Federal Court of Appeal | Cour d'appel fédérale

Date: 20230818

Dockets: A-327-21
A-328-21
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Citation: 2023 FCA 178

CORAM: **WOODS J.A.**
LASKIN J.A.
MONAGHAN J.A.

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

JOHN PRESTON, MONIKA PRESTON and THE PRESTON FAMILY TRUST II

Respondents

Heard at Toronto, Ontario, on January 18, 2023.

Judgment delivered at Ottawa, Ontario, on August 18, 2023.

REASONS FOR JUDGMENT BY: MONAGHAN J.A.

CONCURRED IN BY: WOODS J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

MONAGHAN J.A.

[1] Should an assumption in a reply to a notice of appeal in the Tax Court of Canada be struck out solely on the basis that it is a statement of mixed fact and law? In *Preston Family Trust II v. The Queen* (2021 TCC 79 *per* Spiro J.), the Tax Court appears to have concluded it should. The Crown has appealed that decision, arguing the Tax Court erred in doing so. I agree.

Before I explain why, let me briefly summarize the context in which the Tax Court's decision arose.

I. The Motion before the Tax Court

[2] In 2018, the Minister of National Revenue (Minister) reassessed each of John Preston, Monika Preston, and The Preston Family Trust II (Trust), the respondents in this appeal, under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) in connection with transactions undertaken in 2014. In February 2020, each respondent filed a notice of appeal in the Tax Court, following which the appellant filed a reply. As they were entitled to do, each respondent subsequently filed an answer.

[3] The *Tax Court of Canada Rules (General Procedure)*, S.O.R./90-688a (Rules) prescribe the contents of the notice of appeal and the reply. Rule 49(1)(*d*) requires that the findings or assumptions of fact made by the Minister when making the assessment giving rise to the appeal be stated in the reply. The taxpayer usually has the onus of disproving the Minister's assumptions of fact (*Orly Automobiles Inc. v. Canada*, 2005 FCA 425 at para. 20, citing, among other cases, *Anderson Logging Co. v. The King* (1924), [1925] S.C.R. 45, [1925] 2 D.L.R. 143 and *Pollock v. Canada (Minister of National Revenue)*, [1993] F.C.J. No. 1055, 161 N.R. 232 (F.C.A.). See also *Canada v. Anchor Pointe Energy Ltd.*, 2007 FCA 188, leave to appeal dismissed 32157 (17 January 2008) at para. 35 [*Anchor Pointe 2007*]; and *Goheen v. Canada*, 2019 FCA 104 at para. 15).

[4] In March 2021, the respondents brought motions in writing before the Tax Court to strike out certain assumptions in the replies pursuant to Rule 53(1) asserting they were conclusions of law or mixed fact and law, not assumptions of fact, and on that basis should be struck out. In doing so, the respondents relied principally on *Canada v. Anchor Pointe Energy Ltd.*, 2003 FCA 294 [*Anchor Pointe*] and *Canadian Imperial Bank of Commerce v. Canada*, 2013 FCA 122 [*CIBC*].

[5] Rule 53(1) provides that a pleading may be struck out "on the ground that the pleading…

(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 [Tax] Court; or

(d) discloses no reasonable ground for appeal or opposing the appeal."

The respondents did not specify which part of Rule 53(1) they relied on, but the Tax Court assumed it was Rule 53(1)*(a)*.

[6] Beyond quoting paragraphs 25 and 26 from *Anchor Pointe*, and stating that pleading conclusions of law or mixed fact and law "contravene the basic rules of pleading", the respondents' written submissions offered only one justification for striking out the pleadings. "[T]he Impugned [assumptions] are all conclusions of law or of mixed fact and law without identifying the factual basis on which the [Minister] could reach her conclusions" such that they "do not enable the [respondents] to know the case to be met" (respondents' amended written submissions to the Tax Court at para. 32 (RWS)).

[7] The appellant conceded that two paragraphs in issue should be struck out and, to address the respondents' concern, proposed amendments to two others seeking leave to amend them. With those exceptions, the appellant submitted that the challenged pleadings should not be struck out, primarily on the basis that they were factual assumptions, and that the motion should be dismissed. Alternatively, in the event the Tax Court ordered any other paragraphs struck out, the appellant sought leave to amend the replies.

[8] In paragraph 25 of *Anchor Pointe*, this Court said "legal statements or conclusions have no place in the recitation of the Minister's factual assumptions" because "[t]he implication is that the taxpayer has the onus of demolishing the legal statement or conclusion". In this case, the Tax Court said "[f]or the same reason, the [Crown] may not plead a conclusion of mixed fact and law as an assumption of fact" (Reasons at para. 20). In its view, doing so "is tantamount to the [Crown] telling the [taxpayer]: 'The onus is on you to disprove the Minister's theory of the case including its factual and legal elements.' As we have already seen, this constitutes improper pleading—the taxpayer has no onus to disprove any of the legal elements of the Minister's theory of the case" (Reasons at para. 26 [emphasis in original]).

[9] The Tax Court determined that each of the impugned assumptions was a statement of mixed fact and law and on that basis ordered all but two of them "struck from the assumptions paragraph of the Reply with leave to amend to include them in the Amended Reply as reasons upon which [the Crown] intends to rely" (see Tax Court orders at para. 2). The Tax Court agreed that the appellant could maintain two amended paragraphs as assumptions, but rejected the proposed amendments and instead ordered how those assumptions should be amended.

[10] Although the Tax Court assumed the respondents relied on Rule 53(1)*(a)*, it did not consider whether retaining the impugned assumptions as such might prejudice the respondents or delay the fair hearing of their appeals. The only relevant consideration from its perspective was that the assumption was a statement of mixed fact and law. As I explain below, not all assumptions in the nature of mixed fact and law are prejudicial to the taxpayer.

[11] Although the Tax Court's reasons refer only to the reply to the Trust's notice of appeal, they apply equally to the other two replies (Reasons at para. 24). The Tax Court issued separate orders in each appeal specifying the assumptions to be plead in the amended reply, replicating the unchallenged assumptions and the two amended assumptions in a schedule. It ordered the appellant to file and serve amended replies within 30 days and gave the respondents permission to file amended answers following service of the amended replies.

II. The Appeal

[12] A decision to strike out a pleading is a discretionary decision. Therefore, the appellate standard of review applies and this Court's intervention is justified only where the Tax Court made an error of law or a palpable and overriding error on a question of fact or mixed fact and law (*Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras. 66, 79).

[13] The Tax Court's reasons addressed 30 assumptions, many of which appear in the three replies. However, this consolidated appeal is limited to assumptions regarding the fair market

value of property, assumptions about the identity of beneficiaries of the Trust, and assumptions that use the phrase "received…for the benefit of".

[14] The appellant says that pleadings should be struck out only in the most plain and obvious cases, that constraints around the Minister's assumptions do not replace the test for striking out pleadings, and that the Tax Court did not consider whether it was plain and obvious that the assumptions as plead prejudice the respondents or would delay the fair hearing of the appeals. Moreover, says the appellant, the Tax Court should have granted leave to amend the replies.

[15] The respondents say the Tax Court made no error. While conceding the Tax Court did not use the phrase "plain and obvious" or the word "prejudice", they submit that the Tax Court's reasons indicate that it concluded that, as assumptions, the pleadings would prejudice the respondents because, as assumptions, they ask the taxpayer to disprove both legal and factual elements of the Minister's theory of the case. They also submit that the Tax Court granted the appellant leave to amend the replies.

III. Analysis

A. *Striking Out Pleadings and the Tax Court Decision*

[16] The onus to establish that a pleading should be struck out rests with the person seeking to strike it out (*Erasmus (W.) v. Canada (No. 1)* (1991), 45 D.T.C. 5415, [1992] 2 C.T.C. 20 (F.C.T.D.); *Kopstein v. The Queen*, 2010 TCC 448 [*Kopstein*]; *Heron v. The Queen*, 2017 TCC 71, aff'd 2017 FCA 229, at para. 11; *FU2 Productions Ltd. v. The King*, 2022 TCC

148 at para. 27). The burden has been described as a heavy one (*Status-One Investments Inc. c. La Reine*, 2004 TCC 473 at para 11, citing *Morris v Canada*, [1992] T.C.J. No. 787, 93 D.T.C. 316 (T.C.C.), aff'd *Canada v. Status-One Investment Inc.*, 2005 FCA 119). In my view, the respondents here failed to meet their onus.

[17] Moreover, while the Tax Court assumed the respondents relied on Rule 53(1)*(a)*, it did not then consider whether the assumptions, if retained as such, would be prejudicial or delay the fair hearing of the appeal. Rather, it is evident that the Tax Court concluded that no statement of mixed fact and law can stand as an assumption (Reasons at paras. 1, 26, 28, 33, 36, 40, 42, 44, 46, and 47).

[18] I disagree. There is no principle of law that a statement of mixed fact and law cannot stand as an assumption. Rule 53(1) contains the test for striking out pleadings and the Tax Court did not apply that test, and so erred in law.

[19] Notably, in this case, the Tax Court's order did not strike out the assumptions; it merely ordered them moved to another part of the replies. The only inference that can be drawn is that the Tax Court concluded that leaving them as assumptions placed an onus on the respondents that they would not otherwise bear. But, that is not so.

[20] An assumption that is a statement of mixed fact and law does not put any additional onus on the taxpayer. This is clear. As explained in *Goldman v. Minister of National Revenue*, [1951] Ex. C.R. 274, [1951] C.T.C. 241, cited by the Tax Court, "when the validity of the

assessment is attacked in point of law…there is really no onus on either party, for once the facts have been established, the responsibility for determining the validity of the assessment as a matter of law is solely that of the court" (Ex. C.R. at 281-82). As observed in *Kopstein*, "[i]n assessing whether it is appropriate to strike a paragraph…one must bear in mind the practical effect of the paragraph" and "an invalid or irrelevant assumption does not cast an onus on [a taxpayer] just because it was pleaded" (at paras. 67-68). See also *Chad v. The Queen*, 2021 TCC 45 at para. 44; *Gerbro Holdings Company v. Canada*, 2016 TCC 173 at para. 67, aff'd *Canada v. Gerbro Holdings Company*, 2018 FCA 197.

[21] The respondents complain that unless the facts are extricated from the statements of mixed fact and law, they do not know the case they have to meet. But, that is clearly not so. Reading the notices of appeal, the replies and the answers, there is no doubt where the issues lie and what is in dispute. Indeed, the parties seem to largely agree about what happened; the dispute centers on the consequences.

[22] In light of the reliance the respondents and the Tax Court placed on *Anchor Pointe* and *CIBC*, let me look at what they said about statements of mixed fact and law as assumptions.

(i) Anchor Pointe

[23] *Anchor Pointe* was an appeal of a Tax Court decision (*Anchor Pointe Energy Ltd. v. The Queen*, 2002 D.T.C. 2071, [2002] 4 C.T.C. 2633 [*Anchor Pointe TCC*]) striking out pleadings in the reply that were said to be assumptions on which the assessments in issue were based. They were not. The Tax Court concluded that they should be struck out because "[i]t is

not true that the ‘in assessing, the Minister assumed’ the facts the Attorney General stated the Minister assumed” and to state otherwise is “an abuse of the process of the [Tax] Court” (*Anchor Pointe TCC* at para. 27).

[24] Thus, the Tax Court made a finding that the conditions of Rule 53(1)*(c)* were met—the pleading was not true and so constituted an abuse of process. On appeal, this Court agreed that “[i]t is misleading for the Crown to say that the Minister made certain assumptions in reassessing, when those assumptions were made in confirming a reassessment” (*Anchor Pointe* at para. 22) and so agreed the Tax Court did not err in striking out the assumptions.

[25] However, in *Anchor Pointe TCC*, the Tax Court gave a second reason for striking out one of the assumptions—that it was a “[conclusion] of law that has no place among the Minister’s assumed facts” (*Anchor Pointe TCC* at para. 28). As I note above, this Court agreed. But, it disagreed with the Tax Court’s characterization of the assumption as a conclusion of law, stating (at para. 26):

> However, the assumption in paragraph 10(z) can be more correctly described as a conclusion of mixed fact and law. A conclusion that seismic data purchased does not qualify as CEE within the meaning of paragraph 66.1(6)(*a*) involves the application of the law to the facts. Paragraph 66.1(6)(*a*) sets out the test to be met for a CEE deduction. Whether the purchase of the seismic data in this case meets that test involves determining whether or not the facts meet the test. The Minister may assume the factual components of a conclusion of mixed fact and law. However, if he wishes to do so, he should extricate the factual components that are being assumed so that the taxpayer is told exactly what factual assumptions it must demolish in order to succeed. It is unsatisfactory that the assumed facts be buried in the conclusion of mixed fact and law.
>
> [emphasis added]

[26] It is important to read this passage in light of the text of the relevant pleading: “the seismic data purchased … does not qualify as a Canadian Exploration Expense … within the meaning of s. 66.1(6)(*a*) of the *Income Tax Act*” (see portions of reply quoted in *Anchor Pointe* at para. 8).

[27] First, while a statement of mixed fact and law, it is devoid of any facts; it is entirely conclusory. As the quoted passage notes, the pleading merely states that the seismic data purchased does not meet the legal test (definition) in the *Income Tax Act*. It pointedly does not tell the taxpayer what facts led the Minister to conclude that the legal test was not met or what factual elements of the definition of Canadian exploration expense are in dispute.

(ii) CIBC

[28] *CIBC* was an appeal of two Tax Court decisions (*Canadian Imperial Bank of Commerce v. The Queen*, 2011 TCC 568 [*CIBC TCC*] and *Canadian Imperial Bank of Commerce v. The Queen* 2012 TCC 237 *per* Rossiter A.C.J.). The first addressed the taxpayer’s motion to strike out the reply; the second addressed the amended reply.

[29] The reasons in *CIBC* largely concern a paragraph in the reply that the Tax Court did not strike out because it was not satisfied that it disclosed no reasonable basis for defending the assessments in issue. This Court disagreed and accordingly determined that the pleading should be struck out. That analysis in *CIBC* (at paras. 24-81) is of no relevance here.

[30] However, the Tax Court ordered a number of other pleadings or parts of pleadings struck out, on several different grounds as detailed in an 11-page table appended to its reasons. On appeal by the Crown regarding certain assumptions, this Court said "the statement of factual assumptions must contain no statements of law, and where the assessment under appeal is based on a conclusion of mixed fact and law, the factual components must be extricated and stated as factual assumptions" (*CIBC* at para. 92, citing *Anchor Pointe* at para. 25).

[31] Again, this Court said statements of law should not be in pleadings as assumptions and emphasized that the factual elements in a statement of mixed fact and law should be extricated. But, it did not go so far as to state that *any* conclusion of mixed fact and law that appears as an assumption must be struck out for that reason alone.

[32] To the contrary, this Court expressly acknowledged that "a deficient pleading" may be allowed "to stand if, for example, the facts are relatively simple, there is little or no debate about the applicable legal principles, or there is little risk that the other party will be prejudiced or will be obliged to waste resources": *CIBC* at para. 94. In other words, before striking out a pleading (including as an assumption), the Tax Court must consider whether it is appropriate to do so in the circumstances having regard to the jurisprudence and Rule 53(1). Under Rule 53(1)*(a)* that includes asking whether there is risk of prejudice or delay in the fair hearing of the appeal if the assumption is permitted to stand.

[33] In *CIBC*, the assumption that exemplified an inappropriate conclusion of mixed fact and law shared the flaws of the assumption addressed in *Anchor Pointe*. The assumption in question

stated “the Settlement Payments were not expenditures incurred by the [taxpayer] for the purpose of earning income”. This Court described it as “nothing more than an uninformative paraphrase of paragraph 18(1)(a)” of the *Income Tax Act* (*CIBC* at para. 93). Like the pleading in *Anchor Pointe*, it was entirely conclusory. It did not tell the taxpayer the factual basis for the Minister’s conclusion that the expenditures were not incurred for the purpose of earning income.

[34] In other words, while the assumptions in both *Anchor Pointe* and *CIBC* were statements of mixed fact and law, that alone was not the problem. In both cases, the assumption was a conclusory statement that a legal test specified in the *Income Tax Act* was not met without providing the factual underpinnings for that conclusion. In both, the Tax Court made a specific finding that the assumption in issue was prejudicial, likely to result in delay, or an abuse of process.

[35] Moreover, in both, there were other reasons for striking out pleadings. In *Anchor Pointe TCC*, the Tax Court struck out pleadings that were not true and thus an abuse of process. Even there, the Tax Court said ordinarily it would leave an application to strike out pleadings to the trial judge (*Anchor Pointe TCC* at para. 17). In *CIBC TCC*, the Court dealt with more than 100 pleadings in an 83-page reply, ordering various paragraphs or parts of them struck out for a variety of reasons. Importantly, in neither case was the motion to strike out pleadings successful solely because an assumption was a statement of mixed fact and law.

[36] Not all assumptions of mixed fact and law are prejudicial or likely to lead to delay or an abuse of process. Not all leave the taxpayer uninformed about the facts on which the Minister

relies. As expressly recognized in *CIBC*, a statement of mixed fact and law may stand as an assumption if there is no prejudice, no debate about the legal principles, or the facts are simple—and, I would add, if letting it stand better serves the trial process.

[37] A motion to strike is an interlocutory and discretionary decision. In addition to deciding that Rule 53 has been satisfied, before exercising its discretion to strike out a pleading, the Tax Court must consider the need to facilitate "the just, most expeditious and least expensive determination of" the matters in dispute (Rule 4(1), see also Rule 7). In exercising its discretion, it should consider whether there are other ways to address any perceived deficiencies in the pleadings.

[38] First, the trial judge is often in a better position to decide what effect assumptions should be given (*Kossow v. Canada*, 2009 FCA 83 at paras. 20-23 [*Kossow*], citing *Mungovan v. The Queen*, 2001 TCC 568 at para. 10). The trial judge, "[h]aving the benefit of all evidence, … will be able to appreciate the fairness of the assumptions and provide the necessary relief should it turn out that they work unfairly to the detriment of the [taxpayer]" (*Kossow* at para. 23).

[39] In general, "a motions judge should be very cautious about categorizing an allegation and deciding to strike part of a pleading as a result. Unless it is clear-cut, it is generally appropriate to leave questions as to the category of an allegation and… the consequences that may arise to the trial judge" (*Kopstein* at para. 23). Deficiencies can be addressed in discovery or through a demand for particulars (*Kopstein* at paras. 63-65; *Bemco Confectionery and Sales Ltd. v.*

The Queen, 2015 TCC 48 at para. 49, aff'd *Bemco Confectionery and Sales Ltd. v. The Queen*, 2016 FCA 21).

[40] In this case, rather than ask itself whether the particular assumption as written was prejudicial or would delay the fair hearing of the appeal as required by Rule 53(1)*(a)*, the Tax Court only explained why it was a statement of mixed fact and law. Further, the Tax Court did not consider whether leaving the assumptions as is would better serve the trial process. In my view, the Tax Court therefore erred in law—it did not apply the correct legal test.

[41] It is telling that the Tax Court did not strike out the pleadings entirely; it only ordered them moved to another part of the reply. I am unable to discern any useful purpose served by moving the assumptions in these appeals. Moreover, I disagree that the Minister cannot assume the fair market value of property.

[42] I turn now to the assumptions in issue in this appeal.

B. *Assumptions in issue on appeal*

(i) Assumptions as to fair market value

[43] In reassessing the Trust, the Minister assumed that:

> on September 25, 2014… the fair market value ("FMV") of the [property] received by Mr. and Mrs. Preston was $75,511,267, comprised of the FMV of the Holdco shares of $67,979,759 and the FMV of the Partnership interest of $7,531,508.

[44] On their motion, the respondents submitted this allegation was advanced by way of argument and is a question of mixed fact and law but that no facts were raised by the Minister to support that conclusion. They did not otherwise elaborate on what was objectionable.

[45] The appellant thought the respondents' concern was the fair market value aspect of the assumption. Consequently the appellant said that although the judge is required "to apply the legal definition of fair market value to the facts…the factual component is dominant" and "appellate review of fair market value determinations is seen as chiefly factual" (appellant's written submissions on motion to the Tax Court at para. 12 (AWS)).

[46] The Tax Court's focus was the same: fair market value has a legal meaning. After referring to *Henderson Estate v. Canada (Minister of National Revenue)* (1993), 73 D.T.C. 5471 at 5476, [1973] C.T.C. 636 at 644 (FC) as "[t]he most frequently cited judicial meaning of 'fair market value' in the tax context", the Tax Court stated that "[b]y applying the legal meaning of "fair market value" to certain assumed facts, the Minister arrived at a conclusion of mixed fact and law" (Reasons at paras. 39-40). Accordingly, the Tax Court concluded the pleading could not remain as an assumption, and instead should be a reason for the assessment.

[47] In my view, this is incorrect. A statement that an identified property has a particular fair market value at a particular point in time is an assumption (or finding) of fact, notwithstanding that fair market value has a legal definition. Fair market value is predominantly factual (*Canada (Attorney General) v. Nash*, 2005 FCA 386 at para. 10; *Roher v. Canada*, 2019 FCA 313 at para. 22; *Atlantic Packaging Products Ltd. v. Canada*, 2020 FCA 75 at para. 17).

[48] As the Tax Court itself recognized, there is no dispute about the legal meaning of fair market value. The Tax Court did not suggest what facts should or could be extricated or how any failure to extricate them was prejudicial. The respondents' submissions to the Tax Court do not mention fair market value, never mind any missing facts. And, before us they were unable to identify any underlying fact they needed or that might have been plead to help them. All the facts relevant to valuing property owned by the Trust are presumably entirely within the Trust's knowledge. The rationale for permitting the Minister to make assumptions is exactly that—the taxpayer knows the facts.

[49] It appears from the respondents' answers to the replies that their real concern with the assumption was the words "received by Mr. and Mrs. Preston". As I understand it, the parties agree that the Trust transferred the shares and partnership interest but disagree about who received that property and in what capacity. Unfortunately, while the respondents raised this concern in their answers, they did not in their submissions on the motion and it was irrelevant to the Tax Court's decision. The Tax Court's sole rationale for striking out the paragraph as an assumption is that fair market value has a legal meaning. This is a clear error.

[50] Even if the respondents had made their concern clear, that would not end the matter. The Tax Court would need to consider whether the phrase was prejudicial or risked delay and, if so, how it should be addressed. Should it be left to the trial judge? Alternatively, should the appellant be granted leave to amend it, perhaps by replacing "received by Mr. and Mrs. Preston" with "transferred by the Trust" or by limiting the paragraph to the assumed fair market value of the property on the relevant date?

[51] A pleading generally should not be struck out without leave to amend unless any defect "cannot be cured by amendment" (*Collins v. Canada*, 2011 FCA 140 at para. 26, citing *Simon v. Canada*, 2011 FCA 6 at para. 8. See also *Sweet v. Canada*, [1999] F.C.J. No. 1539, 249 N.R. 17 (F.C.A.) [*Sweet*] at para. 21; *Johnson v. The Queen*, 2022 TCC 31 at para. 8; *Hillcore Financial Corporation v. The King*, 2023 TCC 71 at para. 35).

[52] To summarize, an assumption that a property or service has a particular fair market value is an entirely appropriate assumption of fact. In my view, the Tax Court erred in ordering that assumption moved to the reasons on the basis that fair market value has a legal meaning.

(ii) Assumptions regarding beneficiaries

[53] In their notices of appeal, the respondents asserted as facts that the beneficiaries of the Trust were Mr. and Mrs. Preston and Mr. Preston's issue and that, on September 25, 2014, Mr. and Mrs. Preston validly assigned their capital interests as beneficiaries to a corporation (ULC) of which they were the shareholders.

[54] The reply said that, in reassessing the Trust, the Minister assumed:

> (h) at all material times, the [Trust's] beneficiaries were Mr. Preston, Mr. Preston's spouse (Ms. Preston), and Mr. Preston's issue (collectively, "Beneficiaries").
>
> …
>
> (k) the [Trust's] beneficiaries could only be natural persons.
>
> (l) the [Trust's] beneficiaries could not be corporations.

> …
>
> (w) after the Assignment, Mr. and Ms. Preston remained the income and capital beneficiaries of the [Trust].
>
> …
>
> (aa) ULC was not a beneficiary of the [Trust].

[55] The respondents sought to strike out these assumptions on the basis that they are conclusions of law or mixed fact and law. These are the only assumptions the respondents address in any detail in their submissions to the Tax Court—addressing them together over several pages.

[56] While the respondents objected to the phrase "at all material times", submitting that the appellant "did not provide or extricate any factual assumptions in support of that conclusion, as required by *Anchor Pointe*" (RWS at para. 14), the Tax Court did not engage with this issue. Rather it focussed solely on the use of the term "beneficiary".

[57] In their submissions, the respondents said that whether a person is a beneficiary of a trust must be determined under both common law principles and certain rules in the *Income Tax Act*. They cite the *Income Tax Act* definitions and claim those definitions bring persons who might not be beneficiaries under the common law within the meaning of beneficiary. They then assert that, "in concluding that at all material times the only beneficiaries of the [Trust] were John and Monika Preston (and therefore, not ULC), the [Minister] assumed no facts to support her conclusion that ULC did not meet the test under….the [*Income Tax Act*] to be included as a beneficiary of the [Trust] following the assignments of the capital interests, nor any facts to

support her conclusion that [the provisions of the *Income Tax Act*] otherwise did not apply to ULC" (RWS at para. 21).

[58] The appellant's submissions say that whether a person is a beneficiary of a trust is a question of fact, pointing out that, in the replies, the assumptions state that the ULC was not a beneficiary (as a fact) and the reasons explain why (AWS at para. 7).

[59] Although not described this way by the respondents, the Tax Court analyzed assumptions (h), (w) and (aa) under the heading "John and Monika Preston continued as beneficiaries of the Preston Family Trust even after they assigned their capital interests in the Preston Family Trust to the ULC and the ULC never became a beneficiary of the Preston Family Trust". It analyzed assumptions (k) and (l) under the heading "Who could or could not have been beneficiaries of the Preston Family Trust".

[60] Consistent with the heading it chose, the Tax Court had the following to say about assumptions (h), (w) and (aa) (Reasons at para. 25):

> The Minister's theory of assessment, and the [Minister's] theory of the case, is that John and Monika Preston continued as beneficiaries of the Preston Family Trust even after having assigned their capital interests in that trust to the ULC. On the same theory, the ULC never became a beneficiary of the Preston Family Trust. Each aspect of this theory reflects a conclusion of mixed fact and law. Indeed, the [appellant] says that the "submission" that the ULC was not a beneficiary is "both a factual assumption and a legal argument".

[61] As to assumptions (k) and (l), the Tax Court described them as "another way of saying the law restricts potential beneficiaries of the Preston Family Trust to a certain group" and that

"[l]imiting the application of this legal conclusion to the Preston Family Trust…does not make it an assumption of fact" (Reasons at para. 28).

[62] In my view, in doing so, the Tax Court is taking a group of assumptions and drawing a conclusion from them, rather than focussing on the language of the assumptions and on any risk of prejudice or delay. Notably, the Tax Court did not consider what the respondents conclude qualifies as a fact for purposes of their notice of appeal (i.e., the *beneficiaries* of the Trust were two *non-residents*, John Preston and Monika Preston; on September 25, 2014, each of the Prestons *validly* assigned their capital interest as *beneficiaries* of the Trust to the ULC), but as a statement of mixed fact and law in the reply (*at all material times* the Prestons were *beneficiaries* of the Trust and ULC was not a *beneficiary*).

[63] The Trust deed defines beneficiary "as any of John, Monika (so long as she remains the spouse of John), and John's issue" (Mr. Preston's notice of appeal at para. 15 (NOA)). Mr. Preston explains that "[a]ccording to the CRA, because the ULC was not named as a beneficiary of the Trust under the Trust Deed, it was not a beneficiary within the meaning of subsection 108(1) of the [*Income Tax Act*]" (NOA at para. 36). Again, that may well be the Minister's theory of the assessment, but that is not what the assumptions say.

[64] The assumptions do not refer to the *Income Tax Act* or the common law meaning of beneficiary. In contrast, under the heading "Statutory Provisions, Grounds Relied On and Relief Sought", the replies explain that the "ULC was not, nor could be, a beneficiary of the [Trust]

within the meaning of the … [Income Tax Act]" because "[i]t did not have any right as a beneficiary under the Trust Deed" (reply to NOA at para. 13).

[65] Obviously, good pleadings demand precision. I accept that these assumptions do not specify in what sense beneficiary is used—the common law meaning, the Trust deed definition, the *Income Tax Act* meaning or some other meaning.

[66] However, fatally in my view, the Tax Court does not identify any prejudice arising from these assumptions as written. And so, I ask myself where is the prejudice?

[67] To the extent there are legal conclusions in these assumptions, they do not place any onus on the respondents. This is clear.

[68] Moreover, there is no doubt that the Trust deed, the trustees' resolutions and the other documents relevant to the transactions in issue will be in evidence before the Tax Court. As a practical matter, once they are, they will speak for themselves and the trial judge will decide on their legal effect with the benefit of the arguments advanced by the respondents and the appellant. Would stating that the Trust Deed defines the beneficiaries as a particular group of Preston family members limited to natural persons and that ULC is not a natural person provide the respondents with any better information about the case they have to meet or the facts underlying the Minister's assessment? I do not see how.

[69] They already know that is the basis of the Minister's position, as they themselves describe in the notices of appeal. Indeed, there is no doubt that the respondents understand the case they have to meet. In each of their answers, they devote two full pages to explaining why the ULC is a beneficiary for purposes of the *Income Tax Act* regardless of what the Trust deed might say. They know what "at all material times" means in the context of their appeals. There is no mystery and seemingly little dispute concerning the relevant facts. The real dispute is about the effect and consequences of those facts under the *Income Tax Act*.

[70] Thus, the respondents have not shown any prejudice or merit to their complaint about these assumptions. In my view, the Tax Court's order that these pleadings be moved from the assumptions to the reasons served no useful purpose.

(iii) Assumptions using the phrase "received…for the benefit of"

[71] Three assumptions in the replies state that ULC received certain property or amounts for the benefit of Mr. and Mrs. Preston. The respondents submitted these assumptions should be struck out, describing them as "merely assertions of the [Minister's] conclusions to questions of mixed fact and law" and asserting that "no facts [were] raised by the [Minister] to reach such conclusions nor has the [Minister] extricated any facts from such conclusions" (RWS at para. 36).

[72] The Tax Court treated assumptions using the phrase "received… for the benefit of" as describing the beneficial owner of the property. The assumptions do not use the expression

beneficial owner and the respondents did not advance that as an argument for striking out the pleadings.

[73] Again, the Tax Court failed to ask itself whether the assumptions as plead were prejudicial or might lead to delay. It failed to ask itself what would best serve the interests of the trial process in the circumstances. While I acknowledge that these assumptions are more appropriate as argument than assumptions, my comments regarding the pleadings using the term beneficiary apply equally here. In the context of these appeals, moving these pleadings from assumptions to reasons serves no useful purpose.

C. *Disposition of the Appeals*

[74] The Tax Court erred in striking the three groups of pleadings as assumptions. I agree with the appellant that the Tax Court did not grant the appellant leave to amend the replies as it might choose to address any deficiencies. Rather the Tax Court ordered the appellant to file amended replies in the form the Tax Court specified.

[75] In the context of this appeal, with one exception, I see little difference between characterizing the pleadings that are the subject of this appeal as assumptions or as reasons, given that all the relevant documents undoubtedly will be before the trial judge, the facts seem largely agreed, and both parties understand the nature of the dispute.

[76] However, the important exception is the assumption regarding fair market value of the shares and partnership interests. All the relevant facts regarding that valuation are presumably

within the Trust's knowledge. Accordingly, the Minister is entitled to make an assumption about their fair market value and, if they disagree with it, the respondents bear the onus of establishing it is incorrect.

[77] I would therefore allow the appeal and permit the appellant to retain the pleadings in issue as assumptions.

[78] The respondents did not seek orders permitting them to file amended answers. Nonetheless, the Tax Court granted them 30 days after service of the amended replies to do so. I would not have granted those orders, not only because the respondents did not seek them, but also because the only effect of the Tax Court's orders was to move the pleadings. By not granting the appellant leave to amend the replies, the Tax Court precluded new pleadings. Thus, there should be nothing new to answer.

[79] However, that aspect of the Tax Court's order was not appealed. Accordingly, it stands and the respondents have 30 days from the date the amended replies are served to file amended answers, should they wish to do so.

D. *Costs*

[80] Both parties seek costs of this appeal and the appellant seeks costs in the Tax Court.

[81] The Tax Court awarded costs on the motion in the cause. I would not disturb that award in the circumstances. As to the appeal, I would award costs to the appellant.

IV. Conclusion

[82] While in some circumstances it will be appropriate to strike out an assumption that is a statement of mixed fact and law, that is not universally the case. In each case, the Tax Court must balance the consequences of letting the assumption stand against the consequences of striking it out. It must consider not only the conditions in Rule 53, but also what is in the best interests of the trial process given the need to facilitate the just, most expeditious and least expensive determination of the dispute.

[83] In this case, rather than consider whether the respondents demonstrated a risk of prejudice or delay, or whether its order served the interests of the trial process, the Tax Court decided that any assumption that is a statement of mixed fact and law should be struck out and moved to the reasons. In my view, this served no useful purpose in the context of these appeals. The notices of appeal were filed more than three years ago, and the answers more than two years ago, shortly before the respondents brought their motions. Ironically, here, the only consequence of the Tax Court's decision is to further delay proceedings in the Tax Court—a factor that instead should have weighed against granting the respondents' motions in the circumstances.

[84] I would allow the appeal, set aside the orders of the Tax Court insofar as they struck out the paragraphs from the replies in issue in this appeal as assumptions and, giving the decision the

Tax Court should have given in relation to those paragraphs, dismiss the respondents' motions to strike them out. I would grant the appellant costs of this consolidated appeal.

"K.A. Siobhan Monaghan"
J.A.

"I agree
Judith Woods J.A."

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM THREE AMENDED ORDERS OF THE HONOURABLE JUSTICE DAVID SPIRO OF THE TAX COURT OF CANADA DATED NOVEMBER 15, 2021, NOS. 2020-641(IT)G, 2020-642(IT)G, AND 2020-643(IT)G

DOCKETS:	A-327-21; A-328-21; A-329-21
STYLE OF CAUSE:	HIS MAJESTY THE KING v. JOHN PRESTON, MONIKA PRESTON AND THE PRESTON FAMILY TRUST II
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 18, 2023
REASONS FOR JUDGMENT BY:	MONAGHAN J.A.
CONCURRED IN BY:	WOODS J.A. LASKIN J.A.
DATED:	AUGUST 18, 2023

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