Docket: 2009-3904(GST)G

BETWEEN:

SURREY CITY CENTRE MALL LTD.,

Appellant,
(Applicant)

and

HER MAJESTY THE QUEEN,

Respondent.

Applicant's proposed Rule 58 Motion heard on September 3, 2010
at Vancouver, British Columbia

Before: The Honourable Justice J.E. Hershfield

Appearances:

Counsel for the Applicant:	Joel Nitikman
Counsel for the Respondent:	Ron Wilhelm

ORDER

Having heard the Applicant's request that it be allowed to proceed under Rule 58 of the *Tax Court of Canada Rules (General Procedure)* to bring a motion to determine whether the Respondent is prevented by one or more of *res judicata*, non-mutual issue estoppel or abuse of process from re-litigating the issue of whether the Applicant is liable under section 182 of the *Excise Tax Act* and that such motion be heard prior to any further steps being taken in this Appeal, such as discovery of documents or examinations for discovery;

And having heard the parties' arguments and considered their submissions including a submission that certain paragraphs of the affidavit of Paul Wilson filed by the Respondent be struck;

IT IS ORDERED THAT:

1. paragraphs 8, 12, 13 and 16 of the affidavit of Paul Wilson be struck;

2. the request to proceed under Rule 58 of the *Tax Court of Canada Rules (General Procedure)* to bring a motion for a determination of the question raised is dismissed for the reasons set out in the attached Reasons for Order;

3. The parties shall communicate with the Hearings Coordinator in writing no later than 60 days after the date of this Order to advise the Court of an agreed schedule for proceeding with pre-trial matters, or whether a hearing date or status hearing date will be required; and

4. costs in respect of the hearing of the request shall be in the cause or as otherwise directed by the Court on the disposition of the Appeal.

Signed at Ottawa, Canada this 2nd day of December 2010.

"J.E. Hershfield"

Hershfield J.

Citation: 2010 TCC 619
Date: 20101202
Docket: 2009-3904(GST)G

BETWEEN:

SURREY CITY CENTRE MALL LTD.,

Appellant,
(Applicant)

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Hershfield J.

The Order Sought

[1] The Applicant has appealed an assessment for GST (the "Appeal") made under subsection 182(1) of the *Excise Tax Act* (the "*Act*") but presently seeks an Order granting it leave to make a Motion under Rule 58 of the *Tax Court of Canada Rules (General Procedure)*. This recognizes that the application of that Rule is a 2-step process. The first step is to determine whether the question put is one that should appropriately be dealt with under that Rule.

[2] I will set out the complete text of the Order sought under the heading "Related Issues". However much of that text is incidental to its main thrust which is as follows:

> (a) the Applicant's proposed Rule 58 Motion to determine whether the Respondent is prevented by one or more of *res judicata*, non-mutual issue estoppel or abuse of process from re-litigating the issue of whether the Appellant is liable under section 182 of the *Excise Tax Act* should be heard prior to any further steps being taken in this Appeal, such as discovery of documents or examinations for discovery;

[3] The re-litigation issue arises from a Consent Judgment issued by this Court in respect of a liability under the *Act*. That judgment disposed of an assessment against a different taxpayer in respect of the same transaction as that to which the Appeal relates.

Background

[4] The Applicant, Surrey City Centre Mall Ltd. (the "Appellant Mall Co.") which, at all relevant times, was a wholly owed subsidiary of ICBC Properties Ltd. ("Properties Ltd.") which, at all relevant times, was a wholly owned subsidiary of The Insurance Corporation of British Columbia ("ICBC")[1] which is a provincial Crown corporation operating a mandatory scheme of motor vehicle insurance in British Columbia. Properties Ltd., or its subsidiaries, managed all of ICBC's real estate investments.

[5] At all relevant times, the Appellant Mall Co. and ICBC were both registrants for the purposes of Part IX of the *Act*.

