Docket: 2023-1744(IT)G

BETWEEN:

CHEVRON CANADA LIMITED,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Motion heard on September 5, 2024, at Calgary, Alberta

Before: The Honourable Justice Bruce Russell

Appearances:

Counsel for the Appellant:	Joanne Vandale
	Al Meghji
	Karen Perry
Counsel for the Respondent:	Carla Lamash
	Levi Smith

ORDER

IT IS ORDERED that in accordance with the accompanying Reasons for Order;

(a) the Respondent's motion pursuant to subsection 53(1) of the *Tax Court of Canada Rules (General Procedure)* (Rules) for an order that paragraphs 51, 52, 53 and 54 of the Notice of Appeal be struck out is granted;

(b) in accordance with Rule 53(1)(d), paragraphs 51, 52, 53 and 54 of the Notice of Appeal are hereby struck out;

(c) in accordance with Rules 4, 12(1) and 44(1)(b), the Respondent is allowed up to 45 days from the date of this Order to file and serve a Reply to the Notice of Appeal; and

(d) in accordance with Rule 147, costs of this motion are awarded to the Respondent in the lump sum amount of $7,500, plus disbursements.

Signed this 24th day of March 2025.

"B. Russell"

Russell J.

Citation: 2025 TCC 80
Date: 20250612
Docket: 2023-1744(IT)G

BETWEEN:

CHEVRON CANADA LIMITED,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

AMENDED REASONS FOR ORDER

Russell J.

I. Overview:

[1] The respondent, His Majesty (Crown), moves to strike paragraphs 51, 52, 53 and 54 pleaded in the Notice of Appeal of the appellant, Chevron Canada Limited (Chevron).

[2] These four paragraphs read as follows:

> 51. In April 2018, the CRA Appeals Division ("CRA Appeals") made a referral to the CRA Audit Division ("CRA Audit") to perform a review of the Feasibility Expenses and Representations Expenses.
>
> 52. In performing its review, CRA Audit concluded:
>
> > a. the documents reviewed gave no indication that Chevron had made a commitment to proceed with the Kitamat LNG Project when the Feasibility Expenses and Representation Expenses were incurred;
> >
> > b. the evidence did not support the view that the expenses were incurred to construct an asset after any commitment to proceed with the asset's construction had been made; and
> >
> > c. the amounts in question should be deductible on income account.

> 53. CRA Audit accordingly recommended that CRA Appeals accept all reclassified Feasibility Expenses and Representation Expenses, and allow the objections in respect of those expenditures in full.
>
> 54. Notwithstanding the recommendation by CRA Audit, CRA Appeals has not allowed the objections in respect of the Feasibility Expenses or the Representation Expenses.

[3] The paragraphs reflect alleged activity and views of Canada Revenue Agency (CRA) staff, in circumstances addressed below. For purposes of this motion the pleaded allegations are presumed to be true.

[4] The motion is brought pursuant to subsection 53(1) of the *Tax Court of Canada Rules (General Procedure)* (Rule 53(1)), 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.

II. Background:

[5] Chevron filed tax returns for its 2013 and 2014 taxation years per the federal *Income Tax Act* (Act), reporting "feasibility expenses" it had incurred in determining whether to proceed with developing a liquified natural gas facility. Chevron reported these as capital expenses. The Minister of National Revenue (Minister) assessed as filed, without audit.

[6] Subsequently, on October 25, 2021 and July 10, 2019 respectively, the Minister reassessed Chevron's 2013 and 2014 taxation years, regarding certain matters but not including classification of feasibility expenses (Reassessments).

[7] Chevron served a Notice of Objection respecting each of the two Reassessments, asserting in each that the feasibility expenses should be classified as current expenses. Chevron thus was objecting to its initial filing position.

[8] Accordingly, per subsection 165(3) of the Act the Minister commenced, via CRA, reconsideration of the two objected-to Reassessments of Chevron's 2013 and 2014 taxation years, respecting classification of the reported feasibility expenses.

