Citation: 2023 TCC 66
Date: 20230510
Docket: 2021-912(IT)G

BETWEEN:

THE ESTATE OF VENENCE COTE,

Applicant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

(Edited from the transcript of Reasons for Judgment delivered orally from the Bench on July 6, 2022 at Toronto, Ontario for punctuation, capitalization, spelling, paragraph breaks, and accuracy; to remove repetitive phrases; to add headings, citations and paragraph numbers; and to remove submissions from the parties regarding both the timing of amendments to the reply and costs as those submissions do not form part of the Reasons for Judgment)

Graham J.

[1] When Mr. Cote filed his tax returns for his 2006, 2007 and 2008 tax years, he claimed donation tax credits in respect of gifts that he claimed to have made through a tax shelter known as the Global Learning Gifting Initiative ("GLGI"). The Minister of National Revenue reassessed Mr. Cote to deny those credits. Mr. Cote has since passed away. His estate, the Applicant in this matter, appealed the reassessments. The parties have filed their pleadings and the Applicant has brought a motion to strike more than 200 different paragraphs from the Reply on various grounds.

A. Bases for Striking

[2] The Applicant raises five primary bases upon which it says the relevant paragraphs should be struck. The Applicant argues that many of the paragraphs should be struck under more than one of these bases.

[3] I will provide an overview of the five different bases before moving on to an analysis of specific paragraphs.

Irrelevant Information

[4] The first basis that the Applicant raises is that many of the paragraphs in the Reply contain irrelevant information about the GLGI Program that would not assist the trial judge in understanding the transactions in issue.

[5] It is not my role as motions judge to determine the relevance of facts or assumptions of fact. As set out in *Sentinel Hill Productions (1999) Corp. v. The Queen* (2007 TCC 742) and *Niagara Helicopters Ltd. v. The Queen* (2003 TCC 4), that task is best left to the trial judge who will hear the entirely of the evidence. In fact, as described in *Jolly Farmer Products Inc. v. The Queen* (2008 TCC 124), it would be improper for the Respondent to parse the Minister's assumptions of fact and not disclose those that the Respondent considered irrelevant. Unless it is plain and obvious to me that a fact could never be relevant, I will not strike it.

[6] The Applicant raised relevance in respect of many paragraphs. Except as specifically set out below, the Applicant has not convinced me that it is plain and obvious that those paragraphs could never be relevant.

Inflammatory and Prejudicial Language

[7] Moving to the second point raised by the Applicant, the Applicant says that certain paragraphs contain inflammatory, vexatious, scandalous or prejudicial language. I will not address all of the specific instances that the Applicant has referred to.

[8] The Applicant complains that the words "tax shelter" are prejudicial. I do not understand how this description could be prejudicial. The Respondent has specifically pled that the Program was registered as a tax shelter.

[9] The Applicant also objects to the use of the word "purported" to describe the donations claimed by Mr. Cote and other taxpayers. The Applicant says that the word is prejudicial. In essence the Applicant is saying that the Respondent should accept defeat and admit that Mr. Cote and the other taxpayers made valid donations. There is no merit to this position. The issue before the Court is whether Mr. Cote made donations. Of course the Respondent will want to describe them as

purported donations, just as the Applicant will want to describe them as donations. There is nothing prejudicial about either of them doing so.

[10] It may be that many members of the public would find it immoral to attempt to profit through the use of a charitable donation scheme. If the purpose of the paragraphs dealing with the alleged sham and the Applicant's purported lack of donative intent were simply to paint the Applicant in a bad or immoral light, then it would be entirely appropriate to strike those paragraphs. However, that is not their purpose.

[11] The situation is entirely distinguishable from that in *Canadian Imperial Bank of Commerce v. The Queen* (2013 FCA 122) where pleadings that went to the morality of the transaction in question were struck. Those pleadings were struck because the morality of the transaction in question had nothing to do with their taxation.

[12] I am not saying that morality is an issue in this appeal, but the sham and the purported lack of donative intent are at issue in this appeal.

Mixed Fact and Law

[13] The third issue raised by the Applicant is that certain paragraphs contain arguments or conclusions of mixed fact and law. The Applicant raised this issue in respect of a number of different paragraphs.

[14] In certain circumstances, dealt with in more detail below, the Applicant makes a very relevant point as the Respondent has pled conclusions of mixed fact and law relating to very key issues. However, in most cases, the Applicant is simply being difficult, seeking to find conclusions of mixed fact and law where it is clear that the Respondent is simply using legal language as a simplified way of pleading what appears to be non-controversial points. Other than as set out below, I do not find any merit to this argument.

Overly Broad and Repetitive:

[15] The fourth point raised by the Applicant is that certain paragraphs are overly broad or repetitive. The Applicant disputes all or virtually all of the 201 assumptions of fact pled in the Reply. The Applicant makes the general complaint that the Reply is overly broad and that is unfair that the Applicant has to demolish so many assumptions of fact. It argues that doing so will cost significant amounts

of money and will delay the fair hearing of the appeal and involve significant judicial resources.

[16] I agree that, unless the parties are able to agree to a significant number of facts, the trial will be very lengthy. However, the assumptions are extensive because Mr. Cote participated in a very complex program.

[17] The 2004 and 2005 GLGI Program was already extensively litigated in *Mariano v. The Queen* (2015 TCC 244). The Reply suggests that the Program in the years in question was not materially different. The Notice of Appeal provides no insights as to why the Applicant believes that the Program was materially different in the years in question or what new argument it intends to raise that has not already been canvassed in *Mariano*. Without any such guidance, the Respondent has no choice but to plead every fact and assumption of fact that it could possibly need to support the reassessments.

[18] Accordingly, other than the specific instances of repetitiveness set out below, I find there is no merit to the argument.

Information Relating to Years Not in Issue:

[19] Finally, the Applicant submits that many of the paragraphs in question contain information that relates to the operation of the GLGI Program in years other than the three years that the Applicant participated in the Program.

[20] I agree with the Applicant in respect of facts pled in respect of years after the years in question. I cannot see how those facts could ever be relevant.

[21] The Applicant also argues that since Mr. Cote only participated in the Program in 2006, 2007 and 2008, assumptions about the operation of the Program in 2004 and 2005 are both irrelevant and unfair. Here I must disagree.

[22] While I have serious concerns regarding whether the Applicant should be required to demolish assumptions of fact relating to the operations of the GLGI Program in the years prior to the years in question, I accept the Respondent's submissions that the case law, namely the Tax Court decisions in *Teelucksingh v. The Queen* (2010 TCC 94) and *Mudge v. The Queen* (2020 TCC 77), clearly state that the question of burden, like questions of relevance, should be left to the trial judge.

[23] Not only is the trial judge in the best position to determine relevancy, but the trial judge is also in a far better position than a judge hearing a preliminary motion to consider what effect should be given to assumptions not within the knowledge of the Applicant. It is for the trial judge to decide whether these assumptions are irrelevant or direct that the Respondent bear the onus of proving them.

[24] On that basis, I will leave assumptions of fact regarding the operation of the GLGI Program in 2004 and 2005, assumptions of fact regarding the treatment of insiders under the Program from 2004 to 2008, and assumptions of fact relating to the operation of a similar program prior to 2004 in place. The Applicant is free to raise questions of burden in respect of these assumptions with the trial judge.

B. Disputed Paragraphs

[25] With that background I will now turn to analyzing the specific paragraphs in dispute, starting with paragraphs 1 to 6.

Paragraphs 1 to 6:

[26] These paragraphs are part of an overview of the Respondent's position. In a Reply that spans 40 pages, an overview can be a useful section. It is neither inappropriate to use an overview, nor inappropriate for that overview to contain a summary of the relevant facts and arguments. Other than as set out below no changes need to be made to these paragraphs.

Paragraph 1:

[27] Paragraph 1 introduces the defined term, "the Program." This term is then used throughout the Reply to variously refer to the GLGI Program from 2004 to 2013, from 2004 to 2008, and from 2006 to 2008. As such, it results in pleadings that are confusing or vague. I will strike the word "Program" wherever it appears in the Reply.

[28] The Respondent shall have leave to amend the Reply to add a more clearly defined term or terms that are appropriate to the contexts in which they are used.

Paragraph 2 and 18.4:

[29] Turning then to paragraph 2, as well as paragraph 18.4, both of those paragraphs contain the phrase, "56% to 112%." Because of the problem with the

word “Program,” it is unclear what time period these percentages cover. I will strike this phrase in both paragraphs, with leave to amend to add the appropriate percentages for the GLGI Program from 2004 to 2008.

Paragraphs 3 and 20:

[30] Turning then to paragraph 3 and, as it is related, paragraph 20. The last sentence of paragraph 3 and all of paragraph 20 relate to the operation of the GLGI Program in 2014 and its ongoing audit. This is clearly irrelevant. I will strike these parts of the Reply without leave to amend.

