Docket: 2005-1930(IT)G

BETWEEN:

LLOYD M. TEELUCKSINGH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on September 15, 16 and 17, 2009 at Toronto, Ontario

By: The Honourable Justice E.A. Bowie

Appearances:

Counsel for the Appellant:	A. Christina Tari and Leigh Sommerville Taylor
Counsel for the Respondent:	George Boyd Aitken and Jack Warren

---

AMENDED ORDER

UPON MOTION brought by the appellant, having read the material filed and having heard counsel for the parties;

IT IS HEREBY ORDERED THAT:

1. the respondent shall provide to the appellant, by April 30, 2010, responses to undertakings and follow-up questions in accordance with paragraph 16 of the Reasons for Judgment attached hereto;

2. the parties shall provide to the Registrar their proposed timetable for the completion of all pre-trial proceedings in this matter by **May 31**, **2010** in accordance with paragraph 17 of the Reasons for Judgment; and

3. the parties shall each bear their own costs of the motion.

Signed at Ottawa, Canada, this **22nd day of March, 2010**.

"E.A. Bowie"

Bowie J.

Citation: 2010 TCC 94
Date: **20100322**
Docket: 2005-1930(IT)G

BETWEEN:

LLOYD M. TEELUCKSINGH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR ORDER

Bowie J.

[1] This motion before me was argued for three full days. The appellant seeks various relief, in the alternative, including:

(i) an Order allowing the appeals;
(ii) an Order allowing some 520 appeals in similar cases;
(iii) an Order striking out the Reply to the Notice of Appeal;
(iv) an Order striking out some 18 subparagraphs from the Minister's assumptions of fact pleaded in paragraph 7 of the Reply;
(v) responses to a number of undertakings and follow-up questions that the respondent has either failed or refused to provide, or that the appellant considers have been inadequately answered; and
(vi) an Order requiring that the respondent's nominee reattend at the respondent's expense to be further examined for discovery.

[2] Mr. Teelucksingh was reassessed under the *Income Tax Act*[1] (the *Act*) or the taxation years 1993, 1994, 1995 and 1996 to disallow certain restricted farm losses that he claimed to be entitled to deduct in computing his income, and to include in his

[1] R.S. 1985 c.1 (5th supp.), as amended.

income certain amounts that the Minister of National Revenue says constituted withdrawals of cash from a registered retirement savings plan. His appeal was selected as a test case on the basis that it is representative of approximately 520 appeals that have been filed that involve similar facts. The reassessments under appeal were issued on April 9th 2001, and the appellant filed notices of objection on April 20. The Minister had neither confirmed the reassessments nor reassessed the appellant by June 2005, and so he appealed under paragraph 169(1)(*b*) of the *Act.*

[3] An Order made on September 21, 2005 required the parties to produce documents by January 31, 2006, and to complete examinations for discovery, including any undertakings, by April 30, 2006. These dates were extended to July 31, 2006 for examinations for discovery and October 31, 2006 to complete undertakings. Since then there have been further extensions of time, and other interlocutory procedures. At the end of November 2007 it appeared that the parties were ready to file a joint application for a trial date. Instead, however, the appellant filed a number of motions that resulted in an Order made on January 21, 2009 which permitted a minor amendment to the Notice of Appeal, and recorded the agreement of the parties that the respondent would provide more complete answers to undertakings by March 31, 2009, with the appellant to ask any follow-up questions by April 30, and the respondent to answer those by May 31.

[4] The respondent failed to provide the answers to follow-up questions by May 31, 2009, as the January Order required. That led to the filing on June 23, 2009 of the Amended Notice of Motion that is now before me. On the hearing before me, Mr. Aitken candidly admitted that this failure to comply with the January 21 Order resulted from his error in wrongly diarizing the matter. He accepted responsibility on behalf of the respondent as well for delay occasioned in the discovery of the respondent's nominee that arose from a failure to have all of the respondent's productions examined for privilege, and for the failure of the respondent's nominee to appear for the first day of discovery. That occurred because the examination was scheduled to take place in Ontario on St. Jean Baptiste day, and the nominee lives and is employed in the Province of Québec, and thought that he did not have to appear on a provincial holiday. Ms. Tari's position, asserted during a case management conference to schedule her motion, was that *Rule* 190 precluded the respondent from taking any step to remedy the default pending the hearing of this motion. The respondent has furnished answers to two questions in a letter dated August 31, 2009 which was written at my request, and a copy of which was sent to counsel for the appellant.

[5] That was the state of the matter when the motion was argued before me for three full days on September 15, 16 and 17, 2009.

[6] I shall deal first with the appellant's argument that the appeal should be allowed, along with the appeals of several hundred other individuals for whom this serves as a test case. Clearly this is the most drastic remedy that the Court could apply. To justify it, I would have to be satisfied that there has been deliberate and continuing delay by the respondent, or as Campbell J. put it in *Lichman v. Canada*,[2] "… a consistent pattern of inaction …". There has certainly been significant delay. Some of it has arisen through events beyond the parties' control. On one occasion discovery of the respondent's nominee had to be proponed due to a death in the family of counsel. Some is attributable to the respondent's three gaffes, as Mr. Aitken characterized them. I accept his explanation that these were the result of inadvertence rather than the sort of obstructive conduct that caused Campbell J. to dismiss the appeal in *MacIver v. The Queen*.[3] Some sanction may be called for, but it is certainly not an appropriate case in which to apply the most drastic remedy available.

[7] I turn now to the appellant's attack on the respondent's pleading. It takes two forms. First, it was argued that the Reply should be struck out because it pleads a different basis for the assessment from that which the Minister relied on when the assessment was first made. This argument is without merit. It is now well settled that subsection 152(9) of the *Act* allows the Minister to invoke a different basis for his assessment from that originally relied upon, even after the expiry of the normal reassessment period.[4]

[8] The appellant's other attack on the Reply is directed at 16 subparagraphs of paragraph 7 of the Reply. That paragraph sets out the assumptions that the Minister is said to have relied upon in reassessing the appellant. These subparagraphs are reproduced in Schedule B to the Amended Notice of Motion, and I reproduce it here:[5]

---

2 [2004] DTC 2547.

3 2007 DTC 1465.

4 *Walsh v. Canada*, 2007 FCA 222; RCI *Environment Inc. V. Canada*, 2008 FCA 419.

5 At the hearing of the motion counsel for the appellant withdrew from consideration subparagraphs 7 (l) and (o).

SCHEDULE "B"
SUBPARAGRAPHS FROM THE REPLY TO BE STRUCK

No.	*Pleading*
7(e)	The Offering Memoranda did not describe in detail the manner in which any revenue would be generated by the respective partnerships;
7(f)	The Offering Memoranda did not project profits to be generated during the existence of the limited partnerships;
7(g)	The amounts claimed by the R Partnership and by the XIII Partnership (the respective partnerships) for the years in issue for prepaid expenses of board and care were not, in fact incurred by the respective partnerships;
7(h)	If these amounts were in fact paid, they were paid to Montebello Farms Inc., a party with whom the respective partnerships were not dealing at arm's length;
7(i)	The respective partnerships did not incur any expense in order to gain or produce income from a business during the years under appeal;
7(j)	The portion which reads: "If the amounts claimed by the respective partnerships as prepaid expenses of board and care were, in fact, paid".
7(k)	The amounts claimed by the respective partnerships as prepaid expenses of board and care were not reasonable in the circumstances;
7(l)	The consideration for the horses purchased by the respective partnerships from Montebello Farms Inc. was payable entirely by promissory note;
7(m)	The total fair market value of the respective horse partnerships did not exceed $300,000;
7(n)	At all relevant times, neither of the respective partnerships operated a business;
7(o)	At all relevant times, neither of the respective partnerships generated any gross revenue;
7(p)	At all relevant times, neither of the respective partnerships intended to generate a profit;
7(q)	At all relevant times, the unit holders of each of the respective partnerships, including the General Partner of each, were not persons carrying on business with a view to profit;

7(t) At the time of the transfer, in each case, the actual market value of the partnership assets at the time of transfer were grossly overstated;

7(u) At the time of the transfer of the Preferred Shares in each corporation by the Appellant, to his RRSP, the said shares had little or no value;

7(v) At the time of the transfer of the Preferred Shares in the respective corporations to the appellant's RRSP, each of the respective corporations was not engaged in any business;

7(w) The R Partnership, the R Corporations, Montebello Farms Inc., the general partner of the R Partnership and other involved parties did not deal with each other at arm's length;

7(x) The XIII Partnership, the XIII Corporation, Montebello Farms Inc., the general partner of the XIII Partnership and other parties did not deal with each other at arm's length.

