide certain issues which are integral to the appeal itself and this is particularly true when there is fraud alleged.

(b) Applicable Law and Concepts:
Reference should again be made to Rule 53 of the *Tax Court of Canada Rules (General Procedure)* referred to in paragraph [12] hereof.

[35] In *Transocean Offshore Limited v. The Queen*, 2005 FCA 104, Justice Sharlow, speaking on the issue of assumptions, stated:

> **[34]** The Judge in *Redash* also said this about the factual assumptions that were not within the knowledge of the appellant (at paragraph 31):
>
> [...] Perceptions of fact based upon facts which lie within the peculiar knowledge of the Respondent [the Crown] which are paraded as assumptions in the Reply to the Notice of Appeal, which are beyond the knowledge of the Appellant [Redash] and which are not easily or practicably deniable by the Appellant without extraordinary effort and expenditure, should not be deemed to be facts simply because they are not specifically negated by the Appellant's evidence. Assumptions of fact in such circumstances cannot displace the need of the Respondent to produce evidence to substantiate or support that which may be relevant to counter or affect the Appellant's factual presentation.

> **[35]** This statement recognizes the general principle that, in a tax appeal, the Crown's factual assumptions are taken as true unless they are rebutted (see *Pollock*, cited above). It also recognizes that this general principle, like all general principles, may have exceptions. The justification for the general principle is that the taxpayer knows or has the means of knowing all of the facts relevant to an income tax assessment. A trier of fact is entitled to draw an inference adverse to a party who has or may reasonably be presumed to have some evidence that is relevant to disputed facts, but fails to adduce that evidence. However, there may be situations where fairness would require that no onus be placed on a taxpayer to rebut a specific factual assumption made by the Crown. One example might be a fact that is solely within the knowledge of the Crown. However, I do not see this as such a case.
>
> **[36]** The only factual controversy in this case is this: why was the US $40 million payment made? Section 2 of the Deed of Settlement states that the US $40 million payment was made pursuant to the Deed of Settlement "in consideration for the voluntary termination of the Bareboat Charter" (clause 2).
>
> [Emphasis added]

[36] The Federal Court of Appeal brings the concept of “fairness” to assumptions as pleaded by the Respondent in tax appeals as there may be situations which require that no onus be placed on the taxpayer to rebut a specific factual assumption made by the Crown.

[37] Justice Bowie in *Zelinski v. The Queen*, 2002 DTC 1204, at paragraph [5], affirmed 2002 FCA 330, reviewed the fundamental rule of pleading, as follows:

> [5] The applicable principle is stated in *Holmsted and Watson:*
>
> > This is *the* rule of pleading: all of the other pleading rules are essentially corollaries or qualifications to this basic rule that the pleader must state the material facts relied upon for his or her claim or defence. The rule involves four separate elements: (1) every pleading must state facts, not mere conclusions of law; (2) it must state material facts and not include facts which are immaterial; (3) it must state facts and not the evidence by which they are to be proved; (4) it must state facts concisely in a summary form.

[38] The purpose of pleadings is to assist in clearly and concisely defining the issues before the Court, to set the table for the trial judge so to speak, but that is a far cry from pleadings that attempt to poison the mind of the trial judge with

respect to the issues at hand. I am loathe to interfere in the pleadings of parties; experienced counsel know their case much better than the judge; they know what the real issues are and they know what they must prove. However, while pleading assumptions can and do have significant effect with respect to how the case is tried, I strongly believe that there must be a sense of fairness in the pleadings and as noted by the Appellant in their argument, I believe the issue in pleadings must be one of balance.

[39] Justice Jorré in *Kopstein and Sirett v. The Queen*, 2010 TCC 448, commented on assumptions that may be erroneously left in pleadings and what onus if any may be left on an Appellant:

> [67] In assessing whether it is appropriate to strike a paragraph of a pleading one must bear in mind the practical effect of the paragraph.
>
> [68] In this context one must bear in mind that an invalid or irrelevant assumption does not cast an onus upon an appellant just because it was pleaded. For example, if on discovery it turns out that an assumption was never made then there is no onus on the appellant to disprove it; if the respondent wishes to rely on that particular fact, the respondent will have to prove it. Similarly, if what is pleaded as an assumption of fact is simply a conclusion of law and no underlying facts for that conclusion of law have been assumed elsewhere then there is no obligation on an appellant to disprove that.