[6] A series of transactions led to the Appellant Mall Co. acquiring lands in Surrey, B.C. in 1999 and 2000. These lands were intended to be used for the development of a mall and university space for the Technical University of British Columbia ("Tech BC") created by an enactment of the BC legislature to own and operate a new university in Surrey.[2]

[7] A development agreement was entered into among the Appellant Mall Co., ICBC, Tech BC and the Province in 2000 whereby the Appellant agreed to develop and construct a mall and the university space. Under that agreement the Appellant Mall Co. agreed to lease the university space to Tech BC and Tech BC agreed to lease the space from the Appellant Mall Co.. ICBC agreed to fund the Appellant Mall Co.'s obligations under the agreement to complete the university space.[3]

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[1] This was the structure in 2002 when the transaction giving rise to the assessment under appeal occurred. According to the pleadings, Properties Ltd. was wound-up in 2004 at which time the Appellant Mall Co. became a wholly owned subsidiary of ICBC.

[2] Tech BC never came into being as a university and was, according to the pleadings, dissolved in 2003.

[3] There should be no doubt that I am attempting in providing this background to recite facts that are not contested at least in the pleadings as they were first filed. For example, according to the pleadings, there is no consensus as to whether a "Lease Development Agreement" was entered into although there appears to be a consensus that a final lease agreement was never entered into. The

[8] The development proceeded. ICBC advanced funds to Properties Ltd. which in turn advanced such funds to the Appellant Mall Co. in respect of the project. In 2002, the Province announced that Tech BC would not fulfill its obligations to lease the university space.

[9] A settlement agreement was entered into among ICBC, the Appellant Mall Co., Properties Ltd., Tech BC and the Province. Under the settlement agreement Tech BC agreed on behalf of itself and the Province to pay to ICBC or its nominee $41.1 M (the "Payment") in exchange for ICBC, Properties Ltd. and the Appellant Mall Co. releasing Tech BC and the Province from all obligations under the development agreement and related agreements.

[10] The Payment was made but there is no agreement between the parties to the Appeal as to whom the payment was intended to be made or benefit or on whose behalf it was received although it is not in dispute that the Payment was directed to and received in the bank account of ICBC.

[11] In December 2005, the Minister assessed ICBC for GST in respect of the Payment under subsection 182(1) of the *Act*. That provision would be applicable if ICBC received the Payment for termination of an agreement to make a taxable supply. The taxable supply agreed to be made was a lease. ICBC was asserted to be the supplier of the lease right.[4] Subsection 225(1) of the *Act* calculated the net tax payable based on the amount received by ICBC. In the alternative, the Minister pleaded that the Appellant Mall Co. was the party that made the taxable supply but that ICBC was still liable for the net tax under subsection 225(1) as the recipient of the payment on behalf of the Appellant Mall Co.. ICBC appealed, pleading, *inter alia*, that the Appellant Mall Co. was the party under the development agreement that made the supply and that ICBC incurred no liability under subsection 182(1) of the *Act*. Presumably that obviated any concern over the application of subsection 225(1).

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development agreement only set out a draft lease. In any event, this being step 1 in a 2-step process, there is an inherent danger in relying on a factual background that has yet to be litigated.

[4] The pleadings in the ICBC appeal indicate that reliance was placed on section 133 of the *Act.* That section is a deeming provision that was being relied on as making ICBC a supplier of Tech BC's right to lease the university property by virtue of it being a party to the agreement. Liability arising from section 133 was not addressed in ICBC's pleadings.

[12] The Minister consented to judgment in favour of ICBC. The Respondent in the current Appeal pleads that the consent was given solely on the basis that ICBC was not the party to make the supply under the development agreement. Presumably the Minister assumed the Appellant Mall Co. would not later assert that the Minister by thus consenting, was consenting to a judgment that found, as a matter of law, that the alternative argument, that the Appellant Mall Co. was the supplier in respect of which subsection 182(1) could be applied, had been adjudicated. However, the Appellant Mall Co. is indeed asserting just that. It is asserting that the legal effect of the Consent Judgment is that the respondent in the ICBC appeal failed in its assertion that the Appellant Mall Co. made a taxable supply. That legal effect is said to make the present assessment open to attack on the very grounds now being asserted as determinable under Rule 58.