[9] Ms Taylor argued in respect of some of these subparagraphs that they are pleas of evidence, rather than of material facts. As to others she argued that they ought to be struck out of the pleading because, in her submission, they asserted conclusions of law, or in some cases mixed fact and law.

[10] The appellant's first objection appears to me to be essentially the same as that which was rejected by Bowman A.C.J., as he then was, in *Mungovan v. The Queen*,[6] in the following passage:

> 10 Assumptions are not quite like pleadings in an ordinary lawsuit. They are more in the nature of particulars of the facts on which the Minister acted in assessing. It is essential that they be complete and truthful. The conventional wisdom is they cast an onus upon an appellant and as Mr. Mungovan observes with some considerable justification they may force him to endeavour to disprove facts that are not within his knowledge. Superficially this may be true, but this is a matter that can be explored on discovery. The trial judge is in a far better position than a judge hearing a preliminary motion to consider what effect should be given to these assumptions. The trial judge may consider them irrelevant. He or she might also decide to cast upon the respondent the onus of proving them. The rule in *M.N.R. v. Pillsbury Holdings Ltd.*, 64 DTC 5184, is a rule of general application but it is not engraved in stone. …
>
> …

6 2001 TCC 568.

> 12 It is entirely possible, as Mr. Mungovan points out, that some of the impugned assumptions are irrelevant. This is a matter for the trial judge to determine after the evidence has been presented. It is not a matter that can or should be determined on a preliminary motion to strike. It may well be that the paragraphs contain allegations that lie exclusively within the respondent's knowledge. It is a matter for the trial judge to determine whether the onus should be cast upon the respondent to establish them. …
>
> …
>
> 14 The trial judge may well decide that the Crown has some onus that goes beyond the mere recitation of a bald assumption. The weight to be put on these paragraphs is a matter for the trial judge, as is the onus of proof. This is not, however, a reason for striking the paragraphs before trial.

These paragraphs have since been quoted with approval by the Federal Court of Appeal in *Kossow v. Canada*.[7]

[11] As to the suggestion that the impugned paragraphs, or some of them, plead law, or mixed fact and law, in the guise of assumptions of fact, contrary to the rule in *Anchor Pointe*,[8] I do not agree. Contrary to Ms. Taylor's submission, assertions as to value, that parties do not act at arm's length, that they did not carry on a business, that expenses were not incurred, or were not incurred for a particular purpose are assertions of fact. Certainly those facts have legal implications, and some of them use words that are used in the *Act*, but they are nevertheless factual assumptions.

[12] In any event it is much too late now to attack the pleading. Since the Reply was filed the parties have had production of documents, and the appellant has conducted several days of examination for discovery of the respondent's nominee. The Reply was filed in August 2005. *Rule* 8 provides:

> 8. A motion to attack a proceeding or a step, document or direction in a proceeding for irregularity shall not be made,
>
> (*a*) after the expiry of a reasonable time after the moving party knows or ought reasonably to have known of the irregularity, or

---

7 2009 FCA 83 at para. 21.

8 *Anchor Pointe Energy Ltd. v. Canada*, 2003 FCA 294.

> (*b*) if the moving party has taken any further step in the proceeding after obtaining knowledge of the irregularity,
>
> except with leave of the Court.

Even if I were to conclude that there is an irregularity here, I would not be inclined to grant leave under *Rule* 8 in the circumstances.

[13] I turn now to the questions which counsel for the appellant seeks to have answered. These are enumerated in Schedule C to the Amended Notice of Motion. That schedule is 34 pages in length and lists 180 separate items in a column headed "*Questions arising from further answer*". The heading of this column is something of a misnomer, as some of the items are undertakings which the appellant seeks to have fulfilled, or in some cases a further and better answer, and others are follow-up questions that are said to arise out of an answer given. Others are questions that the respondent has refused to answer.

[14] I do not propose to reproduce in these Reasons all the 34 pages of questions that are in issue, for obvious reasons. Instead, I shall simply list my decision with respect to each, numbered to correspond to the "*Questions*" as they appear in the right-hand column of Schedule C. Nor do I propose to give separate reasons for my decision for each of the 180 questions, as that would result in a document of inordinate length. Instead, I will set out in general terms the principles that I have applied in reaching my conclusion.

[15] Those principles are:

(i) Examination for discovery is an examination as to the information and belief of the other party as to facts that are relevant to the matters in issue, as defined by the pleadings.

(ii) The examining party is entitled to inquire into the relevant facts, but not the evidence by which they may be proved.

(iii) The examining party is entitled to have the names and addresses of persons who might be expected to have knowledge of relevant facts, but not to have production of witness statements.

(iv) The threshold of relevance is relatively low, but pure fishing expeditions are not permitted.

(v) The examining party is entitled to have any information, and production of any documents, that may fairly lead to a train of inquiry that may directly or indirectly advance his case, or damage that of the opposing party.

(vi) The examining party is entitled to have production of any documents that are relevant to the matters in issue as defined by the pleadings, but subject to proper claims of privilege.

(vii) A party producing documents is not required to segregate them by issue for the benefit of the other party.

(viii) A party producing a document that is in one official language is not required to translate it for the benefit of the other party.

(ix) A party is entitled to know the position of the other party as to an issue of law, but is not entitled to have access to either the legal research or the reasoning by which that position is arrived at.

(x) A party asked to produce a relevant document must produce it if it exists and is within the power or control of the party. A document that cannot be found cannot be produced. It is not improper to answer that the party has not found the document, but continues to search for it, as the obligation to produce continues in respect of information and documents discovered after the examination is closed.

(xi) The question "what efforts have you made to fulfill this undertaking?" is not a proper question as it is directed solely to the credibility of the witness, contrary to *Rule* 95(1)(*b*).

[16] Applying these principles, the following is my disposition of the 180 questions that are set out in Schedule C to the Amended Notice of Motion, numbered as they are numbered in the right-hand column of the Schedule.

1. Improper question.
2. Question has been answered.
3. Question has been answered.

4. Question has been answered.
5. Question has been answered.
6. The Respondent should provide the unredacted version of the letter if available.
7. Question has been answered. The Appellant should do his own search in the documents.
8. The Respondent should provide a response.
9. Question has been answered.
10. Question has been answered.
11. Improper question.
12. Improper question.
13. The Respondent should provide a response.
14. Improper question.
15. Improper question.
16. Question has been answered.
17. Improper question.
18. Improper question.
19. Improper question
20. Improper question.
21. Improper question.
22. Improper question.
23. Improper question.
24. The Respondent should provide a response.
25. The Respondent should provide a response.
26. Improper question.
27. Improper question.
28. Improper question.
29. Improper question.
30. The Respondent should provide a response.
31. The Respondent should provide a response.
32. The Respondent should provide a response.
33. The Respondent should provide a response
34. The Respondent should provide a response.
35. The Respondent should provide a response.
36. The Respondent should provide a response.
37. The Respondent should provide a response.
38. The Respondent should provide a response.
39. The Respondent should provide a response.
40. Improper question.
41. Improper question.
42. Improper question.
43. Improper question.
44. Improper question.
45. Improper question.
46. Improper question.
47. Not an undertaking given by the Respondent.
48. Improper question.

49. Question has been answered.
50. Question has been answered.
51. Question has been answered.
52. The Respondent should produce a copy of the video if possible.
53. The Respondent should produce any notes, memoranda or correspondence, if available.
54. Question has been answered.
55. The Respondent should provide a response.
56. The Respondent should provide a response.
57. The Respondent should provide a response.
58. Question has been answered.
59. The Respondent should produce the lease agreement and breeding agreements, if available.
60. Question has been answered.
61. The Respondent should provide contact information, if available.
62. Improper question.
63. Improper question.
64. Improper question.
65. Improper question.
66. Improper question.
67. Improper question.
68. Improper question.
69. Improper question.
70. Improper question.
71. Improper question.
72. Improper question.
73. Improper question.
74. Improper question.
75. Improper question.
76. Improper question
77. Improper question
78. Improper question.
79. Question has been answered.
80. Question has been answered.
81. Improper question.
82. Improper question.
83. Improper question.
84. Improper question.
85. The Respondent should provide contact information if available.
86. The Respondent should provide a response.
87. The Respondent should provide a response.
88. The Respondent should provide a response.
89. The Respondent should provide a response.
90. The Respondent should provide a response.
91. The Respondent should provide a response.
92. The Respondent should provide a response.

93. The Respondent should provide a response.
94. The Respondent should provide a response.
95. The Respondent should provide a response.
96. The Respondent should provide a response.
97. The Respondent should provide a response.
98. The Respondent should provide a response.
99. The Respondent should provide a response.
100. Improper question.
101. Improper question.
102. Improper question.
103. Question has been answered.
104. Question has been answered.
105. The Respondent should provide a response.
106. Improper question.
107. Improper question.
108. The Respondent should provide a response.
109. Improper question.
110. Improper question.
111. The Respondent should provide a response.
112. The Respondent should produce a legible copy of page 2 if available.
113. Question has been answered.
114. The Respondent has no obligation to translate the documents provided.
115. The Respondent should provide a response.
116. The Respondent has no obligation to translate the documents provided.
117. Improper question.
118. Improper question.
119. Improper question.
120. Improper question.
121. The Respondent should provide the date, if known.
122. Improper question.
123. The Respondent should provide a response.
124. Improper question.
125 Improper question.
126. Improper question.
127. Improper question.
128. Improper question.
129. Improper question.
130. Improper question.
131. Improper question.
132. Improper question.
133. Improper question.
134. Question has been answered.
135. Improper question.
136. Improper question.
137. Improper question.
138. Improper question.

139. Improper question.
140. Improper question.
141. Question has been answered.
142. Improper question.
143. The Respondent should provide a response.
144. The Respondent should provide a response.
145. Improper question.
146. Privileged communication. The Respondent does not have to answer the question.
147. The Respondent has no obligation to provide translations of documents produced.
148. The Respondent has no obligation to provide translations of documents produced.
149. Improper question.
150. The Respondent should produce the documents, if available.
151. The Respondent should produce the documents, if available.
152. The Respondent should provide a response.
153. The Respondent should provide a response.
154. Improper question.
155. Improper question.
156. The Respondent should provide a response.
157. Improper question.
158. The Respondent should provide the current status, if known.
159. The Respondent should provide contact particulars, if known.
160. The Respondent should provide a response.
161. The Respondent should provide a response.
162. The Respondent should provide a response.
163. The Respondent should provide a response.
164. The Respondent should provide a response.
165. The Respondent should provide a response.
166. Question has been answered.
167. The Respondent should provide a response.
168. The Respondent should provide a response.
169. Improper question.
170. The Respondent should provide a response.
171. The Respondent should provide a response.
172. The Respondent should provide a response.
173. The Respondent should provide a response.
174. The Respondent should provide a response.
175. The Respondent should provide a response.
176. The Respondent should provide a response.
177. The Respondent should provide a response.
178. The Respondent should provide a response.
179. Question has been answered.
180. The Respondent has no obligation to provide translations of documents produced.

The answers to some of these questions are in the letter of August 31, 2009 to which I have referred. These have not been formally communicated to the appellant, and that should be done now. All the responses required are to be provided to the appellant by April 30, 2010. If for any reason the respondent is not able to meet that deadline an application, supported by proper material, may be made to extend it.

[17] It is apparent that there has not been the degree of cooperation between the parties to this appeal that is usual in this Court when parties are represented by experienced counsel. Unless counsel remedy that there will be more delay, and the cost of the litigation to the parties will continue to escalate. In the hope that that can be avoided, I am directing the parties to make their best effort to agree on a timetable for completion of the remaining pre-trial steps, and on a proposed trial date, to be sent to the Registrar by **May 31, 2010.**

[18] The appellant has had only modest success in the motion. A great deal of time was wasted at the hearing of the motion on arguments that were forlorn. If the respondent had complied with the January 21, 2009 Order then this motion would not have been necessary, or at least would have been confined to a few questions. In the circumstances the parties should each bear their own costs.

Signed at Ottawa, Canada, this **22nd day of March, 2010.**

"E.A. Bowie"

Bowie J.

CITATION:	2010 TCC 94
COURT FILE NO.:	2005-1930(IT)G
STYLE OF CAUSE:	LLOYD M. TEELUCKSINGH and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 15, 16 and 17, 2009

AMENDED REASONS FOR ORDER BY: The Honourable Justice E.A. Bowie

DATE OF AMENDED ORDER: March 22, 2010

APPEARANCES:

Counsel for the Appellant:	A. Christina Tari and Leigh Sommerville Taylor
Counsel for the Respondent:	George Boyd Aitken and Jack Warren

COUNSEL OF RECORD:

For the Appellant:

Name:	A. Christina Tari
Firm:	Richler and Tari

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada