

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20231127**

**Docket: A-166-22**

**Citation: 2023 FCA 231**

**CORAM: GLEASON J.A.  
MONAGHAN J.A.  
HECKMAN J.A.**

**BETWEEN:**

**EL AD ONTARIO TRUST**

**Appellant**

**and**

**HIS MAJESTY THE KING**

**Respondent**

Heard at Toronto, Ontario, on November 27, 2023.  
Judgment delivered from the Bench at Toronto, Ontario, on November 27, 2023.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**MONAGHAN J.A.**

**Federal Court of Appeal**



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**REASONS FOR JUDGMENT OF THE COURT**

**(Delivered from the Bench at Toronto, Ontario, on November 27, 2023).**

**MONAGHAN J.A.**

[1] The appellant, El Ad Ontario Trust, appeals an interlocutory decision of the Tax Court of Canada (Tax Court file 2018-4828(IT) G *per* D'Arcy J.). That decision granted the Crown's motion to amend its reply to the appellant's notice of appeal. The amendments introduced a new alternative argument in support of the assessment under appeal and withdrew a number of admissions.

[2] The appellant takes no issue with the amendment addressing a new argument, expressly permitted by subsection 152(9) of the *Income Tax Act*. However, the appellant submits the Tax Court erred in law by interpreting subsection 152(9) as permitting the Crown “to *automatically* amend the Reply to withdraw the [admissions]” (appellant’s memorandum of fact and law at para. 64, emphasis in original). The appellant submits that the Tax Court therefore constrained its analysis of the proper test for withdrawal of admissions by failing to consider the interests of justice.

[3] We disagree with this characterization of the Tax Court’s decision.

[4] This Court has consistently said that an amendment to a pleading should be allowed where it assists in determining the real questions in controversy between the parties, unless doing so does not serve the interests of justice or results in an injustice to the other party not compensable by costs: *Canada v. Pomeroy Acquireco Ltd.*, 2021 FCA 187 at para. 4, and cases there cited. The Tax Court expressly referred to this jurisprudence.

[5] It found the new argument was clearly consequential on the facts alleged in the appellant’s notice of appeal. It determined the admissions were inconsistent with the new argument and withdrawing them would assist the Tax Court in determining the real question in controversy between the parties, including the merits of the new argument. It noted admissions are not binding on the Tax Court, citing *Hammill v. Canada*, 2005 FCA 252.

[6] The Tax Court found no prejudice to the appellant from the timing of the motion observing that the Crown gave notice of its intention to seek amendments before discovery. The appellant itself had questioned inconsistencies between the admissions and other material facts pled by the Crown leading to discussions between the parties. The Tax Court found no injustice to the appellant that could not be compensated by costs.

[7] These factors informed the Tax Court's decision to permit the withdrawal of admissions and can only be understood as reflecting a determination that the interests of justice favoured allowing the withdrawal.

[8] The decision to permit amendment of a pleading, including by withdrawing admissions, falls entirely within the discretion of the Tax Court. A judge's discretionary decision is subject to the standard of review described in *Housen v. Nikolaisen*, 2002 SCC 33: see *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at para. 79. Therefore, we will not interfere with the Tax Court's exercise of discretion absent an extricable error of law or a palpable and overriding error on a question of fact or mixed fact and law.

[9] We see no error that warrants our intervention. Accordingly, we will dismiss the appeal with costs to the respondent.

"K.A. Siobhan Monaghan"

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-166-22

**STYLE OF CAUSE:** EL AD ONTARIO TRUST v. HIS  
MAJESTY THE KING

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** NOVEMBER 27, 2023

**REASONS FOR JUDGMENT OF THE COURT  
BY:** GLEASON J.A.  
MONAGHAN J.A.  
HECKMAN J.A.

**DELIVERED FROM THE BENCH BY:** MONAGHAN J.A.

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