[9] Paragraph 169(1)(b) of the Act allows the filing of a notice of appeal once 90 days have passed following service of a Notice of Objection pertaining to the particular assessment/reassessment. Here, with more than 90 days having so passed, and with the Minister's objections reconsideration process not concluded, Chevron filed its herein Notice of Appeal, appealing the two objected-to Reassessments, with inclusion of the four paragraphs sought to be struck.

[10] That filing ended the Minister's objections reconsideration process without its completion, which would have involved the Minister reaching a decision as to whether Chevron's Notices of Objection were well founded, and accordingly either confirming or reassessing the objected-to Reassessments.

[11] The CRA information in the four pleaded paragraphs sought to be struck derives from the uncompleted CRA objections reconsideration work.

[12] Chevron's source for the CRA information referenced in the impugned pleaded paragraphs is documentation CRA had shared with Chevron in keeping Chevron informed during the process of considering its objections to the Reassessments regarding classification of the feasibility expenses. Chevron has filed an affidavit in this motion that includes as exhibits much if not all of that shared documentation.

III. Parties' Positions:

[13] Chevron in its written submissions summarizes its position opposing this motion in four points as follow:

(a) there is no authority that the Minister's determinations regarding the feasibility expenses are irrelevant; and relevance and weight should be determined by the trial judge;

(b) the respondent Crown's concerns about discoveries are speculative, premature and based on allegations that there was no audit and no ministerial assumptions of fact;

(c) this motion is an attempt to cut off the taxpayer's right to discovery;

(d) the threshold for relevance at discovery is "the train of enquiry test". That low threshold has been met by the Minister's determinations which were documented and delivered to the appellant.

[14] As for the Crown, it asserts in its amended notice of motion that the impugned paragraphs, "put in issue the conduct of the Minister, which is beyond the jurisdiction of this Court. Pursuant to sections 169 and 171 of the…Act, this Court may only determine the validity or correctness of the assessments."

[15] The Crown states also in its amended notice of motion that the impugned paragraphs ought to be struck:

(a) per Rule 53(1)(a) – because they are likely to prejudice or delay the fair hearing of the appeal [and] likely to burden the parties with disputes on relevance in production of documents and completion of examination for discovery;

(b) per Rule 53(1)(b) – because they are frivolous and/or vexatious. The law is well settled that allegations respecting the conduct or mental processing of the Minister are not relevant to the disposition of this appeal. The Minister made no assumptions on the feasibility expenses. Therefore, inclusion of the allegations in the notice of appeal, serves no purpose, and adds no value;

(c) per Rule 53(1)(c) – because they are an abuse of process of the Court. The correctness of the assessment should be the only focus of the proceedings…; and,

(d) per Rule 53(1)(d) – because they disclose no reasonable grounds for the appeal.

[16] The Crown adds that as the factual allegations in the impugned paragraphs "do not relate in any way" to the correctness of the appealed Reassessments, and thus are irrelevant, it is unfair that they be raised.

IV. Analysis:

[17] What is the test for striking pleadings? In *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17, McLachlin, C.J.C. stated the "plain and obvious test" for striking a pleaded claim:

> A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action… Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial… (underlining added)

[18] Thus, the test for striking a pleading is that it must be plain and obvious that the pleaded claim discloses no cause of action, i.e. has no reasonable prospect of success.

[19] As well, the test for accepting an appealed assessment is of central importance. In *Ereiser v. Canada,* 2013 FCA 20, at para. 21, the Federal Court of Appeal stated that an order vacating an assessment is appropriate where it is found not valid or not correct. The term "valid" refers to "an assessment made in compliance with the procedural provisions of the…Act". The term "correct" refers to "an assessment in which the amount of tax assessed is based on the applicable provisions of the *Income Tax Act*, correctly interpreted and applied to the relevant facts." (underlining added)

[20] The parties concur that the basic issue of this appeal is, as is generally the case whether the appealed Reassessments are correct.