Paragraph 18.5:

[31] Paragraph 18.5 contains a chart summarizing, among other things, the number of participants, purported cash donations and purported in kind donations for the GLGI Program for each year from 2004 to 2008. The Applicant has no way of knowing how many other taxpayers participated in the Program either in the years in question or in 2004 and 2005. This information is exclusively or peculiarly within the knowledge of the Minister. However, as set out above, the case law indicates that that goes to the issue of burden and that burden should be left to be dealt with by the trial judge. Accordingly, I will not strike this paragraph.

Paragraphs 18.12, 18.13, 18.28, 18.30 and 18.67:

[32] Paragraphs 18.12, 18.13, 18.28, 18.30, and 18.67 refer to things that started before the years in question, continued throughout those years and ended sometime thereafter. I find that it is clearly irrelevant at which point these things ended. I will strike the words, “until April 2011,” in paragraph 18.12; the words, “until May 9, 2011,” in paragraph 18.13; the words, “until April 1, 2011,” in paragraph 18.28; the words, “early 2011,” in paragraph 18.30; and the words, “to 2011,” in paragraph 18.67.

[33] The Respondent shall have leave to amend these paragraphs to clarify that the things in question continued throughout the years in issue.

Paragraphs 18.37 to 18.39:

[34] Turning to paragraphs 18.37 to 18.39. As they are currently phrased, these paragraphs appear on their face to either be the Minister’s opinion or a conclusion.

They do not appear to be assumptions of fact. I will strike them but will grant leave for the Respondent to amend.

Paragraphs 18.65, 18.160, 18.165, 18.170 and 18.172:

[35] As currently phrased, paragraphs 18.65, 18.160, 18.165, 18.170 and 189.172 appear to be argument, not assumptions of fact. I will strike these paragraphs but will give the Respondent leave to amend.

Paragraphs 18.73, 18.161, 18.162, 18.174 and 18.191:

[36] As currently phrased, paragraphs 18.73, 18.161, 18.162, 18.174 and 18.191 appear to be conclusions of mixed fact and law. I will strike them but will give the Respondent leave to amend.

Paragraph 18.171:

[37] Turning then to paragraph 18.171, the Respondent has conceded that that paragraph should be struck. The heading that appears immediately before it shall also be struck but with leave to amend.

Paragraph 18.175 to 18.190:

[38] Turning then to paragraphs 18.175 to 18.190, these paragraphs all deal with the purported sham. I am satisfied based on the decision in *Chad v. The Queen* (2021 TCC 45) that these paragraphs have been appropriately pled.

[39] The phrase, “in the sham,” appears in paragraph 18.191. This is an inappropriate conclusion of mixed fact and law. That phrase is struck with leave to amend.

Paragraph 18.196:

[40] Turning to paragraph 18.196, that paragraph is repetitive. I will strike it without leave to amend.

Paragraph 19

[41] Paragraph 19 contains a chart setting out the number of participants, their purported cash donations, their purported in kind donations and the average ratio of

cash to in kind donations for each year of the GLGI Program from 2004 to 2013. The information in the chart from 2004 to 2008 is the same information that appears in paragraph 18.5. As I have not struck paragraph 18.5, the information is repetitive. The information from 2009 to 2013 falls after the period in question. I find that it is clearly irrelevant. Based on the foregoing I will strike the whole of paragraph 19 without leave to amend.

[42] This is the end of my reasons.

[43] So we will say to September 9, 2022 to amend.

C. Costs

[44] I am torn here. I think both parties raise good points. There was merit to a number of the points, clearly, that the Applicant raised, but as the Respondent says, the Applicant appeared to throw everything at the wall and hope to see what would stick, which is not an efficient way of dealing with matters. Given the parties' mixed success, although I am displeased with the manner in which the Applicant proceeded, I am going to award costs in the cause.

Signed at Ottawa, Canada, this 10th day of May 2023.

"David E. Graham"

Graham J.

CITATION:	2023 TCC 66
COURT FILE NO.:	2021-912(IT)G
STYLE OF CAUSE:	THE ESTATE OF VENENCE COTE v HIS MAJESTY THE KING
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	July 6, 2022
REASONS FOR JUDGMENT BY:	The Honourable Justice David E. Graham
DATE OF ORAL REASONS:	July 6, 2022
DATE OF REASONS FOR JUDGMENT:	May 10, 2023

APPEARANCES:

Counsel for the Applicant:	Duane Milot Kris Gurprasad Kateryna Kozachuk
Counsel for the Respondent:	Iris Kingston John Chapman

COUNSEL OF RECORD:

For the Applicant:

Name:	Duane Milot
Firm:	Milot Law Toronto, Ontario

For the Respondent:	Shalene Curtis-Micallef Deputy Attorney General of Canada Ottawa, Canada