Docket: 2015-1196(IT)G

BETWEEN:

MARY DAVIS,

Appellant/Respondent on Motion,

and

HIS MAJESTY THE KING,

Respondent/Applicant on Motion,

Motion heard on January 18, 2023, at Calgary, Alberta

Before: The Honourable Justice K. Lyons

Appearances:

Counsel for the Appellant:	Jonathan Lafrance
Counsel for the Respondent:	Matthew W. Turnell

ORDER

UPON motion by the applicant for an order granting leave to the applicant to file an Amended Reply pursuant to section 54 of the *Tax Court of Canada Rules (General Procedure)*;

AND UPON having read the notice of motion and supporting affidavits;

AND UPON having read the affidavits in opposition to the motion;

AND UPON having heard submissions of both parties;

AND UPON Ms. Davis consenting to the amendments in paragraphs 2, 3, 4, 6.1, 8, 11, 12, 13 and 14 and subparagraphs 15(a), 15(e), 15(i.1), 15(i.3), 15(i.4), 15(i.5), 15(j), 15(k.1), 15(k.2), and 15(k.3) of the Amended Reply attached as Appendix A to the notice of motion;

IT IS ORDERED THAT:

(a) subparagraph 115(1)(a)(ii) of the *Income Tax Act* shall be struck from paragraph 37 of the Amended Reply and replaced with paragraph 115(1)(a); and

(b) all remaining amendments in the Amended Reply are allowed in accordance with the attached Reasons for Order and the Court grants leave to the applicant to file the Amended Reply.

IT IS FURTHER ORDERED THAT:

Costs fixed at $1,000 for this Motion shall be payable by Ms. Davis to the applicant forthwith in any event of the cause; and

Ms. Davis shall pay $17,750 as security for the applicant's costs in these appeals in accordance with section 166.1 of the *Rules* within 30 days from the date of this Order.

Signed at Ottawa, Canada this 24th day of August 2023.

"K. Lyons"

Lyons J.

Citation: 2023 TCC 125
Date: 20230824
Docket: 2015-1196(IT)G

BETWEEN:

MARY DAVIS,

Appellant/Respondent on Motion,

and

HIS MAJESTY THE KING,

Respondent/Applicant on Motion.

REASONS FOR ORDER

Lyons J.

I. Introduction

[1] This Motion is for an order granting leave of the Court for the applicant to file an amended Reply to the Notice of Appeal ("Amended Reply") pursuant to section 54 of the *Tax Court of Canada* (*General Procedure*) (the "Rules") in order to advance an alternative argument, and facts in support, pursuant to subsection 152(9) of the *Income Tax Act* (the "Act").[1] Namely, that Mary Davis' earnings for services she provided in Canada to Seminars Unlimited Inc. (the "Company") should be taxed alternatively as employment income as an employee of the Company (the "employment argument").[2]

[2] The underlying appeals are from assessments made by the Minister of National Revenue for the 2004, 2005, 2006, 2007, 2008, 2009, 2010 and 2011 taxation years (the "relevant years") against Mary Davis. The appeals stem from her refund request of taxes withheld on earnings for services she provided in

[1] *Tax Court Of Canada Rules* (*General Procedure*), SOR/90-688A [*Rules*]. Sections 4, 57, 65 and 70 are also relied on. *Income Tax Act*, RSC 1985, C 1 (5th Supp) [*Act*].

[2] The employment argument is advanced in the event the Court finds that Ms. Davis was not carrying on business in Canada through permanent establishments.

Canada to the Company during the relevant years ("refund request").[2] A non-resident of Canada, she filed income tax returns claiming business income earned by her in Canada, as an independent contractor ("IC"), was not earned from permanent establishments thus was not taxable in Canada. In considering the refund request, the Minister focussed on whether as an IC of an entity that ran the Company, she conducted business in Canada through permanent establishments and assessed her on that basis.

Preliminary matters

[3] At the outset of the Motion hearing, the applicant:

(i) noted he made additional admissions of fact at paragraphs 2, 3 and 6.1 of the Amended Reply and clarified he did not withdraw admissions; and

(ii) noted that paragraph 37 of the Amended Reply should reflect paragraph 115(1)(a) of the *Act* in its entirety, rather than being restricted to subparagraph 115(1)(a)(ii) of the *Act*.

[4] At the outset of the Motion hearing, Ms. Davis:

(i) consented to payment of $17,750.00 into Court as security for the applicant's costs in these appeals in accordance with section 166.1 of the Rules;[3]

(ii) consented to the amendments in paragraphs 2, 3, 4, 6.1, 8, 11, 12, 13 and 14 and subparagraphs 15(a), 15(e), 15(i.1), 15(i.3), 15(i.4), 15(i.5), 15(j), 15(k.1), 15(k.2), and 15(k.3) of the Amended Reply; and

(iii) indicated she opposes the applicant's remaining proposed amendments in subparagraph 15(i.2) and paragraphs 16 to 36 and 39 of the Amended Reply.

[2] The refund request was made at the time of filing her income tax returns in Canada for the relevant years.

[3] The applicant had sought an order for security for costs as part of the Motion.

Motion

[5] The applicant proposes that subparagraph 15(i.2) of the Amended Reply be added as an assumption of fact as it was purportedly made by the Minister when making the assessments, paragraphs 16 to 35 be added as other material facts in support of the employment argument set out in paragraph 39 and paragraph 36 reformulates the issue.[4]

[6] The grounds in the notice of motion are that the proposed amendments define the issues following facts discovered during examination for discovery ("discovery") of Ms. Davis that clarify the applicant's position on facts in the Notice of Appeal and assumptions of facts pleaded in the Reply. The other material facts, many of which are consistent with facts pleaded in the Notice of Appeal, and the employment argument in support of the assessments in the relevant years are based on her discovery which clarify the real question in controversy, cause no prejudice to her nor would result in a higher quantum of tax beyond what was assessed and supports the assessed amount.

