Docket: 2020-641(IT)G

BETWEEN:

THE PRESTON FAMILY TRUST II,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent,

---

Applicant's Motion considered by Written Representations with the Motions in *John Preston* - 2020-642(IT)G and *Monika Preston* - 2020-643(IT)G

Before: The Honourable Justice David E. Spiro

Participants:

Counsel for the Applicant: Yves St-Cyr and Jacob Yau

Counsel for the Respondent: Rishma Bhimji

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## AMENDED ORDER

UPON Motion of the Applicant for an Order striking out subparagraphs 10(h), 10(k), 10(1), 10(o), 10(w), 10(x), 10(y), 10(z), 10(aa), 10(bb), 10(hh), 10(ii), 10(jj), 10(kk), 10(ll), 10(mm), 10(nn), 10(oo), 10(pp), 10(qq), 10(rr), 10(ss), and 10(tt) of the Reply to the Notice of Appeal pursuant to subsection 53(1) of the *Tax Court of Canada Rules (General Procedure)*;

UPON READING the materials filed on behalf of the Applicant in support of this motion and the materials filed on behalf of the Respondent;

THIS COURT ORDERS that the relief sought is granted in part on the following terms:

1. the Respondent shall file and serve an Amended Reply in accordance with this Amended Order within 30 days;

2. subparagraphs 10(h), 10(k), 10(l), 10(o), 10(w), 10(x), 10(y), 10(z), 10(aa), 10(bb), 10(hh), 10(ii), 10(jj), 10(kk), 10(ll), 10(mm), 10(nn), and 10(qq) are struck from the assumptions paragraph of the Reply with leave to amend to include them in the Amended Reply as reasons upon which the Respondent intends to rely;

3. subparagraphs 10(oo) and 10(pp) are struck from the assumptions paragraph of the Reply with leave to amend to read:

   > Mr. and Ms. Preston did not collect and remit Part XIII withholding tax on the Taxable Dividends received from the appellant;
   >
   > Mr. and Ms. Preston did not collect and remit Part XIII withholding tax on the Capital Dividends received from the appellant;

4. subparagraph 10(rr) is struck from the assumptions paragraph of the Reply with leave to amend to read:

   > the appellant did not deduct or withhold Part XIII tax in respect of the Taxable Dividends or Capital Dividends.

5. subparagraphs 10(ss) and 10(tt) are struck from the assumptions paragraph of the Reply without leave to amend;

6. schedule "A" to this Amended Order sets out the remaining and amended assumptions of fact to be pleaded by the Respondent in the Amended Reply;

7. the Applicant may file and serve an Amended Answer within 30 days of the date on which the Amended Reply is served; and

8. costs shall be in the cause.

This Amended Order is issued in substitution of the Order dated November 10, 2021.

Signed at Toronto, Ontario, this 15th day of November 2021.

"David E. Spiro"

Spiro J.

**SCHEDULE "A" TO THE ORDER**
**2020-641(IT)G**

In so reassessing the appellant, the Minister made, *inter alia*, the following assumptions of fact:

**The appellant and its beneficiaries**

a) the appellant was an *inter-vivos* trust;

b) the appellant was an irrevocable trust;

c) the appellant was settled in Ontario;

d) the appellant was governed by the laws of Ontario;

e) the appellant was settled by Margaret Shorey on September 30, 1993;

f) the appellant was settled in accordance with a Deed of Settlement dated September 30, 1993 ("Trust Deed");

g) Ms. Shorey settled the trust by contributing 100 common shares in J.W.S.P. Holdings Inc. ("Holdco");

h) Mr. Preston, Ms. Preston and Mr. Preston's two children have been non-resident persons of Canada since October 1, 1993;

i) at all material times, Mr. Preston and Robert Green were the directors of Holdco;

j) at all material times, the appellant's trustees were Mr. Green and Gilbert J. Weiss ("Trustees");

k) the Trustees could pay and apply any part of the net annual income of the capital of the trust to the Beneficiaries;

**The appellant's capital distribution**

l) as of September 25, 2014, the appellant held 100 common shares in Holdco and 95% interest in North American Development LP (the "Partnership");

m) on September 25, 2014, the Trustees resolved to distribute an equal share of the appellant's assets to Mr. Preston and Ms. Preston after the resolution of the trust (the "Trustees' Resolution");

n) following the Trustees' Resolution, Mr. and Ms. Preston assigned their capital interests in the appellant – 100 common shares of Holdco and 95% partnership interest in the Partnership ("Distributed Property") – to ULC;

o) Mr. and Ms. Preston assigned their capital interests in the Distributed Property pursuant to subsection 85(1) of the *Income Tax Act* ("*Act*") in exchange for 100 common shares each in ULC ("Assignment");

p) Mr. and Ms. Preston were the only shareholders of ULC;

q) on September 25, 2014, the appellant transferred 100 common shares of Holdco and 95% partnership interest in the Partnership to ULC;

r) pursuant to the Trustees' Resolution, a transfer to ULC would be for the benefit of Mr. and Ms. Preston, to the exclusion of any other beneficiary of the appellant;

**Dividends paid to Mr. and Ms. Preston**

s) as part of a 2014 corporate reorganization, Holdco's shareholder signed a series of special resolutions whereby the stated capital of Holdco's common shares was increased by $23,900,000;

t) Holdco filed an election to treat a portion of the deemed dividends, $18,500,000, arising from the increase in the stated capital as capital dividends pursuant to subsection 83(2) of the *Act* ("Capital Dividends");

u) the balance of the increase in the stated capital, $6,400,000, was deemed to be taxable dividends paid to the appellant pursuant to subsection 84(1) of the *Act* ("Taxable Dividends");

v) the appellant reported dividend income of $6,400,000 in its 2014 T3 tax return;

w) the appellant designated the income from the Taxable Dividends to ULC;

**Part XIII withholding on dividends paid to Mr. and Ms. Preston**

x) Mr. and Ms. Preston did not collect and remit Part XIII withholding tax on the Taxable Dividends received from the appellant;

y) Mr. and Ms. Preston did not collect and remit Part XIII withholding tax on the Capital Dividends received from the appellant; and

z) the appellant did not deduct or withhold Part XIII tax in respect of the Taxable Dividends or Capital Dividends.

