Docket: 2009-2430(IT)G

BETWEEN:

CAMECO CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard by telephone conference on July 7, 2011
at Ottawa, Ontario.

Before: The Honourable Gerald J. Rip, Chief Justice

Appearances:

Counsel for the Appellant:	Alexandra K. Brown Pooja Samtani
Counsel for the Respondent:	Elizabeth Chasson Naomi Goldstein

---

ORDER

Upon motion by counsel for the appellant for an order that subparagraphs 14(bbb) and (fff) ("Subject Paragraphs") of the amended reply to the notice of appeal be struck as they fail to comply with the order of the Court dated December 30, 2010 and offend section 53 of the *Tax Court of Canada Rules* (*General Procedure*);

The motion is granted and the Subject Paragraphs are struck from the amended reply without leave to amend.

Costs of this motion to the appellant.

Signed at Ottawa, Canada, this 20th day of July 2011.

"Gerald J. Rip"

Rip C.J.

Citation: 2011 TCC 356
Date: 20110720
Docket: 2009-2430(IT)G

BETWEEN:

CAMECO CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Rip C.J.

[1] On December 10, 2010 I ordered that subparagraphs 14(bbb) and (fff) of the Crown's reply to the notice of appeal be struck with leave for Her Majesty, the respondent, to amend her reply to the notice of appeal. There was no appeal from the Order.

[2] Subparagraphs 14(bbb) and (fff) of the respondent's reply read as follows:

> (bbb) the transfer prices for uranium on the sales by Canco to Swissco and the purchases by Canco from Swissco were not consistent with an arm's length price;
>
> (fff) the terms and conditions made or imposed in respect of the sale and purchase of uranium between Canco and Swissco differ from those that would have been made between persons dealing at arm's length;

[3] The respondent prepared and filed an amended reply to the notice of appeal. Subparagraphs 14(eee) and (lll) of the amended reply read as follows:

> (eee) the transfer prices for uranium on the sales by Canco to Swissco and the purchases by Canco from Swissco were not consistent with an arm's length price;

> (lll) the terms and conditions made or imposed in respect of the sale and purchase of uranium between Canco and Swissco differ from those that would have been made between persons dealing at arm's length;

[4] As the reader may observe subparagraph 14(eee) of the amended reply is identical to subparagraph 14(bbb) of the original reply and subparagraph 14(lll) of the amended reply is identical to subparagraph 14(fff) of the original reply.

[5] The appellant has filed a motion for an order striking subparagraphs 14(eee) and (lll) ("Subject Paragraphs") of the amended reply to the notice of appeal filed by the respondent in "order to make the pleading comply with the Order of the Court dated December 30, 2010".

[6] The grounds for the motion are that subparagraphs 14(bbb) and (fff) of the reply and the Subject Paragraphs are identical and therefore the Subject Paragraphs:

> a) fail to comply to the Order; and
> b) offend section 53 of the *Tax Court of Canada Rules* (*General Procedure*) ("*Rules*").

[7] Section 53 of the *Rules* state:

The Court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,	La Cour peut radier un acte de procédure ou un autre document ou en supprimer des passages, en tout ou en partie, avec ou sans autorisation de le modifier parce que l'acte ou le document :
(*a*) may prejudice or delay the fair hearing of the action,	*a*) peut compromettre ou retarder l'instruction équitable de l'appel;
(*b*) is scandalous, frivolous or vexatious, or	*b*) est scandaleux, frivole ou vexatoire;
(*c*) is an abuse of the process of the Court.	*c*) constitue un recours abusif à la Cour.

[8] The operating words of *Rule* 53 are "strike out" and "expunge" in English and "radier" and "supprimer" in French. These are not "wishy washy" words.

[9] The definition of the word "strike" takes five columns in the *The Shorter Oxford English Dictionary* and amongst many definitions is the following:

> III … 2. To cancel or expunge with or as with a stroke of the pen …

[10] The *Canadian Oxford Dictionary* defines the phrase "strike out" as

> 3. delete (an item or name, etc.)

[11] The *Random House Dictionary of the English Language* defines "strike out" not only in baseball parlance, as an American text may wont to do, but also as "to erase, cross out".

[12] *Black's Law Dictionary* offers the following definitions of "strike out":

> … 4. *Parliamentary law*. To amend by deleting one or more words. See *amendment by striking out* under AMENDMENT (3). – Also termed (in sense 4) *strike out*.
>
> Amendment or ... 3. ... *amendment by striking out.* An amendment that removes wording from a motion's current wording.

[13] *Black's Dictionary* also defines "expunge":

> 1. To erase or destroy. 2. *Parliamentary law.* To declare (a vote or other action) null and outside the record, so that it is noted in the original record as expunged, and redacted from all future copies.

[14] *Le Petit Robert* defines "radier" and "supprimer" as follows:

> radier : Faire disparaître (un nom, une mention) d'une liste, d'un registre, d'un compte, … V. effacer, rayer.
>
> supprimer : 2. Rendre sans effet légal; enlever de l'usage. V. abolir, abroger, annuler, cesser. 3. Faire disparaître, supprimer (d'une œuvre, dans une œuvre).

[15] These definitions make it quite clear that when a court orders a pleading or part of a pleading be struck, the pleading, or part of the pleading must be deleted, removed, erased or made to disappear.

[16] Counsel for the respondent argued that "the Crown amended its pleading and made every effort to address the concerns raised" by the Court. With regard to subparagraph 14(bbb) of the reply (now subparagraph 14(eee) of the amended reply), counsel understood these concerns to relate to the vagueness of the assumption as

stated, specifically with regard to the particularity regarding the assumed quantum of the arm's length transfer price. Counsel explained that the Minister of National Revenue ("Minister") did not, in fact, make any assumption regarding the transfer price per kilogram of uranium. She explained that the Minister rejected the methodology employed by the appellant, that is the "comparable uncontrolled price" ("CUP"). In her argument she stated:

> … what (eee) says is that the transfer prices were not consistent with an arm's length price because they were based on a CUP method, which is an inappropriate method.
>
> But what does the Minister do? The Minister then went and employed another accepted OECD methodology known as the transactional net margin method. And the Minister applied that methodology.
>
> And that methodology's a profit-split methodology. … And that methodology then provides you with what the percentages of profit should be allocated to the parties. And what the Minister concluded, and this has been added as an amendment, that no profit would be realized by Swissco. So if my friend wants a number or a quantum, we've provided it.

[17] In effect, the Minister had assumed a zero profit for Swissco and a 100 per cent profit to Canco. Counsel declared that the appellant knew the case it had to meet.

[18] With regard to subparagraph 14(fff) of the reply (subparagraph 14(lll) of the amended reply), counsel argued that this assumption was indeed a factual assumption and not an assumption of mixed fact and law. She stated that new subparagraphs were added to the reply in order to "address those concerns" and "provide those factual details".

[19] Counsel further argued:

> In addition, we've added further facts which appear at paragraphs 21, 22 and 23 of the amended pleading, which provides additional factual underpinnings for that assertion. And the assertion is the terms and conditions are different. That's a factual conclusion.
>
> …
>
> But the difficulty is we don't want to over – of course, we're not overstating assumptions of fact actually made. These are the assumptions of fact actually made.
>
> So we can't, we don't want to be criticized for leaving out material assumptions, so we've put in (mmm), which was an assumption made that underlies the factual statement that the terms and conditions are different. And then we've added additional facts.

> So some facts, the onus is on the taxpayer, some facts, the onus is on the Crown.

[20] Subparagraph 14(bbb) was ordered struck from the reply because the appellant was entitled to know how the prices for uranium transferred between Canco and Swissco differed from those that would have been agreed upon by arm's length parties. If the Minister had in fact assumed that the CUP methodology was inappropriate and that the transactional net margin method was more suited to the appellant's situation, the Minister was free to make that assumption. However, once the Minister assumed that the transfer prices for uranium contracts differed from those that would have been made between persons dealing at arm's length, the appellant was entitled to know exactly how they differed. In principle, this may apply to subparagraph 14(fff) of the reply as well.

[21] Subparagraph 14(fff) was struck from the reply for parroting the text of the *Income Tax Act* ("*Act*") and for making an assumption of mixed fact and law. The Crown has left that assumption in the amended reply but has provided further details of the facts that underpin the assumption under "additional facts" in paragraphs 21 to 23 of the amended reply. Counsel acknowledges that the Minister did not actually assume these additional facts in assessing the appellant and therefore were not included among the assumptions of fact. I find it strange that the Minister was able to assume a conclusion of fact and law in accordance with subparagraph 247(2)(*a*) of the *Act* but, at the same time, did not assume the facts underpinning that conclusion.

[22] In any event any discussions regarding transfer pricing methodologies are not before me at this stage of the litigation. The fact remains that I ordered paragraphs struck from the pleadings and the Crown did not strike them. Nor did counsel even amend the paragraphs in question beyond changing their numbering. That the Crown has now added clarification to these struck paragraphs by adding assumptions and factual assertions does not alter this reality.

[23] When a court orders a provision of a pleading to be struck the provision in question must be struck. If leave to amend is granted, the struck provisions may be replaced by amendment. In principle, leave to amend does not anticipate the struck provisions will remain in the pleadings even if, on amendment, further provisions are inserted to clarify or address the concerns of the Court in the first place. There may be exceptions but, on the facts before me, I cannot recognize an exception arising from the amended pleadings.

[24] The Subject Paragraphs are struck from the amended reply without leave to amend. Costs of this motion to the appellant.

Signed at Ottawa, Canada, this 20th day of July 2011.

"Gerald J. Rip"

Rip C.J.

CITATION:	2011 TCC 356
COURT FILE NO.:	2009-2430(IT)G
STYLE OF CAUSE:	CAMECO CORPORATION v. THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	July 7, 2011
REASONS FOR ORDER BY:	The Honourable Gerald J. Rip, Chief Justice
DATE OF ORDER:	July 20, 2011

APPEARANCES:

Counsel for the Appellant:	Alexandra K. Brown Pooja Samtani
Counsel for the Respondent:	Elizabeth Chasson Naomi Goldstein

COUNSEL OF RECORD:

For the Appellant:

Name:	Alexandra K. Brown
Firm:	Osler, Hoskin & Harcourt LLP Toronto, Ontario

For the Respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada