2017-1458(IT)G

BETWEEN:

S. ROBERT CHAD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard by videoconference on January 27-28, 2021 at Ottawa, Canada
By: The Honourable Justice Don R. Sommerfeldt

Representatives:

Counsel for the Appellant:	Guy Du Pont, Ad.E., Dov Whitman and James Trougakas
Counsel for the Respondent:	Charles Camirand, Shane Aikat, Grant Nash and Bryn Frape

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ORDER

The Appellant's motion is dismissed, with costs payable by the Appellant to the Respondent.

If the Parties are unable to reach an agreement in respect of costs within 30 days from the date of this Order, the Respondent may, within the ensuing 30 days thereafter, file a written submission on costs, and the Appellant shall thereafter have a further 30 days to file a written response. Any such submissions shall be limited to five pages in length. If, within the applicable time limits, the Parties do not advise the Court that they have reached an agreement and no

submissions are received from the Parties, the costs payable by the Appellant to the Respondent shall be determined in accordance with the Tariff.

Signed at Ottawa, Canada, this 29th day of July, 2021.

"Don R. Sommerfeldt"

Sommerfeldt J.

Citation: 2021 TCC 45
Date: July 29, 2021
Docket: 2017-1458(IT)G

BETWEEN:

S. ROBERT CHAD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Sommerfeldt J.

I. INTRODUCTION

[1] These Reasons relate to a Motion by the Appellant, S. Robert Chad, for an order to strike out or expunge a significant number of provisions (the "Impugned Provisions") from the Respondent's Second Amended Reply. The Impugned Provisions fall within five categories, as follows:

(a) allegations of sham;

(b) conclusions of law;

(c) a provision allegedly disregarding a previous court order;

(d) incorrect assumptions that were corrected during discovery; and

(e) abandoned arguments.

II. BACKGROUND

A. Factual Overview

[2] As I have not yet heard any evidence or seen any documents relating to the substance of this Appeal, my understanding of the facts pertaining to the Appeal is

based on the pleadings. In the Amended Notice of Appeal, the Appellant pleaded (among other facts) the following:

> 1. During his 2011 taxation year, Mr Chad incurred a non-capital loss of $22,184,108.67.
>
> 2. The loss arose from trading foreign currency futures for profit.
>
> 3. Mr.Chad engaged in foreign currency trading with Velocity Trade, a global broker dealer that has offices located in North America, Europe, Australia and Africa and which is owned in part by Bank of Montreal and MacQuarie Bank, the largest banking and investment banking institution in Australia, having A$500 billion in assets under management.
>
> 4. Mr. Chad's foreign currency trades were with Velocity's United Kingdom subsidiary, and the trades were all subject to regulation by relevant United Kingdom government institutions.[1]

[3] Thus, Mr Chad pleaded that, in the course of trading foreign currency futures in 2011, he incurred a non-capital loss in the amount of $22,184,108.67 (the "Non-Capital Loss"). Elsewhere in the Amended Notice of Appeal, Mr. Chad also pleaded that in 2011 he incurred a capital loss in the amount of $6,289,014.93 (the "Capital Loss"), which arose from the disposition of a partnership interest in a partnership known as "SRC 2004 Investments Co."

[4] By means of a reassessment (the "Reassessment") dated September 23, 2016, the Minister of National Revenue (the "Minister"), as represented by the Canada Revenue Agency (the "CRA"), disallowed the Non-Capital Loss for several reasons, one of which was that the foreign currency trades (the "Trades") were allegedly a sham. The Reassessment also disallowed the Capital Loss on the ground that Mr. Chad had not provided sufficient documentation or other information in support thereof.

[5] One of the facts assumed by the Minister was the following:

> Velocity [Trade] was engaged in the promotion of a tax avoidance scheme commonly called a foreign exchange straddle loss….[2]

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1 Amended Notice of Appeal, filed October 8, 2020, p. 1, part (c), ¶1-4.

2 Second Amended Reply, filed November 16, 2020, p. 12, ¶15(eee).

[6] Hence, it is my understanding that two of the questions to be resolved in respect of this Appeal are whether the Trades resulted in the Appellant incurring the Non-Capital Loss, and, if so, whether that loss was deductible in computing the Appellant's income for 2011.

B. Procedural History

[7] The procedural history of this Appeal includes the following steps:

(a) On September 26, 2013, the Minister, as represented by the CRA, sent a Notice of Assessment to the Appellant in respect of the 2011 taxation year.

(b) On September 23, 2016, the Minister sent a Notice of Reassessment to the Appellant in respect of the 2011 taxation year.[3]

(c) On or about October 14 or 15, 2016,[4] the Appellant served a Notice of Objection on the Minister.

(d) Not having been notified, within 90 days after service of the Notice of Objection, that the Minister had vacated or confirmed the Reassessment or reassessed, the Appellant filed a Notice of Appeal on March 28, 2017.

(e) On June 12, 2017, the Respondent filed a Reply.

(f) On August 4, 2017, the Respondent filed her list of documents.

(g) The Appellant filed his list of documents with effect as of July 3, 2018.

(h) On April 16-18, 2018, the Appellant and the Respondent (the "Parties") conducted examinations for discovery.

(i) On July 23, 2018, the Parties provided answers to undertakings.

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[3] The Notice of Reassessment sent on September 23, 2016 embodied the Reassessment, as defined in paragraph 4 above.

[4] In paragraph 14 of the Amended Notice of Appeal, the Appellant stated that he filed a Notice of Objection on October 15, 2016. In paragraph 14 of the Second Amended Reply, the Respondent stated that the Minister received the Appellant's Notice of Objection on October 14, 2016.

(j) On November 14-15, 2018, the Parties provided answers to follow-up questions.

(k) On April 10, 2019, an Order was issued, scheduling the hearing of this Appeal to commence on January 27, 2020, for an estimated duration of five days.

(l) On September 13, 2019, the Parties filed a joint request to adjourn the scheduled hearing.

(m) By letter dated September 20, 2019 and Order dated September 23, 2019, the hearing of this Appeal was rescheduled to commence on June 22, 2020, for an estimated duration of seven days.

(n) On January 15, 2020, the Appellant filed a Notice of Change in Representation of a Party.

(o) On February 20, 2020, the Appellant sent to the Court a draft Notice of Motion for an order granting leave to the Appellant to amend his Notice of Appeal.

(p) By joint letter dated April 25, 2020, when (due to the Covid-19 pandemic) the offices of this Court were not open for the transaction of any business,[5] the Parties requested that:

(i) the hearing scheduled to begin on June 22, 2020 be adjourned to a time and place to be fixed; and

(ii) a case management conference be convened to discuss timetable matters and a fixing of the hearing date once the Court resumed its operations.

(q) On May 25, 2020, the hearing of this Appeal was adjourned due to the Covid-19 pandemic.

(r) On July 29, 2020, the Respondent filed a Notice of Motion for:

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5 See *Practice Direction and Order*, dated March 23, 2020.

(i) an order requiring the Appellant to produce for inspection by this Court certain documents relating to the communication between the Appellant and a US lawyer;

(ii) a ruling confirming that certain questions asked during examinations for discovery were proper questions and that the Appellant's objection thereto was improper; and

(iii) an order directing the Appellant to re-attend an oral examination and to answer the above-referenced questions and any resultant undertakings.

(s) On July 29, 2020, with the consent of the Appellant, the Respondent filed and served an Amended Reply.

(t) By Order dated July 30, 2020:

(i) the Appellant's motion to amend the Notice of Appeal and the Respondent's motion to determine if certain questions on discovery needed to be answered were set down for hearing on September 21, 2020; and

(ii) the hearing of this Appeal was rescheduled to commence on February 16, 2021, for a duration of seven days.

(u) On September 14, 2020, the Appellant filed a Notice of Motion in respect of the motion that was the subject of the draft Notice of Motion previously sent to the Court (i.e., for an order granting leave to amend the Notice of Appeal).[6]

(v) On September 18, 2020, the Parties jointly filed a Notice of Motion for an order providing for the remote attendance, at the hearing of this Appeal, of certain UK experts.

(w) On September 21, 2020, Justice Favreau heard the Appellant's motion to amend the Notice of Appeal, the Respondent's motion to reopen the discoveries, and the joint motion to permit certain expert witnesses to testify remotely (by way of a suitable videoconference platform).

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6 See subparagraph 7(o) above.

(x) On September 24, 2020, Justice Favreau signed an Order granting leave to the Appellant to amend his Notice of Appeal, on certain conditions.

(y) On October 7, 2020, Justice Favreau signed an Order allowing for the provision of evidence remotely (by way of a suitable videoconference platform) by expert witnesses, concerning the laws of England and Wales.

(z) On October 8, 2020, the Appellant filed and served an Amended Notice of Appeal.

(aa) On October 20, 2020, the Respondent filed a Notice of Motion for an order striking out certain portions (including the last sentence of paragraph 4.1) of the Appellant's Amended Notice of Appeal, on the grounds that those portions:

(i) were not consistent with the Order dated September 24, 2020,

(ii) contained elements of fact on which the Respondent would not (by reason of the Order dated September 24, 2020) be permitted to examine for discovery,

(iii) were argumentative, and

(iv) contained conclusions of fact and mixed fact and law dealing with the ultimate issue before this Court.

(bb) On October 29, 2020, Justice Favreau signed an Order requiring the Appellant to produce certain documents for inspection by the Court to determine the validity of the Appellant's claim of solicitor-client privilege.

(cc) On October 29, 2020, Justice Favreau heard the Respondent's motion to strike certain portions of the Appellant's Amended Notice of Appeal.[7]

(dd) On November 5, 2020, Justice Favreau signed an Order upholding the last sentence of paragraph 4.1 of the Appellant's Amended Notice of Appeal (as that sentence had been expressly endorsed by Justice Favreau in the Order dated September 24, 2020), and striking out other paragraphs of the

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[7] See subparagraph 7(aa) above.

Appellant's Amended Notice of Appeal, on the ground that those paragraphs either alleged no foreign statute, principle or jurisprudence on which the Appellant intended to rely or those paragraphs argued conclusions relating to the application of foreign law to the facts of this Appeal. The Order of November 5, 2020 also extended the time, for the Respondent to reply to the Appellant's Amended Notice of Appeal, to November 16, 2020.

(ee) On November 16, 2020, the Respondent filed and served the Second Amended Reply.

(ff) On November 20, 2020, Justice Favreau signed an Order requiring the Appellant, at his own expense, to re-attend an oral examination, to answer specified unanswered questions from a previous examination for discovery, and to satisfy any undertakings arising from the oral examination no later than December 30, 2020.

(gg) On November 25, 2020, the Respondent filed a Notice of Motion for an order to strike out portions of three expert reports obtained by the Appellant.

(hh) On December 2, 2020, the Appellant filed a Demand for Particulars.

(ii) On December 14, 2020, the Appellant filed a Notice of Motion for an order striking out or expunging the Impugned Provisions from the Second Amended Reply (this Notice of Motion relates to the Motion that is the subject of these Reasons).

(jj) On December 21, 2020, the Appellant filed and served a Fresh as Amended Notice of Appeal.

(kk) On January 4, 2021, the Respondent filed a Notice of Motion for an order to compel the Appellant to answer certain questions and to satisfy certain undertakings in respect of his examination for discovery.[8]

(ll) By order dated February 1, 2021, the hearing of this Appeal, which had been scheduled to commence on February 16, 2021, was adjourned *sine die* due to the Covid-19 pandemic.

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[8] At the commencement of the hearing of the Motion that is the subject of these Reasons, counsel for the Respondent withdrew the Motion to compel answers to questions and satisfaction of undertakings.

III. ANALYSIS

A. Fresh Step Rule

[8] As the above summary of the procedural history indicates, a considerable amount of time has elapsed and a number of litigation steps have been taken by the Parties after the Reply was filed on June 12, 2017. In opposing the Appellant's Motion, the Respondent referenced section 8 of the *Tax Court of Canada Rules (General Procedure)* (the "Rules"), which reads as follows:

> A motion to attack a proceeding or a step, document or direction in a proceeding for irregularity shall not be made,
>
> > (a) after the expiry of a reasonable time after the moving party knows or ought reasonably to have known of the irregularity, or
> >
> > (b) if the moving party has taken any further step in the proceeding after obtaining knowledge of the irregularity,
>
> except with leave of the Court.

The Appellant did not actually make a request under Rule 8 for leave to bring this Motion for an order to strike out portions of the Second Amended Reply. The Appellant takes the position that Rule 8 does not apply, as the basis of his Motion arose only when Justice Favreau granted his Order of November 5, 2020. The Respondent did not oppose the Motion on the ground that leave under Rule 8 had not been previously obtained, but rather took the position that Rule 8 precludes the Appellant from succeeding on his Motion.

[9] As indicated in the preceding paragraph, the Appellant submits that the underlying foundation for his Motion is the Order granted by Justice Favreau on November 5, 2020.[9] Therefore, according to the Appellant, this Motion could not have been brought before that date. The Order granted by Justice Favreau on November 5, 2020 struck out several paragraphs of the Amended Notice of Appeal. Counsel for the Appellant submits that the Impugned Provisions in the Second Amended Reply mirror the paragraphs that were struck from the Amended Notice of Appeal, although the particular provisions in the Amended Notice of Appeal related to foreign law, while the Impugned Provisions in the Second

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[9] My thoughts in respect of Justice Favreau's Order of November 5, 2020 are set out in paragraphs 47 and 49 below.

Amended Reply relate to domestic law. I do not accept the Appellant's submission that Justice Favreau's Order of November 5, 2020 created the foundation for this Motion to strike out the Impugned Provisions from the Second Amended Reply. In other words, I do not share the Appellant's view that the Order of November 5, 2020 may be interpreted in such a manner as to form the basis for this Motion. Many of the arguments made by counsel for the Appellant in support of this Motion could have been made before Justice Favreau granted the Order of November 5, 2020. Furthermore, some of the Appellant's arguments do not even refer to Justice Favreau's Order of November 5, 2020.

[10] As will be noted below, all but two of the Impugned Provisions were contained in the Respondent's pleadings long before Justice Favreau granted his Order on November 5, 2020. Therefore, Rule 8 is relevant and must be considered in the context of this Motion.[10]

[11] Section 8 of the Rules should be considered in the context of section 7 of the Rules, which states that an irregularity does not render a document in a proceeding a nullity. Generally, improper pleadings are an irregularity for the purposes of sections 7 and 8 of the Rules.[11]

[12] In commenting on the fresh step rule, the Federal Court of Appeal recently stated the following:

> The fresh step rule is designed to ensure the orderly movement of litigation through to trial. The rule is based on the view that if a party pleads over to a pleading, it implies a waiver of any irregularity that might have been attacked…. [E]xisting jurisprudence … has applied the fresh step rule where a party seeks to strike a reply on the basis that the assumptions contained therein are conclusions of law instead of fact….[12]

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10 In my view, leave of the Court should have been sought, as required by Rule 8, before bringing this Motion. However, I do not base my dismissal of the Motion on the failure to obtain such leave. Rather, the primary basis for the dismissal is the restriction imposed by paragraphs (a) and (b) of section 8 of the Rules, as discussed in these Reasons.

11 *Okoroze v. The Queen*, 2012 TCC 360, ¶15; and *Kossow v. The Queen*, 2008 TCC 422, ¶20; *affirmed*, 2009 FCA 83, ¶16.

12 *Dilalla v. The Queen*, 2020 FCA 39, ¶8. See also *Kossow* (TCC), *supra* note 11, ¶20-22; and *Kossow* (FCA), *supra* note 11, ¶17-18.

[13] Almost all of the Impugned Provisions were in the Reply, which was filed on June 12, 2017, and the Amended Reply, which was filed on July 29, 2020. The only Impugned Provisions that appeared for the first time in the Second Amended Reply, which was filed on November 16, 2020, were paragraph 5.1 and subparagraph 5.2(b).[13]

[14] In other words, all but two of the Impugned Provisions first appeared in the Respondent's pleadings more than three and a half years before the Appellant brought this Motion. During that interval, the Appellant filed a list of documents, completed examinations for discovery, filed an Amended Notice of Appeal, and made several motions. Most tellingly, the Appellant consented to the Respondent's filing of the Amended Reply, which, like the original Reply, contained all but two of the Impugned Provisions.

[15] For the purposes of paragraph 8(a) of the Rules, more than a reasonable amount of time has passed after the Appellant first knew of most of the alleged irregularities in the Reply. For the purposes of paragraph 8(b) of the Rules, the Appellant has taken several steps (as listed in paragraph 7 above and as highlighted in paragraph 14 above) after obtaining knowledge of all but two of the irregularities.

[16] In the trial decision in *Kossow*, Justice Valerie Miller noted that "The purpose of the 'fresh step' rule is to prevent a party from acting inconsistently with its prior conduct in the proceeding."[14] She also affirmed the principle noted above to the effect that the fresh step rule acknowledges "that if a party pleads over to a pleading[,] this implies a waiver of an irregularity that might otherwise have been attacked."[15] Here, the Motion to strike the Impugned Provisions is inconsistent with the Appellant's prior conduct in respect of this Appeal (particularly the Appellant's consent to the filing of the Amended Reply on July 29, 2020). As well, by filing the Amended Notice of Appeal on October 8, 2020, the Appellant was, in

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13 Paragraph 5.1 of the Second Amended Reply will be discussed below under the subheading referencing that provision, and subparagraph 5.2(b) of the Second Amended Reply will be discussed below under the subheading "Sham Allegations."

14 *Kossow* (TCC), *supra* note 11, ¶21, quoting from *Vogo Inc. v. Acme Window Hardware Ltd.*, 2004 FC 851, ¶60.

15 *Kossow* (TCC), *supra* note 11, ¶22, quoting from *Imperial Oil Ltd. v. The Queen*, 2003 TCC 46, ¶20.

essence, taking a step that was perhaps somewhat analogous to pleading over to the Reply filed on June 12, 2017 and the Amended Reply filed on July 29, 2020,[16] thus implying a waiver of the irregularities in the Reply and the Amended Reply.

[17] As the Appellant is restricted by both paragraphs (a) and (b) of section 8 of the Rules, the Motion, except as it pertains to paragraph 5.1 and subparagraph 5.2(b) of the Second Amended Reply, is, by reason of section 8 of the Rules, dismissed.

[18] In case I have improperly exercised my discretion under section 8 of the Rules, I will consider the five arguments made by the Appellant. Such an analysis is necessary, in any event, in order to deal with the Motion to strike out paragraph 5.1 and subparagraph 5.2(b) of the Second Amended Reply.

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[16] Bryan A. Garner (ed.), *Black's Law Dictionary*, 10th ed. (St. Paul: Thomson Reuters, 2014), p. 1340, defines *plead over* as meaning "To fail to notice a defective allegation in an opponent's pleading before responding to the pleading." I acknowledge that the Amended Notice of Appeal was not filed as a response to the Reply or the Amended Reply. However, if there were irregularities in the Reply and the Amended Reply, the Appellant failed to notice or challenge those irregularities before filing the Amended Notice of Appeal.

B. Sham Allegations

(1) Appellant's Position

[19] To understand the Appellant's argument in respect of the sham allegations contained in the Impugned Provisions, some background is helpful. Subparagraph 15(ww) of the Reply, the Amended Reply and the Second Amended Reply reads as follows:

> ww) The purported trades related to the foreign exchange transactions were a sham;…

[20] During the examination for discovery of the designated representative of the Respondent on April 18, 2018, the following exchange occurred:

> Q. And then (ww), ma'am, you didn't actually conclude that these foreign exchange transactions were a sham because you really didn't even know what the transactions were about; isn't that right?
>
> A. That's just an assumption, based on what I could see, *that it's a possibility that the transaction actually never occurred*. Just because I had no supporting documentation, that was a possibility.[17] [*Emphasis added*.]

[21] At the hearing of this Motion, counsel for the Appellant focused on the statement by the Respondent's designated representative "that it's a possibility that the transaction actually never occurred." In other words, as submitted by counsel for the Appellant, the Minister's assumption that the foreign exchange transactions were a sham was based only on the assumption that those transactions did not actually occur (and presumably not on an assumption that the transactions did not have the legal consequences that, on their face, they purported to have).[18]

[22] On July 29, 2020, the Respondent filed a Notice of Motion for a ruling to confirm that three questions asked of the Appellant by the Respondent at an examination for discovery (which the Appellant had refused to answer on the basis that the information sought was subject to solicitor-client privilege) were proper

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17 Transcript of the examination for discovery of Parmpal Sandhu, on April 18, 2018, p. 102, lines 4-11, as set out in Exhibit A to the Affidavit of Arianna Yoffe, dated October 26, 2020 and filed by the Appellant on October 26, 2020.

18 See *Stubart Investments Limited v. The Queen*, [1994] 1 SCR 536, at 539 & 572-573.

questions, and for an order to require the Appellant to produce, for inspection by the Court, copies of documents referred to in an email between the Appellant and a US attorney. The Respondent filed written representations in respect of that motion. Those representations contained the following statements:

> 9. During the examination for discovery, in discussing the trading activities and reviewing exhibit R-4 to the examination for discovery, it became apparent that Mr. Lemons [i.e., the US attorney] appeared to have some involvement with respect to decisions on trading as part of the foreign exchange activities. Despite the Appellant's rejection that Mr. Lemons provided business advice, such evidence suggests or implies that his lawyers provided non-legal advice or *may have been making, directing or participating in the decisions in respect of the transactions at issue* and therefore, the claim of privilege over that communication is improper….[19] [*Italics added; footnotes omitted.*]
>
> 18. A January 20, 2012 email from the Appellant to Velocity Trading indicates that "Bruce", being Mr. Lemons, "wanted to wait a little longer before [they] consider closing these positions out." This implies that Mr. Lemons *was providing input on decisions involving when to trade as part of the foreign exchange activities* or was otherwise providing non-legal advice. The Appellant refused to answer whether Mr. Lemons was authorized to practice law in Canada on the basis of privilege. When asked what kind of advice Mr. Lemons was providing, the Appellant refused to answer the question on the basis of privilege, but responded "no" when asked if Mr. Lemons was providing business advice. As a result of the foregoing and due [to] the nature of the objection, the respondent was unable to assess if the solicitor-client privilege was properly claimed or not.[20] [*Italics added; footnotes omitted.*]

[23] The Appellant takes the position that the statements that are italicized in the above quotation were unconditional statements that constituted judicial admissions by the Respondent that the Trades did occur.[21] As well, the Appellant submits that "The Respondent cannot now resile from Her binding admissions which have been endorsed by this Court."[22]

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19 Respondent's Written Representations, dated and filed July 29, 2020, ¶9.

20 *Ibid*, ¶18.

21 Notice of Motion, dated and filed December 14, 2020, ¶II.4-5; and Appellant's Notes and Authorities – Motion to Strike Portions of the Respondent's Second Amended Reply, dated January 26, 2021, ¶6 & 9-10.

22 Notice of Motion, dated and filed December 14, 2020, ¶II.5.

[24] In issuing his Order dated November 20, 2020, which allowed the Respondent's motion concerning the unanswered discovery questions and the claim of privilege, Justice Favreau stated:

> As *the email exchanges between the appellant and Mr. Lemons are exclusively related to the pricing on the market of the appellant's position and to the appropriate timing to close his position in order to proceed with the next step of transactions*, the appellant's claims of privilege are improper in the circumstances.
>
> The documents I examined strongly suggest that *Mr. Lemons provided non-legal advice and had been involved in the making, directing or participating in the appellant's decisions in respect of the transactions at issue*.[23] [*Italics added*.]

[25] Counsel for the Appellants submits that the italicized statements in the above Order constituted "a judicial finding by this Court, with respect to the foreign exchange transactions at the heart of this Appeal … that [is] completely inconsistent with any allegation that they were in fact sham transactions."[24] The Appellant further submits that, by issuing the Order dated November 20, 2020, the Court adopted the Respondent's statement as to the role of Mr. Lemons, thus triggering the doctrine of issue estoppel, so as to preclude the Respondent from arguing that the Trades were shams.[25]

[26] The Appellant also takes the position that the Respondent's use in the Second Amended Reply of the words *purported* and *purportedly*, when describing the Trades, the contracts to purchase and sell foreign currencies and the actions of entering into those contracts, is similarly precluded, as the Respondent has acknowledged the existence of the Trades and thus is precluded from arguing that the Trades did not occur or that the Trades were non-existent.

(2) Judicial Admission

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23 Order dated November 20, 2020, by Justice Favreau, p. 2.

24 Notice of Motion, dated and filed December 14, 2020, ¶II.4.

25 Appellant's Notes, *supra* note 21, p. 4, ¶11.

[27] To constitute a judicial admission, a statement "must be a deliberate concession made by one party for the benefit of the other."[26] Not only must the statement be deliberate, but it must be clear.[27]

[28] In *Continental Bank Leasing*, Justice Bowman (as he then was) stated:

> 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….[28]

In quoting the above comment by Justice Bowman, I am not implying that the statements made by counsel for the Respondent in the written submissions put before Justice Favreau constituted an admission that the Trades were not a sham, nor do I consider those statements to have been ill-considered. However, if those statements implied that the Trades were not a sham, they were clearly inconsistent with the express statements made by the Respondent in the Reply, the Amended Reply and the Second Amended Reply, which alleged that the Trades were shams. In subparagraph 15(ww) and paragraph 33 of each of the Reply, the Amended Reply and the Second Amended Reply, the Respondent clearly set out her position that the Trades were a sham. I do not view the submissions made by the Respondent before Justice Favreau as negating the allegation of sham. In my view, the allegation of sham "is a triable issue which ought to be tried in the interests of justice."[29]

(3) Issue Estoppel

[29] The doctrine of issue estoppel is designed to limit relitigation. Balancing judicial finality, prudent use of judicial resources and fairness to the parties, the doctrine stipulates that a party may not relitigate an issue that was finally decided in a prior judicial proceeding between the same parties or those who stand in their

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26 *Morel et al. v. The Queen*, 2008 TCC 433, ¶11.

27 *Burlington Resources Finance Company v. The Queen*, 2020 TCC 32, ¶80.

28 *Continental Bank Leasing Corporation v. The Queen*, [1993] 1 CTC 2306, 93 DTC 298 (TCC), ¶22.

29 See *Burlington Resources Finance*, *supra* note 27, ¶82. See also *Paletta v. The Queen*, 2019 TCC 205, ¶102-103.

places.[30] The doctrine is based on the principles of ensuring the finality of litigation and protecting the parties against the unfairness of repeated legal proceedings.[31] Yet, courts retain discretion not to apply issue estoppel when its application would lead to injustice.[32]

[30] In 1975, Justice Dickson (as he then was), speaking for a majority of the Supreme Court of Canada in the *Angle* case, and quoting from the *Carl Zeiss Stiftung* case, indicated that the requirements of issue estoppel are:

> … (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies….[33]

In discussing the first of the above requirements, relating to the question that has been decided, Justice Dickson went on to state the following:

> *It will not suffice if the question* arose collaterally or incidentally in the earlier proceedings or *is one which must be inferred by argument from the judgment….* The question out of which the estoppel is said to arise must have been "*fundamental to the decision arrived at*" in the earlier proceedings….[34] [*Emphasis added.*]

[31] In a dissenting decision in *Angle*, Justice Laskin (as he then was) quoted the following statement from *McIntosh v. Parent*:

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30 *Penner v. Niagara (Regional Police Services Board)*, [2013] 2 SCR 125, 2013 SCC 19, ¶29 & 88.

31 *Ibid*, ¶89.

32 *Ibid*, ¶29 & 93.

33 *Angle v. MNR*, [1975] 2 SCR 248, at 254, quoting from *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 AC 853, at 935. See also *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 SCR 460, 2001 SCC 44, ¶25; *Canadian Union of Public Employees, Local 79 v. City of Toronto*, [2003] 3 SCR 77, 2003 SCC 63, ¶23; *Penner*, *supra* note 30, ¶92; and *Havaris v. Attorney General of Canada and Prelorentzos*, 2021 FCA 124, ¶10.

34 *Angle*, supra note 33, at 255, quoting, in part, from *Hoystead v. Commissioner of Taxation*, [1926] AC 155. See also *Danyluk*, *supra* note 33, ¶24.

> When a question is litigated the judgment of the Court is a final determination between the parties and their privies. Any right, question or fact *distinctly put in issue and directly determined* by a court of competent jurisdiction as a ground of recovery or as an answer to a claim set up cannot be retried in a subsequent suit between the same parties or their privies though for a different cause of action. The right, question or fact once determined must as between them be taken to be conclusively established so long as the judgment remains.[35] [*Emphasis added.*]

[32] I am not persuaded that the question decided by Justice Favreau in his Order dated November 20, 2020 was the same question that arose by reason of the Minister's assumptions and pleadings concerning sham. Justice Favreau addressed the question of whether certain communications between the Appellant and his US attorney concerning the Trades were privileged. It is my understanding that, at the hearing of that motion, no witnesses testified and no evidence was put before Justice Favreau relating specifically to the issue of whether the Trades were a sham. In other words, the reality, existence and nature of the Trades were not "distinctly put in issue" at the hearing of the motion and were not "directly determined" by Justice Favreau in issuing his Order.[36] Counsel for the Appellant urges me to hold that Justice Favreau found that the Trades were real and did exist; however, if he did so find, that is a finding "which must be inferred by argument from" Justice Favreau's Order.[37] In other words, the question of whether the Trades existed or did not exist was not "fundamental to the decision arrived at" in Justice Favreau's Order concerning the applicability of solicitor-client privilege.[38]

[33] To summarize, the Appellant has not established that the principle of issue estoppel precludes the Respondent, in this situation, from arguing that the Trades were a sham. This is sufficient to dismiss the Appellant's Motion in respect of subparagraphs 5.2(b), 15(ff), 15(ww) and 15(zz) and paragraphs 33 and 34 of the Second Amended Reply.

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35 *Angle*, *supra* note 33, p. 267-268, quoting from *McIntosh v. Parent*, (1924) 55 OLR 552, at 555. See also *Danyluk*, *supra* note 33, ¶24, quoting from *McIntosh v. Parent*, [1924] 4 DLR 420, at 422.

36 See *McIntosh v. Parent*, *supra* note 35, as quoted in *Angle*, *supra* note 33, p. 267-268, and as quoted in *Danyluk*, *supra* note 33, ¶24.

37 See *Angle*, *supra* note 33, p. 255.

38 See *Angle*, *ibid*.

[34] If the requirements of issue estoppel are made out, a court may "nevertheless refuse to apply estoppel as a matter of discretion,"[39] although "such a discretion must be very limited in application."[40] As I have concluded that the first requirement for the application of issue estoppel has not been established (i.e., the question of whether the Trades were a sham was not the question decided by Justice Favreau in the motion that he heard), it is not necessary for me to determine whether the "residual discretion"[41] associated with issue estoppel should be exercised in this situation.

(4) *Purported* and *Purportedly*

[35] The above conclusion, to the effect that issue estoppel has not been established, such that the Respondent is not precluded from alleging sham, is sufficient to dismiss the Motion insofar as it seeks to strike the words *purported* and *purportedly* from the Second Amended Reply. A further basis for not striking *purported* and *purportedly* was stated by the Federal Court of Appeal in *Loewen*, which dealt with an appeal from a decision of the Tax Court of Canada to strike the words *so-called*, *called a*, *purported* and *alleged* from the Crown's reply in that case. On appeal, Justice Sharlow stated:

> The Judge concluded that the words in question are always ambiguous and duplicitous, and therefore are always improper in pleadings. I am unable to agree with him on that point. There are occasions where it is appropriate to use such words in pleadings. For example, if the facts relating to an income tax appeal involve allegations by the taxpayer that a certain debt exists and that its terms are set out in a document called a "promissory note", the Crown cannot be compelled to admit those allegations. If the Crown does not wish to admit that the document is a promissory note, that there is a debt, or that the terms of the debt are set out in the document, then it is appropriate for the Crown's reply to refer to the document

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39 *Danyluk*, *supra* note 33, ¶33 & 62. See also *Wamboldt v. Wellman*, [2007] OJ No. 5063 (Ont. Div. Ct.), ¶30-31; and *Penner*, *supra* note 30, ¶29-30 & 93.

40 *General Motors of Canada Limited v. Naken*, [1983] 1 SCR 72, at 101, as quoted in *Danyluk*, *supra* note 33, ¶62. In *General Motors*, Justice Estey made his comment about judicial discretion in the context of the defense of *res judicata*. Issue estoppel is a species of *res judicata*; see *Penner*, *supra* note 30, ¶91.

41 *Penner*, *supra* note 30, ¶31 & 93.

> as a "purported promissory note", and to refer to the alleged debt as an "alleged debt".[42]

[36] In my view, in the Reply, the Amended Reply and the Second Amended Reply, the Respondent used the words *purported* and *purportedly* to refer to alleged foreign exchange transactions and contracts, without admitting the existence or legal effectiveness of those transactions and contracts. I do not see the use of the words *purported* and *purportedly* in those circumstances as being ambiguous or duplicitous. Rather, it was simply a mechanism used to refer to the alleged transactions and contracts without admitting that there were transactions and contracts. Based on *Loewen*, this is an acceptable manner of pleading.[43]

(5) Subparagraph 5.2(b) of the Second Amended Reply

[37] To understand the context of subparagraph 5.2(b) of the Second Amended Reply, we must first consider paragraph 4.2 of the Amended Notice of Appeal (which was one of the new provisions added in response to the direction of Justice Favreau in paragraph 9 of his Order of September 24, 2020).[44] Paragraph 4.2 of the Amended Notice of Appeal reads as follows:

> 4.2. More specifically, the foreign currency trades were governed by, *inter alia*, the laws of England and Wales that are listed in Appendix A hereto and the text of the provisions of those statutes and other written laws, regulations, decrees and resolutions are hereby incorporated by reference.

[38] Subparagraph 5.2(b) of the Second Amended Reply reads as follows:

> 5.2 With respect to paragraph 4.2 of the Amended Notice of Appeal, the Attorney General of Canada:…

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42 *The Queen v. Loewen*, 2004 FCA 146, ¶50; *reversing* 2003 TCC 101. See also *Strother v. The Queen*, 2011 TCC 251, ¶54.

43 In *Loewen*, Justice Sharlow indicated that there may be situations where the use of *purported* or *purportedly* may result in an ambiguous or duplicitous pleading, such that it would be an improper pleading (see ¶51-52). In my view, this is not one of those situations.

44 Paragraph 9 of the Order dated September 24, 2020 is quoted in paragraph 45 below.

> b) Says, if the foreign currency trades were not a sham, that the foreign currency trades would be governed [by] the laws of England and Wales.

Consistent with the submissions made by the Appellant in respect of the other sham allegations contained in the Impugned Provisions, the Appellant argues that the phrase "if the foreign currency trades were not a sham," (as found in subparagraph 5.2(b) of the Second Amended Reply) should be struck out.[45]

[39] As discussed above, the Appellant has not established that there was a judicial admission by the Respondent that the Trades occurred, nor has the Appellant established that issue estoppel precludes the Respondent from arguing that the Trades were a sham.[46] Although this conclusion is sufficient to dismiss the Motion insofar as it pertains to the impugned phrase in subparagraph 5.2(b) of the Second Amended Reply, it should also be noted that that phrase does not actually allege that the Trades were a sham. Rather, the impugned phrase in subparagraph 5.2(b) is merely a conditional proposition acknowledging that the Trades might not have been a sham. This is not a basis for striking out the impugned phrase in subparagraph 5.2(b) of the Second Amended Reply.

C. Conclusions of Law

[40] The Appellant has sought to strike subparagraphs 15(ww), 15(xx), 15(zz), 15(aaa) and 15(bbb) (collectively, the "Legal-Conclusion Assumptions") from the Second Amended Reply on the basis that those subparagraphs, which are located within the list of the assumptions of fact made by the Minister when determining the Appellant's tax liability for the 2011 taxation year, contain conclusions of law. The two shortest, and most obvious (in terms of assuming a conclusion of law), of those subparagraphs are 15(ww) and 15(xx), which read as follows:

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[45] Paragraph 34 of the Second Amended Reply contains a similar phrase, the precise words of which are "if the purported trades relating to the Foreign Exchange Transactions were not a sham," which the Motion also seeks to have struck out. As indicated above, that phrase appeared in both the Reply and the Amended Reply, such that I have already determined that the fresh step rule precludes the Appellant from succeeding in that regard. In addition, the comments made in paragraph 39 of these Reasons apply to the impugned phrase in paragraph 34 of the Second Amended Reply, as well as to the impugned phrase in subparagraph 5.2(b) of the Second Amended Reply.

[46] See paragraph 33 above.

> ww) The purported trades relating to the foreign exchange transactions were a sham;
>
> xx) The purported contracts entered into in the foreign exchange transactions were not legally effective contracts;….

[41] It is well established that a conclusion of law is not to be pleaded as an assumption of fact made by the Minister when assessing.[47] If the Minister, when assessing, reached a conclusion of mixed fact and law, the Crown, when pleading, should extricate the factual components that were assumed by the Minister from the legal conclusion that was drawn. The factual components may be pleaded as an assumption of fact made by the Minister,[48] but the legal conclusion should be pleaded in the portion of the Reply that sets out the Crown's legal arguments (i.e., the reasons or grounds on which the Crown intends to rely).[49]

[42] While the factual components or factual underpinnings of an allegation of sham may be pleaded as assumptions of fact, the conclusion that there was a sham should be pleaded as a reason on which the Crown intends to rely.[50] In other words, in the context of an alleged sham, the factual underpinnings (such as an intention to mislead) may be pleaded as facts assumed by the Minister, but the mention or use of the term *sham* or the drawing of a legal conclusion that there was a sham should be pleaded elsewhere in the particular reply.[51]

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47 *The Queen v. Anchor Pointe Energy Ltd.*, 2003 FCA 294, ¶25; and *Canadian Imperial Bank of Commerce v. The Queen*, 2013 FCA 122, ¶92-93. In *Strother, supra* note 42, ¶10-11, Chief Justice Rip suggested that pleading a conclusion of law is an irregularity. See also *AgraCity Ltd. v. The Queen*, 2015 FCA 288,¶40-41, where the Federal Court of Appeal indicated that the question of whether certain facts would lead to the conclusion that a transaction or series of transactions is a sham is a question of mixed fact and law, which should not be pleaded as a statement of fact. Rather, the facts are to be extricated from such a statement.