Docket: 2020-642(IT)G

BETWEEN:

JOHN PRESTON,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent,

---

Applicant's Motion considered by Written Representations with the Motions in *The Preston Family Trust II* - 2020-641(IT)G and *Monika Preston* - 2020-643(IT)G

Before: The Honourable Justice David E. Spiro

Participants:

Counsel for the Applicant: Yves St-Cyr and Jacob Yau

Counsel for the Respondent: Rishma Bhimji

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**AMENDED ORDER**

UPON Motion of the Applicant for an Order striking out subparagraphs 10(h), 10(k), 10(1), 10(o), 10(w), 10(x), 10(y), 10(z), 10(aa), 10(gg), 10(hh), 10(ii), 10(jj), 10(kk), 10(ll), 10(mm), 10(nn), 10(oo), and 10(pp) of the Reply to the Notice of Appeal pursuant to subsection 53(1) of the *Tax Court of Canada Rules (General Procedure)*;

UPON READING the materials filed on behalf of the Applicant in support of this motion and the materials filed on behalf of the Respondent;

THIS COURT ORDERS that the relief sought is granted in part on the following terms:

1. the Respondent shall file and serve an Amended Reply in accordance with this Amended Order within 30 days;

2. subparagraphs 10(h), 10(k), 10(l), 10(o), 10(w), 10(x), 10(y), 10(z), 10(aa), 10(gg), 10(hh), 10(ii), 10(jj), 10(kk), 10(ll), 10(mm), and 10(pp) are struck from the assumptions paragraph of the Reply with leave to amend to include them in the Amended Reply as reasons upon which the Respondent intends to rely;

3. subparagraphs 10(nn) and 10(oo) are struck from the assumptions paragraph of the Reply with leave to amend to read:

    > the appellant and Ms. Preston did not collect and remit Part XIII withholding tax on the Taxable Dividends received from the appellant;
    >
    > the appellant and Ms. Preston did not collect and remit Part XIII withholding tax on the Capital Dividends received from the appellant;

4. schedule "A" to this Amended Order sets out the remaining and amended assumptions of fact to be pleaded by the Respondent in the Amended Reply;

5. the Applicant may file and serve an Amended Answer within 30 days of the date on which the Amended Reply is served; and

6. costs shall be in the cause.

This Amended Order is issued in substitution of the Order dated November 10, 2021.

Signed at Toronto, Ontario, this 15th day of November 2021.

"David E. Spiro"

Spiro J.

**SCHEDULE "A" TO THE ORDER**
**2020-642(IT)G**

In so reassessing the appellant, the Minister made, *inter alia*, the following assumptions of fact:

**The appellant as beneficiary**

a) The Trust was an *inter-vivos* trust;

b) the Trust was an irrevocable trust;

c) the Trust was settled in Ontario;

d) the Trust was governed by the laws of Ontario;

e) the Trust was settled by Margaret Shorey on September 30, 1993;

f) the Trust was settled in accordance with a Deed of Settlement dated September 30, 1993 ("Trust Deed");

g) Ms. Shorey settled the Trust by contributing 100 common shares in J.W.S.P. Holdings Inc. ("Holdco");

h) the appellant, Ms. Preston and the appellant's two children have been non-resident persons of Canada since October 1, 1993;

i) at all material times, the appellant and Robert Green were the directors of Holdco;

j) at all material times, the Trust's trustees were Mr. Green and Gilbert J. Weiss ("Trustees");

k) the Trustees could pay and apply any part of the net annual income of the capital of the Trust to the Beneficiaries;

**The Trust's capital distribution**

l) as of September 25, 2014, the Trust held 100 common shares in Holdco and 95% interest in North American Development LP (the "Partnership");

m) on September 25, 2014, the Trustees resolved to distribute an equal share of the Trust's assets to the appellant and Ms. Preston after the resolution of the Trust (the "Trustees' Resolution");

n) following the Trustees' Resolution, the appellant and Ms. Preston assigned their capital interests in the Trust – 100 common shares of Holdco and 95% partnership interest in the Partnership ("Distributed Property") – to ULC;

o) the appellant and Ms. Preston assigned their capital interests in the Distributed Property pursuant to subsection 85(1) of the *Act* in exchange for 100 common shares each in ULC ("Assignment");

p) the appellant and Ms. Preston were the only shareholders of ULC;

q) on September 25, 2014, the Trust transferred 100 common shares of Holdco and 95% partnership interest in the Partnership to ULC;

r) pursuant to the Trustees' Resolution, a transfer to ULC would be for the benefit of the appellant and Ms. Preston, to the exclusion of any other beneficiary of the Trust;

**Dividends paid to the appellant**

s) as part of a 2014 corporate reorganization, Holdco's shareholder signed a series of special resolutions whereby the stated capital of Holdco's common shares was increased by $23,900,000;

t) Holdco filed an election to treat a portion of the deemed dividends, $18,500,000, arising from the increase in the stated capital as capital dividends pursuant to subsection 83(2) of the *Act* ("Capital Dividends");

u) the balance of the increase in the stated capital, $6,400,000, was deemed to be taxable dividends paid to the Trust pursuant to subsection 84(1) of the *Act* ("Taxable Dividends");

v) the Trust reported dividend income of $6,400,000 in its 2014 T3 tax return;

w) the Trust designated the income from the Taxable Dividends to ULC;

**Part XIII withholding on dividends paid to the appellant and Ms. Preston**

x) the appellant and Ms. Preston did not collect and remit Part XIII withholding tax on the Taxable Dividends received from the Trust; and

y) the appellant and Ms. Preston did not collect and remit Part XIII withholding tax on the Capital Dividends received from the Trust.

Docket: 2020-643(IT)G

BETWEEN:

MONIKA PRESTON,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent,

---

Applicant's Motion considered by Written Representations with the Motions in *The Preston Family Trust II* - 2020-641(IT)G and *John Preston* - 2020-642(IT)G

Before: The Honourable Justice David E. Spiro

Participants:

Counsel for the Applicant: Yves St-Cyr and Jacob Yau

Counsel for the Respondent: Rishma Bhimji

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## AMENDED ORDER

UPON Motion of the Applicant for an Order striking out subparagraphs 10(h), 10(k), 10(1), 10(o), 10(w), 10(x), 10(y), 10(z), 10(aa), 10(gg), 10(hh), 10(ii), 10(jj), 10(kk), 10(ll), 10(mm), 10(nn), 10(oo), and 10(pp) of the Reply to the Notice of Appeal pursuant to subsection 53(1) of the *Tax Court of Canada Rules (General Procedure)*;

UPON READING the materials filed on behalf of the Respondent in support of this motion and the materials filed on behalf of the Applicant;

THIS COURT ORDERS that the relief sought is granted in part on the following terms:

1. the Respondent shall file and serve an Amended Reply in accordance with this Amended Order within 30 days;

2. subparagraphs 10(h), 10(k), 10(l), 10(o), 10(w), 10(x), 10(y), 10(z), 10(aa), 10(gg), 10(hh), 10(ii), 10(jj), 10(kk), 10(ll), 10(mm), and 10(pp) are struck from the assumptions paragraph of the Reply with leave to amend to include them in the Amended Reply as reasons upon which the Respondent intends to rely;

3. subparagraphs 10(nn) and 10(oo) are struck from the assumptions paragraph of the Reply with leave to amend to read:

    > Mr. Preston and the appellant did not collect and remit Part XIII withholding tax on the Taxable Dividends received from the appellant;
    >
    > Mr. Preston and the appellant did not collect and remit Part XIII withholding tax on the Capital Dividends received from the appellant;

4. schedule "A" to this Amended Order sets out the remaining and amended assumptions of fact to be pleaded by the Respondent in the Amended Reply;

5. the Applicant may file and serve an Amended Answer within 30 days of the date on which the Amended Reply is served; and

6. costs shall be in the cause.