[21] The Crown submits that the conduct and mental processes of the Minister and of CRA officials functioning on the Minister's behalf, which processes are reflected in the four paragraphs sought to struck, are irrelevant in determining the correctness of assessments, here being the appealed Reassessments.

[22] The Crown cites authorities for that proposition. In *Hawkes v. R.*, 97 DTC 5060 (FCAD), the Federal Court of Appeal considered whether the Tax Court had rightly struck certain paragraphs of a notice of appeal. Paragraph 10, one of the struck paragraphs, stated:

> 10. By letter dated April 22, 1993 representatives of the Minister of National Revenue informed representatives of the Appellant that the Minister of National

> Revenue accepted the fact that amounts were expended by the Appellant to gain or produce income and, as such, no reassessment would be issued with respect to the amounts expended as pleaded in paragraph 6, herein.

[23] In finding paragraph 10 to have been rightly struck, Linden J.A. wrote (para. 11):

> 11. Paragraph 10 asserts the undisputed fact that the Victoria office of Revenue Canada advised these appellants on April 22, 1993 that the respondent would allow the deductions in question, apparently on the basis that the Edmonton office had allowed such deductions in respect of Dr. Revell. This was obviously inconsistent with the reassessments actually issued on July 19, 1993. Again the authorities are clear that it is only the final assessment which can be attacked and that interim opinions or even previous assessments, cannot be relied upon to establish the invalidity of the last assessment or reassessment provided the latter is made within the time allowed by the statute. Among other reasons, the proposition that the Minister is bound by earlier assessments (to say nothing of earlier statements of opinion by letter) would make meaningless the times allowed for reassessment by subsection 152(4) of the *Income Tax Act*. Therefore paragraph 10 does not in law allege any fact which could logically affect the validity of the reassessment here. (underlining added)

[24] Here the appellate court is clear that earlier assessments, and "to say nothing of earlier statements of opinion by letter" do not at all go to the "validity" (which term as used here I take as synonymous with "correctness") of the particular assessment.

[25] Also, *R v. Riendeau*, [1991] 2 C.T.C. 64 (FCAD) was cited, in which Stone J.A. of the Federal Court of Appeal wrote (paras. 3 and 4):

> 3. In the present case, the amount assessed remained the same throughout. What is disputed is that the assessments were originally said to have been made on the basis of repealed section 74(5) of the Act which, the appellant says, rendered the assessments invalid, notwithstanding that the Minister afterward corrected this mistake by confirming the assessments on the basis of sections 3 and 9 of the Act.
>
> 4. In our view, the Minister's mental process in making the assessment cannot affect the taxpayer's liability to pay the tax imposed by the Act itself. He may correct a mistake. The trial judge was right in rejecting the appellant's argument, and in determining that the Minister was entitled to confirm the reassessments in question. (underlining added)

[26] Of note here is Justice Stone's statement that, "the Minister's mental process in making the assessment cannot affect the taxpayer's liability to pay the tax imposed by the Act itself. [The Minister] may correct a mistake."

[27] In other words, whatever CRA – or the Minister - may say in the course of reaching the Minister's ultimate position is irrelevant. The Minister can correct a mistake in the process of reaching his/her ultimate position and any such interim mistake must have no significance. What counts is what is the ultimate position.

[28] That is so despite that that ultimate position now has to be expressed via the filing of a Reply in response to the Notice of Appeal, rather than via issuances of Notices of Confirmation or Reassessment in response to the served Notices of Objection.