[7] Affidavits were filed as follows: by Naseem Kausar, a Canada Revenue Agency auditor (the "auditor" and "auditor's affidavit"); two by Jennifer Lum (collectively "Lum Affidavit" including a copy of the transcript of the examination for discovery of Ms. Davis); by Ms. Davis ("Davis Affidavit" including a copy of transcript of examination for discovery of auditor); by Denise Pope ("Pope Affidavit" with Ms. Davis' Responding Motion Record including a copy of the transcript of cross-examination of the auditor on the auditor's affidavit).

II. Law

Section 49 of the Rules

[8] Section 49 of the *Rules* sets out certain elements that must be stated in a Reply. The relevant part of subsection 49(1) of the *Rules* provide, in part, a Reply must state the following:

…

[4] The proposed amendment regarding the purported assumption of fact comprise foreign tax credits claimed by Ms. Davis in the 2005 to 2011 taxation years in her US income tax filings and corrects an amount of taxable income in 2005.

> d) the findings or assumptions of fact made by the Minister when making the assessment,
> e) any other material fact,
> …

Section 54 of the Rules

[9] Section 54 of the *Rules* enables a party to amend his or her pleadings within certain parameters. For example, after the close of pleadings unless the other party consents leave is to be sought from the Court. The section reads:

> **When Amendments to Pleadings May be Made**
> 54 A pleading may be amended by the party filing it, at any time before the close of pleadings, and thereafter either on filing the consent of all other parties, or with leave of the Court, and the Court in granting leave may impose such terms as are just.

[10] The general rule for amending pleadings provides that an amendment should be allowed at any stage of the action for the purpose of determining the real question in controversy, provided it does not result in an injustice to the other party that is not capable of being compensated by costs and would serve the interests of justice.[5] An amendment can be made even during trial to determine the real question in controversy.[6]

[11] Recently, the Federal Court of Appeal in *The Queen v. Pomeroy Acquireco Ltd*., elaborated on the principles governing amendments. It instructs that the controlling principle is that the Courts should allow an amendment at any stage of the action if it helps "in determining the real questions in controversy between the parties" (a significant consideration), provided that the amendments do not result in an injustice not compensable in costs and with the overarching criterion that it would serve the interests of justice.[7]

[12] Consideration should be given to whether the amendments will ensure clarity and certainty at trial.[8]

Subsection 152(9) of the Act

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[5] *Canderel Ltd v R*, [1993] CTC 213 (FCA) at para 10, 93 DTC 5357 [*Canderel*].
[6] *Bristol-Myers Squibb Co v Apotex Inc*, 2011 FCA 34 [*Apotex*].
[7] *The Queen v Pomeroy Acquireco Ltd*, 2021 FCA 187 [*Pomeroy*] paragraphs 2, 4 and 13
[8] *Pomeroy*, paragraph 14.

[13] Subsection 152(9) of the *Act* permits the Minister to advance an alternative argument after the normal reassessment period to support an assessment subject to the limitations in paragraphs 152(9) (a) and (b).

[14] Since the present appeals were instituted in 2015, the relevant iteration of subsection 152(9) provides:[9]

> **152(9) Alternative basis for assessment**
> The Minister may advance an alternative argument in support of an assessment at any time after the normal reassessment period unless, on an appeal under this Act,
>
> > (a) there is relevant evidence that the taxpayer is no longer able to adduce without the leave of the court; and
> >
> > (b) it is not appropriate in the circumstances for the court to order that the evidence be adduced.

[15] The Federal Court of Appeal in *Walsh* enunciated the following conditions governing the Minister's use of subsection 152(9):

a. the Minister cannot include transactions which did not form the basis of the taxpayer's reassessment;

b. the right of the Minister to advance an alternative argument in support of an assessment is subject to paragraphs 152(9) (a) and (b), which speak to the prejudice of the taxpayer; and

c. the Minister cannot use subsection 152(9) to reassess outside the time limitations in subsection 152(4) or to collect tax exceeding the amount of the assessment under appeal. [10]

(the "conditions").

III. Background Facts

[16] During the relevant years, Ms. Davis was a non-resident of Canada and a resident of the US whom provided services to the Company, Seminars Unlimited Inc., a corporation owned by Thelma Box, her mother.[11]

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[9] Subsection 152(9) of the Act was amended on December 15, 2016 by the *Budget Implementation Act*, 2016, No 2, SC 2016, c 12, s 55, with such amendments being applicable to appeals instituted after December 15, 2016. This amendment does not affect the present appeals.
[10] *Walsh v The Queen* 2007 FCA 222.

[17] The Company withheld tax from the payments Ms. Davis received from it as earnings for services she provided in Canada for 2005 to 2011 years.[12]

[18] In 2012, Ms. Davis filed income tax returns for the relevant years and made the refund request for the withholding taxes the Company had deducted.[13]

[19] In June 2012, CRA audited the relevant years. The auditor received a copy of an Independent Contractor Agreement ("Agreement"), dated in March 2012 and retroactive to January 1, 2004, from Ms. Davis entered into between her and the Company. The Agreement purports that she was an IC of an entity that ran her mother's business and it is with respect to services Ms. Davis provided. The Minister assumed she was self-employed providing personal development seminars under a contract for services with the Company and she received earnings for services as a seminar facilitator she had provided at various locations in Canada for the relevant years.

[20] In 2013, the Minister made assessments against Ms. Davis for the relevant years, and later reassessed the 2011 taxation year, on the basis she carried on business in Canada through two permanent establishments and included business income. Subsequently, she objected to the assessments of the 2004 to 2010 taxation years and objected to the reassessment for the 2011 taxation year. In these reasons, when referring to assessments it will be understood that will include the reassessment of the 2011 taxation year.