[13] Resting behind this initial arena of litigious confrontation, the Appeal launched by the Appellant Mall Co., in addition to raising the *res judicata* issue, denies liability under subsection 182(1).[5] That denial appears to be based on the assertion that it was ICBC that received the Payment for its own account for providing the releases which I take to mean it asserts that it was ICBC that provided taxable supplies in respect of which the Payment was received. In the absence of an agreement otherwise, that binds it, there is no rule of law that prevents the Appellant Mall Co. from taking a different position than that taken by ICBC in resolving its dispute with the CRA leaving the Minister vulnerable to missing a legal remedy to collect a tax that otherwise was payable. That is what appears will happen if the Appellant Mall Co. ultimately succeeds in having its position prevail. In any event, the Appellant Mall Co. is now requesting as a preliminary matter a hearing under Rule 58 seeking an Order that the subject assessment under subsection 182(1) is *res judicata* or barred on the basis of non-mutual issue estoppel or abuse of process.

Related Issues

[14] In addition to requesting a hearing under Rule 58 seeking an Order barring the assessment the request goes on as follows:

> …
> (b) the Applicant should obtain a Motion date from the Court that is convenient for the Court and the parties and file a Rule 58 Notice of Motion returnable on that date;
> (c) at the hearing of the Rule 58 Motion the only evidence will be:

[5] There also appears to be an issue as to whether the Payment included the GST amount which inclusion is denied.

(i) the pleadings in this Appeal;
(ii) the pleadings as finally amended in the matter of *ICBC v. Her Majesty the Queen*, Court File No. 2007-858(GST)G; and
(iii)the Consent Judgment issued by this Court in that matter;

and no other evidence will be adduced by either party; and

(d) the costs of this motion be in the cause.

[15] The request for the Order as to the evidence to be allowed to be brought at the Rule 58 hearing, should one be allowed, raises another issue. Rule 58 provides:

58.(1) A party may apply to the Court,
(a) for the determination, before hearing, of a question of law, a question of fact or a question of mixed law and fact raised by a pleading in a proceeding where the determination of the question may dispose of all or part of the proceeding, substantially shorten the hearing or result in a substantial saving of costs, or
…
and the Court may grant judgment accordingly.

(2) No evidence is admissible on an application,
(a) under paragraph (1)(*a*), except with leave of the Court or on consent of the parties, or[6]
…

[16] In addition to the Respondent opposing the request for a Rule 58 hearing, the limitation on the evidence to be heard, should I allow the request, is also opposed. The Respondent has argued for the need for further evidence which would consist, amongst other things, of the two affidavits filed with the Court as part of the current proceeding, copies of certain documents and transcripts of discoveries held during the ICBC appeal.

[17] One of the affidavits referred to above, namely that of Mr. Paul Wilson, an auditor employed with the CRA, included information supplied to the affiant by counsel for the Respondent. Mr. Nitikman objected to the inclusion of those parts of the affidavit that clearly offended the rule against a member of the bar appearing as a witness in a proceeding in which he is acting as counsel. This rule extends to

[6] *Tax Court of Canada Rules (General Procedure)*, S.O.R./90 - 688a, s. 58.

giving evidence by providing it to an affiant.[7] I agree with Mr. Nitikman on this point and, although it may be unnecessary to do so at this stage, I will include in my Order an order recognizing that they have been struck.

[18] That still leaves Mr. Wilson's affidavit intact respecting discussions he had with Mr. Nitikman before and after the signing of the Consent to Judgment which include a proposed assessment of the Appellant Mall Co. and a waiver signed and later revoked by it.

[19] That leaves, as well, the affidavit of Ms. Trinie Gee, an appeals officer with the CRA. That affidavit sets out the background of the assessment both of ICBC and the Appellant Mall Co. including a voluntary disclosure, a meeting with Mr. Nitikman and various telephone conversations all being implicitly suggested as being relevant to the question to be determined at a Rule 58 hearing, should one be allowed.

Appellant Mall Co.'s Argument

[20] In respect of the requirement in Rule 58(1)(a) that the question for determination raised by a pleading may be made by the Court where the determination may dispose of all or part of the proceeding, substantially shorten the hearing or result in a substantial saving of costs, counsel for the Appellant Mall Co. argues that if the result of a determination is to bar the assessment against the Appellant Mall Co., the appeal will be disposed of which meets the requirement for allowing the application of the Rule.

[21] As to whether there is an absolute requirement that there be no facts in issue, the Appellant submits that there is no such requirement and relies on the Federal Court of Appeal decision in *Perera v. Canada*.[8]

> **13** It may be useful to recall that Rule 474 does not confer on anyone the right to have questions of law determined before trial; it merely confers on the Court the discretion to order, on application, that such a determination be made. In order for the Court to be in a position to exercise that discretion, it must be satisfied, as was stated in the Berneche case, that the proposed questions are pure questions of law, that is to say questions that may be answered without having to make any finding of fact. Indeed, the purpose of the Rule is to have the questions answered before the trial; it is neither to split the trial in parts nor to substitute for part of the

[7] *Dr. Bernard C. Sherman v. Her Majesty the Queen,* 2000 DTC 1970.

[8] [1998] 3 F.C. 381, 158 D.L.R. (4th) 341 (FCA).

> trial a trial by affidavits. **This is not to say, however, that the parties must agree on the facts giving rise to the legal questions;** a legal question may be based on an assumption of truth of the allegations of the pleadings provided that the facts, as alleged, be sufficient to enable the Court to answer the question. [footnotes omitted, emphasis added in the Appellant's brief].

[22] Furthermore, counsel for the Appellant Mall Co. notes that Rule 58(1)(a) was amended in 2004 to add the words "a question of fact or a question of mixed law and fact", thereby making it clear that a Court may make a finding of fact on a Rule 58 Motion, so there need not be complete agreement on the facts, so long as the Court is capable of making a finding of fact on the evidence presented at the Rule 58 Motion.

[23] Further, counsel for the Appellant Mall Co. asserts that in the Motion at bar, the pleadings and the Consent Judgment in the ICBC appeal and the pleadings in the Appellant Mall Co. Appeal are a matter of record. Those are the only records that are relevant to the pleas of *res judicata*, issue estoppel and abuse of process. While the parties do not agree on all the facts that might eventually be relevant to the issue of whether the Appellant Mall Co. is liable under subsection 182(1), none of those facts bear on the *res judicata*, issue estoppel or abuse of process issues. And further, in any event, solely for purposes of this request, the Applicant is prepared to admit to the facts asserted in the Reply other than two.

[24] First, there is no admission that the basis for the Consent Judgment was solely that ICBC had no supply obligation under the Development Agreement. This means that the Appellant Mall Co. will insist on the factual assertion, drawn from the Consent Judgment itself, that the Consent Judgment reflects a basis for it that includes a finding that ICBC was not liable under subsection 225(1) of the *Act.* This in turn means the Consent Judgment has thereby found the Appellant Mall Co. not liable under subsection 182(1) since if it were, subsection 225(1) would have applied to ICBC.

[25] Second, the Appellant Mall Co. does not agree with the statement in the Reply that asserts "ICBC's appeal involved an assessment against ICBC and not against the Appellant" Admitting this asserted fact, would presumably suggest that the Consent Judgment could only dispose the ICBC appeal and have no impact on the current Appeal from an assessment of a different party. Such impact is at the heart of Appellant Mall Co.'s request for a determination. It argues that that *is* the impact in law.

[26] It is also pointed out that this Court has previously relied on Rule 58(1)(a) to determine whether a party is prevented from litigating one or more issues under *res judicata*, issue estoppel or abuse of process and that same may be based on a Consent Judgment. The authorities cited are *Mortensen v. The Queen*[9] and *Goodfellow v. The Queen*.[10]

[27] Counsel for the Appellant Mall Co. acknowledges that *res judicata* or issue estoppel will only apply if the burden imposed on the party seeking to invoke it satisfies the burden on it of proving that the Rule needs to be applied to prevent a party from re-litigating a matter.[11]

[28] Counsel for the Appellant Mall Co. points out the distinction between the doctrine of abuse of process and *res judicata* by quoting from *Golden et al. v. The Queen*:[12]

> **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. [emphasis added in the Appellant's brief]

[29] Counsel for the Appellant Mall Co. emphasizes that whether a party has committed an abuse of process is decided by looking at the integrity of the judicial process and not the status, motives or rights of the parties. The Federal Court of Appeal has made this point in *Garber, Belchetz and Morel v. The Queen*[13] as follows:

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[9] 2010 DTC 1124 (TCC).

[10] 2010 DTC 5026 (FCA) at para. 6.

