

Citation: 2012 TCC 237

Date: 20120705

Dockets: 2010-1413(IT)G

2010-1414(IT)G

2010-1640(IT)G

2010-2864(IT)G

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

The Honourable E. P. Rossiter, Associate Chief Justice

Appearances:

Counsel for the Appellant:

Al Meghji and

Joseph M. Steiner

Counsel for the Respondent:

Patricia Lee, Eric Noble, Michael

Ezri and

Craig Maw

ORDER AND REASONS FOR ORDER

[1] On the Appellant's motion to strike, on December 21, 2011, the Court ordered that portions of the four Replies in question be struck because they were prejudicial and/or an abuse of process, conclusions of mixed fact and law, scandalous, not material facts, or evidence (*Canadian Imperial Bank of Commerce v. The Queen*, 2011 TCC 568). The Court rejected the Appellant's argument that the Court should strike references to the "egregious or repulsive" concept.

[2] The Order specified the text struck from the Reply in 2010-1414(IT)G, and held that these strikes should be applied *mutatis mutandis* to the Replies in appeals 2010-1413(IT)G, 2010-1640(IT)G, and 2010-2864(IT)G. The Respondent was ordered to provide draft Amended Replies to the Court within 60 days for the Court to review for compliance and then issue any further Order, as required.

[3] Both parties appealed to the Federal Court of Appeal, but to date, neither party has requested a suspension of operation of the Judgment under rule 172(2) of the *Tax Court of Canada Rules (General Procedure)*.

[4] The Respondent has submitted a single draft Amended Reply for appeal 2010-1414(IT)G as a model, with the intention to then amend the three other replies, as required, in compliance with the Court's assessment as outlined in this Order.

[5] Upon reviewing the draft Amended Reply, Appellant's counsel informed the Court that he believes it is materially non-compliant with the December 21, 2011 Order.

[6] Both parties were invited to provide submissions regarding the compliance of the draft Amended Reply and each party did so.

[7] After reviewing each party's submissions and the draft Amended Reply in detail, the Court determines that the text ordered struck has been removed from the draft Amended Reply. Where ordered, the Respondent also condensed or deleted text to eliminate pleadings determined by the Court's Order to be evidence or non-material facts.

[8] Some of the text deemed by the December 21, 2011 Order to be prejudicial, and/or scandalous, an abuse of process, or conclusions of mixed fact and law has been replaced with new text in the draft Amended Reply. Significant portions of this new text do not comply with the Court's previous Order. A number of the substituted terms are near synonyms with the phrases previously struck. Several of the additional paragraphs are replete with conclusions of mixed fact and law concerning both Canadian Imperial Bank of Commerce ["CIBC"] and a third party and place an unfair onus on CIBC; they are prejudicial and an abuse of process.

[9] The Court orders that all text identified in the table below as not complying with the Court’s December 11, 2011 Order is struck. In addition, the Court accepts any proposals from the Respondent to delete paragraphs with duplicative text.

[10] The Respondent shall file with the Court, within 30 days, four final Amended Replies in each of the appeals, 2010-1413(IT)G, 2010-1414(IT)G, 2010-1640(IT)G, and 2010-2864(IT)G, in compliance with this Order and this Court’s previous Order issued December 21, 2011. Given the partial success of both parties with respect to their arguments before the Court, there will be no order as to costs.

Para #	Replacement or Additional Text in Draft Amended Reply	Decision – Complies or Does Not Comply	Reasons for Compliance or Non-Compliance
2	deceived	Complies	Acceptable in the context of the overview given the Respondent’s claim regarding the Appellant’s alleged misconduct. As discussed in <i>Strother v. Canada</i> , 2011 TCC 251 at para. 44, the overview may contain colourful language.
3	dishonest	Complies	See above regarding paragraph 2.
5	deceptions	Complies	See above regarding paragraph 2.
28.7	knowingly participated in, dishonest	Does not comply	Abuse of process, prejudicial, conclusion of mixed fact and law
28.7.1	falsely	Does not comply	Abuse of process, prejudicial, conclusion of mixed fact and law
28.7.1 – 28.7.4		Complies except as described above regarding paragraph 28.7.1 (“falsely”)	
28.7.5	The impugned FAS 125/140 transactions were recorded as	Complies	Text struck in the Order dated December 21, 2011 has been

	asset sales and equity contributions but were loans made to Enron by the Foreign Affiliates and the appellant		deleted. Remaining text complies.
28.7.6	secret repayment guarantees, knew would disqualify	Does not comply	Abuse of process, prejudicial, conclusion of mixed fact and law
28.7.10	the purported equity stake of CIBC Inc. was a loan limited to the original investment at the stated yield of generally 15%	Complies	Text struck in the Order dated December 21, 2011 has been deleted. Remaining text complies.
28.7.12	the purported equity stake of CIBC Inc. was guaranteed by Enron and therefore was not at risk	Complies	Text struck in the Order dated December 21, 2011 Order has been deleted. Remaining text complies.
28.7.13	knew	Does not comply	Prejudicial, Conclusion of mixed fact and law
28.7.14	... knowing ...could not be disclosed, with actual knowledge to manipulate and misstate ... materially misleading manner	Does not comply	Abuse of process, prejudicial, conclusion of mixed fact and law
28.7.15	... conspired ...manipulate and misstate ...to facilitate self-dealing transactions...	Does not comply	Abuse of process, prejudicial, conclusion of mixed fact and law
28.7.16	were deliberately kept out	Does not comply	Abuse of process, prejudicial, conclusion of mixed fact and law
28.7.17	... knew that Enron was falsifying	Does not comply	Abuse of process, prejudicial, conclusion of mixed fact and law
28.7.18	... permitted the making of ... false and misleading statements	Does not comply	Abuse of process, prejudicial, conclusion of mixed fact and law
28.7.19	false and misleading	Does not comply	

	statements		
28.7.20	the impugned FAS/125 Transactions ostensibly generated approximately US\$1.1 Billion in pre-tax income, and increased operating cash flows of almost US\$2 Billion while US\$2.6 Billion in debt was not show on Enron's balance sheet	Complies	Pleads factual assumptions.
28.7.21	knew, false reporting	Does not comply	Abuse of process, prejudicial, conclusion of mixed fact and law
28.7.22	knew or were reckless in not knowing, false	Does not comply	Abuse of process, prejudicial, conclusion of mixed fact and law
28.7.23	... false reporting	Does not comply	Abuse of process, prejudicial, conclusion of mixed fact and law
28.16.2 – 28.16.4		Complies	Complies with Order, provides condensed summary underlying factual assumptions.
28.18.4.2	dishonest course of conduct	Does not comply	Nearly synonymous with previous strike.
28.19.4	non-recurring outlays	Complies	Replaces text struck as conclusion of mixed fact and law with text describing underlying factual assumptions.
28.19.9 (Former 28.22.14 – 28.22.15)		Portions referring to text struck from other paragraphs are also struck here.	Problematic to the extent that it refers to portions of 28.7 – 28.14, and 28.17 that are struck as described above.
62		Delete as proposed by Respondent	The Court accepts the Respondent's proposal to delete this paragraph as duplicative in light of changes to amended reply.
65		Delete as proposed	The Court accepts the

		by Respondent	Respondent's proposal to delete this paragraph as duplicative in light of changes to amended reply.
66		Delete as proposed by Respondent	The Court accepts the Respondent's proposal to delete this paragraph as duplicative in light of changes to amended reply.
67		Delete as proposed by Respondent	The Court accepts the Respondent's proposal to delete this paragraph as duplicative in light of changes to amended reply.
68		Delete as proposed by Respondent	The Court accepts the Respondent's proposal to delete this paragraph as duplicative in light of changes to amended reply.
69		Delete as proposed by Respondent	The Court accepts the Respondent's proposal to delete this paragraph as duplicative in light of changes to amended reply.
74		Delete as proposed by Respondent	The Court accepts the Respondent's proposal to delete this paragraph as duplicative in light of changes to amended reply.
71		Delete as proposed by Respondent	The Court accepts the Respondent's proposal to delete this paragraph as duplicative in light of changes to amended reply.
72 and 73		Complies	Describes underlying facts.
102		Delete as proposed by Respondent	The Court accepts the Respondent's proposal to delete this paragraph as duplicative in light of changes to amended reply.
103		Delete as proposed by Respondent	The Court accepts the Respondent's proposal to delete this paragraph as duplicative in light of changes to amended reply.
104		Delete as proposed	The Court accepts the

		by Respondent	Respondent's proposal to delete this paragraph as duplicative in light of changes to amended reply.
105		Delete as proposed by Respondent	The Court accepts the Crown's proposal to delete this paragraph as duplicative in light of changes to amended reply.
106		Delete as proposed by Respondent	The Court accepts the Respondent's proposal to delete this paragraph as duplicative in light of changes to amended reply.
107		Delete as proposed by Respondent	The Court accepts the Respondent's proposal to delete this paragraph as duplicative in light of changes to amended reply.
114		Delete as proposed by Respondent	The Court accepts the Respondent's proposal to delete this paragraph as duplicative in light of changes to amended reply.

Signed at Ottawa, Canada, this 5th day of July, 2012.

"E.P. Rossiter"
Rossiter A.C.J.

CITATION: 2012 TCC 237

COURT FILES NOS.: 2010-1413(IT)G
2010-1414(IT)G
2010-1640(IT)G
2010-2864(IT)G

STYLE OF CAUSE: CANADIAN IMPERIAL BANK OF
COMMERCE v. HER MAJESTY
THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING:

REASONS FOR JUDGMENT BY: The Honourable Associate
Chief Justice E.P. Rossiter

DATE OF ORDER: July 5, 2012

APPEARANCES:

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Counsel for the Respondent: Patricia Lee, Eric Noble, Michael Ezri
and Craig Maw

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