[21] The Minister confirmed the assessments and sent a notice of confirmation to Ms. Davis on May 7. 2015.

[22] Since April 2022, Ms. Box has been a patient of Senior Adults Specialty Healthcare, P.A., where she resides in a secured memory care community and is unable to manage her legal, business or personal affairs, and her powers of attorney should be considered invoked. She receives full-time care and total assistance with

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[11] Reply at paragraph 15(d) indicates the Company is a Texas Corporation. Ms. Davis' Responding Motion Record indicates it is a Canadian corporation controlled by Ms. Box.
[12] Notice of Appeal at paragraph 2.
[13] In 2012, CRA had sent her a letter requesting she file tax returns in Canada for 2004 to 2010, and did so, and she also filed her income tax return for 2011 shortly after.

all activities of daily living she requires.[14] Since July 29, 2022, she has been under the care of Austin Geriatric Specialists.[15]

Procedural History

[23] Ms. Davis filed a Notice of Appeal on March 10, 2015.

[24] The applicant filed a Reply on January 14, 2016.

[25] The applicant filed a List of Documents on December 16, 2016.

[26] Effective July 27, 2017, the Law Society of British Columbia was appointed as the custodian of the law practice of Ms. Davis counsel by Order of the Supreme Court of British Columbia.[16]

[27] Ms. Davis filed a notice of change of counsel on August 1, 2017.

[28] Ms. Davis filed her List of Documents on May 15, 2018.[17]

[29] Discovery of the auditor, as nominee of the applicant, was conducted on October 19, 2018. Responses to undertakings arising from the discovery were provided by the applicant to Ms. Davis on December 18, 2018.

[30] Discovery of Ms. Davis was conducted on October 18, 2018 during which 24 undertakings requests were accepted by her.

[31] As of July 2019, the Alberta Law Society placed her second counsel on administrative suspension. Ms. Davis communicated her answers to undertakings on December 6, 2019.[18] The applicant served follow-up questions to undertakings

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[14] Davis Affidavit, Exhibit 11, dated December 1, 2022, signed by her clinical nurse, Eddie Maraboto MSN, APRN, ACNS-BC, Austin, Texas.

[15] Davis Affidavit, Exhibit 12. Note received December 2, 2022 by Ms. Davis from her mother's geriatrician indicating she does not have the capacity to make medical, legal or financial decisions safely.

[16] Davis Affidavit, Exhibit 1.

[17] She had failed to file her List of Documents before December 30, 2016. A Show Cause Hearing was held on May 11, 2017. A change of counsel for Ms. Davis was filed on January 25, 2018.

[18] Ms. Davis had failed to provide responses to undertakings before December 2018 resulting in a Show Cause Hearing on June 6, 2019. She was given until July 31, 2019 to provide her

on Ms. Davis on March 4, 2020, but between April 2020 and October 2020 she failed to respond.

[32] On January 6, 2021, the applicant informed Ms. Davis' second counsel that amendments to the Reply would be proposed once the responses to undertakings were received from Ms. Davis.

[33] On September 29, 2021 a Show Cause Hearing was held in which it was provided that Ms. Davis' file be transferred to a third law firm.

[34] The Court issues an Order scheduling a conference call for June 3, 2022. On June 1, 2022, Ms. Davis had filed a notice of change of second counsel.

[35] As of June 13, 2022, Ms. Davis was represented by her third and current counsel.

[36] On October 27, 2022 her current counsel communicated her answers to the follow-up questions to undertakings to the applicant and the applicant provided Ms. Davis with the proposed Amended Reply.[19]

[37] On November 1, 2022, and subsequently, the applicant was advised by her current counsel that Ms. Davis intended to oppose the filing of the Amended Reply given the employment argument was raised at a late stage.[20]

[38] On November 1, 2022 the applicant scheduled this Motion in 2023.

[39] On November 16, 2022:

> a) Ms. Davis' counsel sent a letter to the applicant in order to set an informal timetable for the pre-motion steps leading to the Motion hearing;[21] and
>
> b) the applicant served Ms. Davis with a Request to Admit, as well as an annotated request to admit referencing facts within the documents and transcript of the examination for discovery.[22]

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responses but failed to do so. A further Show Cause Hearing was held on November 18, 2019 and was given until December 6, 2019 to provide her responses and she provided those.

[19] Davis Affidavit, Exhibit 5.

[20] Davis Affidavit, Exhibit 6 and 7.

[21] Davis Affidavit, Exhibit 8.

[40] On November 24, 2022, Ms. Davis served a response to the Request to Admit refusing to admit the truth of any of the facts in the Request until the status of the amendments to the Reply had been determined.[23]

[41] On December 6, 2022 the applicant served the notice of motion for leave to amend and the Motion record.

IV. ISSUE 1: Subparagraph 15(i.2) of the Amended Reply

[42] First, whether the proposed amendment in subparagraph 15(i.2) of the Amended Reply constitutes an assumption of fact. It states:

> [T]he Appellant filed her United States income tax returns, reporting the following foreign income amounts, and claiming the foreign tax credit in respect of the income:

	Gross foreign source income ($USD)	**Taxable income ($USD)**	**Foreign tax credit ($USD)**
2004	Unavailable	Unavailable	Unavailable
2005	Unavailable	$43,565	$6,535
2006	$141,446	$129,158	$21,217
2007	$166,040	Unavailable	$22,430
2008	$155,000	Unavailable	$23,250
2009	$155,000	$144,808	$30,625
2010	$196,444	$180,132	$36,280
2011	$199,724	$174,275	$31,535

Parties' positions

[43] The applicant's position is that the proposed amendment in subparagraph 15 (i.2) is an assumption of fact made by the Minister in assessing Ms. Davis for the

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[22] Davis Affidavit, Exhibit 9.
[23] Davis Affidavit, Exhibit 10.

relevant years as confirmed in the auditor's affidavit.[24] The applicant notes that except for a corrected amount (that is, $43,565) and the "Foreign tax credit ($USD)"column in the Amended Reply describing credits claimed by Ms. Davis, the other columns and amounts were plead in the existing Reply. He submits although the auditor acknowledged during cross-examination on her affidavit that the proposed amendment was not in her audit report, not every assumption need be stated in the audit report nor is there a requirement that an assumption be documented in any particular document. As such, the cross-examination does not rebut that the proposed amendment was not made as an assumption of fact at the time in raising the assessments.

[44] Ms. Davis' position is that whilst she is amenable to this proposed amendment being included as an other material fact, she disagrees it is an assumption of fact because when the auditor was cross-examined, she admitted that she did not receive such information when she was writing her audit report thus would not be included in her report at that time.[25]

V. Analysis

[45] An assessment is founded on the assumptions of fact made by the Minister.

[46] Again, section 49 of the *Rules* requires a Reply to specify the assumptions of fact made by the Minister when making the assessment. An appeal is from the assessment that establishes the amount of tax owing by a taxpayer (as initially assessed or determined and subsequently confirmed by the Minister); the assessment process is not completed by the Minister until the amount of tax owing is finally determined in order to ascertain the tax liability of the taxpayer.[26] The applicant can plead other material facts that were not assumed by the Minister and bears the burden of proving those in Court.[27] A material fact is a fact which is necessary to establish a cause of action (or defence).

[47] Admittedly, the auditor acknowledged she did not receive the information when preparing her audit report, signed on July 29, 2013. That leaves a one month intervening period from that date to when the notices of assessments (of August

[24] Crown's Motion Record (Vol 1 of 2), auditor's affidavit, paragraphs 5, 6 and 9.
[25] Auditor cross-examined on December 19, 2022. Ms. Davis' Responding Motion Record (Volume I) at page 241.
[26] The *Queen v Anchor Pointe Energy Ltd*. 2007 FCA 188. An appeal is from the product of the assessment.
[27] The *Queen v Loewen 2004 FCA 146.* [*Loewen*]

29, 2013) were sent; these effectively notify Ms. Davis of the Minister's final determination of the assessment.

[48] Even if the auditor had the information at the time of signing the report, I do not agree with Ms. Davis' assertion that it was a requirement that the assumption itself be in the audit report. The requirement is that the assumption was made when the Minister finally determined the tax liability.

[49] Given that intervening period combined with the auditor deposing in her affidavit that the proposed amendment "accurately sets out the assumption of fact made by the Minister in assessing the Appellant for the years under appeal", which I accept, I am satisfied the proposed amendment (the foreign tax credits and corrected amount) in subparagraph 15 (i.2) constitutes an assumption of fact made by the Minister when making the assessments. I infer the assumption was likely made during the intervening period and was omitted from the Reply.[28]

VI. ISSUE 2: Leave To Amend - Employment Argument and Facts In Support

[50] Turning now to whether the Court should exercise its discretion and grant leave to the applicant to advance the employment argument and other material facts in support of it set out at paragraphs 16 to 35 and paragraph 39 of the Amended Reply as follows:

> 16. Thelma Box is the principal of Seminars Unlimited Inc. and is the Appellant's mother.
>
> 17. At all material times, Seminars Unlimited Inc. owned the intellectual property and all rights relating to the Seminars.
>
> 18. Seminars Unlimited Inc. was registered as an extra-provincial company under the Company Act (British Columbia) on April 22, 1999.
>
> 19. Seminars Unlimited Inc. was registered as an extra-provincial corporation under the Business Corporations Act (Alberta) on August 5, 1999.

[28] The auditor deposed that before becoming involved as nominee in preparing for examination for discovery she had no opportunity to review the Reply but on doing so recognized errors and omissions.

20. Seminars Unlimited Inc. had physical offices in both Calgary and Vancouver during the material period, and also had staff that worked out of those offices.

21. Ms. Box was primarily responsible for presenting the Seminars during the material period, including those presented at the Calgary and Vancouver seminar locations, and other locations in Canada and the United States.

22. During the 2004, 2005, 2006, 2007, 2008, 2009, 2010 and 2011 taxation years, the Appellant performed duties and services in Canada for Seminars Unlimited Inc., including assisting and supporting the facilitation of approximately six to eight Seminars each year.

23. The Appellant was not responsible for arranging any of the dates for the Seminars in Canada, or making arrangements or bookings with the hotels where those seminars were held. Instead, those were arranged by Seminars Unlimited Inc.

24. Seminars Unlimited Inc. also engaged Enrollment Coordinators who were responsible for marketing and promoting the Seminars.

25. The Appellant was paid a flat-fee for each seminar that she assisted with, and the amount of the fee was based on the number of participants who attended the seminar.

26. The Appellant had no ability to influence the number of participants, and thus no ability to increase the amount of the remuneration she received.

27. The Appellant had no opportunity to profit and no risk of loss with respect to the services she provided for Seminars Unlimited Inc.

28. Seminars Unlimited Inc. reimbursed the Appellant for any expenses associated with providing the services for the seminars, including travel and accommodation costs.

29. The tools and equipment necessary for the Seminars included flip-charts and audio equipment which were owned by Seminars Unlimited Inc.

30. The Appellant was not required to, nor did she provide, any tools with respect to the services she provided in facilitating the Seminars.