[40] In *Strother v. Canada*, 2011 TCC 251, Chief Justice Rip reviewed the types of statements that should be found within a reply, and those that should be excluded, stating:

> **[15]** Once the respondent has admitted and denied facts and stated she has no knowledge of certain facts alleged in the Notice of Appeal and puts these facts in issue, there are only two more statement of facts for the respondent to plead: the finding or assumptions of fact made by the Minister when making the assessment, and any other material fact. All these statements of fact are to be statements of material fact, not immaterial facts, not statements or principles of law and not statements mixing fact with law. Subparagraphs *f*), *g*) and *h*) of Rule 49 accord the respondent opportunity to describe the issues, state the statutory provisions in play and submit the reasons she is relying on in this appeal.
>
> **[16]** It is poor and improper pleading when a litigant admits or denies a fact in a pleading but couples the admission or denial with a conclusion of law or some extraneous comments that add nothing to the process. The assumptions of fact should be facts the Minister relied on in assessing and the facts so relied on should

> be material facts. Otherwise, why were these facts relied on if they were not material?

Chief Justice Rip emphasized that statements of facts must only include facts and not conclusions of law and mixed fact and law, but recognized the challenges that counsel may face in distinguishing between these categories, as follows:

> **[21]** It does not require complex statutory analysis to arrive at the conclusion that a "fact" means a fact in the legal context. The majority of the Supreme Court of Canada took a technical interpretation approach to the word "sale" in the *Income Tax Act* with Major J. stating:[10]
>
> > To apply a "plain meaning" interpretation of the concept of a sale in the case at bar would assume that the *Act* operates in a vacuum, oblivious to the legal characterization of the broader commercial relationships it affects. It is not a commercial code in addition to a taxation statute. Previous jurisprudence of this Court has assumed that reference must be given to the broader commercial law to give meaning to words that, outside of the *Act*, are well-defined. ...
>
> **[22]** In terms of "facts", this word is in the rules of civil procedure and so should be interpreted in the legal context with the relevant distinctions between questions of law, questions of fact and questions of mixed fact and law. The word "facts" excludes conclusions of law and mixed fact and law.
>
> **[23]** The appellants claim that the disputed bracketed portions of the Replies are actually conclusions of law or mixed fact and law. However, the respondent states that these are simply factual assertions.
>
> **[24]** It is frequently difficult to draw the line between a question of fact and a question of law. It is more difficult when the third category, mixed question of fact and law, is considered. Iacobucci J. of the Supreme Court of Canada recognized this problem and stated the following:[11]
>
> > ... Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or *vice versa*.

The Chief Justice also asserted that pleadings are of a summary nature, and should avoid repetition and redundancy, stating:

> **[39]** The appellants' alternative argument to strike is based on the repetition and redundancy of the Replies. When reading through redundant and repetitive portions of the Replies it is only a matter of pages before one has the feeling that one of the parties is trying to beat the other into submission, never mind the judge who is only just entering the fray. The appellants rely on *Mudrick v. Mississauga Oakville Veterinary Emergency Professional Corporation*[20], in which Master Haberman of the Ontario Superior Court of Justice struck out the plaintiff's overview and summary for this very reason. In reaching this conclusion Master Haberman stated:[21]
>
> > The pleading contains a summary, which essentially repeats the overview. This will be unnecessary when the claim is pleaded properly. Including the summary and the overview means the same things are repeated three times in the pleading. They should only be discussed once, in the body of the claim, where they fall chronologically.
>
> In concluding, he added the following general comments regarding pleadings in general:[22]
>
> > Repetition should be avoided. Superfluous detail should be eliminated. Editorialized comments should be removed. ... This is not "the last chance" to tell the whole story - it is only an overview of what the case will be about. ...

[41] Having referred to Justice Sharlow's decision in *Transocean*, Justice Bowie in *Zelinski*, Justice Jorré in *Kopstein and Sirett*, and Chief Justice Rip in *Strother*, and in considering Rule 53, the following can be succinctly stated:

1. There may be situations where fairness would require that no onus be placed on the taxpayer to rebut a specific factual assumption made by the Respondent.

2. The pleadings themselves must not be prejudicial or delay the hearing of the action, be scandalous, frivolous or vexatious, or amount to an abuse of the process of the Court.

3. The pleadings must contain material facts that clearly and concisely define the issues before the Court. Rarely should facts which are relevant be pleaded if they are not material facts. One must be careful that one is not pleading evidence and further one must be careful not to be repetitive and redundant.

[42] The task in reviewing an 83 plus page Reply is significant, to say the least; especially given the various grounds that one must look to in determining whether or not part of the Reply should be struck. The following are some of the grounds upon which portions of the pleadings could be struck:

1. Material facts: Facts are not material if they are directed at a matter not in issue. This means that when one refers to materiality, in talking about the relationship between the fact and the matter at issue, one asks, what is the party trying to prove? If the item to be proven is not a matter in issue, then it is immaterial. See *Strothers* above at paragraph 16, and David M. Paciocco and Leo Stuesser, the *Law of Evidence*, at page 27.

2. Relevance: Simply because something is relevant does not make it a material fact, and it can be that many facts are relevant but are not material facts. Questions of relevancy should generally be left to the trial judge, in the context of all evidence at trial, unless the pleadings are clearly irrelevant and doomed to fail, see *Sandia Mountain Holdings Inc. v. The Queen*, 2005 TCC 136 at paragraph [17]; *Sentinel Hill Productions*, above, at paragraph [4].

3. Evidence: Facts relating to the way the party will prove allegations are basically evidence and should not be included in pleadings. See *Zelinski* above. For example, a pleading can say that notice was provided but it does not have to go into the particulars as to the form and manner of the notice.

4. Allegations of fraud and dishonesty: Because allegations of fraud and dishonesty are so serious, many more particulars are required, see *Weyerhaeuser Co. v. The Queen*, 2007 TCC 65 at paragraph [21].

5. Conclusions of law: Assumptions of fact cannot include conclusions of law and mixed fact and law. Questions of law concern the correct legal test, and questions of fact address what has happened. Questions of mixed fact and law apply the legal test to the facts. See *Strother*, above, at paragraph [21]-[24].

6. Prejudice or Delay of Fair Hearing (Rule 53(a)): Rule 53(a) describes the possibility of a matter being prejudged or prejudiced due to the delay of a fair hearing. Prejudicial facts or evidence may result in triers of fact giving more weight to evidence or facts than it deserves. Further, a lack of precision in describing the relationship of third parties can be prejudicial. See *Status-One Investments Inc. v. The Queen*, 2004 TCC 473, appeal dismissed 2005 FCA 119.

7. Scandalous, frivolous or vexatious (Rule 53(b)): Scandalous refers to pleadings which are offensive and do not relate to issues and are abusive or prejudicial. Also, pleadings might be struck because they were inserted for colour, or because they are just plain inflammatory. Frivolous claims usually have little weight or importance and lack a rational argument, where vexatious claims are usually malicious and have no cause. Striking pleadings for being scandalous, frivolous or vexatious should only be done in the most obvious cases.

8. Abuse of process (Rule 53(c): As asserted in *Toronto (City) v. C.U.P.E. Local 79*, 2003 SCC 63, this is a flexible doctrine and refers to a misuse of procedure that prejudices a party and/or brings the administration of justice into disrepute. Litigation may be found as an attempt to re-litigate even if issue estoppel is not present. A court must consider fairness and balance the right to be heard with the concerns about finality, efficiency and the authoritative weight of judicial decisions. See also *Morel v. The Queen*, 2007 TCC 109, 2008 FCA 53. Abuse of process includes an attempt to use the Court processes in an unfair manner, i.e. consideration should be given in particular with tax litigation, when one is considering the implication of assumptions.

[There has been no judicial consideration of the MegaClaim and Newby litigation on their merits and as such this is not an attempt to relitigate.]

[43] It is in light of the foregoing principles that a review of each paragraph of the Respondent's Reply has been made.

[44] I am in agreement with the Appellant in part where the Appellant wants the entire Reply to be struck out - it is difficult to strike out parts of the Reply without the remaining parts resulting in incoherent pleadings. The Respondent themselves have acknowledged that there are portions of the Reply to be struck, and took steps to make certain admissions with respect to what ought to be removed. These were described as the "gray screened" paragraphs in the Reply filed with the Court and prepared by the Respondent for argument on April 2, 2011.

[45] In the appeal in 2001-1414(IT)G, after giving a four paragraph overview, the Appellant does a three page Statement of Fact at paragraphs 9 to 24. The Respondent in their Reply does an eighty-three page Reply with two appendices of eleven pages for a total of a ninety-four page Reply. The Respondent pleaded no

less than seventy pages of assumptions. I mention the volume of the Reply because it gives one an indication of the breadth and detail that the Respondent has pleaded and relied on.

[46] I have reviewed each word, and each sentence of the Respondent's Reply and have listed in the attached Schedule the particular text which should be struck out, and the summary reasons why the text should be struck. The strikes to the Respondent's Reply in appeal 2010-1414(IT)G should be applied *mutatis mutandis* to the three other replies. The quantum of the text to be struck is considerable and it will be necessary for the Respondent to prepare draft Amended Replies given the schedule attached, to bring more coherency to the Replies after applying my decision on the motion to strike.

[47] I further order the Respondent provide to the Appellant and the Court, within 60 days of the date of this Order, draft Amended Replies to bring more coherency to the Replies given the text to be struck, and to provide same to the Court. The Court will review the draft Amended Replies to determine if it complies with the provisions of this Order and issue a further Order, if and when required, with respect to formally filing the Amended Replies.

Costs:

[48] Given the partial success of both parties with respect to their arguments before the Court on this motion, there will be no order as to costs.

Signed at Ottawa, Canada, this 21st day of December, 2011.

"E.P. Rossiter"

Rossiter A.C.J.

CITATION:	2011TCC568
COURT FILE NO.:	2010-1413(IT)G 2010-1414(IT)G 2010-1640(IT)G 2010-2864(IT)G
STYLE OF CAUSE:	CANADIAN IMPERIAL BANK OF COMMERCE v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 28, 2011
REASONS FOR JUDGMENT BY:	The Honourable Associate Chief Justice E.P. Rossiter
DATE OF ORDER:	December 21, 2011

APPEARANCES:

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Counsel for the Respondent:	Gordon Bourgard and John Shipley

COUNSEL OF RECORD:

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CANADIAN IMPERIAL BANK OF COMMERCE V. HER MAJESTY THE QUEEN
2010-1414(IT)G, 2010-1413(IT)G, 2010-2864(IT)G, 2010-1640(IT)G

MOTION TO STRIKE

TABLE: TEXT TO STRIKE WITH REASONS

Note: This table refers to the paragraph numbers in the reply for 2010-1414(IT)G. The strikes should be applied *mutatis mutandis* to the replies in 2010-1413(IT)G, 2010-1640(IT)G, and 2010-2864(IT)G.

Paragraph	Text to Strike	Reason
1	"fraudulent overstatement"	Abuse of process, Prejudicial, Conclusion of Mixed Fact and Law
2	"defrauded"	Abuse of process, Prejudicial, Conclusion of Mixed Fact and Law
2	"fraudulent purpose"	Abuse of process, Prejudicial, Conclusion of Mixed Fact and Law
3	"fraudulent conduct"	Abuse of process, Prejudicial Conclusion of Mixed Fact and Law
5	"frauds"	Abuse of process, Prejudicial, Conclusion of Mixed Fact and Law
28.4.1-28.4.2.4	Condense to material facts	Too much evidence, Condense to material facts
28.4.2.2	"Disguised Loan"	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.4.2.4	"Disguised Loan"	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.4.2.5 – 28.4.2.9, 28.4.2.11-28.4.2.20	All text	Evidence
28.4.2.13	"Schottlaender was fired on October 31, 2002"	Prejudicial, Scandalous
28.4.2.20	"Wolf was fired in December 2003"	Prejudicial, Scandalous
28.4.3.3 – 28.4.3.5	All text	Not material facts
28.5.1-	Condense to material facts	Too much evidence, Condense to

28.5.9		material facts
28.5.10-28.5.19	All text	Not material facts
28.5.11	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.5.19	“voluntarily and received a significant ‘golden handshake’ from the appellant”	Not material facts, Scandalous
28.6.2	“with reported annual revenue of more than 150 billion. Enron rose to number 7 on the Fortune 500 list of companies before its fall in 2001”	Not material facts
28.6.4	“when discover of its accounting frauds forced”	Abuse of process, Prejudicial, Conclusion of Mixed Fact and Law
28.6.4	“from more than US$80 per share to less than US$1 in under a year”	Evidence, Not material facts
28.6.7	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.7	“aided and abetted” and “fraud”	Abuse of process, Prejudicial, Conclusion of Mixed Fact and Law
28.7.1	“senior officers of Enron engaged in transactions that manipulated its reported financial results”	Abuse of process, Prejudicial, Conclusion of Mixed Fact and Law
28.7.1 – 28.7.4	Condense to material facts, eliminate evidence and conclusions of mixed fact and law	Evidence, Conclusions of Mixed Fact and Law
28.7.5	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.7.5	“who knowingly aided and abetted Enron to violate the United States’ federal securities laws, and falsify its financial statements”	Abuse of process, Prejudicial, Conclusion of Mixed Fact and Law
28.7.6	“lucrative”	Scandalous
28.7.6	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.7.6	“Enron in its criminal conduct by knowingly assisting Enron in misrepresenting certain transaction to give them the appearance of compliance with U.S. accounting standards known as FAS 125/140 when they knew the transaction did not in fact comply with these standards”	Abuse of process, Prejudicial, Conclusion of Law and Mixed Fact and Law
28.7.10	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.7.10	“misrepresented”	Prejudicial, Conclusion of Mixed Fact and Law
28.7.10	“in reality”	Prejudicial, Conclusion of Mixed Fact and Law

28.7.13	All text	Abuse of process, Prejudicial, Conclusion of Mixed Fact and Law
28.7.14	All text	Abuse of process, Prejudicial, Conclusion of Mixed Fact and Law
28.7.16	“it was in appearance only”	Prejudicial, Conclusion of Mixed Fact and Law
28.7.17	“in substance and effect”	Prejudicial, Conclusion of Mixed Fact and Law
28.7.19	“and did not meet the FAS 125/140 requirements”	Conclusion of Mixed Fact and Law
28.8.1	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.8.3	“For example, unlike standard financing transactions: 8.3.1. minimal due diligence on the assets involved in the transactions was performed; 8.3.2. material terms of the transactions were deliberately kept out of the written deal documents; 8.3.3. the transaction were disguised loans but structured as purported asset sales at the design of Enron; 8.3.4. commitments on repayments were obtained from Enron that the Foreign Affiliates and the appellant knew, if disclosed, would defeat the sale accounting treatment desired by Enron; 8.3.5. the transactions were a form of asset parking as opposed to a standard commercial transaction; 8.3.6 millions of dollars in credit was extended to a borrower whose reported earnings were financially “engineered” and dependent on fraudulent accounting gains, rather than cash from operations; 8.3.7. credit decisions were fee driven; and 8.38. numerous last minute and/or unusually small financings were chosen not on the basis of objective commercial criteria but to allow Enron to fine tune its financial reporting at the end of	Evidence

	the reporting periods”	
28.3.3	“Disguised loans”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.8.4	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.8.5	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.8.6	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.8.7	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.4 – 28.8	Condense to material facts	Too much evidence, Condense to material facts
28.9	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.9.3	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.9.1 – 28.9.3	Condense to material facts	Condense to material facts – too much evidence
28.9.4 – 28.9.7	All text	Evidence
28.10	Condense to material facts	Condense to material facts: Evidence or relevant but not material
28.10.5	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.11	Condense to material facts	Condense to material facts: Evidence or relevant but not material
28.11.1	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.12.1	All text	Not material facts
28.12.2, 28.13.1	Check wording for “Capital Credit Market Group”	Inconsistent wording sequence, see paragraph 4.1, etc.
28.12.3 – 28.12.4	All text	Conclusions of mixed fact and law, Evidence
28.12.3	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact

		and Law, Scandalous
28.12.4	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.13	Almost all evidence. Eliminate and condense to material facts	Evidence
28.14	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.14	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.14.4	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.14.5	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.14.6	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.14.6	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.15	All text	Evidence
28.15.2	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.16	All text	Evidence
28.17	Mostly evidence. Condense to material facts regarding the limited involvement of the appellant with transactions	Evidence, Not material facts
28.17	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.17.1	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.17.3	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.17.4	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.17.5	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.17.7	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.18.1	All text	Abuse of process, Prejudicial

28.18.2	All text	Deleted in proposed amended reply filed by respondent
28.18.3	Mostly evidence. Condense to material facts	Evidence
28.18.4	All text	Deleted in proposed amended reply filed by respondent
28.19	All text	Deleted in proposed amended reply filed by respondent, subject to particularization of paragraphs 28.22.14 and 28.22.15 (“subject to pleading a single comprehensive set of particulars of assumptions of fact regarding conduct, acts and agreements, their purpose and effect, without reference to source, and without duplication”) which would include the substance of 28.19.1.1 and 19.1.2
28.20.5	All text	Deleted in proposed amended reply filed by respondent, subject to particularization of paragraphs 28.22.14 and 28.22.15 (“subject to pleading a single comprehensive set of particulars of assumptions of fact regarding conduct, acts and agreements, their purpose and effect, without reference to source, and without duplication”)
28.20.5	“Disguised Loan”	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
28.20.7 – 28.20.9	All text	Evidence
28.21.4	Condense to summary of material facts	Evidence
28.21.4.3	“fraudulent schemes”	Abuse of process, Prejudicial, Conclusion of Mixed Fact and Law
28.21.4.3	“Fraudulent”	Abuse of process, Prejudicial,

		Conclusion of Mixed Fact and Law
28.21.4.3.7	“fraudulent scheme”, “illicit” “falsify”, and “Ponzi scheme”	Abuse of process, Prejudicial, Conclusion of Mixed Fact and Law
28.21.5-21.7	All text	Deleted in proposed amended reply filed by respondent, subject, however, to particularization of paragraphs 28.22.14 and 28.22.15, (“subject to pleading a single comprehensive set of particulars of assumptions of fact regarding conduct, acts and agreements, their purpose and effect, without reference to source, and without duplication”)
28.21.10 – 28.21.11	All text	Evidence
28.22.2 – 28.22.3	All text	Evidence
28.22.5	All text	Evidence
28.22.7	All text	Conclusion of mixed fact and law
28.22.8	“once and for all payments”	Conclusion of mixed fact and law
28.22.11	“to minimize the public scrutiny and bad publicity that would ensue if the public were made aware of the complicity of the appellant and its Foreign Affiliates in its Enron dealings”	Relevant but not material
28.22.13	All text	Conclusion of mixed fact and law
28.22.14 – 28.22.15	All text	Deleted in proposed amended reply filed by respondent, subject, however, to particularization of paragraphs 28.22.14 and 28.22.15, “subject to pleading a single comprehensive set of particulars of assumptions of fact regarding conduct, acts and agreements, their purpose and effect, without reference to source, and without duplication”
28.22.16 – 28.22.17	All text	Not material facts, Prejudicial