48 *Anchor Pointe*, *supra* note 47, ¶26.

49 *CIBC*, *supra* note 47, ¶93; and *Strother*, *supra* note 42, ¶19.

50 *CIBC*, *supra* note 47, ¶92-93; and *Strother*, *supra* note 42, ¶32.

51 *CIBC*, *supra* note 47, ¶93; *Strother*, *supra* note 42, ¶32; and *Bemco Confectionary and Sales Ltd. v. The Queen*, 2015 TCC 48, ¶40-41.

[43] There may well be merit in the Appellant's submission that the Legal-Conclusion Assumptions do contain conclusions of law. Nevertheless, by reason of the decision that I have made concerning the application of the fresh step rule,[52] I do not propose to strike out the Legal-Conclusion Assumptions, nor do I need to make a definitive finding as to whether each Legal-Conclusion Assumption actually pleads a conclusion of law. However, I will note that, were it not for the Appellant's delay in making this Motion, he may well have succeeded in having the Legal-Conclusion Assumptions struck from the Second Amended Reply.

[44] The Appellant's lack of success in having the Legal-Conclusion Assumptions struck from the Second Amended Reply should be of no comfort to the Respondent, given the following comments made by Associate Chief Justice Lamarre in *Gerbro Holdings*:

> 67. Assumptions of law or mixed fact and law are not binding on this Court, regardless of the fact that they could have or should have been stricken from the pleadings. To hold otherwise would be to divest this Court of its power to rule on questions of law. In *Kopstein* …, Justice Jorré, ruling on a motion to strike, enunciated this proposition in the following way:
>
> > 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.

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52 See paragraphs 13-17 above.

> 68. Furthermore, this Court should not be required to extract the factual components from assumptions of mixed fact and law when these assumptions are incorrectly pleaded….[53]

Hence, to the extent that any subparagraph in paragraph 15 of the Second Amended Reply contains a conclusion of law or an assumption of mixed fact and law, the trial judge who hears this Appeal will likely disregard that subparagraph in its entirety, without endeavouring to extricate any facts that might be contained in that subparagraph (for that is not the role of the trial judge).[54]

D. Paragraph 5.1 of the Second Amended Reply

[45] To understand the Appellant's concern about paragraph 5.1 of the Second Amended Reply, some background will be helpful. As noted in the chronological summary set out above, on September 21, 2020 Justice Favreau heard the Appellant's motion for leave to amend his Notice of Appeal in a manner consistent with a draft Amended Notice of Appeal attached to the applicable Notice of Motion. The Respondent objected to only one of the proposed amendments, being the addition of proposed paragraph 4.1, which, in the draft Amended Notice of Appeal, read as follows:

> 4.1 The foreign currency trades were governed by the laws of England and Wales. Based on those laws, the foreign currency trades were legally effective.

In an Order signed on September 24, 2020, Justice Favreau granted the Appellant leave to amend his Notice of Appeal. Paragraph 9 of that Order read as follows:

> 9. Considering the foregoing and the representations made by the parties at the hearing, this Court hereby grants the Appellant leave to amend his Notice of Appeal consistent with the Proposed Amendments on condition that, with respect to paragraph 4.1:
>
> > (a) the text of the provisions of all statutes and other written laws, regulations, decrees and resolutions on which the Appellant intends to rely must be incorporated by reference in the Notice of Appeal; and

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53 *Gerbro Holdings Company v. The Queen*, 2016 TCC 173, ¶67-68; *affirmed*, 2018 FCA 197. Associate Chief Justice Lamarre quoted from *Kopstein et al. v. The Queen*, 2010 TCC 448, ¶67-68.

54 I am currently assigned to be the trial judge for this Appeal. If that assignment continues, at the trial I intend to follow the guidance given in *Kopstein* and *Gerbro Holdings*.

> (b) the tenor and effect of the jurisprudence that is alleged to establish a specific non-statutory rule or principle as distinct from decisions that reflect only a straight forward application of statutory provisions must be pleaded.

[46] In endeavoring to comply with the Order of September 24, 2020, the Appellant added, not only paragraph 4.1 to the Notice of Appeal, but also paragraphs 4.2 through 4.34, which comprised slightly more than 13 pages, which had not been included in the draft Amended Notice of Appeal previously provided to the Respondent and the Court, and which contained a detailed analysis of relevant statutes and jurisprudence from the laws of England and Wales (as required by paragraph 9 of the Order of September 24, 2020). The Amended Notice of Appeal was served on the Respondent on October 8, 2020, after which the Respondent made a motion to strike out certain portions (the "Disputed Paragraphs") of the Amended Notice of Appeal (including the last sentence of paragraph 4.1, which appeared in the filed Amended Notice of Appeal in the same manner as had been proposed in the draft Amended Notice of Appeal, as quoted above). In written representations filed on October 22, 2020 in support of its motion, the Respondent submitted that the Disputed Paragraphs were objectionable because they did "not allege any material facts relating to the foreign statutes, regulations or jurisprudence on which the appellant intends to rely." Rather, the Disputed Paragraphs "argue[d] conclusions relating to the application of foreign law on the facts of this appeal."[55]

[47] By paragraph 12 of his Order dated November 5, 2020, Justice Favreau struck out the Disputed Paragraphs,[56] with the exception of the last sentence of paragraph 4.1, which he permitted to remain, as it had been expressly endorsed in his Order of September 24, 2020. In paragraph 13 of the Order of November 5, 2020, Justice Favreau then went on to state:

> 13. The Disputed Paragraphs, with the exception of the last sentence of paragraph 4.1, are not consistent with the September 24 Order. The Disputed Paragraphs with the exception of the last sentence of paragraph 4.1 either allege no foreign statute, principle or jurisprudence on which the appellant intends to rely on [*sic*] or argue conclusions relating to the application of foreign law on the facts of this appeal. The inclusion of the Disputed Paragraphs with the exception of the last sentence of paragraph 4.1 in the Amended Notice of Appeal would

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55 Respondent's Written Representations, dated and filed October 22, 2020, p. 4, ¶16.

56 The Disputed Paragraphs that were struck out are not relevant to this Motion.

> cause a prejudice to the respondent that cannot be remedied through the award of costs.

The Appellant interprets paragraph 13 of Justice Favreau's Order of November 5, 2020 as acknowledging that the last sentence of paragraph 4.1 of the Amended Notice of Appeal "allege[s] a foreign statute, principle or jurisprudence on which the Appellant intends to rely; and … does not argue conclusions relating to the application of foreign law on the facts of this Appeal."[57]

[48] It was against this backdrop that the Respondent pleaded the following in paragraph 5.1 of the Second Amended Reply (which was filed on November 16, 2020):

> 5.1 With respect to paragraph 4.1 of the Amended Notice of Appeal, the Attorney General of Canada could not find any foreign law advanced by way of fact to admit or deny. He states that the paragraph is advanced by way of argument and to the extent that there are facts contained therein, they are denied.

[49] In arguing this Motion, the Appellant submitted that the statement in paragraph 5.1 of the Second Amended Reply, to the effect that paragraph 4.1 of the Amended Notice of Appeal did not contain any foreign law advanced by way of fact, directly contradicts Justice Favreau's finding that paragraph 4.1 of the Amended Notice of Appeal alleges a foreign statute, principle or jurisprudence, with the result that paragraph 5.1 of the Second Amended Reply should be struck.[58] While I acknowledge that paragraph 13 of Justice Favreau's Order of November 5, 2020 could perhaps be interpreted in the manner suggested by the Appellant, I prefer a narrower reading of that paragraph. In my view, Justice Favreau was stating only that the Disputed Paragraphs, except for the last sentence of paragraph 4.1, either alleged no foreign law or argued conclusions relating to the application of foreign law. Paragraph 13 does not specifically state that the last sentence in paragraph 4.1 alleged foreign law and did not argue any conclusions relating to the application of foreign law. It is possible, particularly in light of paragraph 12 of Justice Favreau's Order of November 5, 2020, that Justice Favreau permitted the last sentence in paragraph 4.1 to remain simply because he had expressly endorsed it in his Order of September 24, 2020. In addition, Justice Favreau may have decided to apply the principle enunciated in *CIBC* as follows:

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57 Appellant's Notes, *supra* note 21, p. 7, ¶20.

58 *Ibid*, ¶23.

> It may well be that in certain situations it is reasonable to allow a deficient pleading to stand if, for example, the facts are relatively simple, there is little or no debate about the applicable legal principles, or there is little risk that the other party will be prejudiced or will be obliged to waste resources.[59]

In other words, I am not convinced that paragraph 5.1 of the Second Amended Reply directly contradicts what Justice Favreau stated in paragraph 13 of his Order of November 5, 2020.

[50] Based on oral submissions made by counsel for the Appellant at the hearing of this Motion, it is my understanding that the Appellant does not have concerns about the second sentence of paragraph 5.1 of the Second Amended Reply. Rather, the Appellant's concern relates to the first sentence of paragraph 5.1 of the Second Amended Reply, i.e., the failure of the Attorney General of Canada (the "AGC") to find, in paragraph 4.1 of the Amended Notice of Appeal, any foreign law advanced by way of fact. I also understand that counsel for the Appellant merely wants the Respondent to make a straightforward denial of paragraph 4.1 of the Amended Notice of Appeal.

[51] If paragraph 4.1 of the Amended Notice of Appeal contains a pleading of foreign law that the AGC could not find (as stated in the first sentence of paragraph 5.1 of the Second Amended Reply), in the second sentence of paragraph 5.1 of the Second Amended Reply, the AGC goes on to deny any facts that may be contained in paragraph 4.1 of the Amended Notice of Appeal.

[52] I do not consider paragraph 5.1 of the Second Amended Reply as prejudicing or delaying the fair hearing of the Appeal, as being scandalous, frivolous or vexatious, or as being an abuse of the process of the Court, nor do I view paragraph 5.1 as being part of a pleading that discloses no reasonable grounds for opposing the Appellant's Appeal. Accordingly, I do not believe that paragraph 5.1 of the Second Amended Reply should be struck out under subsection 53(1) of the Rules, particularly as "The jurisprudence is also well established that in order to succeed on a motion to strike out …, the applicant must show that the pleading attacked is so clearly immaterial, frivolous, embarrassing, abusive, etc., that it is

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59 *CIBC*, *supra* note 47, ¶94.

obviously forlorn and futile."[60] Consequently, I cannot see any basis in Rule 53(1) for striking out paragraph 5.1 of the Second Amended Reply.

E. Corrections or Admissions Made During the Examination for Discovery

[53] On April 18, 2018, the Respondent produced her designated representative or nominee for an examination for discovery conducted by counsel for the Appellant. During the course of that examination, that nominee and counsel for the Respondent both made certain statements which suggested that subparagraphs 15(cc), 15(pp), 15(tt) and 15(aaa) of the Reply, which contained some of the Minister's assumptions of fact, were, according to the Appellant, incorrect or imprecise. The Respondent does not accept that those statements during the examination were as clear cut and absolute as the Appellant suggests. Rather, the Respondent submits that the nominee merely agreed that the information contained in certain documents suggested that the actual facts were contrary to the assumed facts, but did not admit or agree that the assumed facts were incorrect.

[54] As noted, the examination for discovery took place on April 18, 2018, almost three years before the Appellant filed the Notice of Motion for this Motion. Thus, as already explained above in my discussion of the fresh step rule, there is no need for me to specifically address those four assumptions of fact, as section 8 of the Rules precludes the Appellant from succeeding in respect of this Motion.

[55] If it were not for the Appellant's delay in making this Motion and if I were to make a decision as to whether Rule 53 permits subparagraphs 15(cc), 15(pp), 15(tt) and 15(aaa) to be struck out, I would likely be inclined to follow the approach taken by Justice Miller in *Kossow*, where she stated the following in respect of certain pleadings that were, when the Crown's nominee was examined for discovery, established to be incorrect:

> 11 The Respondent's counsel admitted that there was an error in paragraph 39(e). It was his position that the pleadings could be amended with leave from the Court. Alternatively, the paragraph could remain as it is. The Appellant has the

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60 *Duquette v. The Queen*, [1993] 1 CTC 2701, 93 DTC 833 (TCC), ¶14, quoting from *Burnaby Machine & Mill Equipment Ltd. v. Berglund Industrial Supply Co.*, (1982) 64 CPR (2d) 206 (FCTD). See also *The Queen v. Imperial Tobacco Canada Ltd.*, [2011] 3 SCR 45, 2011 SCC 42, ¶17, and *CIBC*, *supra* note 47, ¶7, both of which reiterate the principle that is sometimes called the "plain and obvious" test.

> admission that the paragraph is incorrect and it cannot be used at trial against the Appellant.
>
> 12 … I do agree with counsel for the Respondent that the Appellant has the admission of the inaccuracy in paragraph 39(e). The pleading cannot be used against the Appellant at the hearing of this appeal. I do not see the need at this point in time to grant further relief.[61]

[56] While counsel for the Respondent has not admitted, in the context of this Motion, that there were errors in subparagraphs 15(cc), 15(pp), 15(tt) and 15(aaa), the general principle enunciated by Justice Miller still applies. The Appellant has the clarifying comments made by the Respondent's nominee and counsel and may put those comments before the trial judge by reading in excerpts from the transcript of the examination for discovery.

F. Abandoned Arguments

(1) Capital-Loss Argument

[57] In paragraph 12 of the Reply (as well as the Amended Reply and the Second Amended Reply), the Respondent pleaded that for the 2011 taxation year, the Appellant had reported the Capital Loss (in the amount of $6,289,014). In subparagraphs 15(kkk) and 15(lll) of the Reply, the Respondent pleaded that the Minister had assumed that the Appellant did not have a Capital Loss of $6,289,014 in the 2011 taxation year, and that the Appellant did not provide information to support that he had incurred the Capital Loss. In subparagraph 30(a) of the Reply (as well as the Amended Reply and the Second Amended Reply), the Respondent stated that one of the issues in the Appeal is whether the Appellant had incurred the Capital Loss of $6,289,014.

[58] In a joint letter dated September 13, 2019, signed by counsel for the Respondent and counsel for the Appellant, the Parties advised the Court as follows:

> The parties have been working continuously on advancing the matters in issue in the appeal. The parties have made significant progress in the area of settlement. With respect to the capital loss of $6,289,014, being the "Capital Loss" as defined in paragraph 12 of the Reply and as identified in the recitation of the issues under appeal in subparagraph 30(a) of the Reply, the Crown has agreed to allow the

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61 *Kossow* (TCC), *supra* note 11, ¶11-12. The decision of Justice Miller in respect of this particular issue was not appealed by the taxpayer to the Federal Court of Appeal.

> Capital Loss. Accordingly, the Crown will not rely on [sub]paragraphs (kkk) and (lll) of paragraph 15 [of] the Reply. Given that this concession does not fully resolve the appeal, the parties agree that any reassessment to allow the Capital Loss will be processed after the final resolution of the appeal. The terms of the Crown's concession on the Capital Loss issue have been confirmed in writing between the parties.[62]

[59] During the hearing of this Motion, counsel for the Respondent advised the Court that the Respondent continued to concede the capital loss issue and intended to file a partial consent to judgment so as to allow the capital loss. That document, entitled "Consent to Partial Disposition of Appeal" (the "Consent"), was filed on March 9, 2021. A Partial Judgment, based on the Consent, was granted by the Court on March 17, 2021.

[60] Given the comments made by both counsel in the above-quoted excerpt from the letter of September 13, 2019 and given the reiteration of the concession made by the Respondent at the hearing of this Motion, I do not see any need to strike subparagraphs 15(kkk), 15(lll) and 30(a) (collectively, the "Capital-Loss Provisions") from the Second Amended Reply. The principle applicable here is analogous to that enunciated by Justice Miller in *Kossow*, as set out above.[63] The Appellant has the Respondent's concession in respect of the Capital Loss, both in writing and on the record, and could put that concession before the trial judge if it were to become necessary (although it should not be necessary, given the recently filed Consent and the recently granted Partial Judgment). Furthermore, in my view, to grant an order striking the Capital-Loss Provisions from the Second Amended Reply would not be a wise or prudent use of scarce judicial resources.[64]

(2) Tax-Shelter Argument

[61] Subparagraphs 15(eee), 15(fff), 15(hhh), 15(iii) and 15(jjj) of the Reply (as well as the Amended Reply and the Second Amended Reply) set out assumptions of fact made by the Minister to underpin and plead that the Trades related to a tax

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62 Letter dated September 13, 2019 from counsel for the Respondent and counsel for the Appellant to the Court, p. 1-2.

63 *Kossow* (TCC), *supra* note 11, ¶11-12; and paragraph 55 above.

64 See *La Coopérative de Transport Maritime et Aérien v. United Steelworkers, Local 9538*, 2015 FCA 287, ¶8(b); *Express File, Inc. v. HRB Royalty, Inc.*, 2004 FCA 341, ¶3; and *Wood v. The Queen*, [1999] GSTC 55 (TCC), ¶11.

shelter and that the promoters thereof did not apply for or obtain a tax shelter identification number in respect thereof. Paragraph 31 of the Reply (as well as the Amended Reply and the Second Amended Reply) states that the AGC is relying on (among other provisions) section 237.1 of the *Income Tax Act.*[65]

[62] At the examination for discovery of the Respondent's nominee on April 18, 2018, the following exchange between counsel occurred:

> [Counsel for the Appellant, addressing counsel for the Respondent]: Ms. …, is it the Crown's position that it is proceeding … with the tax-shelter allegation and argument in connection with Mr Chad's 2011 tax year?
>
> [Counsel for the Respondent]: At present, the reply does not contain any reasons relied on in relation to the tax-shelter position, and that is consistent with our instructions at the time of drafting the reply, is that we have not advanced that position. We do have assumptions of fact related to the tax-shelter position because, as you will be aware from the information conveyed to Mr. Chad during the audit, that was an aspect of the assessing position, the tax-shelter position. However -- and because we made assumptions -- the Minister made assumptions relating to the tax-shelter position, those are, of course, listed as assumptions, but the legal position as identified in the reply does not contain any position advanced in relation to the tax-shelter position. If that changes, we, of course, will let you know, and if there's any requirement to advance the position, it would require an amendment to the reply, in our view.[66]

[63] Between that examination for discovery and the hearing of this Motion, the Respondent did not advise of a change in her position, nor did she seek to amend the Reply (or to amend the Amended Reply or the Second Amended Reply) so as to add reasons relied on in relation to the tax-shelter argument. Nevertheless, the Appellant seeks to have subparagraphs 15(eee), 15(fff), 15(hhh), 15(iii) and 15(jjj) and paragraph 31 (collectively, the "Tax-Shelter Provisions") struck out. At the hearing of this Motion, counsel for the Respondent advised that the Respondent will not rely on the tax-shelter argument at the trial of this Appeal, and that the Respondent could accept subparagraph 15(iii) being struck out. However, the Respondent was of the view that certain of the Tax-Shelter Provisions remained

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65 *Income Tax Act*, RSC 1985, c. 1 (5th Supplement), as amended.

66 Transcript of the examination for discovery on April 18, 2018, p. 18, line 11 to p. 19, line 5, as set out in Exhibit A to the Affidavit of Michelle Fung, dated December 14, 2020 and filed by the Appellant on December 14, 2020.

relevant because they also related to the Respondent's arguments concerning sham and the general anti-avoidance rule.

[64] Unexpectedly, on June 29, 2021, the Respondent filed a Notice of Motion, seeking leave to file a Third Amended Reply, which would (among other things) add, in the context of the tax-shelter argument, provisions stating other material facts and the related reasons or grounds on which the Respondent now intends to rely. Given the statements made by counsel for the Respondent at the hearing of this Motion, the recently proposed amendments relating to the tax-shelter argument came as a surprise to me.

[65] Were it not for the recent filing of the Respondent's Notice of Motion seeking leave to file a Third Amended Reply, I would have been inclined, for reasons similar to those expressed in respect of the Capital-Loss Provisions, to state explicitly that the Tax-Shelter Provisions should not be struck out. In particular, those reasons would have included the following:

(a) The Respondent's position in respect of the tax-shelter argument was stated at the examination for discovery held on April 18, 2018, almost three years before the Appellant brought this Motion.

(b) The Appellant had the position of the Respondent, as stated on the record at the examination for discovery and at the hearing of this Motion, to the effect that the Respondent was not relying on the tax-shelter argument.[67]

(c) In view of the foregoing, it would have not been a wise or prudent use of scarce judicial resources to strike out the Tax-Shelter Provisions.

However, given the Respondent's recently filed Notice of Motion for leave to file a Third Amended Reply, I now prefer not to make any definitive comments as to whether the Tax-Shelter Provisions should be struck out (apart from the decision that I have already made not to do so by reason of section 8 of the Rules), until after the Respondent's motion has been heard.

IV. CONCLUSION

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[67] It seems that the Respondent has recently changed her mind and may now desire to resile from the position stated at the examination for discovery and the hearing of this Motion.

[66] The Appellant's Motion is dismissed, with costs payable by the Appellant to the Respondent.

[67] If the Parties are unable to reach an agreement in respect of costs within 30 days from the date of the Order pertaining to this Motion, the Respondent may, within the ensuing 30 days thereafter, file a written submission on costs, and the Appellant shall thereafter have a further 30 days to file a written response. Any such submissions shall be limited to five pages in length. If, within the applicable time limits, the Parties do not advise the Court that they have reached an agreement and no submissions are received from the Parties, the costs payable by the Appellant to the Respondent shall be determined in accordance with the Tariff.

Signed at Ottawa, Canada, this 29th day of July, 2021.

"Don R. Sommerfeldt"

Sommerfeldt J.

CITATION:	2021 TCC 45
COURT FILE NO.:	2017-1458(IT)G
STYLE OF CAUSE:	S. ROBERT CHAD AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Canada
DATES OF HEARING:	January 27-28, 2021
REASONS FOR ORDER BY:	The Hon. Justice Don R. Sommerfeldt
DATE OF ORDER:	July 29, 2021

APPEARANCES:

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