Docket: 2012-2683(IT)G

BETWEEN:

BURLINGTON RESOURCES FINANCE COMPANY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Motion held on October 31, 2019 at Toronto, Ontario

Before: The Honourable Justice Johanne D'Auray

Appearances:

Counsel for the Appellant:	Andrew Boyd Alexander Cobb
Counsel for the Respondent:	Alexandra Humphrey Erin Strashin

ORDER

UPON respondent's Amended Notice of Motion to amend pleadings dated September 27, 2019 for the following relief:

1. an Order of the Court granting the respondent leave to file:

    a. the proposed Amended Amended Reply to the Notice of Appeal;

    b. the proposed Fresh as Amended Reply to the Notice of Appeal, which is simply the cumulative product of the various rounds of amendments made to the Reply.

2. such further and other relief as counsel may advise and the Court may permit.

AND UPON hearing the submissions of the parties;

IT IS ORDERED THAT:

The respondent's Motion is allowed. Accordingly, the respondent is granted leave to file her Amended Amended Reply and Fresh as Amended Amended Reply.

The request of the appellant for costs thrown away is denied.

The costs of this Motion will follow the cause.

Signed at Ottawa, Canada, this 20th day of February 2020.

"Johanne D'Auray"

D'Auray J.

Docket: 2013-2595(IT)G

BETWEEN:

CONOCO FUNDING COMPANY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion held on October 31, 2019 at Toronto, Ontario

Before: The Honourable Justice Johanne D'Auray

Appearances:

Counsel for the Appellant:	Andrew Boyd Alexander Cobb
Counsel for the Respondent:	Alexandra Humphrey Erin Strashin

ORDER

WHEREAS this Motion was brought on for hearing on October 31, 2019 to be heard concurrently with the Respondent's motion in *Burlington Resources Finance Company v. Her Majesty the Queen*, Docket 2012-2683(IT)G, whereby the appellant requested that costs thrown away be awarded by this Court as a result of the respondent abandoning the transfer pricing issue;

WHEREAS the parties have advised the Court on November 14, 2019, that they have no objection to leave being granted to the Respondent to file the Amended Reply and Fresh as Amended Reply, without prejudice to the parties' respective positions and submissions as to whether costs thrown away should be ordered as a term of such leave;

WHEREAS this Court issued an Order dated November 27, 2019, whereby the Court granted the respondent leave to file the Amended Reply and Fresh as Amended Reply;

IT IS ORDERED that the appellant is not entitled to an award of costs thrown away;

The costs of this Motion will follow the cause.

Signed at Ottawa, Canada, this 20th day of February 2020.

"Johanne D'Auray"

D'Auray J.

Citation: 2020 TCC 32
Date: 20200220
Docket: 2012-2683(IT)G

BETWEEN:

BURLINGTON RESOURCES FINANCE COMPANY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2013-2595(IT)G

AND BETWEEN:

CONOCO FUNDING COMPANY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

D'Auray J.

I. BACKGROUND

[1] The respondent filed a Motion asking the Court to grant leave to file:

i. the proposed Amended Amended Reply to the Notice of Appeal in the Burlington Resources Finance Company ("Burlington") appeal, which was filed with the Court on October 31, 2019;

ii. the proposed Fresh as Amended Amended Reply to the Notice of Appeal in the Burlington appeal which was also filed with the Court on October 31, 2019.

[2] At the hearing of the Motion, counsel for Conoco Funding Company ("Conoco") and Burlington stated that he was consenting to the filing and the serving of the Amended Reply with respect to the Conoco appeal. Accordingly, I issued an Order dated November 27, 2019 granting the respondent leave to file the Amended Reply.

[3] The proposed amendments to the Reply with respect to the Burlington appeal deal with the application of paragraph 20(1)(e.1) of the *Income Tax Act* (the *"Act*"), whether the amounts payable by Burlington to its parent Burlington Resources Inc. ("BRI") as "guarantee fees" fell within the ambit of paragraph 20(1)(e.1), and whether the fee agreements are legally ineffective.

[4] The respondent has also abandoned the transfer pricing issue in her proposed Amended Amended Reply. Therefore she is no longer relying on the provision dealing with transfer pricing, namely section 247 of the *Act*.

[5] Burlington argues that the Court should not grant leave to the respondent to file an Amended Amended Reply since Burlington would be prejudiced by the proposed amendments.

[6] Neither Burlington nor Conoco takes issue with the respondent abandoning the transfer pricing issue. However, they argue that costs thrown away should be awarded to them, for the time and efforts they have wasted dealing with the transfer pricing issue so far.

II. PROCEDURAL HISTORY

[7] The Burlington appeal has a long procedural history beginning in 2012. This is history is relevant to this Motion as the parties dispute the appropriateness of the timing of this Motion and its impact on a potential award of costs. In the procedural history, I only refer to the facts relevant to the respondent's Motion to amend her Further Amended Reply in Burlington and the request by Burlington and Conoco to be awarded costs thrown away.

[8] Burlington, a Nova Scotia unlimited liability company, borrowed approximately $3 billion USD in 2001 and 2002 by issuing seven bonds (the "Notes") guaranteed by BRI, its non-resident parent.

[9] The Minister of National Revenue (the "Minister") reassessed Burlington's 2002 to 2005 taxation years to deny deductions for annual payments made by Burlington to BRI for its unconditional guarantee of the Notes under the transfer pricing rules in paragraphs 247(2)(a) and (c) of the *Act*. The Minister also disallowed deductions for financing expenses incurred by Burlington in issuing the Notes (the "Financing Costs") and assessed transfer pricing penalties.

The Initial Pleadings

[10] On June 26, 2012, Burlington filed and served its Notice of Appeal.

[11] On October 9, 2012, the respondent filed her Reply with Burlington's consent to an extension of time to file. In her initial Reply the respondent included additional arguments defending the Minister's reassessment. In her initial Reply, the respondent also defined the annual guarantee fees paid as "Charges". She relied on the following provisions in addition to paragraphs 247(2)(a) and (c) of the *Act*; 18(1)(a), (b), 20(1)(e), (e.1), 67, 152(9), 169(2.1), 212, 215, 227, 247(a), (b), (c) and (d), 248 and 251 of the *Act*.

[12] The respondent at paragraph 13 of the initial Reply defended the Minister's reassessment, by addressing 18(1)(a) and 20(1)(e.1) of the *Act* in the following manner:

> 13. He [The Attorney General of Canada] submits that no deduction should be allowed in respect of the Charges, as they were not incurred for the purpose of earning or producing income under ss 18(1)(a) and 20(1)(e.1) of the Act:
>
> > a) the Charges were incurred for the purpose of obtaining a tax benefit for [Burlington];
> >
> > b) the Charges were unnecessary and redundant due to [Burlington's] status as an unlimited liability company.

[13] The respondent also relied on the transfer pricing provisions, 247(a), (b), (c) and (d) of the *Act*. Since these provisions are no longer in issue, I did not find necessary to reproduce the respondent's position on these provisions, as she has abandoned the transfer pricing issue all together.

Burlington's Demand for Particulars

[14] On November 14, 2012, Burlington served a Demand for Particulars on the respondent.

[15] Burlington was not satisfied by the particulars given by the respondent and, on March 28, 2013, Burlington filed a Notice of Motion seeking:

> 1. an Order striking the Reply filed by the Respondent on October 9, 2012, with leave to file and Amended Reply within 15 days of the Court's Order, except with respect to Financing Costs (as defined in the Notice of Appeal);
>
> 2. in the alternative, and Order:
>
> a. directing the Respondent to deliver particulars within 30 days of the Court's Order in response to [Burlington's] Demand for Particulars served on the Respondent on November 14, 2012; and
>
> b. extending the time for the service and filing of an Answer to 15 days after the particulars are ordered to be delivered

[16] On April 10, 2013, Burlington filed an Amended Notice of Motion, which requested additional relief in the form of an Order striking the Reply in its entirety on the basis that none of the pleaded arguments had a reasonable prospect of success and the appeal be allowed with costs.

The Respondent's First Proposed Amendment

[17] On April 19, 2013, the respondent served Burlington with a proposed Amended Reply entitled "Amended Reply".