[29] Regarding CRA specifically, in *Silicate Holdings Limited v. The Queen*, [2001] 2 C.T.C. 2222 (TCC), para. 13, Justice Beaubier of the Tax Court stated:

> In the course of argument, it became apparent that there are a number of categories on which the appellant seeks to examine in the examination for discovery, to which the respondent objects. These include:
>
> > 1. The opinions of various civil servants, as to the possible success of the assessment in litigation…
> >
> > 3. The opinions and discussions of various civil servants respecting amendments to section 17 of the Act…
> >
> > 8. Inter-office or civil servant memos respecting the above;
>
> In the Court's view, all of these matters are irrelevant to the assessment in issue, and the refusal to answer are affirmed. (underlining added)

[30] Here, the Court made clear that civil servants' opinions and memos regarding possible success of an assessment, which material the appellant sought for in discovery examination, "are irrelevant to the assessment in issue…".

[31] Consistent with all this, the Crown asserts (respondent's submissions, para. 17):

> …it is trite law that a Tax Court appeal is about the correctness of an assessment. It is not about the conduct of the Minister or how the Minister arrived at her conclusion.

[32] As well, the Crown cites *Zhou v. R.*, 2006 FCA 211. In *Zhou* the Federal Court of Appeal considered whether a CRA official's statements or actions pertaining to an assessment are relevant. In addressing this, the Court per Sharlow, J.A. stated (para. 5):

> 5. Dr. Zhou based part of her argument on settlement discussions that she says were part of the history of this case, but which the Judge did not permit to be made part of the record. The Judge was correct on this point. The task of the Judge was to determine, based on the evidence presented to him, whether the tax assessments under appeal are correct. The correctness of the assessments depends upon the facts relating to the transactions entered into by Dr. Zhou and her corporation, which must be determined based on evidence relating to those transactions. A tax official may have been prepared to discuss or even compromise a particular point, but such discussions cannot change the facts. For that reason, settlement discussions generally are not relevant in determining the correctness of a tax assessment. (underlining added)

[33] *Zhou* shows that "correctness of the assessment depends upon the facts…which must be determined based on evidence relating to the [subject] transactions." And, discussions with a tax official as to resolution of an assessment, "cannot change the facts".

[34] Turning to Chevron, its counsel states that it received considerable documentation from CRA in the course of the Minister's ultimately interrupted objections reconsideration process, regarding the then objected-to and now appealed Reassessments, and that this material should not be excluded from consideration in determining the correctness of the appealed Reassessments.

[35] Chevron cites *R. v. Perlman*, 2010 TCC 658, which concerned a self-represented taxpayer who had relied on a CRA letter stating determination of his residency but with CRA subsequently changing its position. Justice Boyle of the Tax Court observed that such changes:

> …will not generally bind the Crown…but CRA determinations such as these certainly hold a certain persuasive value and, when the CRA chooses to resile from them, call for a sound explanation not a mere dismissal as musings.

[36] Further, in its written submissions (para. 39), Chevron cites the "train of inquiry" test as being the standard for relevance on discovery examinations. *Her Majesty v. Lehigh Cement*, 2011 FCA 120 is cited, wherein at para. 34 the Federal Court of Appeal states:

> …a [discovery] question is relevant when there is a reasonable likelihood that it might elicit information…which fairly might lead to a train of inquiry that may either advance the questioning party's case or damage the case of its adversary.

[37] Also, Chevron cites *Choptiany v. R.*, 2022 TCC 112 and *HSBC Bank Canada v. R.*, 2010 TCC 228 – both relating to admission of documents - for the proposition that the Minister's file relating to the issue in dispute is *prima facie* relevant to the appeal.

[38] I turn to Chevron's four-point summary of its opposition to this motion, noted above. The first point is the assertion that there is no authority that the alleged facts of the Minister set out in the impugned paragraphs are irrelevant; and also that relevance and weight should be determined by the trial judge.

[39] In response I reference the above-noted three Federal Court of Appeal decisions of *Hawkes*, *Riendeau* and *Zhou*, and the *Silicate Holdings* Tax Court decision. They provide relatively clear authority that in this matter the alleged facts stated by CRA officials, set out in the impugned paragraphs, are irrelevant as they do not at all go to the correctness of an assessment.

[40] The law is what determines an assessment, applied to proven facts that are relevant to the law being applied. Facts need to be proven in court. Pleaded ministerial assumptions of facts are presumed correct, subject to being proven otherwise on a balance of probabilities, although that is not what we are addressing here where, pending resolution of this motion, no Reply by the Crown has yet been filed.

[41] Chevron's remaining three summarized positions are all discovery related. The first is that "the Crown's concerns about discoveries are speculative, premature and based on allegations that there was no audit and no ministerial assumptions of fact".

[42] The Crown's concerns being referred to are that if the impugned paragraphs are not struck, they are "likely to burden the parties with disputes on relevance in production of documents and completion of examination for discovery."

[43] The second of the remaining three Chevron summarized submissions is that "this motion is an attempt to cut off the taxpayer's right to discovery".

[44] Chevron's final summary submission is also a discovery examination proposition - that, "the threshold for relevance at discovery is 'the train of enquiry test', [and] that low threshold has been met by the Minister's determinations which were documented and delivered to it."

[45] To these three discovery examination submissions, I remind that this is a motion to strike pleadings, not a motion to address disputes as to discovery examination questions and documentary productions. For example, the "train of enquiry" test applies to documentary production, not as to whether a pleading should be struck.

[46] This motion will be determined on the recognized criteria for striking pleadings, as discussed above. Both parties' discovery examinations should be conducted only in respect of matters that are rightly before the Court.

[47] Chevron refers to the CRA statements in the impugned four paragraphs sought to be struck as appearing in documentation CRA had shared with it. This occurred in the course of CRA's uncompleted process of considering Chevron's objections. However, application of the test for striking pleadings in no way turns on how or in what quantity Chevron obtained CRA documented information reflected in the pleadings sought to be struck.

[48] Should this motion be determined by a trial judge rather than a motions judge as urged by the appellant? I think not. At this early stage of the litigation it is "plain and obvious" that the facts asserted in the impugned paragraphs relate to the mental processes of CRA on behalf of the Minister in the course of considering Chevron's Notices of Objection. In accordance with the jurisprudence cited by the Crown - mostly appellate - such statements are irrelevant for purposes of determining the fundamental issue, being correctness of the two appealed Reassessments.

[49] As noted above, the test for striking pleadings is that it must be "plain and obvious" that the content of the pleadings sought to be struck - i.e. what CRA officials thought and did in the unfinished course of their consideration of the Notices of Objection - is irrelevant to judicial determination of the correctness of the appealed Reassessments. Rather, the governing factors as to correctness of the appealed Reassessments are the law and application of that law to relevant facts proven at trial.

[50] For the foregoing reasons, I consider that it is plain and obvious that the subject four pleaded paragraphs disclose no reasonable grounds of appeal, i.e. no cause of action or reasonable prospect of success.

[51] Chevron expressed much concern about the scope of its right of discovery examination in this matter should the motion to strike be granted.

[52] However, in granting this motion I do not anticipate that discovery examinations relating to the issue of correctness of the appealed Reassessments would at all be curtailed.

[53] Based on the foregoing reasons, pursuant to Rule 53(1)(d) I will grant the motion, with costs, and order that paragraphs 51, 52, 53 and 54 of the Notice of Appeal be struck out, with costs, and with leave for the Reply to be filed within the period of 45 days from the date of the sought Order.

These Amended Reasons for Order are issued in substitution of the Reasons for Order dated March 24, 2025 in order to include a citation number underscored on page 1 hereof.

Signed this 12th day of June 2025.

"B. Russell"

Russell J.

CITATION:	2025 TCC 80
COURT FILE NO.:	2023-1744(IT)G
STYLE OF CAUSE:	CHEVRON CANADA LIMITED AND HIS MAJESTY THE KING
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	September 5, 2024
AMENDED REASONS FOR ORDER BY:	The Honourable Justice Bruce Russell
DATE OF ORDER:	March 24, 2025

APPEARANCES:

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