31. The Appellant did not exercise any control in the delivery or presentation of the Seminars.

> 32. The Appellant's work duties were performed at the direction of Ms. Box and Seminars Unlimited Inc.
>
> 33. On March 21, 2012, the Appellant and an entity related to Seminars Unlimited Inc. executed an agreement purporting to make the Appellant an independent contractor with respect to services she provided dating back to January 1, 2004.
>
> 34. Having a written agreement was suggested by the Appellant's Canadian tax counsel, and related to the filing of the Appellant's Canadian Income Tax Returns for the material periods in early 2012.
>
> 35. Contrary to the assumption made by the Minister at paragraph 15(c), the Appellant was not in business on her own account but was instead an employee of Seminars Unlimited Inc. in the 2004, 2005, 2006, 2007, 2008, 2009, 2010 and 2011 taxation years.
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> ….
>
> 39. In the alternative, if the Appellant did not carry on her own business, she was employed with Seminars Unlimited Inc. under a contract of service. Accordingly, the Appellant earned income in Canada in the 2004, 2005, 2006, 2007, 2008, 2009, 2010 and 2011 taxation years. The remuneration that was paid to the Appellant was borne by Seminars Unlimited Inc.'s permanent establishments located in Canada.

[51] Paragraphs 16 to 21 clarify that Ms. Box is the principal of the Company and primarily responsible for presenting seminars and the Company was registered as an extra-provincial company in Alberta and in British Columbia.

Parties' positions

[52] The applicant's position is the criteria for leave to amend pursuant to section 54 of the *Rules* and the conditions in subsection 152(9) of the *Act* as interpreted in *Walsh* have been satisfied. The proposed amendments in paragraphs 16 to 35 of the Amended Reply are premised on existing facts in both parties' pleadings and new facts that emerged during Ms. Davis' discovery such that the facts are largely the same, whether it is for the position currently pleaded in the Reply or the employment argument pleaded in the Amended Reply. He advances four arguments in support of his position.

[53] Ms. Davis position is that the applicant has failed to satisfy the burden to obtain leave to amend the Reply and the employment argument was never the real

question in controversy. If the proposed amendments are permitted, it would result in an injustice not compensable by costs and she would suffer prejudice because she would be unable to produce key evidence at trial given Ms. Box is unable to testify because of her health. Nor would it serve the interests of justice to permit the applicant to amend the Reply this late in the process because when the appeal was filed the sole issue centred on the permanent establishment. Further, his affidavits do not clearly state facts to support the section 54 criteria.

[54] Conversely, Ms. Davis' affidavit is detailed, explains why she would suffer prejudice (Ms. Box's inability to testify) that is not compensable by an award of costs and why it is against the interests of justice to allow the amendment. Since the applicant chose not to cross-examine Ms. Davis on her affidavit, the evidence she adduced is unchallenged and uncontradicted and must be taken as is. The proposed amendments regarding the employment argument directly contradict the initial basis of assessment.

Real question in controversy

[55] First, the applicant argues the proposed amendments and employment argument clarify the real question in controversy because the key issue in dispute is whether Ms. Davis' earnings from the Company are subject to taxation in Canada. She is a non-resident of Canada, and subject to taxation pursuant to subsection 2(3) of the *Act* to the extent that she was employed in Canada or carried on business in Canada. The taxable earnings upon which a non-resident is subject to income tax is determined pursuant to section 115 of the *Act*.

[56] Initially, the applicant framed the issue narrowly because of the limited scope of the auditor's review as to whether Ms. Davis had permanent establishments in Canada during the auditor's consideration of the refund request based on the Agreement provided to her by Ms. Davis; she did not ascertain if the Agreement accurately characterized Ms. Davis as an IC or as an employee.

[57] Ms. Davis counters that the applicant is framing the real question in controversy too broadly, disagrees the real question is whether the amounts earned by her were taxable income in Canada, and amongst other things, said it defeats the purpose of the legal test for allowing amendments under section 54. Since the audit began and during the appeal, the sole question has been: whether Ms. Davis carried on a business in Canada through permanent establishments and her entire case is premised on being the only question at issue.

Injustice and prejudice to the taxpayer

[58] Second, the applicant argues the proposed amendments and the employment argument do not cause an injustice nor prejudice to Ms. Davis as these rely on evidence given by her during her discovery and plead by her. Nor is she prejudiced by Ms. Box's inability to testify as her ability to do so was a live issue even before the employment argument was proposed. Additionally, Ms. Box is a non-resident, not compellable by subpoena, and it is unclear if she would have any probative evidence to offer.

[59] Ms. Davis contends she will suffer significant prejudice given Ms. Box's inability to provide viva voce evidence at trial that is non compensable by costs if the employment argument is allowed. Determining if Ms. Davis is an employee or an IC requires ascertaining the subjective intent of her and Ms. Box but Ms. Box cannot testify at trial due to health issues thus placing Ms. Davis at a significant disadvantage. The applicant has been aware of such health issues since 2018 and could have pleaded the employment argument before now.

Interests of justice

[60] Third, the applicant argues the proposed amendments are in the interests of justice because they ensure that the Court may reach the correct result based on the facts and the law and will not delay the expeditious trial as they rely on facts already pleaded in the Notice of Appeal and Ms. Davis' own discovery evidence and is bringing the Motion in a timely fashion before trial is scheduled.

[61] Ms. Davis asserts it is contrary to the interests of justice to allow the proposed amendments, the Motion was not timely and the applicant has not justified the late amendment. He learned of the new facts underlying the employment argument in 2018 during discoveries, not 2022, and could have brought the Motion earlier, allowing Ms. Davis to take steps to preserve evidence. Due to the passage of time, she now has limited ability to bring forward Ms. Box and adduce evidence against the employment argument negatively impacting her chance of success at trial.

Same transactions and no increases in tax liability

[62] Fourth, the applicant argues the employment argument relies on the same transactions already in issue in the assessments and does not increase the tax

liability.[29] Furthermore, whether Ms. Davis' earnings are taxable in Canada as business income or employment income does not change her tax liability under the assessments in these appeals.[30] Hence, the condition in *Walsh* has been met because the applicant neither seeks to reassess nor collect more tax than assessed within the normal reassessment period.

Contradicting the original Reply

[63] Ms. Davis argues that the employment argument directly contradicts the applicant's initial basis of assessment that Ms. Davis is an IC. A person cannot be both an employee and an IC. For almost ten years, the applicant admitted Ms. Davis was an IC but after discoveries, the applicant created the employment argument. The facts supporting the employment argument contradict the applicant's assumptions of facts supporting the initial basis. It is internally incoherent for both bases to coexist in the Amended Reply and he cannot make inconsistent allegations of fact.

VII. Analysis

[64] Under section 54 of the *Rules*, the Court has a broad discretion to grant leave to amend pleadings.

[65] In my view, the applicant has met the burden, on a balance of probabilities, to obtain leave to amend the Reply thus weighing in favour of permitting the proposed amendments in respect of the employment argument which will assist the Court in determining the real question in controversy, will not result in an injustice to Ms. Davis nor fail to serve the interests of justice and fall within the criteria in section 54 and comply with the controlling principle and satisfy the conditions in subsection 152(9) of the *Act* as interpreted in *Walsh*.

[66] In her Notice of Appeal, Ms. Davis frames the issues in dispute as:

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[29] This argument supports the assessed amount. With the exception of the 2011 taxation year (where the Minister determined that an additional amount of income was not reported in her income tax returns), the amounts assessed are based upon the T4-ANR forms issued to Ms. Davis by the Company. She filed income tax returns, reporting those amounts, but claimed they were exempt from taxation by virtue of Article VII of the *Canada-United States Income Tax Convention (*the Treaty), on the basis that they represented business income which was not attributable to a permanent establishment in Canada.

[30] *The Queen v. Last*, 2014 FCA 129 (*Last*).

Is the Appellant entitled to a refund of the Withholding Taxes? In particular:

a. **Is the Appellant liable for tax in Canada on her earnings from Seminars Inc.** In particular:

i Was the Appellant operating a business from a permanent establishment as defined in Article V of the Canada-US Treaty and relevant case law; and

ii If so, is she otherwise exempt from tax? [31]

[67] In framing (in "a.") the question as one of liability for tax in Canada, it closely aligns with the applicant's reformulated issue whether she is subject to taxation in Canada which flowed from evidence that emerged at her discovery which clarified facts alleged or assumed in both parties' pleadings.

[68] During her discovery, the transactions that formed the basis for her earnings in Canada were more fully explored together with the context in which those arose with greater elaboration provided regarding the Agreement. Details and facts emerged regarding her role and the nature of services she provided in Canada that changed the complexion of the appeals and differed from information she previously provided. Paragraphs 22 and 23 of the proposed amendments particularizes and clarifies Ms. Davis duties and services as including assisting and supporting facilitation of seminars and paragraph 24 identifies others responsible for marketing and promoting seminars. Paragraphs 25 to 32 speak to her arrangement with the Company giving a fuller picture of her relationship with the Company. Paragraphs 33 and 34 involve the Agreement and circumstances surrounding that and paragraph 35 asserts that contrary to the Minister's assumption she was an IC, it alleges Ms. Davis was an employee of the Company.

[69] Whether her earnings are from a business as an IC, included under subparagraph 115(1)(a)(ii) of the *Act*, or from the duties of employment performed in Canada, included under subparagraph 115(1)(a)(i), it does not change the fundamental question as to whether she is liable for tax, or subject to taxation, in Canada on her earnings from the Company. The Court is to arrive at the correct assessment of tax based on the facts.

[70] Although the applicant initially described the issue in the Reply as "whether the Appellant carried on business in Canada through permanent establishments

[31] Notice of Appeal at paragraph 31.

situated therein", this was premised on the limited scope of the auditors review as previously noted predicated on the Agreement in which Ms. Davis is purported to be an IC of an entity that ran Ms. Box's business.

[71] Ms. Davis' other submission that the sole question since the audit stage was whether she carried on business in Canada through permanent establishments, therefore precludes the employment argument, disregards the purpose of subsection 152(9) to permit an alternative argument in support of the assessment provided the conditions are met. Nor is there any requirement for the employment argument to be raised during the CRA audit stage nor is the applicant involved in CRA's audit process.[32] In *Polarsat Inc v His Majesty The King*[33], Justice Favreau found, and I concur, even if CRA officers have not pursued an alternative argument during the pre-trial steps, the Attorney General of Canada should not be precluded from adding an alternative argument in a reply because CRA officers chose not to do so.

[72] Ms. Davis relied on *Canderel* in which the Court rejected the Crown's motion to amend its reply to include an alternative argument (that the inducement payments were capital expenditures) and clarify the real question in controversy under section 54 of the *Rules.* She also relied on *Last* whose strategy, similar to Ms. Davis, was based on existing pleadings and the Crown sought to frame the issue more broadly. However, the rejection in *Canderel* was largely because the Crown waited until the fifth day of trial to bring a motion to amend the reply for the fourth time after expert witnesses had testified.[34] The rejection in *Last* was because the Crown's motion to amend the reply was on the fourth day of the hearing after three days of evidence had been presented. However, the applicant's

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[32] It is well established that the Tax Court of Canada has exclusive jurisdiction to determine the validity and correctness of a tax assessment, but this does not include the power to consider questions regarding CRA's process nor its conduct.

[33] 2023 TCC 10 at paragraph 60 [*Polarsat Inc*].