This Amended Order is issued in substitution of the Order dated November 10, 2021.

Signed at Toronto, Ontario, this 15th day of November 2021.

"David E. Spiro"

Spiro J.

**SCHEDULE "A" TO THE ORDER**
**2020-643(IT)G**

In so reassessing the appellant, the Minister made, *inter alia*, the following assumptions of fact:

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g) Ms. Shorey settled the Trust by contributing 100 common shares in J.W.S.P. Holdings Inc. ("Holdco");

h) Mr. Preston, the appellant, and Mr. Preston's two children have been non-resident persons of Canada since October 1, 1993;

i) at all material times, Mr. Preston and Robert Green were the directors of Holdco;

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y) Mr. Preston and the appellant did not collect and remit Part XIII withholding tax on the Capital Dividends received from the Trust.

Citation: 2021 TCC 79
Date: 20211110
Docket: 2020-641(IT)G

BETWEEN:

THE PRESTON FAMILY TRUST II,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2020-642(IT)G

AND BETWEEN:

JOHN PRESTON,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2020-643(IT)G

AND BETWEEN:

MONIKA PRESTON,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

## REASONS FOR ORDERS

Spiro J.

### I. Overview

[1] In assessing tax, interest, or penalty under the *Income Tax Act* (the "Act"),[1] the Minister of National Revenue (the "Minister") may make findings or assumptions of fact.[2] The Minister may also arrive at conclusions of law or conclusions of mixed fact and law. However, only the former may be pleaded as "assumptions of fact" in the Respondent's Reply to a Notice of Appeal.

[2] By motion in writing, each of the Applicants ask the Court to strike out certain assumptions pleaded in the Respondent's Replies to their Notices of Appeal[3] on the basis that they are not "findings or assumptions of fact made by the Minister when making the assessment" within the meaning of paragraph 49(1)(d) of the *Tax Court of Canada Rules (General Procedure)* (the "Rules").[4]

[3] I have concluded that the Applicants are entitled to succeed on their motions but not in the way they had hoped. For the most part, their motions have simply resulted in a restructuring of the Replies. Costs will, therefore, be in the cause.

### II. The issue in these appeals

[4] The issue in these appeals is whether a particular tax plan works under the Act — a plan designed to avoid the tax consequences of the deemed disposition at fair market value of the capital property of a trust every 21 years under subsection 104(4) of the Act. All parties agree that the only beneficiaries of the trust, at least until the plan was implemented, were non-residents.

[5] A number of strategies designed to avoid the tax consequences of the 21-year deemed disposition rule have been discussed in the tax literature. A tax-deferred roll out of trust assets under subsection 107(2) of the Act to Canadian resident beneficiaries is one strategy, but it does not work under the Act in respect of non-resident beneficiaries. In 2014, two practitioners offered an overview of the planning options where non-resident beneficiaries are involved:

> There are a few planning options available to address the implications of a non-resident beneficiary. One planning option is to distribute trust property to a Canadian resident corporation, of which the nonresident individual beneficiary is directly or indirectly a shareholder. Subsection 107(2) of the Act is only available if the trust property is “distributed by the trust to a taxpayer who was a beneficiary under the trust”. Accordingly, for this option to be available to the trustees, the class of beneficiaries to which capital can be distributed must include corporations that are owned or controlled by one or more of the individual beneficiaries that are also within the class of capital beneficiaries (often respectively referred to as “Corporate Beneficiaries” and “Individual Beneficiaries”).
>
> A benefit of distributing trust assets to a Corporate Beneficiary is that control over the assets can continue to be retained while deferring the income tax on the accrued gains on the trust property until the Corporate Beneficiary sells the property or the shareholders dispose of their shares, on a deemed or real basis. For this reason, the use of a Corporate Beneficiary may have appeal even when dealing with a distribution to an Individual Beneficiary who is a Canadian resident.
>
> If the terms of the trust do not expressly include the concept of Corporate Beneficiaries within the class of capital beneficiaries, an issue arises as to whether subsection 107(2) will be satisfied. The trustees will need to consider whether the language of the dispositive provisions allow for a distribution to a corporation that is owned or controlled by an Individual Beneficiary. An option, suggested by Tim Youdan, is to consider whether the trust contains general language within the capital distribution provisions, such as a power to distribute “to or for the benefit of” an Individual Beneficiary. To reach a conclusion that a corporation is itself a beneficiary on the basis that the distribution is “for the benefit” of the individual beneficiary, the trustees would need to rely upon the extended meaning of “beneficially interested” provided in subsection 248(25), which applies to the definition of “beneficiary” in subsection 108(1).[5]

[6] The Appellants in these appeals are a trust resident in Canada (the “Preston Family Trust”) and two non-resident beneficiaries of that trust, John and Monika Preston.[6] Just before the 21$^{st}$ anniversary of the Preston Family Trust, John and Monika Preston became sole shareholders of an Alberta ULC (“ULC”) to which they assigned their capital interests in the Preston Family Trust and to which the Preston Family Trust transferred all of its capital property, consisting of shares of a holding company and a partnership interest.

[7] The Minister’s theory of assessment is that the ULC never became a beneficiary of the Preston Family Trust and that John and Monika Preston continued to be beneficiaries of that trust even after the assignment of their capital interests in that trust to the ULC. Under the Minister’s theory, the property of the Preston Family Trust was effectively distributed to John and Monika Preston and not to the ULC.

[8] The Minister assessed about $12 million in tax to the Preston Family Trust under Part I and Part XII.2 of the Act on the theory that it had realized gains from the disposition, deemed to have been made at fair market value, of its capital property to non-resident beneficiaries in 2014.

[9] The Minister also assessed each of John and Monika Preston under Part XIII of the Act in respect of certain dividends (capital dividends and taxable dividends) deemed to have been paid by the holding company in 2014. Each of their Part XIII assessments amounted to about $2 million in tax.

III. <u>The position of the Applicants on the motions</u>

[10] The Applicants’ motions are based on subsection 53(1) of the Rules which provides:

> **53(1)** The Court may, on its own initiative or on application by a party, strike out or expunge all or part of a pleading or other document with or without leave to amend, on the ground that the pleading or other document
>
> > **(a)** may prejudice or delay the fair hearing of the appeal;
> >
> > **(b)** is scandalous, frivolous or vexatious;
> >
> > **(c)** is an abuse of the process of the Court; or
> >
> > **(d)** discloses no reasonable grounds for appeal or opposing the appeal.

[11] The Applicants say that the impugned subparagraphs reflect conclusions of law or conclusions of mixed fact and law and not “assumptions of fact made by the Minister when making the assessment” as required by paragraph 49(1)(d) of the Rules. They should, therefore, be struck out presumably on the basis of paragraph 53(1)(a) of the Rules.

IV. The position of the Respondent on the motions

[12] The Respondent contends that the impugned subparagraphs (with the exceptions described in Part H. below) reflect “assumptions of fact made by the Minister when making the assessment” within the meaning of paragraph 49(1)(d) of the Rules and are properly situated within the “assumptions” paragraph of each Reply.

V. Assumptions of fact

[13] Subsection 49(1) of the Rules sets out what “every reply shall state”:

> **(a)** the facts [pleaded in the Notice of Appeal] that are admitted,
>
> **(b)** the facts [pleaded in the Notice of Appeal] that are denied,
>
> **(c)** the facts [pleaded in the Notice of Appeal] of which the respondent has no knowledge and puts in issue,
>
> **(d)** the findings or assumptions of fact made by the Minister when making the assessment,
>
> **(e)** any other material fact,
>
> **(f)** the issues to be decided,
>
> **(g)** the statutory provisions relied on,
>
> **(h)** the reasons the respondent intends to rely on, and
>
> **(i)** the relief sought.[7]

[14] As the architecture of subsection 49(1) of the Rules makes clear, a Reply has two parts. First, paragraphs 49(1)(a) to 49(1)(e) of the Rules require the

Respondent to set out the facts. This part of the Reply includes the facts the Respondent admits, the facts the Respondent denies, and the facts of which the Respondent has no knowledge and puts in issue. It includes assumptions of fact made by the Minister in assessing and any other material facts the Respondent pleads in support of the assessment. After the Respondent has set out all of the facts, the Respondent states the issues to be decided (paragraph 49(1)(f) of the Rules).

[15] Second, paragraphs 49(1)(g) and 49(1)(h) of the Rules require the Respondent to relate the facts to the law. This part of the Reply sets out the statutory provisions and the reasons upon which the Respondent intends to rely. In this part of the Reply, the Respondent has an opportunity to describe how the law applies to the facts pleaded in the first part of the Reply. The Respondent concludes the Reply by stating the relief sought (paragraph 49(1)(i) of the Rules).

[16] It would make little sense for a Reply to include (a) a recitation of facts and law under the “assumptions” called for by paragraph 49(1)(d) of the Rules and (b) a recitation of facts and law under the “reasons” called for by paragraph 49(1)(h) of the Rules. As Chief Justice Rip put it in *Strother v The Queen*:[8]

> [19] The form of the Reply set out in Rule 49(1) contemplates the avoidance of commingling facts with law. Facts are required to be plead first through paragraphs 49(1)(a)(b)(c) and (e). Rule 49(1)(d) restricts the respondent to pleading findings of fact or assumptions of fact made by the Minister in assessing; there are material facts only. Rules 49(1)(f) to (i) inclusive give the respondent the right to plead matters described in these Rules. This is similar to the rules of practice in common law provinces, including Ontario and British Columbia as well as the Federal Court which allow the pleading of law if the factual underpinnings have been pled.
>
> [20] The respondent argues that Rule 49 merely sets out what must be included and does not establish a specific structure. In other words, so long as the requirements of Rule 49 are met, it is possible to intersperse conclusions of law with the facts throughout. To accept the respondent’s argument would lead to incoherent, repetitious pleadings as difficult and frustrating as the ones faced with under this motion.

[17] Taxpayers have the onus of disproving, on a balance of probabilities, assumptions of fact — and only assumptions of fact — made by the Minister in assessing. That is why paragraph 49(1)(d) of the Rules requires the Respondent to

state in the first part of the Reply "the findings or assumptions of fact made by the Minister when making the assessment". In its 2003 decision in *Anchor Pointe Energy Ltd. v R*,[9] the Federal Court of Appeal explained:

> [23] The pleading of assumptions gives the Crown the powerful tool of shifting the onus to the taxpayer to demolish the Minister's assumptions. The facts pleaded as assumptions must be precise and accurate so that the taxpayer knows exactly the case it has to meet.[10]

[18] However, taxpayers have no onus to go further and disprove the Minister's conclusions of law or the legal elements of the Minister's conclusions of mixed fact and law. As President Thorson of the Exchequer Court stated in *Goldman v MNR*:[11]

> . . .. When the taxpayer challenges the correctness in fact of the assessment the onus of proof that the assessment is erroneous in fact lies on him. But when the validity of the assessment is attacked in point of law it is not, strictly speaking, correct to say that the onus of establishing its invalidity lies on the appellant. In such a case there is really no onus on either party, for once the facts have been established, the responsibility for determining the validity of the assessment as a matter of law is solely that of the court. It must decide the question according to the applicable law regardless of the submissions of the parties.[12]

[19] In *Anchor Pointe*, the Federal Court of Appeal made it clear that conclusions of law may not be pleaded by the Crown in the guise of assumptions of fact:

> [25] I agree that legal statements or conclusions have no place in the recitation of the Minister's factual assumptions. The implication is that the taxpayer has the onus of demolishing the legal statement or conclusion and, of course, that is not correct. The legal test to be applied is not subject to proof by the parties as if it was a fact. The parties are to make their arguments as to the legal test, but it is the Court that has the ultimate obligation of ruling on questions of law.[13]

[20] For the same reason, the Respondent may not plead a conclusion of mixed fact and law as an assumption of fact. It is helpful to review the general concept of a "question of mixed fact and law" as described by Justice Iacobucci of the Supreme Court of Canada:

> … Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts

satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or *vice versa*.[14]

[21] The Federal Court of Appeal in *Anchor Pointe* explained the meaning of a “conclusion of mixed fact and law” using the following example:

> [8] In reassessing, the Minister assumed the following facts:
>
> ...
>
> > (z) the seismic data purchased by API, APII, APIII, APIV and APV does not qualify as a Canadian Exploration Expense ("CEE") within the meaning of s. 66.1(6)(a) of the *Income Tax Act* (the "Act").
>
> ...
>
> [26] . . . the assumption in paragraph 10(z) can be more correctly described as a conclusion of mixed fact and law. A conclusion that seismic data purchased does not qualify as CEE within the meaning of paragraph 66.1(6)(a) involves the application of the law to the facts. Paragraph 66.1(6)(a) sets out the test to be met for a CEE deduction. Whether the purchase of the seismic data in this case meets that test involves determining whether or not the facts meet the test. The Minister may assume the factual components of a conclusion of mixed fact and law. However, if he wishes to do so, he should extricate the factual components that are being assumed so that the taxpayer is told exactly what factual assumptions it must demolish in order to succeed. It is unsatisfactory that the assumed facts be buried in the conclusion of mixed fact and law.[15]