[11] Lange, *The Doctrine of Res judicata in Canada* (3rd ed. 2010) at p. 17; *Re EnerNorth Industries Inc.* (2009), 55 C.B.R. (5th) 1 (Ont. CA), leave to appeal refused 2010 CarswellOnt 124 (SCC); *Ernst & Young Inc. v. Central Guaranty Trust Co.* (2006), 24 B.L.R. (4th) 218 (Alta. CA), leave to appeal refused (2007), 432 A.R. 397 (note) (S.C.C.).

[12] 2008 DTC 3363 (TCC), aff'd 2009 DTC 5079 (FCA).

[13] 2008 DTC 6154.

> **39** In terms of how to exercise one's discretion in applying the abuse of process doctrine, Justice Arbour provided a number of considerations in deciding when it would be an abuse of process to relitigate a matter in CUPE at paragraphs 51-2:
>
> > 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. …

[30] Accordingly, abuse of process focuses on whether the judicial system has been abused, not on whether the parties have been abused. Therefore, an examination for discovery of the Appellant Mall Co. or ICBC to determine if the Crown has been abused by bestowing a benefit on the other parties would be irrelevant.

[31] Lastly, it is argued that this Court should not look behind the Consent Judgment. It is argued that with regard to each of *res judicata*, issue estoppel and abuse of process, it is clear that a court in a subsequent proceeding cannot look behind an earlier Consent Judgment to examine the negotiations leading up to the Consent Judgment. This was conclusively determined in the BC Supreme Court, and confirmed by the BC Court of Appeal in *Prairie Hydraulic Equipment Ltd. v. Lakes District Maintenance Ltd.* [14]

Respondent's Argument

[32] Respondent's counsel argues that *res judicata*, issue estoppel and abuse of process all involve exercises of the Court's discretion and that they focus on issues of fairness between the parties. It is argued that fairness will depend on a balancing of various interests to arrive at the most just result which requires a detailed, factual underpinning not found simply in the pleadings.

[33] Respondent's counsel reviews the two branches of *res judicata*: cause of action estoppel and issue estoppel.[15] Cause of action estoppel precludes a person from bringing an action against another when an earlier proceeding has determined that same cause of action.[16] That is, it requires a final decision of a court of

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[14] 1999 Carswell BC 2357 (BCCA), aff'ing 1998 Carswell BC 2017, [1998] B.C.J. No. 2035 (BCSC).

[15] *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 S.C.C. 63, [2003] S.C.J. No. 64 (Q.L.), at para. 23.

[16] *Angle v. Canada*, [1975] 2 S.C.R. 248 at p. 254.

competent jurisdiction in the prior action. While not elaborated on by Respondent's counsel, it also requires, amongst other things, that the parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action [mutuality].[17] Issue estoppel has three pre-conditions: a) the issue must be the same as the one decided in the prior case; b) the prior judicial decision must have been final; and c) the parties to both proceedings must be the same, or their privies.[18]

[34] Respondent's counsel asserts that the doctrine of non-mutual issue estoppel is an American concept that is not accepted as a general principle of Canadian law. The American concept would drop the third pre-condition noted above in respect of issue estoppel. That is, the condition respecting mutuality of parties is not required under a doctrine of non-mutual issue estoppel. It is suggested that even this doctrine encounters difficulties when used offensively as the Respondent asserts Appellant Mall Co. seeks to do in this case.[19]

[35] Further, it is asserted that non-mutual issue estoppel is not a mechanical, self-applying rule. It contains discretionary elements which may militate against its application. Its abandonment of mutuality requires it to contain sufficient flexibility to prevent unfairness.[20]

[36] With respect to abuse of process, it is submitted that it is a flexible doctrine that does not bar litigation where its continuation would enhance the integrity of the judicial system, including when fairness dictates that the original result should not be binding in the new context.[21]

[37] It is also acknowledged that abuse of process may be established where proceedings would violate the fundamental principles of justice underlying the community sense of fair play and decency.[22]

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[17] See *Grandview (Town) v. Doering*, [1976] 2 S.C.R. 621.

[18] *Toronto (City) (supra)*, at para. 23.

[19] *Toronto (City) (supra)*, at paras. 23 to 28 and 32.

[20] *Toronto (City) (supra)*, at paras. 29 to 31.

