Docket: 2004-26(IT)G

BETWEEN:

SHARAN GOLDEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard together with the motion of
Allan R. Golden (2004-27(IT)G) by way of a conference call
on March 12, 2008 at Ottawa, Ontario.

Before: The Honourable Justice Patrick Boyle

Participants:

Counsel for the Appellant:	Barbara M. Shields
Counsel for the Respondent:	David G. Frayer Ainslie Schroeder

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ORDER

By virtue of the application of the inherent and statutory jurisdiction of this Court to control abuses of its processes, the Appellant will not be permitted to take the position that her unreported income in 1989 was less than $217,816.90.

Costs in the amount of $1,750 will be payable by the Appellant to the Respondent.

Signed at Ottawa, Canada, this 26th day of March 2008.

"Patrick Boyle"

Boyle, J.

Docket: 2004-27(IT)G

BETWEEN:

ALLAN R. GOLDEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard by way of a conference call together with the motion of *Sharan Golden* (2004-26(IT)G) on March 10, 2008 and continued on March 12, 2008 at Ottawa, Ontario.

Before: The Honourable Justice Patrick Boyle

Participants:

Counsel for the Appellant:	Barbara M. Shields
Counsel for the Respondent:	David G. Frayer Ainslie Schroeder

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ORDER

By virtue of the application of issue estoppel, the Appellant will not be permitted to take the position that his unreported income in 1989 was less than $34,000 nor will he be allowed to take position that penalties should not apply to that amount.

Costs in the amount of $1,750 will be payable by the Appellant to the Respondent.

Signed at Ottawa, Canada, this 26th day of March 2008.

"Patrick Boyle"

Boyle, J.

Citation: 2008TCC173
Date: 20080326
Dockets: 2004-26(IT)G,
2004-27(IT)G

BETWEEN:

SHARAN GOLDEN,
ALLAN R. GOLDEN,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDERS

Boyle, J.

[1] The Crown has brought motions in the tax appeal of each of Allan Golden and Sharan Golden asserting that issue estoppel or abuse of process should apply to prevent a relitigation of a portion of each of the Goldens' appeals. The possible application of issue estoppel and abuse of process arise out of Mr. Golden's earlier conviction before a judge and jury for tax evasion. The criminal trial lasted three weeks. The conviction and the sentence were upheld on appeal.

I. Facts

A. *The tax appeals*

[2] Mr. Golden and Mrs. Golden are married to each other. The taxation years under appeal by each taxpayer are 1989, 1990 and 1991. The reassessments for those years were issued in 1995. The total amount of the reassessments is based on over $1,000,000 of unreported income which was determined by the Canada Revenue Agency conducting what is commonly called a net worth audit upon the Goldens as a family unit. For 1989 the unreported income reassessed was

approximately $836,000. Mr. Golden's return as filed had apparently reported approximately $16,000 of employment income and family allowance payments.

[3] The total amount of CRA's net worth discrepancy for the Goldens for each taxation year was allocated by CRA between them. To the extent the net worth increase was believed by CRA to result from shareholder appropriations from corporations owned by the Goldens, such amounts were allocated by CRA between the Goldens for reassessment purposes based upon their respective shareholdings in the particular corporation whose revenue had been appropriated. The 1989 unreported income was reassessed by CRA as to approximately $455,000 to Mr. Golden and approximately $381,000 to Mrs. Golden. CRA also assessed "gross negligence" penalties in respect of this unreported income.

[4] The Goldens' tax appeals are scheduled to begin at the end of this month. The Court has two scheduled weeks committed to this hearing however, the parties' position is that these tax appeals will require eight weeks of hearings.

B. *The criminal conviction*

[5] In 1998 Mr. Golden was charged with wilful tax evasion and with filing false returns for his 1989, 1990 and 1991 taxation years. Mr. Golden pleaded not guilty to the charges. He was convicted in respect of 1989 and acquitted in respect of 1990 and 1991.

[6] Mrs. Golden was also charged with tax evasion relating to the same net worth audit. She and her husband were represented by the same lawyer throughout their criminal trial process.

[7] The Goldens' lawyer agreed with the Crown counsel that for the purposes of Allan Golden's criminal trial, Allan and Sharan Golden would be treated as one economic unit. Counsel agreed that if Allan Golden would take full responsibility for the amounts alleged in the indictments, the charges laid against Sharan Golden would be stayed by the Crown upon completion of Allan Golden's trial. A stay of proceedings was entered on the charges against Sharan Golden on September 13, 2000.

[8] As a result of the single economic unit agreement just described, Mr. Golden's 1989 conviction is in respect of amounts CRA has reassessed in part to him and in part to his wife.

[9] For purposes of the criminal proceedings, two adjustments were made to the net worth computations used in the reassessments. Firstly, as just mentioned, Mr. Golden was charged in respect of amounts reassessed to him and his wife. Secondly, for purposes of the criminal charges for 1989, the total amount reassessed of approximately $836,000 was reduced to approximately $728,000. This difference of approximately $108,000 related to a loan alleged by Mr. Golden to have been made by a Mr. Alegro that should have reduced the total net worth discrepancy further by such amount. I assume this was done because the Crown did not believe it could prove the absence of such a loan beyond a reasonable doubt in the criminal trial or, put another way, that Mr. Golden would be able to establish reasonable doubt that such a loan was in fact made. While there remains an approximately $1,000 discrepancy between the unreported amounts used criminally and the 1989 reassessments, this amount is immaterial for our purposes.

[10] After a three-week trial, the jury found Mr. Golden guilty of both counts relating to 1989, wilful tax evasion and filing a false return. Prior to that, there had been a lengthy preliminary inquiry.

[11] The evidence involved a number of transactions involving a number of parties including several of the Goldens' companies and their business activities. The relevant corporation in these proceedings is Golden Sports Recreation and Convention Services Limited which carried on the business known as the Transcona Country Club. The jury did not, and was not required to, report any decision on what specific amounts were not reported by the Goldens nor which specific transactions gave rise to unreported income. However, the trial judge had advised the jury in his charge as follows:

> I am now going to move on to the three counts alleging income tax evasion. As an initial piece of law, I should tell you that the offence of tax evasion occurs whether the amount evaded is 10,000 or a million dollars, a lesser amount or any amount in between. Although the indictment that you are going to have with you when you retire to deliberate refers to certain amounts of income declared and tax evaded, the Crown need only prove that there was income in 1989, 1990 or 1991 that should have been declared, which was not, that a tax was thereby evaded and that the failure to declare was done willfully, for the purposes of evading tax.
>
> If you find that the amount of undeclared income or the tax evaded is zero, then you must acquit. As well, you should know, though, that the law does not concern itself with trifling matters. If you determine that the amount of tax evaded was a mere trifle which, if continued, in practice, will weigh little or nothing on the public interest, you should not enter a conviction, but rather, you should acquit, but it is all for you to determine, based on the evidence before you.

And later:

> Let me remind you that in order for the Crown to be successful in this count they need not prove that the failure to declare income was in any specific amount or that the tax evaded was in any specific amount, but must prove to you beyond a reasonable doubt that there was a failure to declare income in some amount and that the payment of taxes was thereby avoided in some amount, again remembering that the law does not concern itself with trivial matters. If you find that the failure to declare income or the evasion of taxes was a mere trifle, you should acquit.

[12] The judge stayed Mr. Golden's conviction on filing a false return applying the *Kienapple* principle that a person should not be convicted of multiple offences arising out of one crime.

[13] The trial judge sentenced Mr. Golden to one day in prison and to a fine of approximately $75,000 payable over two years for the tax evasion conviction. Because section 239 of the *Income Tax Act* provides that the fine to which one is liable is a function of the amount of the tax sought to be evaded, it was necessary for the trial judge to determine what income was unreported in 1989. In this regard, the trial judge found as follows:

> However when we get to Golden Sports, in 1989 a shareholders loan in the amount $217,816.90 is created. Counsel argue and disagree as to how that came to be. Well, I am satisfied that Mr. Simpson did not create it out of some fanciful flight. He indicated he was instructed to do so and I am satisfied that he was. Mr. Golden reviewed that return. He signed it as accurate. There was no shareholders loan in that year and that was tax evasion, and I am satisfied that the jury found such. And with respect to the missing invoices I am also satisfied in Golden Sports that in that year the jury was satisfied that there was a suppression of income, both by the shareholders loan and the missing invoices and I am finding that 1 and 2 are the basis upon which the jury convicted. So that would come to a total of $251,816.90[1].

[14] The reference by the trial judge to missing invoices in respect of Golden Sports was a reference to evidence of $34,000 of sales not reported for which CRA could not locate invoices, even after seizing business records. This had instead been evidenced at trial by the testimony of eight witnesses who had held and paid for their events at the Transcona Country Club[2].

[15] Section 724 of the *Criminal Code* provides the basis for, and upon which, the trial judge found that the amounts evaded were the approximately $218,000 Golden Sports shareholder loan and the $34,000 Golden Sports missing invoices[3].

[16] While the amounts in question were not "essential" to the jury's verdict of guilty to use the language of paragraph of 724(2)(*a*), it was clearly open to the judge to make such findings of fact. In the judge's words:

> [A]s was my duty under the law, I determined the extent of the conviction, or the particulars of the conviction, after submission of counsel as to what the jury's conviction meant[4].

[17] The trial judge determined that the tax sought to be avoided on $251,816.90 was $75,250.18 and set that amount as the penalty.

[18] Mr. Golden appealed both the conviction and the sentence to the Manitoba Court of Appeal. It appears that the appeal of the sentence related only to the imprisonment and not the fine. The Court of Appeal dismissed Mr. Golden's appeal orally in a two-sentence judgment.

[19] At several points in the criminal proceedings, Mr. Golden complained that he was not being provided full access to the records seized by CRA or disclosure of CRA's documentary evidence. This was in part the subject of a pre-trial proceeding during the preliminary inquiry. Following conviction by the jury, this also formed at least part of a motion for a mistrial. The trial judge's decision not to declare a mistrial was one of the grounds of appeal to the Manitoba Court of Appeal. The Manitoba Court of Appeal's pronouncement on the subject was that "Concerning the accused's motion for mistrial on the basis of alleged non-disclosure of evidence, we are not persuaded that the trial judge was in error in dismissing the motion."

II. The Law

A. *Issue estoppel*

[20] It is open to this Court to apply the doctrine of issue estoppel to prevent relitigation of matters already decided in another court proceeding. The Federal Court of Appeal has confirmed that issue estoppel can apply in a civil proceeding in the Tax Court where the issue estoppel is based on a conviction in a criminal case: *Van Rooy v. M.N.R.*, 88 DTC 6323.

[21] Issue estoppel can be decided on a motion prior to hearing the evidence at trial[5]. Some such motions have been brought under Rule 58 of this Court and some under Rule 53. In this case the motion was brought under Rule 58 which permits supporting evidence to be tendered. In this case, each of the parties filed two extensive affidavits in support of their position on the motions.

[22] In considering whether or not issue estoppel applies, it is open for the Court to look at more than the certificate of criminal conviction. This Court should look at the realities of the criminal proceedings in order to determine what was decided by it[6].

[23] The preconditions for the application of issue estoppel are:

1. the earlier court decision must have decided the same question that is before this Court, and the question was fundamental to the earlier court's decision;
2. the earlier court decision must be final; and
3. there must be a mutuality of parties in the proceedings, that is, the parties to the earlier judicial decision or their privies need be the same persons as the parties in this proceeding or their privies[7]

[24] The doctrine of issue estoppel is not to be applied automatically or inflexibly once the preconditions are established. It remains for this Court to decide whether, as a matter of discretion, issue estoppel ought to be applied or if its application would be unfair in these particular circumstances[8].

[25] The doctrine of issue estoppel should only be applied in a tax appeal in this Court in respect of a prior criminal tax evasion conviction in clear cases. It should not be applied indiscriminately once the preconditions are met. The Court should be satisfied that the issue of quantum in each particular taxation year was decided in the criminal proceedings[9].

B. *Abuse of process*

[26] It is also open to this Court to apply the doctrine of abuse of process to prevent relitigation of matters already decided in another court proceeding[10].

[27] The scope and application of the doctrine of abuse of process to prevent relitigation has recently been thoroughly canvassed by the Supreme Court of Canada in *C.U.P.E.*[11].

[28] The principal difference between issue estoppel and abuse of process to prevent relitigation is with respect to the question of mutuality of parties and privity. Abuse of process does not require that the preconditions of issue estoppel be met. Abuse of process can therefore be applied when the parties are not the same but it would nonetheless be inappropriate to allow litigation on the same question to proceed in order to preserve the courts' integrity.

[29] Abuse of process is also a doctrine that should only be applied in the Court's discretion and requires a judicial balancing with a view to deciding a question of fairness. However, it differs somewhat from a consideration of the possible application of issue estoppel in that the consideration is focused on preserving the integrity of the adjudicative process more so than on the status, motive or rights of the parties.

[30] Relitigation should be avoided unless it is in fact necessary to enhance the credibility and effectiveness of the adjudicative process. This could be the case where (1) the first proceeding is tainted by fraud or dishonesty; (2) fresh new evidence, previously unavailable, conclusively impeaches the original result; or (3) when fairness dictates that the original result should not be binding in the new context.

III. Position of the parties

A. *Crown*

[31] It is the Crown's position that the doctrine of issue estoppel should apply to Mr. Golden in respect of the appropriation by him and/or Mrs. Golden of $34,000 of Golden Sports revenue from events held at the Transcona Country Club. The Crown maintains that the three preconditions to the application of the doctrine are met and that there are no persuasive reasons of fairness or otherwise that militate

against the normal or usual application of the doctrine. The Crown maintains that all of the objects and purposes of the doctrine apply in this case and cautions that this Court should not lightly exercise its discretion in favour of a person convicted criminally once it is satisfied that the preconditions are met.

[32] With respect to the application of issue estoppel in respect of the penalties assessed under the *Income Tax Act* that relate to this $34,000 amount, it is the Crown's position that the *mens rea* and wilfulness necessarily and fundamentally determined by the jury in the criminal proceeding is at least as great a standard as the knowingly or gross negligence requirements of the *Income Tax Act* regarding such penalties.

[33] It is the Crown's position that it would be an abuse of process for Mrs. Golden to be able to dispute her 1989 reassessment in this Court to the extent of the $217,000 amount relating to Golden Sports' shareholder loan in respect of which her husband was convicted of tax evasion given that the court found the shareholder loan entry was fictitious and that such amount should have been included in the income of Mr. Golden and/or Mrs. Golden. It is the Crown's position that the issue is the same and the Manitoba court's decision is final. The Crown submits that, had this $217,000 shareholder loan amount been reassessed by CRA to Mr. Golden instead of Mrs. Golden, issue estoppel would apply. This amount was instead apportioned to Mrs. Golden in CRA's reassessments because she was the sole shareholder of Golden Sports and hence the precondition of mutuality of parties or privies would not support the application of issue estoppel. The Crown submits that it would nonetheless be an abuse of process to permit Mrs. Golden in this Court to argue against the findings of the Manitoba court that this $217,000 shareholder loan amount should properly have been included in the income of Mr. Golden and/or Mrs. Golden.

[34] The Crown similarly contends that it would be an abuse of process to permit Mrs. Golden to argue that such amount should instead have been reassessed by CRA against her husband. The Crown points out that Mrs. Golden was represented by the same counsel as her husband throughout their criminal proceedings, did have an opportunity to be heard directly but for the agreement reached that her husband would accept full criminal responsibility for any tax evasion by him or her treated as a single economic unit, and that her interests were represented via her husband and his interests in his criminal trial and appeal. It is the Crown's position that, since reassessments under the *Income Tax Act* have to be issued against individuals and do not treat families or married couples as a single economic unit, CRA reasonably apportioned the shareholder loan portion of the total net worth

discrepancy to Mrs. Golden as sole shareholder of Golden Sports. The Crown's position is that Mrs. Golden should not now be able to further benefit from the stay agreement put in place for her benefit to spare her a possible criminal conviction, either by saying that she did not have a prior opportunity to litigate or defend her position in respect of the shareholder loan amount or by saying that the Manitoba court has not decided the issue of whether this amount should have been included in her income as opposed to her husband's.

[35] The Crown does not seek to have Mrs. Golden prevented from arguing in this Court that the penalties under the *Income Tax Act* in respect of the $217,000 amount should not be upheld because she did not leave this out of her income wilfully or in circumstances amounting to gross negligence. The Crown accepts that, since there was no trial of Mrs. Golden, there has been no prior determination of her *mens rea*.

B. *Taxpayers' position*

[36] It is the taxpayers' position that the first precondition for the application of the doctrine of issue estoppel against Mr. Golden is not met with respect to the $34,000. Taxpayers' counsel contends that the jury conviction did not address issues of quantum of unreported income or tax evaded much less make specific findings of the source of that income. The taxpayers' position is that any findings of the trial judge on sentencing were not subject to the beyond a reasonable doubt standard of proof but only a balance of probabilities standard. The taxpayers maintain that, in any event, the nature of a net worth assessment is such that it does not identify sources of unreported income, only amounts, and therefore the issue in this proceeding is not the same issue as in the criminal proceedings even as regards the $34,000 appropriation finding of the Manitoba court.

[37] The taxpayers further contend that it would be unfair in the circumstances to apply the doctrine of issue estoppel against Mr. Golden and that I should exercise my discretion against its application. Specifically, the unfairness is that Mr. Golden was denied full access to the seized records when defending his criminal charges; the proceedings in this Court would therefore be his first opportunity to fully defend the alleged under-reporting of income.

[38] With respect to Mrs. Golden, it is the taxpayers' position that the issue in the criminal court was not the same as the issue in this Court relating to the $217,000 amount of the Golden Sports shareholder loan. The reasons for this are the same as their position with respect to issue estoppel and Mr. Golden, and arise both out of

the jury not making any express or implicit findings regarding quantum or source and out of the nature of net worth assessments dealing only with quantum and not with source.

[39] The taxpayers' position is that it would be unfair to apply the abuse of process doctrine against relitigation and that I should not exercise my discretion to do so. The first unfairness identified is that relating to the full records and evidence not being previously available to Mr. Golden to defend the alleged wilful under-reporting of income in the criminal proceedings. A further unfairness put forward with respect to Mrs. Golden is that the Tax Court proceedings would be her first chance to litigate the issue and defend herself since she was not the subject of a previous criminal trial, acquittal or conviction. Further, taxpayers' counsel notes that, if the abuse of process doctrine was applied to prevent her from disputing the correctness of her reassessment for the $217,000 amount, this would have the unfair result of extending the agreement reached to treat her and her husband as a single economic unit for purposes of his criminal trial to the civil reassessment, which was clearly not the agreement reached.