[34] In *Canderel*, the real question in controversy was whether tenant inducement payments were deductible when paid, or whether the payments should be amortized over the term of the lease. The Court said the motion was an abuse of process given it was brought in the midst of trial even though the real question in controversy (timing of the deduction) was agreed upon by both parties long before trial began, and facts enabling the Crown to try and characterize the payments on capital account were in evidence well before trial began. Further the proposed amendment, drafted in the "alternative", was not an alternative argument because the trial judge would logically dispose of the capital expenditure issue before disposing of the timing issue. The trial judge would not even be in a position to rule in favour of the taxpayer on that issue because the taxpayer already admitted the expenses were not on account of capital and had not sought leave to withdraw the admission.

Motion has been made even before the trial has been scheduled for hearing leaving Ms. Davis ample time to prepare and respond to the employment argument. After all, the proposed amendments are based on facts that had surfaced during her discovery. In my view, it would be appropriate to frame the issue more broadly.

[73] In pleading paragraphs 16 to 35 as other material facts, the applicant will, in any event, have the burden of proving the proposed amendments so as to persuade the Court of the employment argument that the transactions show Ms. Davis was an employee.

[74] Ms. Davis cites the decisions in *Mandel*, *Drouin* and *McKay* for the proposition that fact evidence being unavailable at trial will result in a prejudice that cannot be compensated with costs. My view is that these cases do not assist Ms. Davis. [35]

[75] Again, the condition in *Walsh* that the Minister has the right to advance an alternative argument in support of an assessment is subject to the limitations in paragraphs 152(9)(a) and (b) of the *Act*. The Minister however cannot advance an alternative argument if there is evidence the taxpayer cannot adduce without leave of the Court. In interpreting the condition in *Walsh*, this Court in *TD Bank* notes that such paragraphs refer only to evidence the taxpayer cannot adduce without leave of the Court and states:

> [32] It seems to me that the words of paragraphs (a) and (b) of subsection 152(9) of the Act are precise and unequivocal. It seems clear that the reference to "relevant evidence" is to relevant evidence that the taxpayer is no longer able to adduce without the leave of the court, and it is not appropriate in the circumstances for the court to order that the evidence be adduced. Because paragraph (b) is linked to paragraph (a) as a result of the use of "and" at the end of paragraph (a), and because paragraph (b) states that "it is not appropriate in the circumstances for the court to order that the evidence be adduced" it seems clear

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[35] *R v Mandel*, [1996] FCJ No 252, 194 NR 50 [*Mandel*], *Drouin c R*, 2011 CCI 519, *McKay v R*, 2015 TCC 33 [*McKay*]. In *Mandel*, the Federal Court of Appeal refused to allow the applicant to amend his pleadings because 23 years had passed since the filing of the statement of claim preventing the crown from locating its witnesses nor was prejudice considered in the context of subsection 152(9) in that case. In *Drouin*, this Court refused a request to amend the reply to add an alternative argument regarding a tax shelter at the time discoveries were completed as the alternative argument had been known for years. In McKay, this Court did not allow an amendment to the reply to notice of appeal to add an alternative argument because a non-party was placed into receivership and the circumstances relating to the receivership would prejudice McKay from a documentary evidence perspective.

> to me that the phrase "without the leave of the court" is intended to modify the type of evidence that the taxpayer is no longer able to adduce. Therefore only evidence that the taxpayer is no longer able to adduce without leave of the court is the type of evidence that is referred to in these paragraphs.[36]
>
> [emphasis added]

[76] In its discussion, the Court further notes that:

> [48] The evidentiary problem of the Appellant is not that the Appellant requires the leave of the court to adduce evidence but that key witnesses are now deceased. This type of evidentiary problem is not the type of evidentiary problem contemplated by paragraphs (a) and (b) of subsection 152(9) of the Act.

[77] Thus, the fact that key witnesses from TD's perspective were deceased and other witnesses were retired and no longer with TD is not the type of prejudice contemplated by such paragraphs, therefore, do not fall into this category and would not preclude the Minister from advancing an alternative argument under subsection 152(9).

[78] In my view, the evidentiary problem in the present case - Ms. Box's inability to testify - is not the type of prejudice contemplated by paragraphs 152(9) (a) and (b) because Ms. Davis does not require leave of the court to adduce Ms. Box's testimony. Thus, the Minister would not be constrained by the limitations in those paragraphs.

[79] Furthermore, Ms. Davis' concerns are addressed by the applicant's submissions to the effect Ms. Box's ability to testify and provide probative evidence is a live issue regardless of whether the applicant amends his Reply and the prejudice alleged stem from Ms. Davis' own discovery evidence.

[80] Nor am I persuaded that Ms. Davis is at a significant disadvantage because Ms. Box's testimony is required to determine the intent of each contracting party to the Agreement. [37] Apart from the applicant being ready to concede that there was

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[36] *Toronto-Dominion Bank v R*, 2008 TCC 284 [*TD Bank*].

[37] *1392644 Ontario Inc v Minister of National Revenue*, 2013 FCA 85 (*Connor Homes*) at paragraph 42. The first step is to determine the intention of the parties and whether the parties' relationship is reflected in objective reality.

common intent between Ms. Box and Ms. Davis that Ms. Davis is an IC, Ms. Davis can testify as to the *Wiebe Door* factors without with Ms. Box.[38]

[81] Prejudice results, in part, from Ms. Davis' own procedural delays of which there were many between October 2018 to October 2022 resulting in status hearings and show cause hearings regarding a number of failures on her part to comply.

[82] Consequently, I find that the proposed amendments will not cause any prejudice to Ms. Davis by not having access to relevant evidence, nor result in an injustice to her that is not compensable in costs.