[22] In 2013, the same principle was applied by a different panel of the Federal Court of Appeal in *Canadian Imperial Bank of Commerce v Canada*:[16]

> [92] It is now well established that the statement of factual assumptions must contain no statements of law (*Anchor Pointe* (2003) at paragraph 25), and where the assessment under appeal is based on a conclusion of mixed fact and law, the factual components must be extricated and stated as factual assumptions (*Anchor Pointe* (2003) at paragraph 26). The Crown did not observe those principles in

> many parts of its statement of assumptions, and the judge made no error in requiring the assumptions to be revised accordingly.[17]

[23] Finally, it is not for the Court to extricate the facts buried in a conclusion of mixed fact and law — it is incumbent on the Respondent to do so in the Reply.[18]

VI. The impugned subparagraphs

[24] I will list each impugned subparagraph as pleaded in the Reply to the Preston Family Trust's Notice of Appeal. My reasoning in respect of the Reply to the Preston Family Trust's Notice of Appeal applies equally to the other two Replies.

A. John and Monika Preston continued as beneficiaries of the Preston Family Trust even after they assigned their capital interests in the Preston Family Trust to the ULC and the ULC never became a beneficiary of the Preston Family Trust

> 10. In so reassessing the appellant, the Minister made, *inter alia*, the following assumptions of fact:
>
> …
>
> (h) at all material times, the appellant's beneficiaries were Mr. Preston, Mr. Preston's spouse (Ms. Preston), and Mr. Preston's issue (collectively, "Beneficiaries").[19]
>
> …
>
> (w) after the Assignment, Mr. and Ms. Preston remained the income and capital beneficiaries of the appellant.[20]
>
> …
>
> (aa) ULC was not a beneficiary of the appellant.[21]
>
> …
>
> (hh) ULC was not a beneficiary of the appellant.[22]

[25] The Minister's theory of assessment, and the Respondent's theory of the case, is that John and Monika Preston continued as beneficiaries of the Preston

Family Trust even after having assigned their capital interests in that trust to the ULC. On the same theory, the ULC never became a beneficiary of the Preston Family Trust. Each aspect of this theory reflects a conclusion of mixed fact and law. Indeed, the Respondent says that the "submission" that the ULC was not a beneficiary is "both a factual assumption and a legal argument".[23]

[26] Pleading conclusions of mixed fact and law as "assumptions of fact made by the Minister when making the assessment" is tantamount to the Respondent telling the Appellants: "The onus is on you to disprove the Minister's theory of the case including its factual and legal elements." As we have already seen, this constitutes improper pleading — the taxpayer has no onus to disprove any of the legal elements of the Minister's theory of the case.

[27] These subparagraphs will be struck from the assumptions paragraph but may be included in the Amended Reply as reasons upon which the Respondent intends to rely under paragraph 49(1)(h) of the Rules.

B. Who could or could not have been beneficiaries of the Preston Family Trust

> 10. In so reassessing the appellant, the Minister made, *inter alia*, the following assumptions of fact:
>
> …
>
> (k) the appellant's beneficiaries could only be natural persons.[24]
>
> (l) the appellant's beneficiaries could not be corporations.[25]

[28] This is another way of saying that the law restricts potential beneficiaries of the Preston Family Trust to a certain group. This is a conclusion of mixed fact and law. Limiting the application of this legal conclusion to the Preston Family Trust ("the appellant's beneficiaries") does not make it an assumption of fact.

[29] These subparagraphs will be struck from the assumptions paragraph but may be included in the Amended Reply as reasons upon which the Respondent intends to rely.

C. The extent of trustee discretion

> 10. In so reassessing the appellant, the Minister made, *inter alia*, the following assumptions of fact:
>
> …
>
> (o) the Trustees did not have discretion to vary the terms of the Preston Trust Deed or to add new beneficiaries of the appellant.[26]

[30] Whether the trustees of the Preston Family Trust had the discretion to vary the terms of that trust or to add new beneficiaries to that trust is a conclusion of mixed fact and law.

[31] This subparagraph will be struck from the assumptions paragraph but may be included in the Amended Reply as a reason upon which the Respondent intends to rely.

D. Use of the phrase “received . . . for the benefit of”

> 10. In so reassessing the appellant, the Minister made, *inter alia*, the following assumptions of fact:
>
> …
>
> (x) ULC received the Distributed Property for the benefit of Mr. and Ms. Preston.[27]
>
> …
>
> (ii) ULC received the Taxable Dividends for the benefit of Mr. and Ms. Preston.[28]
>
> …
>
> (ll) ULC received the Capital Dividends for the benefit of Mr. and Ms. Preston.[29]

[32] In Canadian tax law, the "beneficial owner" of income is subject to tax on that income. For example, if a creditor instructs a debtor to direct payments of interest to a third party, that does not make those interest payments any less the income of the creditor for purposes of the Act.[30]

[33] These subparagraphs reflect the Minister's conclusion that John and Monika Preston, and not the ULC, were the "beneficial owners" of the property distributed by the Preston Family Trust. That is a conclusion of mixed fact and law. In this context, it is worth noting that the Respondent had argued in *Canada v Prévost Car Inc.*[31] that this Court made a legal error by giving the treaty term "beneficial owner" the meaning it has in common law while ignoring its meaning in civil law and international law.[32]

[34] These subparagraphs will be struck from the assumptions paragraph of the Reply but may be included in the Amended Reply as reasons upon which the Respondent intends to rely.

## E. Use of certain "deeming" provisions of the Act

> 10. In so reassessing the appellant, the Minister made, *inter alia*, the following assumptions of fact:
>
> …
>
> (y) the appellant was deemed to have distributed the Distributed Property to Mr. and Ms. Preston at its fair market value ("FMV").[33]
>
> (z) Mr. and Ms. Preston were deemed to have received the Distributed Property from the appellant at its FMV.[34]
>
> …
>
> (jj) the appellant was deemed to have distributed the Taxable Dividends to Mr. and Ms. Preston.[35]
>
> (kk) Mr. and Ms. Preston were deemed to have received the Taxable Dividends from the appellant.[36]
>
> …

(mm) the appellant was deemed to have distributed the Capital Dividends to Mr. and Ms. Preston.[37]

(nn) Mr. and Ms. Preston were deemed to have received the Capital Dividends from the appellant.[38]

[35] As noted by Ruth Sullivan in *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) a deeming provision creates a "legal fiction":

> **§4.106** ***Use of "deem" (or "consider" or "is") to create legal fictions.***
>
> The most important use of "deems" is to create a legal fiction: a given fact 'x' is declared to be 'y' or is to be dealt with as if it were 'y' for some or all purposes. A person is deemed to be single even though they may be married; a notice is deemed to have arrived on a certain day regardless of when it actually arrived; a provision is deemed to have come into force on a certain day even though the legislation was not in fact in force that day. Although a sovereign legislature cannot change reality, it can declare that for legal purposes reality is to be considered different from what it was or is.[39]

[36] Describing the effect of "deeming" provisions of the Act on certain assumed facts, therefore, reflects conclusions of mixed fact and law.

[37] The Respondent contends that describing the effect of deeming provisions of the Act on certain assumed facts as assumptions of fact is helpful because it provides the Appellants with "added particularity" and "added context".[40] That may very well be the case, but the conclusion reached by the Minister after applying deeming provisions of the Act to certain assumed facts is not, in itself, an assumed fact.

[38] These subparagraphs will be struck from the assumptions paragraph but may be included in the Amended Reply as reasons upon which the Respondent intends to rely.

## F. Use of the terms "fair market value", "adjusted cost base", "capital gain", and "taxable capital gain"

> 10. In so reassessing the appellant, the Minister made, *inter alia*, the following assumptions of fact:
>
> …
>
> (bb) on September 25, 2014:
>
> i) the fair market value ("FMV") of the Distributed Property received by Mr. and Ms. Preston was $75,511,267, comprised of the FMV of the Holdco shares of $67,979,759 and the FMV of the Partnership interest of $7,531,508;
>
> ii) the adjusted cost base ("ACB") of the Distributed Property received by Mr. and Ms. Preston was $25,046,400, comprised of the ACB of the Holdco shares of $24,900,100 and the ACB of the Partnership interest of $146,300;
>
> iii) the capital gain on the distribution of the Distributed Property received by Mr. and Ms. Preston was $50,464,867, comprised of the capital gain on the Holdco shares of $43,079,659 and the capital gain of the Partnership interest of $7,385,208; and
>
> iv) the taxable capital gain on the distribution of the Distributed Property received by Mr. and Ms. Preston was $25,232,433, comprised of the taxable capital gain on the Holdco shares of $21,539,829 and the taxable capital gain of the Partnership interest of $3,692,604.

[39] The most frequently cited judicial meaning of "fair market value" in the tax context is that formulated by Justice Cattanach in *Henderson Estate v Canada (Minister of National Revenue)*:[41]

> The statute does not define the expression "fair market value", but the expression has been defined in many different ways depending generally on the subject matter which the person seeking to define it had in mind. I do not think it necessary to attempt an exact definition of the expression as used in the statute other than to say that the words must be construed in accordance with the common understanding of them. That common understanding I take to mean the highest price an asset might reasonably be expected to bring if sold by the owner in the normal method applicable to the asset in question in the ordinary course of

> business in a market not exposed to any undue stresses and composed of willing buyers and sellers dealing at arm's length and under no compulsion to buy or sell. I would add that the foregoing understanding as I have expressed it in a general way includes what I conceive to be the essential element which is an open and unrestricted market in which the price is hammered out between willing and informed buyers and sellers on the anvil of supply and demand. These definitions are equally applicable to "fair market value" and "market value" and it is doubtful if the use of the word "fair" adds anything to the words "market value".[42]

[40] By applying the legal meaning of “fair market value” to certain assumed facts, the Minister arrived at a conclusion of mixed fact and law. She did the same with respect to her conclusion about the “adjusted cost base” of the capital property distributed by the Preston Family Trust. The meaning of “adjusted cost base” in section 54 of the Act begins with the “cost” of the capital property to the taxpayer. That cost is then adjusted by the statutory additions set out in subsection 53(1) of the Act, the statutory deductions set out in subsection 53(2) of the Act, and the statutory recomputations set out in subsections 53(4) to 53(6) of the Act. The net result of applying those statutory adjustments to that cost is the “adjusted cost base”.

[41] The cost of property is a fact and must be pleaded as an assumption of fact if it was indeed assumed as a fact by the Minister in making the assessment. However, the conclusion reached after the Minister has applied the statutory additions, deductions and recomputations in section 53 of the Act to the cost of the capital property is not a fact.

[42] The Respondent argues that by including the Minister’s application of the law to the facts with respect to “fair market value” and “adjusted cost base”, the Respondent has simply “ensured that the Reply accurately explains how the Minister assessed”.[43] The Reply <u>should</u> explain how the Minister assessed, but an explanation of how the Minister applied the law to the assumed facts is not, in itself, an assumption of fact. It is, rather, a conclusion of mixed fact and law.

[43] The contents of this subparagraph will be struck from the assumptions paragraph but may be included as reasons upon which the Respondent intends to rely.

G. The Minister's computation of the amount of tax payable under the Act

10. In so reassessing the appellant, the Minister made, *inter alia*, the following assumptions of fact:

(qq) the part XIII withholding tax calculation for each of Mr. and Ms. Preston's 2014 taxation year was: [44]

| | |
|---|---|
| Taxable Dividends | $6,400,000 |
| Capital Dividends | $18,500,000 |
| Total amount received from appellant | $24,900,000 |
| 50% portion for each of John and Monika Preston | $12,450,000 |
| Part XIII withholding tax at 15% | $1,867,500 |

[44] The Minister's computation of tax under Part XIII of the Act is not an "assumption of fact" nor is it a "statement of facts" as the Respondent suggests.[45] It reflects the result, expressed in dollar amounts, of the Minister's application of Part XIII of the Act to certain assumed facts. It cannot be pleaded in the paragraph that sets out assumptions of fact made by the Minister in making the assessment.

[45] The contents of this subparagraph will be struck from the assumptions paragraph but may be included in the Amended Reply as reasons upon which the Respondent intends to rely.

H. Liability to Part XIII tax under the Act

10. In so reassessing the appellant, the Minister made, *inter alia*, the following assumptions of fact:

…

(oo) Mr. and Ms. Preston were liable to Part XIII withholding tax on the Taxable Dividends received from the appellant.[46]

(pp) Mr. and Ms. Preston were liable to Part XIII withholding tax on the Capital Dividends received from the appellant. [47]

…

> (rr) the appellant was obligated to deduct or withhold Mr. and Ms. Preston's Part XIII tax and to remit the amount to the Canada Revenue Agency.
>
> (ss) the appellant was jointly and severally liable for the Part XIII tax with Mr. and Ms. Preston; and
>
> (tt) the appellant became additionally liable to a penalty of 10% of the Part XIII tax.

[46] These paragraphs are conclusions of mixed fact and law as they reflect the Minister's application of the law to the facts. The Respondent has conceded the point and offers to redraft those paragraphs to read:

> 10. In so reassessing the appellant, the Minister made, *inter alia*, the following assumptions of fact:
>
> …
>
> (oo) Mr. and Ms. Preston did not collect and remit Part XIII withholding tax on the Taxable Dividends received from the appellant.[48]
>
> (pp) Mr. and Ms. Preston did not collect and remit Part XIII withholding tax on the Capital Dividends received from the appellant. [49]
>
> …
>
> (rr) the appellant did not deduct or withhold Mr. and Ms. Preston's Part XIII withholding tax as set out in paragraph 10(qq) above.
>
> (ss) [deleted]
>
> (tt) [deleted]

[47] The Respondent's concessions are accepted other than the proposed amendment to subparagraph 10(rr). First, it continues to reflect a conclusion of mixed fact and law as it assumes John and Monika Preston's liability to Part XIII tax. Second, as former subparagraph 10(qq) is not an assumption of fact, it cannot be referred to as such in the amended version of subparagraph 10(rr).

[48] Subparagraph 10(rr) will, therefore, be amended to refer only to facts that have been assumed by the Minister. The Respondent will amend it as follows:

> 10. In so reassessing the appellant, the Minister made, *inter alia*, the following assumptions of fact:
>
> …
>
> (rr) the appellant did not deduct or withhold Part XIII tax in respect of the Taxable Dividends or Capital Dividends.

## VII. Concluding observations

[49] There is an opportunity in every Reply for the Respondent to explain why the assessment at issue is correct in law. That opportunity is provided by paragraph 49(1)(h) of the Rules which requires that every Reply include the reasons upon which the Respondent intends to rely.[50] The assumptions paragraph is not the place for the Respondent to plead conclusions of law or the legal elements of conclusions of mixed fact and law, even if they were in the mind of the Minister when making the assessment.

[50] If the assumptions pleaded by the Respondent are limited to the assumptions of fact made by the Minister in assessing, will taxpayers be fully informed of the Respondent's legal position before trial? Of course they will. The factual case against the taxpayer (which the taxpayer has the onus to disprove) will be set out in the portion of the Reply setting out the assumptions of fact made by the Minister in making the assessment. The legal case against the taxpayer (which the taxpayer does not have an onus to disprove) will be set out in the portion of the Reply describing the reasons upon which the Respondent intends to rely. Although it is not always possible to compartmentalize facts and law quite so neatly, those who draft Replies on behalf of the Respondent should strive to do so to the extent possible under the circumstances.

[51] Finally, the Appellants will be obliged to prove at trial the allegations of fact pleaded in their Notices of Appeal to the extent the Respondent does not admit them (or is not deemed to admit them by subsection 49(2) of the Rules).[51] The result of these motions does nothing to change that. Judge Bowman (as he then was) reminds us of this in *The Cadillac Fairview Corporation Limited v The Queen*:[52]

> The appellant pleaded that the payments were made pursuant to the guarantees and this allegation was denied. Counsel for the appellant argued that since the

> Minister had not pleaded that he "assumed" that the payments were not made pursuant to the guarantees the Minister had the onus of establishing that the payments were not made pursuant to the guarantees. The question is, if not a pure question of law, at least a mixed one of law and fact. In any event the basic assumption made on assessing was that the appellant was not entitled to the capital loss claimed and it was for the appellant to establish the several legal components entitling it to the deduction claimed. An inordinate amount of time is wasted in income tax appeals on questions of onus of proof and on chasing the will-o'-the-wisp of what the Minister may or may not have "assumed." I do not believe that *Minister of National Revenue v. Pillsbury Holdings Ltd.* [1964] C.T.C. 294, [1964] D.T.C. 5184, has completely turned the ordinary rules of practice and pleading on their head. The usual rule—and I see no reason why it should not apply in income tax appeals—is set out in Odgers' Principles of Pleading and Practice, 22nd edition at page 532:
>
>> The "burden of proof" is the duty which lies on a party to establish his case. It will lie on A, whenever A must either call some evidence or have judgment given against him. As a rule (but not invariably) it lies upon the party who has in his pleading maintained the *affirmative* of the issue; for a *negative* is in general incapable of proof. *Ei incumbit probatio qui dicit, non qui negat*. The affirmative is generally, but not necessarily, maintained by the party who first raises the issue. Thus, the onus lies, as a rule, on the plaintiff to establish every fact which he has asserted in the statement of claim, and on the defendant to prove all facts which he has pleaded by way of confession and avoidance, such as fraud, performance, release, rescission, etc.

## VIII. Disposition

[52] The Respondent shall file and serve Amended Replies within 30 days. The assumptions to be pleaded in each Amended Reply are set out in a schedule attached to each Order.[53]

[53] The Applicants may file and serve Amended Answers within 30 days of the date of service of the Amended Replies.

[54] Costs shall be in the cause.

Signed at Ottawa, Canada, this 10th day of November 2021.

"David E. Spiro"

Spiro J.

| | |
|---|---|
| CITATION: | 2021 TCC 79 |
| COURT FILE NO.: | 2020-641(IT)G, 2020-642(IT)G and 2020-643(IT)G |
| STYLE OF CAUSE: | THE PRESTON FAMILY TRUST II AND THE QUEEN<br>JOHN PRESTON AND THE QUEEN<br>MONIKA PRESTON AND THE QUEEN |
| PLACE OF HEARING: | N/A |
| DATE OF HEARING: | Applicants' Motions considered by Written Representations |
| REASONS FOR ORDERS BY: | The Honourable Justice David E. Spiro |
| DATE OF AMENDED ORDERS: | November 15, 2021 |

APPEARANCES:

| | |
|---|---|
| Counsel for the Applicants: | Yves St-Cyr and Jacob Yau |
| Counsel for the Respondent: | Rishma Bhimji |

COUNSEL OF RECORD:

For the Applicants:

| | |
|---|---|
| Name: | Yves St-Cyr and Jacob Yau |
| Firm: | Dentons Canada LLP<br>Toronto, Ontario |
| For the Respondent: | François Daigle<br>Deputy Attorney General of Canada<br>Ottawa, Canada |

[1] R.S.C. 1985, c.1 (5th Supp.).

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[2] To say that “the Minister” makes findings or assumptions of fact underlying an assessment is a legal fiction. The Minister acts through duly authorized officials of the Canada Revenue Agency who make findings or assumptions of fact in assessing. For the sake of convenience and consistency, however, we say that “the Minister” does so.
[3] The Preston Family Trust asks the Court to strike out 23 of the 46 subparagraphs in the assumptions paragraph of the Reply to its Notice of Appeal. Each of John and Monika Preston ask the Court to strike out 19 of the 42 subparagraphs in the assumptions paragraph of the Replies to their Notices of Appeal.
[4] SOR/90-688.
[5] M Elena Hoffstein & Corina S Weigl, “Overview of the Twenty One Year Rule—A Trust Lawyer's Perspective,” in 2014 *Ontario Tax Conference* (Toronto: Canadian Tax Foundation, 2014), 7:1-62 at 47. This excerpt includes reference to a paper by Tim Youdan, “Planning to Deal with the 21-Year Deemed Disposition Rule”, in 2008 *Ontario Tax Conference* (Toronto: Canadian Tax Foundation, 2008), 4:1-16.
[6] John Preston’s two children were the other non-resident beneficiaries of the Preston Family Trust.
[7] Subsection 49(1) of the Rules has applied to all appeals instituted in this Court after December 31, 1990. Before then, the rules did not require a statement in the Reply of “the findings or assumptions of fact made by the Minister when making the assessment” although Replies would typically, but not always, include them.
[8] 2011 TCC 251 at paras 19 and 20.
[9] 2003 FCA 294 [*Anchor Pointe*].
[10] *Ibid* at para 23. When the Federal Court of Appeal speaks of “the case”, it is referring to the factual case the taxpayer has to meet. The Federal Court of Appeal in *Anchor Pointe* did not give the Respondent carte blanche to plead as an assumption of fact everything — including conclusions of law and the legal elements of conclusions of mixed fact and law — that was in the Minister’s mind during the assessment process. Those may be pleaded elsewhere in the Reply.
[11] [1951] CTC 241, 51 DTC 519.
[12] *Ibid* at 247-248 and 522-523.
[13] *Anchor Pointe*, *supra* note 9 at para 25.
[14] *Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 SCR 748 at para 35.
[15] *Anchor Pointe*, *supra* note 9 at paras 8 and 26.
[16] 2013 FCA 122 [*Canadian Imperial Bank of Commerce*]. The members of the panel in *Canadian Imperial Bank of Commerce* were Evans, Sharlow, and Stratas, JJ.A. The members of the panel in *Anchor Pointe* were Linden, Rothstein, and Sexton, JJ.A.
[17] *Ibid* at para 92.
[18] *Gerbro Holdings Co. v The Queen,* 2016 TCC 173 at para 68, aff’d at 2018 FCA 197.
[19] Reply to John Preston’s Notice of Appeal at subparagraph 10(h) [Reply to John Preston]. Reply to Monika Preston’s Notice of Appeal at subparagraph 10(h) [Reply to Monika Preston].
[20] Reply to John Preston at subparagraph 10(w). Reply to Monika Preston at subparagraph 10(w).
[21] Reply to John Preston at subparagraph 10(aa). Reply to Monika Preston at subparagraph 10(aa).
[22] Reply to John Preston at subparagraph 10(gg). Reply to Monika Preston at subparagraph 10(gg).
[23] Respondent’s Written Representations at paragraph 7.

[24] Reply to John Preston at subparagraph 10(k). Reply to Monika Preston at subparagraph 10(k).
[25] Reply to John Preston at subparagraph 10(l). Reply to Monika Preston at subparagraph 10(l).
[26] Reply to John Preston at subparagraph 10(o). Reply to Monika Preston at subparagraph 10(o).
[27] Reply to John Preston at subparagraph 10(x). Reply to Monika Preston at subparagraph 10(x).
[28] Reply to John Preston at subparagraph 10(hh). Reply to Monika Preston at subparagraph 10(hh).
[29] Reply to John Preston at subparagraph 10(kk). Reply to Monika Preston at subparagraph 10(kk).
[30] See *Curragh Inc. v The Queen*, [1995] 1 CTC 2163, 94 DTC 1894.
[31] 2009 FCA 57.
[32] *Ibid* at para 7.
[33] Reply to John Preston at subparagraph 10(y). Reply to Monika Preston at subparagraph 10(y).
[34] Reply to John Preston at subparagraph 10(z). Reply to Monika Preston at subparagraph 10(z).
[35] Reply to John Preston at subparagraph 10(ii). Reply to Monika Preston at subparagraph 10(ii).
[36] Reply to John Preston at subparagraph 10(jj). Reply to Monika Preston at subparagraph 10(jj).
[37] Reply to John Preston at subparagraph 10(ll). Reply to Monika Preston at subparagraph 10(ll).
[38] Reply to John Preston at subparagraph 10(mm). Reply to Monika Preston at subparagraph 10(mm).
[39] See *Canada (Attorney General) v Scarola*, 2003 FCA 157 at paras 19 to 21 and *Sero v Canada*, 2004 FCA 6 at paras 39 to 41.
[40] Respondent's Written Representations at paragraphs 16 and 17.
[41] [1973] CTC 636, 73 DTC 5471.
[42] *Ibid* at 644 and 5476.
[43] Respondent's Written Representations at paragraph 13.
[44] Reply to John Preston at subparagraph 10(pp). Reply to Monika Preston at subparagraph 10(pp).
[45] Respondent's Written Representations at paragraph 23 and a letter dated November 8, 2021 from the Respondent.
[46] Reply to John Preston at subparagraph 10(nn). Reply to Monika Preston at subparagraph 10(nn).
[47] Reply to John Preston at subparagraph 10(oo). Reply to Monika Preston at subparagraph 10(oo).
[48] Reply to John Preston at subparagraph 10(nn). Reply to Monika Preston at subparagraph 10(nn). The Respondent's concession applies to those subparagraphs as well.
[49] Reply to John Preston at subparagraph 10(oo). Reply to Monika Preston at subparagraph 10(oo). The Respondent's concession applies to those subparagraphs as well.
[50] The importance of the "reasons" portion of the Reply should not be underestimated. See, for example, *Canada v Pomeroy Acquireco Ltd.*, 2021 FCA 187 where the Federal Court of Appeal held that the Respondent was entitled to amend a Reply to, among other things, add a sham argument to the reasons upon which the Respondent intended to rely. The proposed amendment is set out in *Pomeroy Acquireco Ltd. v The Queen*, 2020 TCC 107 at para 17.
[51] See *Eisbrenner v Canada*, 2020 FCA 93. In particular, see the reasons of the Federal Court of Appeal at para 48:

> In this case, if, as submitted by Mr. Eisbrenner, the facts that he has pled in his notice of appeal are irrelevant and only the assumptions of fact made by the

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Minister are relevant, why would the TCC General Rules require an appellant to identify the material facts that *the appellant will be relying on*? The reference to the requirement in Form 21(1)(a) of the TCC General Rules that an appellant in a notice of appeal is to "[r]elate the material facts relied on", supports a finding that in a Tax Court hearing, the general principle of "he who alleges must prove" is still applicable. It is only logical that an appellant, who is relying on certain material facts, should have the onus of proving such facts. Since both Mr. Eisbrenner and Mr. Morrison pled that they owned the pharmaceuticals, they should have the onus of proving this on the civil standard of proof — a balance of probabilities.

[52] [1996] 2 CTC 2197 at 2202, 97 DTC 405 at 407, footnote 2.

[53] Several of those assumptions could have been the subject of successful attack by the Applicants but were not impugned on these motions. Those arguably deficient assumptions will be allowed to stand in light of the important observation by the Federal Court of Appeal in *Canadian Imperial Bank of Commerce*, *supra* note 16 at para 94 that in certain situations it is reasonable to allow a deficient pleading to stand. This is one of those situations.