IV. Analysis

A. *Mr. Golden*

[40] The Crown maintains that the preconditions for the application of issue estoppel have been satisfied with respect to the $34,000 Golden Sports events amount. Mr. Golden's position is that the first requirement, that it be the same issue as decided previously, is not met. In the circumstances, I am satisfied that it is met.

[41] The taxpayer is correct that the jury, in finding Mr. Golden guilty, did not identify this *amount* specifically nor this *source* specifically. However, it is clear that the trial judge, after the trial and conviction and before sentencing, did both make such a finding and concluded that this was one of the bases for the jury's conviction. The trial judge was required to make the determination of *quantum* and did so in very clear language.

[42] There was a disagreement between counsel, and there remains uncertainty in my mind, whether the trial judge's findings were made applying the balance of probabilities standard or the beyond a reasonable doubt standard. This arises from the wording of section 724 of the *Criminal Code* and the caselaw addressing the burden of proof in sentencing matters[12]. However, I am inclined to think that, since

the amount of unreported income directly affects the fine portion of the sentence, the amount of unreported income is an aggravating fact for purposes of section 724 which must have been proved beyond a reasonable doubt. It is clear from the sentencing transcript that the trial judge believed he had to be satisfied beyond a reasonable doubt and that Mr. Golden's counsel shared that view[13]. I am not persuaded that this makes any difference to a determination of whether the issue has already been decided. Issue estoppel can apply in an entirely civil context and is not limited to prior criminal convictions.

[43] Further, I do not I think the question of which standard of proof applied, or was applied, raises any question of fairness. The prior conviction in respect of the $34,000 amount was subject to at least a balance of probabilities standard. That is the same standard that this Court will need to apply to Mr. Golden's tax appeal.

[44] The trial judge was not required to determine the *source* of this unreported income even though he did so. However, I am entitled to consider this finding in deciding what the realities of the criminal proceeding were. The Golden Sports events as the source of $34,000 of unreported income were clearly the subject of considerable evidence.

[45] Taxpayer's counsel is correct that a purely "net worth" reassessment does not address sources of income in the normal sense. That is because it looks to unexplained increases in net worth in order to estimate income in circumstances where actual income from particular sources can neither be determined nor audited because of the taxpayer's absence of adequate reporting or records. However, this need not mean that issue estoppel cannot apply to a net worth reassessment. It simply means that, if issue estoppel does apply to Mr. Golden, at least $34,000 of the net worth discrepancy will be upheld without necessarily having regard to the source. It will also impact what, if any, can go in at trial as evidence relating to Mr. Golden's increase in net worth attributable to Golden Sports.

[46] The sentencing process, including any findings of the trial judge following a jury trial is a fundamental and integral part of the criminal proceeding. Findings made as part of the sentencing process should be entitled to full weight in determining whether a question decided in a prior criminal proceeding is the same as the one before this Court on a tax appeal. This case is readily distinguishable from the Federal Court of Appeal's recent decision in *Garber* (see endnote 10). In that case the criminal charges were for fraud and were against the tax shelter promoters. The taxpayer/investors in that case wanted to be able to put in evidence

of business activities and business expenses. The Court recognized those could be different questions and the Crown's abuse of process motion was unsuccessful.

[47] The Crown and the evidence have satisfied me that the fundamental issue in the criminal proceedings with respect to the $34,000 Golden Sports amount not being reported in Mr. Golden's income as it should have been, is the same as part of the reassessment under appeal. There is no question with respect to the other two preconditions, that the Manitoba decision be final and that there be mutuality of parties.

[48] I therefore need to determine if applying the doctrine of issue estoppel to the extent of $34,000 of income would be unfair to Mr. Golden. Mr. Golden argues that it would be unfair because he did not have adequate access to the seized records nor adequate disclosure by the Crown. Similar complaints were made before and during the trial. An appeal to the Manitoba Court of Appeal was made on this issue. Mr. Golden was not successful in persuading the courts that he had inadequate disclosure or records. In essence, the Manitoba courts have already decided a similar issue, if not the same issue, in the context of Mr. Golden's criminal conviction. Mr. Golden's concern expressed to this Court does not rise to the level of fresh new evidence previously unavailable that will conclusively impeach the Manitoba courts' findings described by Arbour J. in *C.U.P.E.*. Even if the threshold is not necessarily that high, I cannot conclude that any significant unfairness results to Mr. Golden. In contrast, if issue estoppel is not applied with respect to this $34,000 amount, it would negatively affect the preservation of the integrity, credibility and effectiveness of both courts involved.

[49] I also find that issue estoppel applies to Mr. Golden with respect to the gross negligence penalty assessed in respect of the $34,000 of his undeclared income. Mr. Golden's criminal *mens rea* and wilfulness was an integral and fundamental component of the jury's guilty verdicts. *Mens rea* was established beyond a reasonable doubt. Proof of criminal *mens rea* beyond a reasonable doubt satisfies the onus on the Crown under the subsection 163(2) gross negligence penalties of the *Income Tax Act* to establish Mr. Golden's under-reporting was wilful or in circumstances amounting to gross negligence[14].

[50] While I do not need to decide it, had the CRA reassessment included the $217,000 shareholder loan amount in Mr. Golden's income instead of his wife's issue estoppel should also apply to that amount for the same reasons it applies to the $34,000 amount. Similarly, the doctrine of abuse of process would also have prevented Mr. Golden from relitigating either amount.

B. Mrs. Golden

[51] I am satisfied that it would be an abuse of process to permit Mrs. Golden to challenge her reassessment with respect to the $217,000 Golden Sports shareholder loan amount. This is in reality the same issue that has been finally decided by the Manitoba courts to have been income that should have been included in the income of Mr. Golden and/or Mrs. Golden. This is not a case such as *Garber*, where the criminal conviction for fraud was of third parties and dealt with a different issue than whether the defrauded investors incurred any business expenses for tax purposes.

[52] The only uncertainties arise because of the agreement that was put in place at the criminal trial. This permitted Mrs. Golden to avoid a criminal trial on the charges laid against her. This also created this uncertainty associated with the verdict against Mr. Golden that it does not clearly determine whether the $217,000 amount should have been included in Mr. Golden's income or Mrs. Golden's income for tax purposes. The arrangement with the criminal proceedings against Mr. Golden and Mrs. Golden also are the only reason Mrs. Golden can say she has not yet had the chance to defend herself from the allegations that this should have been included in her income. As a result of this arrangement she can contend that the amount was not income to either her or her husband, or that, if it was income, the amount was appropriated by her husband not her.

[53] I do not see how Mrs. Golden can now complain that, on the facts of this case, being estopped from having this aspect relitigated in this Court results in any significant unfairness to her. Any unfairness to her is greatly exceeded by the negative effect on preserving the integrity, credibility and effectiveness of the courts if she is allowed to litigate this issue. The only reason the above analysis of issue estoppel preconditions and Mr. Golden does not extend to Mrs. Golden and the $217,000 amount is the requirement of mutuality of parties and privies[15]. If Mrs. Golden was able to contest this, there would be a risk of inconsistent verdicts. It would also be a questionable use of judicial resources.

[54] Whether or not Mr. Golden or Mrs. Golden wants to pursue these parts of their tax appeals for the purpose of relitigating Mr. Golden's conviction, it would have precisely that effect. In this case, the Goldens' stakes in the criminal proceedings against them were high and they had adequate incentive and opportunity to defend the charges that proceeded to trial against Mr. Golden. There was no taint of error in the trial or sentencing process; the Court of Appeal

affirmed that. No fresh new evidence has been discovered. In short, if either Mr. Golden or Mrs. Golden were allowed to challenge the tax reassessments in respect of these two amounts in this Court, and this Court were to decide in their favour, few reasonable people apart from tax accountants and lawyers would not think this to be an apparent affront to the integrity of our judicial system.

V. Conclusion

[55] The Crown's motions are allowed.

[56] Mr. Golden will not be permitted to take the position that his unreported income in 1989 was less than $34,000 nor will he be allowed to take the position that penalties should not apply to that amount.

[57] Mrs. Golden will not be permitted to take the position that her unreported income in 1989 is less than $217,816.90.

[58] Costs in the amount of $3,500 will be payable by the taxpayers to the Crown.

Signed at Ottawa, Canada, this 26th day of March 2008.

"Patrick Boyle"

Boyle, J.

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[1] The references to 1 and 2 are to the first two items listed under "Appropriations by Allan Golden" in Schedule K of the Bailey Affidavit which was before the judge.

[2] See pages 20 and 21 of the transcript appearing at Schedule F of the Bailey Affidavit.

[3] Section 724 provides as follows:

> Information accepted
>
> 724.(1) In determining a sentence, a court may accept as proved any information disclosed at the trial or at the sentencing proceedings and any facts agreed on by the prosecutor and the offender.
>
> Jury
>
> (2) Where the court is composed of a judge and jury, the court
>
> (*a*) shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty; and
> (*b*) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.
>
> Disputed facts
>
> (3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,
>
> (*a*) the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;
> (*b*) the party wishing to rely on a relevant fact, including a fact contained in a presentence report, has the burden of proving it;
> (*c*) either party may cross-examine any witness called by the other party;
> (*d*) subject to paragraph (*e*), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and

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(*e*) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender.

[4] See p. 56 of the transcript appearing at Schedule I of the Bailey Affidavit.

[5] See for example *Holub v. H.M.Q.*, [1996] T.C.J. No. 1784, *Sarraf v. M.N.R.*, 93 DTC 1569 (T.C.C.), *Boehm v. H.M.Q.*, 96 DTC 6087 (FCTD) and *Wetzel v. H.M.Q.*, 2008 DTC 2138 (T.C.C.).

[6] In *Van Rooy* the Federal Court of Appeal decided it was appropriate to consider the judge's reasons. In *Letendre et al. v. Canada* (2001), 201 D.L.R. (4th) 35, the Federal Court of Appeal held (at paragraphs 36 to 38) that a court considering cause of action estoppel should look into the realities to decide what was decided and can look beyond the judgment and the reasons for judgment. In considering issue estoppel, Rothstein J.A. went on (at paragraph 48) to consider the pleadings and the transcript of the proceedings.

[7] The preconditions for the application of issue estoppel are canvassed by Laskin J. in *Angle v. M.N.R.*, [1975] 2 S.C.R. 248, 74 DTC 6278. These are quoted approvingly by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.* (2001), 201 D.L.R. (4th) 193.

The principal requirements derive from the House of Lords' decision in *Carl Zeiss Stiftung v. Rayner Keeler Ltd.* (No. 2), [1967] 1 A.C. 853 (at paragraph 935):

> ... (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies…

With respect to the first precondition, Dickson J. said "It will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment… The question out of which the estoppel is said to arise must have been fundamental to the decision arrived at in the earlier proceedings… so fundamental to the substantive decision that the latter cannot stand without the former. Nothing less than this will do."

[8] Per Binnie J. in *Danyluk* (at paragraph 33):

> The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party… has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle*, *supra*. If successful, the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied."
>
> [Emphasis in original]

In discussing the exercise of such discretion, Binnie J. adopted the following from *British Columbia v. Bugbusters Pest Management Inc.* (1998), 159 D.L.R. (4th) 50 (B.C.C.A.):

> The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case."

He also quoted approvingly from *Schweneke v. Ontario* (2000), 47 O.R. (3rd) 97 (C.A.):

> In exercising the discretion the court must ask – is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?

Binnie J. also noted that in *General Motors of Canada Ltd. v. Naken*, [1983] 1 S.C.R. 72, Estey J. noted that the discretion to refuse to apply estoppel in the context of prior court proceedings, in contrast of administrative proceedings, must be very limited in application.

In *Toronto (City) v. C.U.P.E.*, [2003] 3 S.C.R. 77, the Supreme Court of Canada had occasion to extensively address the doctrines of issue estoppel and abuse of process as they apply with respect to a prior criminal conviction. In *C.U.P.E.* (at paragraph 15), Arbour J. identifies some of the matters to be considered in the exercise of judicial discretion:

> The body of law dealing with the relitigation of issues finally decided in previous judicial proceedings is not only complex; it is also at the heart of the administration of justice. Properly understood and applied, the doctrines of *res judicata* and abuse of process govern the interplay between different judicial decision makers. These rules and principles called for a judicial balance between finality, fairness, efficiency and authority of judicial decisions.

See also Arbour J.'s paragraphs 53 and 54 reproduced in footnote 11, below.

[9] In the context of considering the application of issue estoppel in a tax appeal as the result of a prior tax evasion conviction, Bowman J. (as he then was) specifically cautioned *in Mike Adams v. H.M.Q.*, 96 DTC 1733, *Nick Adams v. H.M.Q.*, 96 DTC 1737 and in *Neeb v. H.M.Q.*, 97 DTC 895 that it would be dangerous to apply issue estoppel indiscriminately and that it should only be applied in clear cases. In *Mike Adams*, Bowman J. carefully satisfied himself that the amounts in question in the appeal formed an essential and integral part of the criminal court's finding of guilt. His cautions were particularly focused on a situation, as here, where the accused did not himself testify. In both *Mike Adams* and *Nick Adams*, Bowman J. found the doctrine of issue estoppel to be applicable. In *Neeb*, Bowman J. did not apply the doctrine of issue estoppel because the taxpayer had pleaded guilty in the criminal proceedings and, as there had been some negotiation as to the amount of tax evaded or unreported income, the judge was not satisfied in those circumstances that the quantum had been itself finally determined or agreed to with respect to the different years involved.

In *Dwyer v. H.M.Q.*, 2003 DTC 5575, the taxpayer argued that issue estoppel applied in his favour as a result of having being found not guilty of criminal tax evasion charges. The Federal Court of Appeal upheld the Tax Court's decision that issue estoppel could not apply on the basis that "there can be no doubt that an acquittal can occur in a criminal trial where, on a balance of probabilities, the offence would have been made out."

[10] The Federal Court of Appeal in *H.M.Q. v. Garber*, 2008 DTC 6154, considered that abuse of process could apply to prevent relitigation of an issue in a tax appeal that had been determined in a criminal fraud case against the promoters of the tax shelter in question. The Court held that, in the particular circumstances, the Tax Court was correct not to apply it. In *Van Rooy*, the Federal

Court of Appeal in *obiter* acknowledged the availability of the abuse of process doctrine to overcome the mutuality of parties precondition of issue estoppel.

[11] In that case, Arbour J. wrote:

> 37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would ... bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:
>
>> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
>>
>> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added by Arbour J.]
>
> As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *Franco v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.).) This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson, *supra*, at pp. 624-25).
>
> 38 It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (Lange, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-48):
>
>> The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the

> application [page 104] of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

39 The *locus classicus* for the modern doctrine of abuse of process and its relationship to *res judicata* is *Hunter, supra*, aff'g *McIlkenny v. Chief Constable of the West Midlands*, [1980] Q.B. 283 (C.A.). The case involved an action for damages for personal injuries brought by the six men convicted of bombing two pubs in Birmingham. They claimed that they had been beaten by the police during their interrogation. The plaintiffs had raised the same issue at their criminal trial, where it was found by both the judge and jury that the confessions were voluntary and that the police had not used violence. At the Court of Appeal, Lord Denning, M.R., endorsed non-mutual issue estoppel and held that the question of whether any beatings had taken place was estopped by the earlier determination, although it was raised here against a different opponent. He noted that in analogous cases, courts had sometimes refused to allow a party to raise an issue for a second time because it was an "abuse of the process of the court", but held that the proper characterization of the matter was through non-mutual issue estoppel.

40 On appeal to the House of Lords, Lord Denning's attempt to reform the law of issue estoppel was overruled, but the higher court reached the same result via the doctrine of abuse of process. Lord Diplock stated, at p. 541:

> The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

41 It is important to note that a public inquiry after the civil action of the six accused in *Hunter, supra*, resulted in the finding that the confessions of the Birmingham six had been extracted through police brutality (see *R. v. McIlkenny* (1991), 93 Cr. App. R. 287 (C.A.), at pp. 304 *et seq*.). In my view, this does not support a relaxation of the existing procedural mechanisms designed to ensure finality in criminal proceedings. The danger of wrongful convictions has been acknowledged by this Court and other courts (see *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, at para. 1; and *R. v. Bromley* (2001), 151 C.C.C. (3d) 480 (Nfld. C.A.), at pp. 517-18). Although safeguards must be put in place for the protection of the innocent, and, more generally, to ensure the trustworthiness of court findings, continuous re-litigation is not a guarantee of factual accuracy.

42 The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of *res judicata* while offering the discretion to prevent relitigation, essentially for the purpose of preserving the

integrity of the court's process. (See Doherty J.A.'s reasons, at para. 65; see also *Demeter* (H.C.), *supra*, at p. 264, and *Hunter, supra*, at p. 536.)

43 Critics of that approach have argued that when abuse of process is used as a proxy for issue estoppel, it obscures the true question while adding nothing but a vague sense of discretion. I disagree. At least in the context before us, namely, an attempt to relitigate a criminal conviction, I believe that abuse of process is a doctrine much more responsive to the real concerns at play. In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays (see *Blencoe, supra*), or whether it prevents a civil party from using the courts for an improper purpose (see *Hunter, supra*, and *Demeter, supra*), the focus is less on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. In a case such as the present one, it is that concern that compels a bar against relitigation, more than any sense of unfairness to a party being called twice to put its case forward, for example. When that is understood, the parameters of the doctrine become easier to define, and the exercise of discretion is better anchored in principle.

And later:

51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

52 In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result

should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk, supra*, at para. 80.

53 The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (*Danyluk, supra*, at para. 51; *Franco, supra*, at para. 55).

54 These considerations are particularly apposite when the attempt is to relitigate a criminal conviction. Casting doubt over the validity of a criminal conviction is a very serious matter. Inevitably in a case such as this one, the conclusion of the arbitrator has precisely that effect, whether this was intended or not. The administration of justice must equip itself with all legitimate means to prevent wrongful convictions and to address any real possibility of such an occurrence after the fact. Collateral attacks and relitigation, however, are not in my view appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy result.

[except as noted, emphasis added]

[12] The confusion arises because the cases cited by counsel which are subsequent to the Supreme Court of Canada's decision in *R. v. Gardiner*, [1982] 2 S.C.R. 368, do not appear to address the paragraph 724(3)(*d*) reference to the balance of probabilities standard or the fact that paragraph 724(3)(*e*) only applies to aggravating facts and previous convictions.

[13] See the sentencing transcript Schedule H of the Bailey Affidavit at page 45, lines 29 to 32, and at page 2, lines 31 to 34.

[14] See, for example, *DeCae v. H.M.Q.*, [1998] T.C.J. No. 732, 98 DTC 3451; and *Pannu v. H.M.Q.*, [1999] T.C.J. No. 935, 2000 DTC 3583.

[15] Although I note that spouses have been considered privies for issue estoppel purposes in some cases.

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