[83] Contrary to Ms. Davis submission the Motion was not timely, I note it was brought shortly after the conclusion of the discovery process and even before the trial is scheduled, which in my view is timely.[39] Bringing it in 2018 as Ms. Davis suggests would have been premature until responses arising from follow-up questions were satisfied. The applicant had informed Ms. Davis' former counsel in 2021 that he would be moving to amend the Reply to include the employment argument once such responses to follow-up questions were provided.

[84] Permitting the proposed amendments in respect of the employment argument will not likely delay the trial because these rely on facts already pleaded in the Notice of Appeal and based on Ms. Davis' own discovery evidence that is largely uncontested thus would serve the interests of justice.

[85] The applicant does not rely on transactions other than those that transpired in issuing the assessments. And, given that the employment argument does not increase Ms. Davis' liability from services she provided in Canada, this is consistent with subsection 152(9) as interpreted by the Court in *Last*, in which the

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[38] *Wiebe Door Services Ltd v Minister of National Revenue*, [1986] 2 CTC 200, 87 DTC 5025 *Wiebe Door* factors involve control, ownership of tools, chance of profit, and risk of loss for delineating between an independent contractor and an employee. Cited with approval by the SCC in *Sagaz Industries Canada Inc et al v 671122 Ontario Limited*, 2001 SCC 59. In *Polarsat Inc.*, this Court found that not having potential access to the shareholders who approved the reorganization in question as witnesses did not constitute a real problem because another witness would be able to adduce evidence regarding the transactions forming part of the reorganization.

[39] In *Thompson v The Queen*, 2018 TCC 167 at paragraph 48 [*Thompson*]. The Crown made a motion to amend its reply to advance an additional argument at the end of discovery, where the proposed amendments arose and were in part from the evidence given by one of the appellants during discovery. The Court found that the motion was made at an early stage of the litigation.

Court held that as long as the tax liability in respect of the source of income (either capital property or inventory) does not exceed the amount assessed by the Minister, it is irrelevant whether the amount was assessed as capital or business income. Similarly, it is irrelevant whether Ms. Davis earned employment income or business income through the Company, as the source, as long as her tax liability in that regard does not increase the tax liability beyond the amounts assessed by the Minister. In my view, those factors combined with the fact that the employment argument does not prejudice Ms. Davis as contemplated by paragraphs 152(9)(a) and (b) of the *Act*, satisfy the conditions in subsection 152(9) of the *Act.*[40]

[86] Ms. Davis submission that the applicant should not be able to make inconsistent allegations of fact because it is a binary enquiry whether an individual is an employee or an IC, therefore, he cannot plead both grounds and cites *Canderel* for that proposition.[41] While still good law and noting the comments made previously in these reasons about the circumstances in *Canderel*, it was decided before the enactment of subsection 152(9).

[87] Ms. Davis submission appears to run counter to the principles in *Loewen.* The Court ruled that the Crown cannot plead inconsistent assumptions in the reply because it is impossible for the Minister, when assessing, to have made inconsistent assumptions at the same time. However, the Crown can assert allegations that are inconsistent with the assumptions as other material facts elsewhere in the reply, and if the Crown does allege a fact that is not among the facts assumed by the Minister, the onus of proof lies with the Crown. [42]

[88] In the present case, the applicant does not seek to plead inconsistent assumptions. Rather, the assumptions of fact in the Reply and the Amended Reply remain intact and point to Ms. Davis being an IC. The employment argument - entirely contained under the other material facts of the Amended Reply - point to

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[40] The condition that the Minister does not seek to reassess outside the time limitations in subsection 152(4) is not in dispute between the parties.

[41]Again, the appellate court held that the alternative argument was not truly an alternative argument and it was inconsistent with the Crown's admissions that the expenses were not on account of capital, and the Crown had not sought leave to withdraw its admissions.

[42] In *Loewen*, the Minister reassessed the taxpayer to reduce the capital cost allowance claimed with respect to the acquisition of computer software, partly on the basis that the fair market value of the software was less than the amount determined by the taxpayer. The Crown sought to raise a new argument in the reply that "no income earning purpose" existed, hence no amount would have been allowed as a deduction for capital cost allowance if this would have been the basis for the reassessment.

her being an employee of the Company such that the applicant can assert that Ms. Davis is an IC or alternatively an employee in the Amended Reply.[43] The applicant's approach accords with the principles in *Loewen*.

[89] Having regard to the criteria in section 54 of the *Rules* and the controlling principle and the conditions in subsection 152(9) of the *Act*, I find that the proposed amendments and the employment argument is permissible in that it assists the Court in determining the real question in controversy between the parties, will not result in an injustice to Ms. Davis that is non compensable in costs nor fails to serve the interests of justice. All of which will ensure clarity and certainty at trial and that the applicable provisions are canvassed in determining the question whether Ms. Davis is subject to taxation in Canada for earnings she received for services she provided to the Company in Canada during the relevant years.

VIII. Conclusion

[90] I conclude that the applicant has met the burden for justifying the proposed amendments that fall within section 54 of the *Rules* and the conditions in subsection 152(9) of the *Act* were satisfied to advance the employment argument. For these reasons, the Motion is allowed and the Court grants leave for the applicant to file the Amended Reply to the Notice of Appeal.

[91] Costs fixed at $1,000 shall be payable to the applicant by Ms. Davis forthwith in any event of the cause.

Signed at Ottawa, Canada, this 24th day of August 2023.

"K. Lyons"

Lyons J.

[43] In *RCI Environnement Inc. v R*, 2007 TCC 647, the taxpayer received $6 million under a settlement agreement arising from the termination of a non-competition agreement. The Crown argued that amount was business income and not a windfall. This Court permitted the Crown to make the alternative argument, and contradictory allegations in support, that a fraction of the amount paid gave rise to a capital gain or an eligible capital amount. Similar to the IC versus employee analysis, whether a taxable amount is received on account of income or on account of capital it is also a binary enquiry.

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