28.22.18	All text	Evidence, Conclusion of mixed fact and law
29	“with its headquarters in Houston, Texas”	Not material facts
33	All text	Not material facts
34	All text	Conclusion of mixed fact and law, Not material facts
35	All text	Not material facts
36	All text	Evidence, Not material facts, Abuse of process
37	All text	Evidence, Not material facts, Abuse of process
38	All text	Evidence, Abuse of process
39	All text	Evidence
40	All text	Evidence
41	All text	Evidence
42	All text	Evidence
43	All text	Evidence
44	All text	Evidence
45	“A competitor, Dynergy Corp., offered to purchase Enron but when the deal fell through” “With assets of US$63.4 billion, it was to that point the largest corporate bankruptcy in U.S. history.”	Not material facts
48	All text	Not material facts
49	All text	Not material facts
50	All text	Not material facts, Evidence

51	All text	Not material facts
53	All text	Not material facts
59 (a) – 59 (j)	Mostly evidence, condense to material facts regarding Hawaii transactions	Evidence, Not material facts
60	Mostly evidence and some conclusions of mixed fact and law, eliminate and condense to material facts.	Evidence, Some conclusions of mixed fact and law
61	All text	Not material facts
62	"During the Enron Task Force's ongoing criminal investigation into matters relating to the collapse of Enron"	Not material facts
64	All text	Evidence
65	All text	Evidence
66	All text	Evidence
67	"Disguised Loan"	Prejudicial, Conclusion of Mixed Fact and Law, Scandalous
67	"Between June 1998 and October 2001, Enron used these disguised loans to increase reported earnings by more than US$1 billion, to increase reported operating cash flows by almost US$2 billion, and to avoid disclosure of more than US$2.6 billion in debt on its financial statements. The disclosure of this additional debt would likely have had a detrimental impact on Enron's credit rating and stock price."	Evidence, Abuse of process
68	All text from "Enron treated these transfers as accounting 'sales' pursuant to Financial Accounting…" up to and including "nor the requirement that the transferor relinquish control over the asset"	Evidence
71	"fraudulent"	Prejudicial, Conclusion of Mixed Fact and Law
73	"in the US DOJ's view had been committed by them and their former employees related to	Evidence

	certain structured finance transactions with Enron"	
74	All text from "CIBC agreed to an independent compliance monitor for three years…" up to and including "or engage in any period end transaction motivated by accounting objectives"	Evidence
76 – 80	All text	Not material facts, Abuse of process
81	Entire quotation from paragraph 14 of amended complaint	Evidence, Not material facts
82	All text	Evidence, Not material facts
83	All text	Evidence, Not material facts
84	All text	Evidence, Not material facts
85	All text	Evidence, Not material facts
86	All text	Evidence, Not material facts
87	All text	Evidence, Not material facts
88 - 101	Too much evidence, condense to material facts	Evidence, Not material facts, prejudicial.
91	"fraudulent"	Abuse of process, Prejudicial, Conclusion of Mixed Fact and Law
102	All text	Condense to material facts
107	All text	Evidence
110	All text	Evidence, Conclusion of Mixed Fact and Law
112	"On June 10, 200, the Citigroup US$2 billion Newby settlement was announced. On June 14, 2005 JPMorgan settled for US$2.2 billion"	Not material facts
113	"with full knowledge of the allegations made by Newby and others and with the knowledge of the CIBC Defendants that in substance and effect, the allegations were true"	Prejudicial, Conclusion of mixed fact and law

114	All text except amount specifically referring to CIBC	Not material facts
115	All text	Evidence
115(l)	“sham”	Conclusion of mixed fact and law
116	All text	Evidence
118 – 122	All text	Deleted by respondent in proposed amended reply as it duplicates an assumption. Also contains conclusions of mixed fact and law, evidence, prejudicial statements
128 (a)	“fraudulent”	Deleted by respondent in proposed amended reply
Schedule A to Reply	All text	Evidence
Schedule B to Reply	All text	Evidence