[21] *Toronto (City) (supra)*, at paras. 37 and 52.

[22] *Toronto (City) (supra)*, at para. 35.

[38] In focusing on the Court's discretion to apply the doctrines sought to be applied by the Appellant Mall Co., the Respondent underlines that their purpose is to prevent unfairness and cites the Supreme Court of Canada in *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*:[23]

> **53** … 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. …

[39] In order to determine the question of fairness and justice the Court must look at the entirety of the circumstances to see whether the application of the *res judicata* or the abuse of process doctrines would work an injustice in this particular case.[24] That is, the Court requires a proper factual underpinning which includes a complete picture of what led up to the execution of the Consent Judgment in the ICBC Appeal. This can be achieved by having the trial Judge, hearing the totality of the evidence, decide whether in fairness the Respondent should be precluded from pursuing the assessment against the Appellant Mall Co.. The question asked cannot be determined in the abstract or in a vacuum.[25] Determining or assuming in advance what facts may or may not be relevant to the determination of a question of law is asserted to be troublesome and heightens the importance of at least allowing for discoveries before considering such a hearing.[26] The Respondent's right to discoveries would be unfairly barred if the evidentiary limitations sought by the Appellant Mall Co. are accepted. It is asserted, as well, that the discoveries relating to the ICBC appeal, amongst other things, are necessary to give the necessary factual picture.

[40] As well, the Court's discretion must be exercised, in addition to fairness, on the basis of convenience and efficiency.[27] The Respondent's counsel argues that the application of Rule 58 would only serve to bifurcate the proceedings and would not likely result in a substantial saving of time or cost. Indeed, it could increase the

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[23] 2003 S.C.C. 63, [2003] S.C.J. No. 64 (Q.L.). See also para. 55.

[24] *Garber, Belchetz and Morel (supra)* at para. 40.

[25] *Gregory v. Canada*, [2000] F.C.J. No. 1660 (Q.L.) (C.A.), at para. 4; *Banque Nationale du Canada v. Canada*, 2006 TCC 363, [2006] T.C.J. No. 264 (Q.L.), at paras. 8, 9 and 11.

[26] *Webster, (supra)*, at para. 19. *Spencer v. Canada*, [2001] T.C.J. No. 604 (Q.L.), at paras. 12 to 14 and 16.

[27] *Kossow v. Canada*, 2006 TCC 151, [2006] T.C.J. No. 101 (Q.L), at para. 14.

cost if the Court determines that none of these doctrines preclude the Respondent from litigating the assessment against the Appellant Mall Co..

[41] Again focusing on the Court's discretion, the Respondent emphasizes the importance of the principles of law that may be involved, such as non-mutual estoppel, have far-reaching effect and are of serious public concern given their resonance within the system of administration of justice. As such, consideration of the application of such principles should not be considered in a vacuum.

Analysis

[42] Counsel for Appellant Mall Co. has argued that the facts set out in the pleadings in this Appeal, the pleadings as finally amended in the ICBC appeal, and the Consent Judgment issued by this Court in that matter be the only evidence allowed to be adduced by either party on the hearing of a Rule 58 determination. As well, the Appellant Mall Co. is prepared to admit to the facts asserted in the Reply to the Appeal other than the two referred to above.

[43] There is no admission that the basis for the Consent Judgment was solely that ICBC had no supply obligation under the Development Agreement. However, this is the very basis on which the Respondent relies to escape the determination sought by the Appellant Mall Co.. The purpose of the Respondent's request for more evidence is to demonstrate that the basis for the Consent Judgment was solely that ICBC had no supply obligation under the Development Agreement and that the question of whether the Appellant Mall Co. had made the taxable supply in question has not been litigated or decided.

[44] Further, the Appellant Mall Co. does not agree with the statement in the Reply that asserts "ICBC's appeal involved an assessment against ICBC and not against the Appellant." As noted earlier in these Reasons, admitting this asserted fact would presumably suggest that the Consent Judgment could only dispose the ICBC appeal and have no impact on the current Appeal from an assessment of a different party. Such impact is at the heart of Appellant Mall Co.'s request for a determination. It argues that that *is* the impact in law.

[45] I agree with the Respondent's position in this matter. Indeed, I am of the view that the correctness of that position should be self-evident. As Dickson J. (as he was then) wrote when discussing the requirements for an estoppel of this sort:

> 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.[28]

[46] We must be all the more wary of drawing inferences from consent judgments, which provide no reasons. The result, and only the result, to the parties to the appeal that the consent relates to, is normally all that can be drawn from such a judgment. That is, all that can be taken as disposed of by a consent judgment is that which can obviously and necessarily be drawn from it as being disposed of. That which is not expressly declared on the face of the judgment cannot be presumed to have been dealt with or disposed of unless it is, nonetheless, necessarily such an integral part of it as to require a finding that it has effectively been dealt with in express terms; beyond that there can be no such thing as *res judicata* by implication.[29] It is only the necessary aspects of a consent judgment, not the inferred or possible indirect aspects of it, that can be said to have been disposed of by the Court. More simply put, when no reasons or factual basis for a judgment is given, it is not possible to say what issues and arguments a litigant is estopped from raising except for the single issue resolved by the judgment. In this case, the only issue resolved on the face of the judgment was the liability of ICBC.

[47] Further, the elevation of an agreement to a judgment does not necessarily change the underlying premises of the agreement which might still stand as between the parties and others, provided it is not inconsistent with the direct result of the judgment. In some cases it has even been held that a consent judgment is not a judicial determination of the merits of a case and can be defeated on the same grounds as the agreement.[30] While in tax cases a consent judgment can be taken as judicial approval of the merits of the particular agreed result, it cannot be taken as addressing the merits of any other aspect of the matters that are entangled in the litigation events that gave rise to the agreement and judgment.

[48] It is all the more important then, in such cases, to ascertain what the real matter of controversy in the case was and the enquiry required to make that determination cannot be limited to what is found on the record. Indeed, limiting the

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[28] *Angle (supra*) at p. 255.

[29] *Carlton Condominium Corp. No. 21 v. Minto Construction Ltd.* [2001] O.J. No. 5124 (Q.L.) at paras. 200-01.

[30] Abella J. in *Rick v. Brandsema*, 2009 SCC 10 at para. 64.

enquiry, in this way, in any genre of case seeking to find what issues are *res judicata*, has a heritage of not being encouraged by the Courts.[31]

[49] To argue that the Consent Judgment does more than dispose of the liability of ICBC puts the onus on the party asserting it to demonstrate a compelling factual background that would lead to a finding that limiting the result of the Consent Judgement would lead to an abuse that would undermine in some material way the administration of justice. The need for that factual background is exactly what the Respondent is asserting is required. Granting that request, however, undermines the purpose of applying Rule 58 in the first place.

[50] Further, without an esoteric analysis of when and why *res judicata*, non-mutual issue estoppel or abuse of process are bars to litigation, it strikes me as self-evident, in this case, that there is no danger to the administration of justice in allowing the litigation to proceed. Rather, the administration of justice could be more damaged by applying those doctrines, in this case, than by not applying them.

[51] Further still, the allowance of the request for a Rule 58 determination is discretionary. Even if I have placed less reliance on the Appellant Mall Co.'s counsel's well-crafted arguments and use of authorities than he believes to be appropriate, he is not prevented from urging the trial judge to consider, *ab initio*, the bar to the re-litigation issue raised in the Notice of Appeal. My finding ultimately is only to dismiss the request for a Rule 58 determination.

[52] In short, I embrace all the Respondent's arguments. I see no need to review the authorities relied on further. They are referred to in these Reasons and afford me sufficient comfort in arriving at my conclusion to dismiss the request.

Signed at Ottawa, Canada this 2nd day of December 2010.

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[31] Re Ontario Sugar Co. [1911] O.J. No. 76 (Q.L.) (Ont. C.A.) at paragraph 16. Other cases that encourage the view that all available evidence and material must be examined to ascertain what issues were disposed of by a consent judgment include *Greer v. Harrison* [1979] B.C.J. No. 946 (Q.L.) (BCSC) and *Carlton Condominium Corp. No. 21 v. Minto Construction Ltd.(supra).*

"J.E. Hershfield"

Hershfield J.

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APPEARANCES:

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Counsel for the Respondent:	Ron Wilhelm

COUNSEL OF RECORD:

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