[18] In this Reply, the respondent abandoned the Financing Costs issue and no longer relied on section 67 of the *Act*. The respondent continued to rely on subsection 9(1), and paragraphs 18(1)(a) and 20(1)(e.1) of the *Act*, in the same manner as she did in her initial Reply.

[19] Burlington offered to accept the filing of the Amended Reply on the condition that (i) its upcoming motion to strike the Reply be directed at the Amended Reply instead, and (ii) the respondent pay $5,000 in costs. The responded rejected this offer.

[20] On April 22, 2013, the respondent filed a Notice of Motion requesting an Order granting her leave to file the Amended Reply.

Burlington's Motion to Strike the Amended Reply and the respondent's first Motion to File an Amended Reply

[21] On April 30, 2013, Justice Hogan heard both Burlington's and the respondent's Motions.

[22] On July 17, 2013, Justice Hogan allowed Burlington's Motion to strike the Amended Reply. However, Justice Hogan also granted the respondent leave to serve and file a Further Amended Reply addressing the deficiencies he had identified in the Amended Reply.

[23] In striking the Amended Reply, Justice Hogan agreed with Burlington that drafting deficiencies resulted in the respondent failing to adequately frame its case with regard to the transfer pricing issue, namely paragraphs 247(2)(a) and (c). Justice Hogan held that the respondent's framing of the questions to be decided with respect to paragraphs 247(2)(a) and (c) was "manifestly incorrect." The Amended Reply framed the issue as "whether the terms or conditions made or imposed in respect of the Charges differed from those that would have been made between persons dealing at arm's length." At paragraph 29 of the Order, Justice Hogan identified that the correct question was *"whether the terms or conditions imposed in respect of the guarantee itself, not the terms or conditions of the guarantee fees, differed from those that would have been set between persons dealing at arm's length."* Justice Hogan stated that without acknowledging the existence of the guarantee, the respondent could not challenge the price of that guarantee. Justice Hogan also noted in his reasons that the respondent must take a clear position on the facts, namely the facts dealing with the transfer pricing issue. Finally, Justice Hogan stated that the Burlington should not be forced to waste resources attempting to discern the respondent's position on several of the key facts at issue.

[24] However, Justice Hogan rejected Burlington's argument that the appeal should be allowed on the basis that none of the pleaded arguments had a reasonable prospect of success. He stated as follows at paragraph 40 of his reasons:

> . . . In the Amended Reply, the respondent points out that the appellant was an NSULC. Under section 135 of the *Companies Act*, present and certain past shareholders are liable for an NSULC's unpaid debts and liabilities if the NSULC is wound up and liquidated without sufficient assets. This means that BRI would be liable for the appellant's debts if the appellant were wound up without sufficient assets. I agree with the respondent that it is legitimate to ask whether an arm's length person standing in the appellant's shoes would have been willing to pay the guarantee fees for BRI's explicit guarantee knowing that BRI was potentially responsible for the appellant's liabilities even without the guarantee.

Further Amended Reply

[25] On September 13, 2013, in compliance with Justice Hogan's Order, the respondent served and filed with the Court an amended Reply entitled "Further Amended Reply". In the Further Amended Reply, the respondent changed the word "Charges" to "Guarantee Fees' as ordered by Justice Hogan. The respondent, as she did in her initial Reply, continue to argue the application of paragraphs 18(1)(a) and 20(1)(e.1). As well as the transfer pricing provisions. Her position was as follows:

> 13. He submits that no deduction should be allowed in respect of the Charges Guarantee fees, as they were not incurred for the purpose of earning or producing income under ss 18(1)(a) and 20(1)(e.1) of the Act:
>
> > a) the ~~Charges~~ Guarantee fees were incurred for the purpose of obtaining a tax benefit for [Burlington];
> >
> > b) the ~~Charges~~ Guarantee fees were unnecessary and redundant due to [Burlington's] status as an unlimited liability company.

Burlington's Answer

[26] On November 12, 2013, Burlington filed its Answer to the Further Amended Reply.

Exchanging Lists of Documents and Discoveries

[27] Each of the parties served and filed their Lists of Documents on March 12, 2014.

[28] On April 15, 2014, Burlington requested the timeline for the completion of examinations for discovery be extended to July 31, 2014. The request was granted and Justice Campbell ordered a corresponding amended timeline on June 12, 2014.

[29] On June 3, 2014, the respondent filed a supplementary List of Documents.

[30] Burlington examined the respondent's nominee, Ms. Fawcett, for six days between June and November 2014.

[31] In July 2014, the respondent examined Burlington's nominee, Mr. Delk, for four days and in December 2014 for an additional two days.

Burlington's Motion to Compel Answers at Discovery

[32] On December 1, 2014, Burlington filed a Notice of Motion seeking an Order to compel the respondent's nominee, Ms. Fawcett, to answer outstanding questions from discovery.

[33] On March 20, 2015, Justice Campbell ordered Ms. Fawcett to re-attend examination for discovery to answer questions that the respondent had previously refused to answer or to provide more complete answers. It is to be noted that the respondent advised Justice Campbell that she would no longer be relying on paragraphs 247(2)(b) and (d) as a basis to argue that no deduction should be allowed in respect to the guarantee fees. Justice Campbell noticed that there had been no amendment to the pleadings and no steps taken to amend since the date of the hearing of the Motion in December 2014.[1]

[34] The respondent filed a Notice of Appeal from Justice Campbell's Order with the Federal Court of Appeal on March 30, 2015.

[35] On April 21, 2015, Justice Campbell Ordered Burlington to provide the respondent with the remainder of its outstanding answers on discovery together with updated answers to undertakings before June 19, 2015.

[36] On May 17, 2016, the respondent discontinued her appeal of Justice Campbell's Order at the Federal Court of Appeal.

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1 *Burlington v The Queen*, 2015 TCC, at paragraph 20.

The Respondent's Motion to Compel Answers at Discovery

[37] On December 14, 2015, the respondent filed a Notice of Motion seeking an Order to compel Burlington's nominee, Mr. Delk, to answer outstanding questions from discovery.

[38] On January 5, 2016, the respondent filed an Amended Notice of Motion to include in the relief sought, alternative Orders requiring Burlington to respond to all fully disputed questions in writing and to produce all documents requested by the respondent within 90 days, in the event Burlington failed to comply with the requested Order, an Order dismissing the Appeal.

[39] The parties were set to appear before Justice Woods on January 11, 2016 for what was scheduled to be four and a half days of submissions with respect to the respondent's Motion. However, the hearing was adjourned after a day to allow Burlington time to provide the respondent and the Court a written reply to the respondent's Motion to compel Answers to Discovery Questions.

[40] On February 12, 2016, Burlington filed its Written Submission to the respondent's Motion to Compel Answers to Discovery Questions.

[41] I heard the respondent's Motion and on August 3, 2017, I issued an Order directing Burlington to answer certain of the disputed questions from discovery. In my Order, I summarized the respondent's position. At paragraph 5 of my reasons, I summarized the position of the respondent that is relevant to the Motion at bar:

> 5. . . .
>
> 16. In her Amended Reply to Notice of Appeal, the Respondent also relied on *paragraphs 18(1)(a)* and *20(1)(e.1)* of the *Act*. The paragraph 18(1)(a) argument falls under the duplicative theory, namely that the guarantee fees were not paid to ensure that the outside investors would get their money back, in light of the fact that Burlington was a [Nova Scotia Unlimited Liability Corporation] and due to the hybrid financing arrangements. Therefore, the guarantee fees were not incurred for the purposes of earning income from a business but for the purpose of obtaining a tax benefit.
>
> 17. With respect to paragraph 20(1)(e.1) of the *Act*, the Respondent's theory is that the guarantee fees were not incurred for the purposes of borrowing money because BRI provided the guarantee to Burlington before it had to pay a guarantee

> fee and before it actually paid a guarantee fee. Therefore, the guarantee fees were not made for the purpose of borrowing money to be used by Burlington for the purpose of earning income from a business but to obtain a tax benefit.
>
> 18. In her Amended Reply, the Respondent also relied on paragraphs *247(2)(b)* and *(d)* to deny the deduction of the guarantee fees; however, the Respondent has informed the Court that she is abandoning the argument that the guarantees were not entered into for *bona fide* purposes other than to obtain a tax benefit for Burlington pursuant to paragraphs 247(2)(b) and (d) of the *Act*.

[42] At the respondent's Motion to compel Mr. Delk to answer to discovery questions, Burlington argued that the scope of the underlying dispute had been significantly narrowed by admissions it made in its Answer and comments made by the respondent's nominee at discovery. Burlington maintained that its appeal should be allowed because (1) the respondent no longer relied on paragraphs 247(2)(b) and (d) of the *Act* and (2) the admissions made by Burlington of some the Minister's assumptions with respect to 247(a) and (c) of the *Act* rendered the position of the respondent moot with respect to transfer pricing.

[43] In other words, Burlington reiterated the arguments that it unsuccessfully made before Justice Hogan. Specifically, Burlington argued that the position taken by the respondent on transfer pricing could not stand, in light of the assumptions made by the Minister. As I stated in my Reasons for Order dated August 3, 2017, Burlington's position was based on a mischaracterization of the Minister's assumption which referred to the price which a non-arm's length party would require Burlington to pay in order to guarantee its debt if Burlington operated on a stand alone basis. I held in that Order, that the transfer pricing issue remained a live issue in the appeal.

The Respondent's Further Motion to Compel Answers

[44] At a case management conference in the summer of 2018, the respondent submitted that the answers given by Burlington and Conoco following my Order were not responsive.

[45] On November 30, 2018, the respondent filed a Notice of Motion seeking an Order that Burlington provide responsive answers and relevant documents relating to my Order dated August 3, 2017.

[46] On April 8, 2019, I issued an Order requiring Burlington to answer some, but not all, of the outstanding questions and dealt with the issue concerning with privileged documents.

III. REQUESTED AMENDMENTS

The Respondent's Present Motion to Amend

[47] After the respondent completed the examination for discovery of Burlington's nominee, since Burlington did not consent to the respondent filing the proposed Amended Amended Reply, the respondent filed a Motion requesting leave to file the said Reply before this Court. The proposed Amended Amended Reply is dated August 13, 2019. In this proposed Amended Amended Reply, the respondent conceded the transfer pricing issue but added back section 67 of the *Act*, which she had previously removed.

[48] In the August 13, 2019 version of the Reply, the respondent continued to argue subsection 18(1)(a) and paragraph 20(1)(e.1) of the *Act*. With respect to paragraph 20(1)(e.1), the respondent took the position that the amounts paid by Burlington to BRI were not payable as guarantee fees within the meaning of paragraph 20(1)(e.1). She argued in the alternative, that if the amounts were "guarantee fees", they were not incurred by Burlington for the purpose of borrowing money within the meaning of paragraph 20(1)(e.1) of the *Act*. She also argued that notes agreement were legally ineffective.

[49] On September 23, 2019, the respondent filed amended motion materials, including a further amended Amended Amended Reply.

[50] On October 30, 2019, the day before the Amending Motion was scheduled to be heard, the respondent provided the Court and Burlington with another proposed Amended Amended Reply. In that Reply, the respondent abandoned her argument with respect to section 67 of the *Act*, but with respect to the arguments dealing with paragraph 20(1)(e.1) and legal ineffectiveness of the fees agreement, she took the same position as the one set out in the proposed Amended Amended Replies dated August 13, 2019 and September 23, 2019.

[51] On October 31, 2019, the morning of the Motion at bar, the respondent provided the Court and Burlington with a further proposed Amended Amended

Reply which made typographical corrections but contained no substantive amendments.

[52] The respondent is requesting leave from this Court to file the proposed Amended Amended Reply dated October 30, 2019 and presented to the Court on the day of the hearing of the Motion, namely October 31, 2019. It states as follows:

> 12. He [The Attorney General of Canada] relies on ss 18(1)(a), (b), 20(1)(e.1), 152(9), 169(2.1), and 248 of the Income Tax Act, RSC 1985, c 1 (5th Supp), as amended (the "Act") and s 135 of the Companies Act, RSNS 1989, c 81, as amended.
>
> 12.1 He [The Attorney General of Canada] submits that no deduction should be allowed in respect of the amounts the Appellant says were payable to BRI pursuant to the Agreements because:
>
> > a) no amounts were payable to BRI as "guarantee fees" in the years in issue within the meaning of paragraph 20(1)(e.1) of the Act; and
> >
> > b) in the alternative, if the Court finds that the amounts were payable to BRI as "guarantee fees," they were not incurred by the Appellant for the purpose of borrowing money, within the meaning of paragraph 20(1)(e.1) of the Act.
>
> 12.2 Though the Appellant needed an unconditional guarantee from BRI to borrow money from the public market under the notes, it did not need to agree to pay, and did not agree to pay, a fee to BRI to secure that guarantee or as consideration for that guarantee. To the extent that the Agreements purported to obligate the Appellant to provide BRI with a fee as consideration for BRI's prior agreement to fully and unconditionally guarantee the Notes, or for BRI's performance of its obligations under its prior agreement to fully and unconditionally guarantee the Notes, the Agreements were legally ineffective in doing so.
>
> 13. He [The Attorney General of Canada] submits that no deduction should be allowed in respect of the amounts because they were not made or incurred for the purpose of earning or producing income from a business, but were instead agreed to for the purpose of obtaining a tax benefit for the Appellant contrary to section 9 and paragraph 18(1)(a) of the Act. Furthermore, the amounts were unnecessary and redundant due to the Appellant's status as an unlimited liability company and due to the effect of the Hybrid Instruments.

> 14. He [The Attorney General of Canada] requests that the appeal be allowed with respect to the Costs and the transfer pricing penalties only and dismissed in all other respects, with costs to the Respondent.

[53] The appeals are scheduled to be heard beginning on May 11, 2020 for three weeks with respect to Conoco's appeal and on May 25, 2020 for three weeks with respect to the Burlington's appeal.

[54] The proposed amendments deal with the characterization of the guarantee fees and the legal ineffectiveness of the fee agreements.

IV. POSITION OF THE PARTIES

[55] The respondent asserts that by abandoning the transfer pricing issue, the appeal is been narrowed. As to the proposed amendments, she argues that they only particularize the respondent's pre-existing position that the amounts claimed were not guarantee fees and that the fee agreements were legally ineffective. Therefore the amounts claimed by Burlington are not deductible under section 9 and paragraphs 18(1)(a) and 20(1)(e.1) of the *Act*.

[56] The respondent argues that she has always taken the position that the amounts in issue were not "guarantee fees" within the meaning of paragraph 20(1)(e.1) of the *Act*, and has always denied Burlington's claim that the amounts paid under the "Guarantee Fee Agreements" were paid as consideration for BRI's guarantee. The respondent asserts that her position on 20(1)(e.1) was pleaded in her initial Reply, that Burlington canvassed her position on 20(1)(e.1) at discoveries, and that she never admitted the amounts were guarantee fees within the ambit of 20(1)(e.1).

[57] The respondent also submits that Justice Hogan's Order dealt solely with the transfer pricing issue. Complying with Justice Hogan's Order, she referred to the amounts as guarantee fees in the Further Amended Reply for the purpose of the transfer pricing provisions. That said, the respondent submits that she never admitted that the amounts paid were guarantee fees for the purposes of paragraph 20(1)(e.1) of the *Act*. She further submits that this is quite clear from the examinations for discovery conducted after Justice Hogan's Order was rendered.

[58] On the issue of the legal ineffectiveness of the fee agreements, the respondent asserts that it is not a new issue but is part of the broader issue of whether the amounts paid by Burlington to BRI were paid as consideration for BRI's guarantee. The respondent argues that, while the parties agree that payments were made under the four agreements, the parties never agreed on the legal character of those amounts for tax law purposes. Additionally, the respondent asserts she never made an admission on either of these points. However, if this Court finds that she did, the respondent asserts that this Motion constitutes a request to withdraw those admissions.

[59] On the issue of timing, the respondent submits that she waited to finish the discovery of Mr. Delk to amend her Further Amended Reply, as she did not want to amend on piecemeal basis. The respondent submits that she acted reasonably; since she filed a Motion seeking leave to file the Amended Amended Reply two months after the discovery process was completed.

[60] Accordingly, the respondent submits that she meets the conditions for granting leave to amend pleadings as set out in the decision of the Federal Court of Appeal in *Canderel Ltd v The Queen* [2] (*"Canderel"*) and by the Tax Court of Canada in *Continental Bank Leasing Corp*. v *The Queen*[3](*"Continental*"). As such, the respondent argues that this Court should grant leave permitting her to file and serve the Amended Amended Reply dated October 30, 2019.

[61] Burlington does not take issue with the respondent's abandonment of the transfer pricing issue or the respondent's reliance on paragraph 20(1)(e.1) as the respondent has always relied on paragraph 20(1)(e.1) of the *Act*. However, Burlington argues that this Court should not grant leave to the respondent permitting her to file the proposed Amended Amended Reply dated October 30, 2019 since it purport to withdraw:

a) admissions that Burlington agreed to pay BRI fees in exchange for the guarantee service it provided back in 2001 and 2002;

b) admissions that the amounts in issue were payable and payable as guarantee fees;

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2 *Canderel Ltd v R,* [1993] 2 CTC 213. [*Canderel*]

3 *Continental Bank Leasing Corp v R,* [1993] 1 CTC 2306. [*Continental*]

c) the related admission that the guarantee fee agreement were not legally ineffective.

[62] Burlington also submits that the respondent failed to explicitly request permission to withdraw the above noted admissions and failed to provide a basis for the withdrawal. In addition, granting permission to the respondent to file the Amended Amended Reply would prejudice Burlington since the proposed amendments and the purported withdrawals would raise new factual issues about what occurred nearly 20 years ago in 2001. With the passage of time, a number of documents have become unavailable and the employees have moved on.

[63] Burlington and Conoco submit that costs thrown away should be awarded as all the work and the costs associated with the transfer pricing issue have been wasted due to the respondent abandoning the transfer pricing issue at this stage of the litigation.

[64] The respondent argues that this is not an appropriate case for an award of costs thrown away as the respondent's decision to abandon the transfer pricing issue does not render any of Burlington's or Conoco's costs wasted. Instead, the respondent argues that these costs led to the early resolution of a complex issue. In addition, the respondent submits that she did not conduct herself in a reprehensible, scandalous or outrageous manner as is required for an award of costs thrown away.

V. ISSUES

[65] Should the Court grant the respondent leave to amend, file, and serve the proposed Amended Amended Reply dated October 30, 2019?

[66] Should costs thrown away be awarded to Burlington and Conoco, as a result of the respondent abandoning the transfer pricing issue?

VI. ANALYSIS

[67] I will first deal the proposed amendments and then I will analyse whether costs thrown away should be awarded to Burlington and Conoco.

A. *Proposed Amendments*

[68] Section 54 of the *Rules of the Tax Court of Canada (General Procedure),* (the "*Rules*") sets out the right to amend pleadings. Section 54 provides as follows:

> A pleading may be amended by the party filing it, at any time before the close of pleadings, and thereafter either on filing the consent of all other parties, or with leave of the Court, and the Court in granting leave may impose such terms as are just.

[69] Section 54 of the *Rules* must be read in conjunction with section 4, which requires that the *Rules* be *"liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits."*

[70] Generally, this Court has allowed proposed amendments to pleadings where it is in the interest of justice to do so and where the proposed amendments will not cause prejudice to a party that cannot be compensated in costs.

Purported withdrawal of the respondent's admission "the amounts paid were guarantee fees"

[71] Burlington argues that the respondent failed to explicitly request permission or provide a basis for withdrawing the admissions. To support its argument, Burlington relies on the Federal Court of Appeal's holding in *Canderel* that a request for permission to withdraw an admission was a prerequisite to the Court's exercise of its discretion to allow withdrawals of previous admissions under section 132 of the *Rules*. Additionally, Burlington relies on this Court's decision in *Nolasco v R,*[4] ("*Nolasco*") which held that a party must provide sufficient reasons regarding the withdrawal of an admission and that a failure to do so is fatal to their leave application.

[72] This argument by Burlington is only relevant if I were to find that the proposed amendments withdraw admissions made by the respondent. In light of the evidence, I do not agree that the respondent made admissions as contemplated by section 132 of the *Rules*.

[73] The section that deals with withdrawals of admissions is section 132 of the *Rules*. It states as follows:

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4 *Nolasco v R,* 2015 TCC 318.

> A party may withdraw an admission made in response to a request to admit, a deemed admission or an admission in the party's pleading on consent with leave of the Court.

[74] Section 132 of the *Rules* only applies to admissions of fact made in a request to admit or in a pleading, referred to as "formal admission". Section 132 of the *Rules* does not apply to admissions made in the context of an examination for discovery, referred to as "informal admissions". An answer given during an examination for discovery maybe corrected without leave of the Court. Subsection 98(1) of the Rules deals with admissions made during an examination for discovery, it states as follows:

> 98 (1) Where a party has been examined for discovery or a person has been examined for discovery on behalf or in place of, or in addition to the party, and the party subsequently discovers that the answer to a question on the examination,
>
> (a) was incorrect or incomplete when made, or
>
> (b) is no longer correct and complete,
>
> the party shall forthwith provide the information in writing to every other party.

[75] In addition, contrary to Burlington's argument, Courts have taken a somewhat flexible approach with respect to withdrawals of admissions. In *HMQ* v *Andersen Consulting*,[5] the Federal Court of Appeal held that an application for leave to withdraw admissions did not require a separate form. In that decision, Justice Strayer states as follows:

> 7. The motions judge, in our view, wrongly held that an application for leave to withdraw admissions was required separate from, and in addition to, the Appellant's motion to amend its pleadings which were said by the Respondent to involve withdrawals of admissions. We can find no reason in logic or doctrine as to why such a separate motion should be required. A motion to amend pleadings, if it involves some changes to the pleadings which might be construed as a withdrawal of admissions, is still a proper motion to amend pleadings pursuant to Rule 420. If there is any legitimate reason to object to any such withdrawal it may be addressed in the same proceeding where other types of amendments are considered.

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5 *HMQ* v *Andersen Consulting*, [1998] 1 FC 605 (FCA).

[76] Justice Hughes of the Federal Court explains the distinction between an admission made in a pleading and admission made during a discovery in the decision of *Apotex* v *Astrazeneca Canada Inc*.[6] He opines that leave is not required to withdraw an admission made during an examination for discovery. As the rules of the Federal Court are similar to the rules of this Court, his comments are relevant to this Motion. In that decision, he holds:

> [20] It appears that this Court has extended the categories of the means by which "formal" admissions are made to certain kinds of admissions made by Counsel on discovery, as is illustrated by the decision of Justice Tremblay-Lamer in *Archambault v Ministre du Revenu National*, [1998] FCJ No 635, 189 FTR 37 (aff'd without discussion on the point: 264 NR 171). The reported reasons do not repeat what was actually said during the discovery, but what was said appears to have been said expressly for the purpose of trial if we take paragraph 6 of the reasons, which refer to another case, as being illustrative. At paragraph 5, Tremblay-Lamer J. states that, absent consent of the opposite party, a "formal" or "judicial" admission cannot be withdrawn without leave of the Court:
>
> > 5 *The case law is clear on the question of withdrawing admissions: a party may not withdraw a "formal admission" (or "judicial admission") without first obtaining leave of the Court or consent of the adverse party.*
>
> [21] On the other hand, this Court has treated answers on discovery as "informal" admissions which can be qualified, enlarged upon or even contradicted upon notice to the opposite party. Prothonotary Lafreniere in *Apotex Inc v Wellcome Foundation Ltd*, [2009] FCJ No 177, 343 FTR 41 wrote at paragraph 37:
>
> > *37 Although the answers provided by GSK's representative during examination for discovery are considered informal admissions, they can be qualified, enlarged upon, or even contradicted upon notice to the opposing party. The correction of inaccurate or deficient answers is specifically contemplated by Rule 245 which provides that a person who was examined for discovery and who discovers that the answer to a question in the examination is no longer correct or complete must provide the corrected or completed information in writing without delay*.
>
> [22] The Ontario Court of Appeal in *Marchand v Public General Hospital Society of Chatham*, [2000] OJ No 4428, 51 OR (3d) 97 dealt precisely with the

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6 *Apotex Inc. v. Astrazeneca Canada Inc.*, 2012 FC 559; aff'd 2013 FCA 77.

issue of correction of an answer given on discovery where the correction was made during the trial itself. The Court distinguished between answers given on discovery and "formal" admissions. Discovery answers could be corrected, leaving the impact of the correction to be determined by the trial judge. The entire discussion on the point in the decision written by the Court at paragraphs 70 to 86 is instructive. I repeat only paragraphs 77 and 80:

> *77 First, Dr. Asher's original discovery answer was not a formal admission. As such, it was always open to him to explain his discovery answer in his testimony. In Sopinka, Lederman and Bryant, The Law of Evidence in Canada, 3rd ed. (Toronto: Butterworths, 1999) at 1051-53, the authors distinguish between formal and informal admissions. A formal admission is conclusive as to the matter admitted, and cannot be withdrawn except by leave of the court or the consent of the party in whose favour it was made. The Law of Evidence states at 1051-52 that a formal admission may be made in the following ways:*
>
> > *1) by a statement in the pleadings or by failure to deliver pleadings;*
> >
> > *2) by an agreed statement of facts filed at the trial;*
> >
> > *3) by an oral statement made by counsel at trial, or even counsel's silence in the face of statements made to the trial judge by opposing counsel with the intention that the statements be relied on by the judge;*
> >
> > *4) by a letter written by a party's solicitor prior to trial; or*
> >
> > *5) by a reply or failure to reply to a request to admit facts.*
>
> *In contrast, an informal admission does not bind the party making it, if it is overcome by other evidence. That is, a party making an informal admission may later lead evidence to reveal the circumstances under which the admission was made in order to reduce its prejudicial effect.*
>
> . . .
>
> *80 Holmested and Watson, supra, describe at 31 Subsection 25 the obligation under rule 31.09 as an ongoing duty to correct and complete the answers given. In general, parties are entitled to correct their discovery answers. The impact of corrections is a matter to be decided by the trial judge, who is entitled to examine*

> *both the original and the amended answers: See Machado v. Pratt & Whitney Canada Inc. (1993), 17 C.P.C. (3d) 340 (Ont. Master); Capital Distributing Company v. Blakey (1997), 33 O.R. (3d) 58 (Gen. Div).*

[77] In Burlington's examination for discovery of the respondent's nominee in 2014, the respondent clearly expressed her position. Numerous times the respondent's counsel stated that it was the respondent's position that no amounts were payable as guarantee fees. For example, Ms. Goldstein answered the question posed by counsel for Burlington as follows:

> 21. BY MS. MacDONALD : Q. I would like to start by asking some questions about paragraph 20(1)(e.1). . .
>
> . . .
>
> 22. BY MS. MacDONALD : Q. . . . So Looking at subsection 20(1), it says: Notwithstanding paragraphs 18(1)(a), 18(1)(b) and 18(1)(h), in computing a taxpayer's income for a taxation year from a business or property, there may be deducted such of the following amounts . . . Do you see that ?
>
> MS. GOLDSTEIN: Yes.
>
> 23. BY MS. MacDONALD : Q. And then (e.1) is a lengthy provision, but there are just a few phrases I want to look at out of (e.1). Is says: an amount payable by the taxpayer … and then after a lengthy bracket it says: . . . as a . . . guarantee fee . . . do you see that those words appear?
>
> MS. GOLDSTEIN: Yes.
>
> 24. BY MS. MacDONALD : Q. Is it the respondent's position that there was no amount payable by the taxpayer as a guarantee fee?
>
> MS. GOLDSTEIN: Yes.
>
> 25. BY MS. MacDONALD : Q. So the amount at issue that was disallowed in these assessments was not, in the Respondent's position, a guarantee fee?
>
> MS. GOLDSTEIN: Correct.
>
> 28. BY MS. MacDONALD: Q. I'm asking for the respondent's position because I understand, you've told me that the Respondent's position was that there was no amount paid as a guarantee fee, so this agreement I've taken you to . . .

> 36. BY MS. MacDONALD: Q. Then what is the Crown's position?
>
> MS. GOLDSTEIN: I think I'm repeating it again for the third time. The Crown's position is that the alleged guarantee fee was not paid as a guarantee fee, it was paid to earn a tax benefit.
>
> 75. BY MS. MacDONALD: Q. . . . then the next phrase in the statute there says, and that is incurred by the taxpayer. So I understand that there is a dispute about whether the amounts paid are a guarantee fee, but is there any dispute that the amounts that were disallowed here were actually incurred by the taxpayer?

[78] In addition to the answers given during the examination for discovery, the respondent's position, namely that the amounts paid were not guarantee fees is also restated in the Order rendered by Justice Campbell in *Burlington* in 2015.[7]

[79] In my view, the only potential admission is at paragraph 4 of both the initial Reply and the Further Amended Reply which provides as follows:

> Paragraph 13 of the Notice of Appeal states:
>
> 13. The amounts of the guarantee fees payable by the Appellant to BRI during the taxation years ending December 31, 2002; December 31, 2003; December 31, 2004; and December 31, 2005 ("the 2002-2005 Taxation Years") were as follows (collectively, the "Guarantee Fees"):

Taxation Year	Guarantee Fees
December 31, 2002	$23,156,153
December 31, 2003	$21,952,025
December 31, 2004	$19,590,771
December 31, 2005	$18,118,688

> Paragraph 4 of the Reply states:
>
> With respect to paragraph 13 of the Notice of appeal, he admits that the amount of the guarantee fees payable by the Appellant are as stated therein (the "Charges").
>
> Paragraph 4 Further Amended Reply states:

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7 *Burlington Resources Finance Company* v *The Queen*, 2015 TCC 71 at paragraph 57.

> With respect to paragraph 13 of the Notice of Appeal, he admits that the amount of the guarantee fees payable by the Appellant are as stated therein (the "guarantees fees").[8]

[80] In light of the position taken by the respondent at the discoveries in 2014, the 2015 Order of Justice Campbell,[9] I am of the view that the respondent did not make a clear and deliberate concession that the amounts paid to BRI were guarantees fees.

[81] I am also of the view that the question of whether certain payments constitute guarantee fees within the ambit of paragraph 20(1)(e.1) of the *Act*, is a question of fact and mixed law. Therefore, any comments made by the respondent at discoveries cannot be considered admissions. In addition, the denial by the respondent of paragraphs 11 and 12 of the Notice of Appeal tends to confirm my finding. As Justice Bowman stated in *Continental*[10]:

> It would not do credit to our justice system in Canada if the courts were restricted in their consideration of a case by an ill-considered admission that is inconsistent with another position that is being advanced, particularly where it is sought to withdraw such an admission at an early stage in the proceeding. This is equally true whether the party seeking to change its position is the taxpayer or the Crown.

[82] In any event, if I had decided that the respondent made an admission at paragraph 4 of the Reply with respect to the "guarantee fees", I would still have permitted the withdrawal of the admission since in my view there is a triable issue which ought to be tried in the interests of justice. On this issue, the Federal Court of Appeal holds as follows in *Andersen Consulting*:[11]

> 11. By contrast, the Respondent filed before the motions judge extensive material to oppose the amendments and support its contention that the amendments purport to withdraw admissions. Interestingly enough, the Appellant relied upon the same material filed by the Respondent to show that the proposed amendments were mere clarifications and precisions of their previous pleadings.

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8 The change in the terminology was made in accordance with Justice Hogan's Order, where he directed the respondent to provide clarity as to the nature of her transfer pricing position. It did not have anything to do with the respondent's 20(1)(e.1) position.

9 *Burlington Resources Finance Company* v *The Queen*, 2015 TCC 71.

10 *Continental Bank Leasing Corp v R*, [1993] 1 CTC 2306 at para 22.

11 *Andersen Consulting v R*, [1997] FCJ No 1433 at paras 11 to 14.

> 12. Different tests of varying stringency have been applied in different jurisdictions across Canada with respect to a withdrawal of admissions. At one end of the spectrum, the case law in Ontario, with respect to the interpretation of R. 51.05 of the *Rules of Civil Procedure*, requires that the party requesting leave to withdraw an admission satisfies three conditions:
>
> > (1) that the proposed amendment raise a triable issue;
> >
> > (2) that the admission was inadvertent or resulted from wrong instructions; and
> >
> > (3) that the withdrawal would not result in any prejudice that could not be compensated for in costs
>
> 13. At the other end, the British Columbia Courts have taken a more flexible approach and have not required as a condition essential to a withdrawal of an admission that the admission in the Statement of Defence be made inadvertently or hastily. Rather, they have adopted as a test that, in all the circumstances of the case, there be a triable issue which ought to be tried in the interests of justice and not be left to an admission of fact. Under such a test, inadvertence, error, hastiness, lack of knowledge of the facts, discovery of new facts, and timeliness of the motion to amend become factors to be taken into consideration in deciding whether or not the circumstances show that there is a triable issue which ought to be tried in the interests of justice
>
> 14. We prefer the approach taken by the Courts in British Columbia which gives the Court seized with a motion to amend pleadings, including an amendment withdrawing or purporting to withdraw an admission, the needed flexibility to ensure that triable issues are tried in the interests of justice without injustice to the litigants.

[83] In this Motion, the proposed amendments raise triable issues. In addition, the purported withdrawal does not amount to an injustice to Burlington since it has been aware of the respondent's position at least since its discovery of the respondent's nominee in 2014. In addition, the examination for discovery of the respondent's nominee was not completed at the time of this Motion. Burlington could ask more questions on that issue, if it wishes to do so**.**

> *Purported withdrawal of the respondent's admission that the fee agreements were legally ineffective*

[84] With respect to the amendments dealing with the respondent's position that the fee agreements are legally ineffective, the respondent does not need leave from the Court to withdraw or to correct an answer made during the examination for discovery. In any event, I do not agree with Burlington that the respondent admitted during examination for discovery that she was abandoning the "legally ineffective argument." Consequently I do not agree that the proposed amendments revive a previously abandoned argument. A close analysis of the answers given at examination for discovery and the Order rendered in *Burlington Resources Finance Company v HMQ* [12] by Justice Campbell show that the respondent did not abandon the argument that the agreements were legally ineffective. Specifically at paragraph 124 of her Order, Justice Campbell stated that it was the respondent's "admitted position that the guarantee fee agreements are legally ineffective."

The application of the tests set out by the Federal Court of Appeal in Canderel and Continental to the proposed amendments

[85] In *Canderel,*[13] the Crown brought a Motion to amend the reply on the fifth day of the trial. The trial judge did not allow the Crown to amend the Reply. The Federal Court of Appeal confirmed the decision of the trial judge. It is clear from the comments of Justice Decary of the Federal Court of Appeal, that the lateness of the Motion was a major factor in denying the amendments in *Canderel*. At paragraphs 14 and 15, Justice Decary states as follows:

> 14. While it is true that leave to amend may be sought at any stage of a trial, it is safe to say that the nearer the end of the trial a motion to amend is made, the more difficult it will be for the applicant to get through both the hurdles of injustice to the other party and interests of justice. We note that in all the tax cases referred to by counsel for the appellant, the motion to amend had been made before trial or was made at trial but was to be expected by the opposing counsel during trial.
>
> 15. In the case at bar, the real question in controversy (the timing issue) had been known to both parties and agreed upon by them long before the trial began. Facts enabling counsel for the appellant to try to characterize the payments on capital account were in evidence well before the trial began. Even when the allegedly undisclosed facts were disclosed to counsel just prior to the beginning of the trial, counsel did not then seek leave to amend and waited until 22:00 hours on the

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12 See the Transcript of Proceedings pp 59 to 62, Order of Justice Campbell in Burlington Resources Company v HMQ 2015 TCC pp 20-21.

13 *Canderel Ltd v R*, [1993] 2 CTC 213.

> night of the fourth day of the trial before he raised the issue with counsel for the respondent. By then, of course, witnesses, including expert witnesses, had already testified, and discoveries had been held. It was the view of the trial judge that the amendment "could lead to a recall of all the witnesses and the experts to consider in their testimony the proposed change" (A.B. at page 60).

[86] However, Justice Decary reiterated in *Canderel*[14] the general principle that amendments should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided that the allowance would serve the interests of justice and not provided result in an injustice to the other party not capable of being compensated by costs.

[87] In *Continental*,[15] Chief Justice Bowman of this Court, as he then was, allowed the Minister's Motions to amend the replies to add a number of paragraphs and to withdraw admissions. In reviewing the application of sections 4, 54, and 132 of the *Rules,* Justice Bowman held that these *"provisions give the court a broad discretion to permit the withdrawal of admissions and the amendment of pleadings where it is in the interest of justice to do so."*

[88] Regarding the appropriate test courts ought to apply in considering whether an amendment should be allowed, Justice Bowman held that that courts should consider:*"whether it is more consonant with the interests of justice that the withdrawal or amendment be permitted or that it be denied."* Additionally, Justice Bowman highlighted factors to consider in determining whether the amendments are consonant with the interests of justice. However, Justice Bowman was clear that no single factor was predominant or determinative and, instead, that each had to be weighted in the context of the specific case. Those factors include:

a) the timeliness of the Motion to amend or withdraw;

b) the extent to which the proposed amendments would delay the expeditious trial of the matter;

c) the extent to which a position taken originally by one party has led another party to follow a course of action in the litigation which it would be difficult or impossible to alter and

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14 *Canderel Ltd v R,* [1993] 2 CTC 213.

15 *Continental Bank Leasing Corp v R,* [1993] 1 CTC 2306.

d) whether the amendments sought will facilitate the Court's consideration of the true substance of the dispute on its merits.

[89] Justice Bowman's holding in *Continental* has been cited with approval by the Federal Court of Appeal in *Canderel Ltd v R*, [1993] 2 CTC 213 ("*Canderel*"), *Merck & Co v Apotex Inc*, 2003 FAC 488. ("*Merck & Co*") and *AbbVie Corp v Janssen Inc*, 2014 FCA 242. ("*AbbVie Corp*").

[90] I will now apply the factors set out in *Continental* to the Motion at bar:

(a) The Timeliness of the Motion to Amend or Withdraw

[91] The respondent filed her Motion for leave to amend two months after the completion of the discovery.

[92] The respondent advised the Court and Burlington in 2014 that she would no longer rely on subsections 247(b) and 247(d) of the *Act*. Also in 2014, the respondent outlined her position with respect to whether the amounts were guarantee fees and the legally ineffectiveness of the fee agreements during the examination for discovery. In addition, the position that the respondent is taking in the proposed Amended Amended Reply, is well summarized by Justice Campbell in the Order she rendered in Burlington in 2015. Burlington has therefore been aware of the position of the respondent.

[93] At the hearing of the Motion, the respondent stated that she waited for the discovery process to be over to amend her Further Amended Reply. This is nothing new, since the respondent took the same position before Justice Campbell in December 2014:[16]

> We heard yesterday and this morning that, through our answers to undertakings, the respondent has advised that we will be dropping section 247(b) and 247(d). We just want the Court to know that the reason that we have not yet amended our Reply is because we have not competed our examinations for discovery for the Appellant's nominee. There may be additional things that we want to amend on once those are completed. In an effort to avoid filing multiple amended pleadings, we want to wait until the completion of the examinations for discovery and then amend based on our positions at that time.

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16 Transcript of Refusals Motion, appellant's Motion Record at tab R.

[94] In my view, this is a reasonable way of proceeding. Accordingly, the respondent has met the timeliness factor.

(b) The extent to which the proposed amendments would delay the expeditious trial of the matter

[95] In light of the respondent abandoning the transfer pricing issue, the trial is shorten. In addition, Burlington will be able to continue discovering the respondent's nominee. As such the amendments will not delay the trial and this factor is met.

(c) The extent to which a position taken originally by one party has led another party to follow a course of action in the litigation which it would be difficult or impossible to alter

[96] With respect to the proposed amendments, the respondent made Burlington aware of her position during the examination for discovery and later on before Justice Campbell and myself.[17] Furthermore, during the discovery of the respondent's nominee, Burlington asked questions dealing with the issues that are now included in the proposed amendments. In addition, since I had already ordered the continuation of the examination of the discovery process, Burlington is able to ask more questions to the nominee of the respondent, if it wishes to do so. This factor is met.

(d) Whether the amendments sought will facilitate the Court's consideration of the true substance of the dispute on its merits

[97] In my view, this factor is also met. The proposed amendments sought will facilitate the Court's consideration. The respondent has always relied on paragraph 20(1)(e.1) of the *Act*. The proposed amendments have the benefits of explaining to the Court what is in issue with respect to paragraph 20(1)(e.1). It is important for the Court to understand the arguments of the respondent. Although the appeal of Burlington is in respect of the 2002, 2003, 2004, 2005 taxation years, the outcome will apply to later taxation years, namely 2006 to 2031. It is important that the Court considers the true substance of the dispute on its merits. In addition, as stated

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17 *Burlington Resources Finance Co v R*, 2015 TCC 71 and *Burlington Resources Finance Co v R.*, 2017 TCC 144.

by Justice Bowman in *Continental* at paragraph 23, there is public interest in income tax appeals:

> . . . While I do not doubt the authority of the Attorney General of Canada to make admissions of fact in litigation to which the Crown is a party, it must be recognized that there is a public interest in income tax appeals and the Court should be in a position to decide cases on the basis of correct facts and properly defined issues (c.f.*The Clarkson Co. v. The Queen*, [1979] C.T.C. 96, 79 D.T.C. 5150 (F.C.A.)at page 97 (D.T.C. 5151), footnote 3). It would do no credit to our system of justice in Canada if the courts were restricted in their consideration of the merits of a case by an ill-considered admission that is inconsistent with another position that is being advanced, particularly where it is sought to withdraw such an admission at an early stage in the proceeding. This is equally true whether the party seeking to change its position is the taxpayer or the Crown.

[98] All of the above factors are met I conclude the proposed amendments are consonant with the interests of justice.

[99] Finally, as stated in *Canderel*, before allowing leave to a party to amend, the Court must consider whether the amendment would cause an injustice that cannot be compensated by costs.

Prejudice that cannot be compensated by costs

[100] Burlington argues that it would suffer a prejudice by the proposed amendments as the discovery of Ms. Fawcett has concluded and she has since retired. Specifically, Burlington argues that the scope of the original examination was limited to the theory as it was then, which did not include an issue of whether the payments were guarantee fees. Additionally, Burlington argues that its ability to marshal evidence to rebut the respondent's allegation that the payments were not guarantee fees has been compromised by the passage of time, since the beginning of litigation in 2012.

[101] However, counsel for Burlington admitted that it is likely that, to the extent there were documents Burlington may have wanted to marshal, many of them would have been lost prior to 2012 and that Burlington has already been in contact with two former employees informed about the issues under appeal. Additionally, contrary to counsel's assertions, Burlington had the opportunity to question the Minister's nominee on the issue of paragraph 20(1)(e.1) of the *Act*.

[102] Finally, as I have already stated, Burlington's discovery of the respondent's nominee has yet to conclude. Burlington has the option to re-attend examination for discovery of Ms. Fawcett on these issues prior to trial.

[103] For the reasons above, Burlington has not shown that the proposed amendments will cause it to suffer.

[104] Therefore, the respondent's Motion for leave to file and serve the Amended Amended Reply and Fresh as Amended Amended Reply is granted.

B. *Costs Thrown Away*

[105] As can be noted in the Procedural History of these reasons, the Minister's reassessment was based on the transfer pricing provisions, namely paragraphs 247(1)(a), 247(1)(c) and subsection 247(3) of the *Act.* As the appeal proceeded, the respondent added and removed certain arguments defending the Minister's reassessment. With the passage of time, the respondent conceded the transfer pricing issue and abandoned arguments based on section 67 and paragraphs 20(1)(e) and 247(a), (b), (c) and (d) of the *Act.*

[106] The respondent provided the Court and Burlington four proposed Amended Amended Replies on August 13, 2019, September 23, 2019, October 30, 2019, and on the morning of the Motion, October 31, 2019.[18] The withdrawal of the transfer pricing issue was outlined in the version of the Reply dated August 13, 2019, which was the first proposed Amended Amended Reply after the completion of the respondent's discovery of Burlington's nominee. The amendments made in the October 31, 2019 Reply were only to correct typographical errors and contained no substantive amendments.

[107] Burlington argues that although the respondent acknowledged that it was necessary for Burlington to obtain a guarantee in order to borrow money, the respondent maintained that this price was zero. Burlington submits that in light of the admission that Burlington required a guarantee in order to borrow funds, the respondent took an aggressive and vigorous position in this appeal.

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[18] The only Replies filed with the Court were the initial Reply dated October 9, 2012 and the Further Amended Reply dated September 13, 2013.

[108] In other words, Burlington states that it should be granted thrown away costs because the respondent's position on transfer pricing could not stand all along. However, Burlington stated that it is not suggesting that the respondent's counsel did anything improper or that her conduct was reprehensible, outrageous or scandalous. Instead, Burlington argues that an award of cost thrown away does not require a finding of improper conduct from a party.

[109] Burlington incurred significant effort and expense to respond to the respondent's transfer pricing allegations, including answering thousands of questions relating to those allegations during and after the discovery of its nominee. Burlington argues that the respondent's decision to abandon the arguments based on the transfer pricing provisions renders all of its work on transfer pricing useless or wasted.

[110] Burlington stated at the hearing of the Motion, that it did not particularize these costs because it is a complex and time-consuming exercise for both parties to determine what costs have been thrown away. Burlington submits that it is asking for a "principled" decision granting it costs. The parties could determine the quantum later on. If the parties were to disagree, they could submit the quantum dispute to the Court for resolution. If the Court were not to award costs thrown away, Burlington would not have wasted more efforts and resource to determine the quantum.

[111] Burlington submits that in light of the unique circumstances of this appeal, the Court should grant reasonable costs thrown away as a condition to granting leave to amend the respondent's Reply.

[112] The respondent argues that an award of costs thrown away is not appropriate for several reasons:

a) the courts have consistently held that costs are not thrown away when a party opts not to pursue an issue at trial once she has obtained full discovery on that issue;

b) awarding costs thrown away in these circumstances would run contrary to the purpose of discovery by creating a disincentive for parties to narrow or eliminate issues prior to trial lest they risk being held liable to pay each other's costs; and

c) solicitor-client costs are only awarded in rare circumstances where a party's conduct is reprehensible. The respondent's post-discovery decision not to rely on section 247 is not reprehensible and does not justify an award of solicitor-client costs.

[113] In addition, the respondent argues that she did not delay the process. She made the decision to withdraw the transfer pricing argument following Burlington's delivery of its final set of answers to undertakings in June 2019. That is nine months before the trial date. The responsibility for this delay should not fall on her shoulders since it took five years and three Motions for Burlington to comply with its discovery obligations. The respondent also submits that the vigorous pursuit of the respondent's position does not justify a costs award.

[114] The respondent further submits that the case law provides that for this Court to grant costs thrown away, the Court must determine not only that costs have been wasted, but also which costs have been wasted. Burlington had enough time to put forward which costs it argued have been wasted but failed to do so.

[115] Before Justice Hogan, Burlington argued that the appeal should be allowed because the reassessment was not defensible in light of some of the assumptions made by the Minister with respect to the transfer pricing issue. Justice Hogan rejected this argument and stated that it was legitimate for the respondent to ask whether an arm's length person standing in Burlington's shoes would have been willing to pay the guarantee fees for BRI's explicit guarantee knowing that BRI was potentially responsible for Burlington's liabilities even without the guarantee. I came to the same conclusion in my Order dated August 3, 2017.

[116] In addition, as Justice Owen stated in *Cameco Corporation v HMQ*,[19] at paragraphs 12 and 34 of his reasons, the rationale for costs is not to punish the losing party and a party is entitled to vigorously defend his or her position:

> 12. . . . the rationale for costs is not to punish the losing party on ex post facto analysis of the relative merit of the positions taken…
>
> 34. I do not agree with the Appellant that the Respondent's decision to vigorously pursue its sham argument is relevant under this factor. The Respondent led extensive evidence in support of its sham argument. I simply did not agree

[19] *Cameco Corporation v The Queen*, 2018 TCC 195.

> with the Respondent's position that this evidence supported a finding of sham based on my findings of fact and the legal test for sham developed in the jurisprudence

[117] I am of the view that the respondent cannot be penalised and Burlington be awarded costs thrown away, for the position the respondent took with respect to transfer pricing issue. There is no evidence that the respondent acted in a reprehensible, scandalous or outrageous manner. Especially in complex cases, where the stakes are high, there is an expectation that counsel will defend the interest of their clients in a vigorous manner.

[118] In addition, contrary to Burlington's assertions, the respondent cannot be found solely responsible for the time it took for the Burlington appeal to be ready for trial. As the respondent correctly stated, it took three Motions to complete her examination for discovery of Burlington's nominee. Nor is Burlington solely responsible for the delays caused by the Motions. To date, the Motions filed by both parties have not proven to be frivolous.

[119] There are numerous decisions dealing with costs thrown away.

[120] In *Teva Canada Limited* and *Pfizer Canada Limited,*[20] Justice Zinn of the Federal Court states at paragraph 3 of his reasons that:

> 3. Costs thrown away is described in paragraph 8 of *Caldwell* v *Caldwell* 2015 ONSC 7715: The phrase "costs thrown away" refers to a party's costs for trial preparation which have been wasted and will have to be re-done as a result of the adjournment of the trial"

[121] Further, at paragraph 6 of his reasons Justice Zinn states that:

> 6. I agree with the submission of Teva, that the authorities relied on by Pfizer in support of its request for full indemnity, being cases from the Ontario courts, are of little assistance to me in deciding the matter here. Such an award of costs is not in keeping with this Court's jurisprudence. I find that Teva's actions that led to the adjournment of the earlier hearing date do not come close to being reprehensible, scandalous or outrageous conduct that might justify an award of full indemnity: see *Blackmore v R*, 2011 FCA 335 at para 3. It was only as a result of Teva failing to inform the Court and Pfizer as soon as it received instructions to

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20 *Teva Canada Limited v. Pfizer Canada Inc.,* 2017 FC 610.

> seek leave to appeal the Federal Court of Appeal's decision to the Supreme Court of Canada, that Pfizer was awarded its thrown away costs.

[122] In *Milliken & Co. v. Interface Flooring Systems (Canada) Inc*.,[21] costs thrown away are defined at paragraph 7 as:

> Costs thrown away are those which are wasted for work rendered useless as a result of the amendment sought, either because an issue has been withdrawn, abandoned or otherwise rendered moot. The expression is well illustrated in the following example given by Bouck J. in Cominco Ltd. v. Westinghouse Canada Ltd.:
>
> For example, a plaintiff may completely change his case in midstream from one of negligence to one of breach of trust. To meet this new allegation a defendant may have to entirely revise his defence and conduct new examinations for discovery. The old defence and the old discovery would have become useless and so the defendant would be entitled to the cost of these proceedings because he was put to the expense of defending allegations in negligence which were subsequently abandoned by the plaintiff and changed to breach of trust. It is as if the plaintiff's case for negligence was dismissed or discontinued and a fresh action for breach of trust was begun.
>
> But some amendments do not establish an entirely new claim. Often there is no need for a defendant to amend his defence after a plaintiff has amended his statement of claim. If a new discovery is required it might just be for a limited purpose and most if not all of the earlier discovery might still be useful. In that sense the cost of the earlier discovery would not have been completely "thrown away". Only a part would have been lost.

[123] In *Milliken* costs thrown away were not awarded since the party could not be blamed for the deficiency. The same rationale applies in *Teva*. Costs thrown away were not awarded since Teva's actions that led to the adjournment of the earlier hearing date did not come close to being the kind of reprehensible, scandalous or outrageous conduct that might justify an award of full indemnity.

[124] In *Bradley Holdings*,[22] this Court awarded the appellant costs thrown away on a solicitor client scale. There, the respondent had previously amended the reply and was requesting further changes to make the amendments comprehensible at a

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21 *Milliken & Co. v. Interface Flooring Systems (Canada) Inc*., [1998] F.C.J. No. 541.

22 *Bradley Holdings Ltd v R*, 2004 TCC 221.

time when the respondent had already indicated the case was ready for trial and a hearing date had been set. On the issue of costs, the Court held at paragraph 20:

> . . . a party acting reasonably may be obliged to amend its pleadings if investigation during preparation of the case or if answers on discovery paint the case in a fresh light. Such amendments are, I think, normal and usual. Here however, nothing of the sort is suggested in the affidavit filed in support of the motion. It would seem, so far as I can tell, that the amendment is required simply because the Respondent failed to properly analyze his case in a timely fashion. All of that should have been done long before this application for amendment was made. In my view, the circumstances here meet the scandalous and outrageous conduct threshold for the award of costs on a solicitor and client scale. Costs of this motion and costs thrown away will be awarded on that scale.

[Emphasis added]

[125] In *Blackmore* v *R*,[23] the Federal Court of Appeal in a unanimous decision, reversed a decision of this Court that awarded costs thrown away. In that decision, Justice Nadon holds that costs thrown away clearly constitutes an award of costs on a solicitor client basis and for these type of costs to be awarded the conduct of the party has to be either reprehensible, scandalous or outrageous. He states as follows:

> [2] We are all agreed that the judge erred in principle in allowing $50,000 to the respondent in respect of the "thrown away costs" resulting from the adjournment of the trial following the late presentation of a motion by the appellant seeking a publication ban and an order precluding the use in future criminal prosecutions of the appellant's witnesses' evidence adduced at trial.
>
> [3] There can be no doubt that the $50,000 – representing the respondent's legal fees for trial preparation calculated on an hourly basis – clearly constitutes an award of costs on a solicitor/client basis for which there is, in our respectful view, no basis on the record before us. The appellant's conduct in bringing the motion was not found by the judge to be either reprehensible, scandalous or outrageous.

[126] The principle emanating from these decisions[24] is that costs thrown away on a solicitor client basis are awarded only in situations where the conduct of the parties are found by a Court to be either reprehensible, scandalous or outrageous.

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23 *Blackmore v R*, 2011 FCA 335.

24 See also *Bradley Holdings Ltd v R*, 2004 TCC 221.

In any event, I am bound by the decision of the Federal Court of Appeal in *Blackmore*.

[127] In this Motion, the respondent conceded the transfer pricing issue two months after the discovery process was completed. In my view, two months is a reasonable time to reconsider ones case following examinations for discovery. In addition, conceding an issue after the discovery is completed is my view, an acceptable and reasonable way of proceeding.

[128] Moreover, one of the purposes of discovery is to narrow or to eliminate issue under appeal.[25] As stated by Justice Favreau in *Thompson* v *HMQ*,[26] generally, issues are withdrawn after the discovery process is completed. He states at paragraph 41:

> The respondent's motion to amend its pleadings is being brought at exactly the right time, i.e., immediately following the close of the examinations for discovery which is when the facts became known to the Crown. At the examinations for discovery, the respondent was exploring its case and the facts. This is the main purpose of an examination for discovery and there was no objection raised by counsel for the appellants at any time.

[129] Burlington has not established that the respondent's conduct was reprehensible, scandalous or outrageous. Therefore, I am of the view that the requirements for costs thrown away have not been met such that I cannot award this exceptional remedy to either Burlington or Conoco.

[130] The respondent's Motion is allowed. Accordingly, the respondent is granted leave to file her Amended Amended Reply and Fresh as Amended Amended Reply.

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25 *Lehigh Cement Ltd v R*, 2011 FCA 120 at para 6.

26 *Thompson v The Queen*, 2018 TCC 167.

[131] The costs of this Motion will follow the cause.

Signed at Ottawa, Canada, this 20th day of February 2020.

"Johanne D'Auray"

D'Auray J.

CITATION:	2020 TCC 32
COURT FILE NO.:	2012-2683(IT)G 2013-2595(IT)G
STYLE OF CAUSE:	BURLINGTON RESOURCES FINANCE COMPANY v THE QUEEN CONOCO FUNDING COMPANY v THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 31, 2019
REASONS FOR ORDER BY:	The Honourable Justice Johanne D'Auray
DATE OF ORDER:	February 20, 2020

APPEARANCES:

Counsel for the Appellants:	Andrew Boyd Alexander Cobb
Counsel for the Respondent:	Alexandra Humphrey Erin Strashin

COUNSEL OF RECORD:

For the Appellants:

Name:	Alexander Cobb Andrew Boyd Al Meghji Jacyk David
Firm:	Osler, Hoskin & Harcourt LLP

For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada