Docket: 2020-1606(IT)G

BETWEEN:

SYLVAIN HAMMOND,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Motion to strike heard together with the motion in Yolaine Labonté's appeal (2020-1605(IT)G) on October 19, 2021, at Montreal, Quebec.

Before: The Honourable Justice Gabrielle St-Hilaire

Appearances:

Counsel for the Applicant:	Michel Beauchamp Alexandre Rafael
Counsel for the Respondent:	Alain Gareau Audrey Turcotte-Bourgeois (student-at-law)

ORDER

UPON the motion filed by the applicant on April 26, 2021, requesting:

1. An order to strike out introductory paragraphs 2, 4, 5, 7, 11, 13, 15, 22, 23, 25, 26, 29, and 31; subparagraphs 56(d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n), (o), (p), (s), (t), (u), (v), (w), (x), (y), (z), (aa), (bb), (cc), (dd), (ee), (ff), (gg), and 57(a); and paragraph 59, pursuant to section 53 of the *Tax Court of Canada Rules (General Procedure)*;

2. An assessment of costs against the respondent;

AND UPON Michel Beauchamp's affidavit;

AND after hearing the submissions of the parties;

The motion is allowed in accordance with the attached Reasons for Orders. The respondent may file an Amended Reply to the Notice of Appeal within 30 days following the date of this Order.

Costs will be in the cause.

Signed at Fredericton, New Brunswick, this 3rd day of November 2021.

"Gabrielle St-Hilaire"

St-Hilaire J.

Translation certified true
on this 14th day of June 2022.

Melissa Paquette

Docket: 2020-1605(IT)G

BETWEEN:

YOLAINE LABONTÉ,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Motion to strike heard together with the motion in Sylvain Hammond's appeal (2020-1606(IT)G) on October 19, 2021, at Montreal, Quebec.

Before: The Honourable Justice Gabrielle St-Hilaire

Appearances:

Counsel for the Applicant:	Michel Beauchamp Alexandre Rafael
Counsel for the Respondent:	Alain Gareau Audrey Turcotte-Bourgeois (student-at-law)

ORDER

UPON the motion filed by the applicant on April 26, 2021, requesting:

1. An order to strike out introductory paragraphs 2, 4, 5, 7, 11, 13, 15, 22, 23, 25, 26, 29, and 31; subparagraphs 48(a), (f), (g), (h), (i), (j), (k), (l), (m), (n), (o), (p), (s), (t), (u), (v), (w), (x), (y), (z), (aa), (bb), (cc), (dd), (ee), (ff), (gg), and 49(a); and paragraph 51, pursuant to section 53 of the *Tax Court of Canada Rules (General Procedure)*;

2. An assessment of costs against the respondent;

AND UPON Michel Beauchamp's affidavit;

AND after hearing the submissions of the parties;

The motion is allowed in accordance with the attached Reasons for Orders. The respondent may file an Amended Reply to the Notice of Appeal within 30 days following the date of this Order.

Costs will be in the cause.

Signed at Fredericton, New Brunswick, this 3rd day of November 2021.

"Gabrielle St-Hilaire"

St-Hilaire J.

Translation certified true
on this 14th day of June 2022.

Melissa Paquette

Citation: 2021 TCC 72
Date: 20211103

Docket: 2020-1606(IT)G

BETWEEN:

SYLVAIN HAMMOND,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Docket: 2020-1605(IT)G

BETWEEN:

YOLAINE LABONTÉ,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR ORDERS

St-Hilaire J.

I. Introduction

[1] Sylvain Hammond and Yolaine Labonté (the applicants) filed motions with this Court to strike out paragraphs or subparagraphs of the Replies to the Notice of Appeal submitted by the respondent on December 8, 2020, pursuant to section 53 of the *Tax Court of Canada Rules (General Procedure)* (the "Rules").

[2] The applicants sold two buildings, one in 2015 and the other in 2017. They did not claim the gains from the disposition of these two buildings because they

considered them capital gains from the sale of their principal residences, which are exempt from tax pursuant to paragraph 40(2)(b) of the *Income Tax Act* (the "Act").

[3] The applicants were reassessed for the 2015 and 2017 taxation years. As part of these reassessments, the Minister added amounts in the computation of their income, having found that the income from the disposition of the two buildings was business income within the meaning of section 9 of the Act.

[4] Further adjustments were made to Mr. Hammond's income in connection with shareholder benefits for the 2015, 2016 and 2017 taxation years. Subsequent to these reassessments, redeterminations were also issued against Ms. Labonté concerning the Canada Child Benefit for the 2015, 2016 and 2017 base taxation years. The paragraphs and subparagraphs that are the subject of the motions to strike are related to the issue regarding the gains from the sale of the two buildings and do not, at least not directly, involve the issues concerning the shareholder benefit and the Canada Child Benefit.

[5] The definition of business in subsection 248(1) of the Act expressly includes "an adventure … in the nature of trade". This term, however, is not defined in the Act, though its meaning has been established in the case law. In *Friesen v. Canada*, [1995] 3 S.C.R. 103, the Supreme Court of Canada stated that "[t]he concept of an adventure in the nature of trade is a judicial creation designed to determine which purchase and sale transactions are of a business nature and which are of a capital nature." *MNR v. Taylor* (1956), [1956–1960] Ex. C.R. 3, contains an in-depth analysis of the tests to be applied in order to give meaning to this term. These tests have been repeatedly recognized in the case law. In *Happy Valley Farms v. MNR* (1986), 7 F.T.R. 3 at para. 14, the Federal Court stated that the courts have used the following tests to determine whether the proceeds of the disposition of a property constitute business income or a capital gain:

(1) The nature of the property sold;

(2) The length of period of ownership;

(3) The frequency or number of other similar transactions by the taxpayer;

(4) Work expended on or in connection with the property realized;

(5) The circumstances that were responsible for the sale of the property; and

(6) Motive (the intention at the time of the acquisition).

[*Hansen v. The Queen*, 2020 TCC 102 at para. 97]

These factors will guide the Court in determining the issue of whether certain passages should be struck from the respondent's Replies in this case.

II. **Rule of procedure and legal principles applicable to striking out**

[6] The relevant part of section 53 of the Rules provides for the following:

> 53 (1) The Court may, on its own initiative or on application by a party, 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
>
> (a) may prejudice or delay the fair hearing of the appeal;
>
> (b) is scandalous, frivolous or vexatious;
>
> (c) is an abuse of the process of the Court; or
>
> (d) discloses no reasonable grounds for appeal or opposing the appeal.
>
> (2) No evidence is admissible on an application under paragraph (1)(d).

[7] The case law principles that apply to a motion to strike under section 53 of the Rules are well established and have been reiterated in many decisions of this Court and of the Federal Court of Appeal. Counsel for the applicants referred to *Mont-Bruno C.C. Inc. v. The Queen*, 2018 TCC 105, and *Mudge v. The Queen*, 2020 TCC 77, in which this Court reviewed the principles and case law dealing with this matter.

[8] It is well settled in the case law that the test applicable to motions to strike is to determine whether it is "plain and obvious" that the facts alleged disclose no reasonable cause of action or that the position taken has no chance of succeeding and the threshold to be met is high.

[9] Chief Justice Bowman (as he then was) briefly summarized the case law principles that are relevant to this case in *Sentinel Hill Productions (1999) Corporation, Strother v. The Queen*, 2007 TCC 742. He stated the following:

> [4] I shall begin by outlining what I believe are the principles to be applied on a motion to strike under Rule 53. There are many cases in which the matter has been considered both in this court and the Federal Court of Appeal. It is not necessary to quote from them all as the principles are well established.
>
> (a) The facts as alleged in the impugned pleading must be taken as true subject to the limitations stated in *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441 at 455. It is not open to a party attacking a pleading under Rule 53 to challenge assertions of fact.
>
> (b) To strike out a pleading or part of a pleading under Rule 53 it must be plain and obvious that the position has no hope of succeeding. The test is a stringent one and the power to strike out a pleading must be exercised with great care.
>
> (c) A motions judge should avoid usurping the function of the trial judge in making determinations of fact or relevancy. Such matters should be left to the judge who hears the evidence.
>
> [citation omitted]

[10] More recently, in *Canadian Imperial Bank of Commerce v. The Queen*, 2013 FCA 122, the Federal Court of Appeal affirmed the test for striking pleadings. It stated the following:

> [7] There is no dispute as to the general test for striking pleadings. It was recently restated in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 at paragraph 17. In the context of a motion to strike the Crown's reply in an income tax appeal, the motion will be granted only if it is plain and obvious, assuming the facts as pleaded in the reply are true, that the reply fails to state a reasonable basis for concluding that the reassessment under appeal is correct.

[11] In short, in order to determine whether certain paragraphs and subparagraphs of the respondent's Replies should be struck out pursuant to paragraph 53(1)(d) of the Rules as the applicants have requested in this case, it must be plain and obvious that they disclose no reasonable cause of action, and if a debate on relevance is involved, this issue is best left to the trial judge.

III. **Analysis**

[12] At the hearing, counsel for the applicants made submissions with reference to the motion in Mr. Hammond's (the applicant's) appeal. With respect to the motion in Ms. Labonté's appeal, counsel indicated that the same submissions applied and that only the paragraph numbers may differ from those in the Reply to Mr. Hammond's Notice of Appeal. Under these circumstances, in these reasons, the Court will defer to the submissions regarding Mr. Hammond's motion. At the end of the reasons, the Court will also indicate the decision regarding the relevant numbers of the statements in Ms. Labonté's motion.

[13] In his motion to have the 43 paragraphs and subparagraphs of the Reply to Mr. Hammond's Notice of Appeal struck out, the applicant organized the paragraphs and subparagraphs at issue into three groups (a, b, and c) based on the reasons for the motion to strike out, but always under paragraph 53(1)(d) of the Rules. Paragraph 4 of the Notice of Motion provides the following:

> [TRANSLATION]
> (a)Subparagraphs 56(h), 56(i), 56(j), 56(s), 56(t), and 56(u) of the Reply do not follow the form prescribed in section 49 of the Rules because they are argumentative and/or interpretive and do not constitute facts. Furthermore, they do not constitute reasonable grounds for opposing the appeal, although they are included in the facts section of the Reply;
> (b) Introductory paragraphs 2, 4, 5, 7, 11, 13, 15, 22, 23, 25, 26, 29, and 31; subparagraphs 56(j), 56(k), 56(l), 56, 56(p), 56(q), 56(r), 56(v), 56(w), 56(y), 56(aa), 56(bb), 56(cc), 56(dd), 56(ee), 56(ff), 56(gg), and 57(a); and paragraph 59 disclose no reasonable grounds for opposing the appeal;
>
> (c) Subparagraphs 56(d), 56(e), 56(f), 56(g), 56(n), 56(o), 56(x), and 56(z) refer to facts that are irrelevant to the case. Consequently, these subparagraphs disclose no reasonable grounds for opposing the appeal;

[14] All the subparagraphs of paragraph 56 contain assumptions of fact that the Minister used as a basis to assess Mr. Hammond. Subparagraph 57(a) contains an issue, while in paragraph 59, the respondent indicated one of the reasons she intends to rely on. The [TRANSLATION] "introductory paragraphs" are in the Reply's Statement of Facts, where the respondent stated her position with respect to the allegations of fact submitted in the Notice of Appeal. I will first deal with the introductory paragraphs and with paragraphs 57 and 59.

Introductory paragraphs

[15] I note that pursuant to section 49 of the Rules, the respondent's Reply must state the facts that are admitted, the facts that are denied and the facts of which the respondent has no knowledge and puts in issue. The relevant part of section 49 reads as follows:

> 49 (1) Subject to subsection (1.1), every reply shall state
>
> (a) the facts that are admitted,
>
> (b) the facts that are denied,
>
> (c) the facts of which the respondent has no knowledge and puts in issue,
>
> (d) the findings or assumptions of fact made by the Minister when making the assessment,
>
> (e) any other material fact,
>
> (f) the issues to be decided,
>
> (g) the statutory provisions relied on,
>
> (h) the reasons the respondent intends to rely on, and
>
> (i) the relief sought.
>
> . . .
>
> (2) All allegations of fact contained in a notice of appeal that are not denied in the reply shall be deemed to be admitted unless it is pleaded that the respondent has no knowledge of the fact.

[16] With respect to paragraphs 5, 11, 13, 23, 25, and 29 of the Reply to Mr. Hammond's Notice of Appeal, the respondent wrote the following [TRANSLATION]: "The AGC denies the facts alleged in paragraph(s) … ." These paragraphs are completely appropriate and comply with the requirements of paragraph 49(1)(b) and subsection 49(2) of the Rules. These paragraphs will therefore not be struck out.

[17] With respect to paragraphs 2, 4, 7, 15, 22, 26, and 31 of the Reply to Mr. Hammond's Notice of Appeal, the respondent wrote the following [TRANSLATION]: "The AGC denies the facts alleged as they are worded in paragraph(s) … ." For example, paragraph 2 of the Reply to the Notice of Appeal and paragraph 9 of the Notice of Appeal read as follows:

Paragraph 2 of the Reply to Mr. Hammond's Notice of Appeal:

> [TRANSLATION]
> The AGC denies the facts alleged as they are worded in paragraph 9 of the Notice of Appeal.

Paragraph 9 of Mr. Hammond's Notice of Appeal:

> [TRANSLATION]
> The appellant purchased this building as a principal residence jointly with his spouse, Yolaine Labonté, in April 2011 and sold it in May 2015. The taxpayer was therefore an undivided co-owner of the building for a period of four years.

[18] I note that paragraph 9 of Mr. Hammond's Notice of Appeal contains facts that the respondent took into account in making the assessment, such as the fact that the property on De la Pérouse Street was purchased in 2011 and sold in 2015. The use of the phrase [TRANSLATION] "as they are worded" left the appellant wondering whether some of the facts contained in the paragraph could be admitted and what facts would be in dispute. Given the assumptions of fact in paragraph 56 of her Reply, it appears that the respondent does not deny the entire contents of paragraph 9 of the Notice of Appeal.

[19] At the hearing, the respondent recognized that the wording of the paragraphs that contain the phrase [TRANSLATION] "as they are worded" does not formally meet the requirements of section 49 of the Rules. As the Federal Court of Appeal explained in *Canada v. Anchor Pointe Energy Ltd.*, 2003 FCA 294 at para. 26 when ruling on assumptions containing conclusions of mixed fact and law, "the taxpayer [must be told] exactly what factual assumptions it must demolish in order to succeed." Statements containing the phrase [TRANSLATION] "as they are worded" do not enable the applicant in this case to know exactly what facts are in dispute. Accordingly, paragraphs 2, 4, 7, 15, 22, 26, and 31 of the Reply to Mr. Hammond's Notice of Appeal are struck out. However, the respondent may amend them.

Subparagraph 57(a) and paragraph 59

[20] In subparagraph 57(a) of the Reply to Mr. Hammond's Notice of Appeal, the respondent stated the issue regarding the disposition of the buildings, while in paragraph 59, she indicated the reasons on which she intended to rely. In her Reply, the respondent was required to state the issues to be decided and the reasons the respondent intended to rely on pursuant to paragraphs 49(1)(f) and (h) of the Rules. I would add that both the issue stated in subparagraph 57(a) of the Reply and the issue stated in paragraph 92 of the Notice of Appeal, although worded differently, indicate that the issue of whether the income was business income was an issue to be decided. Subparagraph 57(a) and paragraph 59 comply with section 49 of the Rules and will not be struck out.

Assumptions of fact in group (a)

[21] The first group of impugned assumptions of fact are subparagraphs 56(h), (i), (j), (s), (t), and (u).

[22] Subparagraphs 56(h) and (i) contain assumptions of fact concerning the date of purchase, the purchase price and the cost of renovations to the building on De la Pérouse Street. In the written submissions in Mr. Hammond's Motion Record ("written submissions") regarding subparagraph 56(h), the applicant criticizes the respondent for having made this assumption [TRANSLATION] "without submitting any facts whatsoever that would make it possible to contradict that it was the applicant's principal and family residence at the material time." With respect to his challenge regarding subparagraph 56(i), the applicant argues that the fact [TRANSLATION] "of performing renovations or alterations does not, in itself, constitute a fact that in any way allows the purchase to be construed as a 'business'." Rather, these assertions resemble arguments regarding the characterization of the income generated from the disposition of the building.

[23] In my opinion, subparagraphs 56(h) and (i) contain facts that are closely related to the computation of the business income added to the applicant's income for the 2015 taxation year. Furthermore, one of the factors to be considered in determining whether a building was purchased as capital property or as an adventure in the nature of trade is the work realized on the property (see *Happy Valley Farms, supra* at para. 14). The respondent considered these facts in making the assessment, and it is appropriate that she say so in her Reply. These assumptions will not be struck out.

[24] In subparagraph 56(j) of her Reply, the respondent indicates that she assumed that the applicant [TRANSLATION] "intended" to live in the building on De la Pérouse

Street for some time before reselling it to make a profit. The applicant challenged this assumption, arguing that it was not a fact and that it was for the Court to decide what the applicant's intention was. I note that in subparagraph 56(u) of her Reply, with respect to the building on Wilfrid-Pelletier Street, the respondent also considered the applicant's intention by stating that he [TRANSLATION] "intended to quickly sell it for a profit." Counsel for the respondent argued that intention was part of the tests established in the case law that are applicable in this case and added that even if it was true that the Court would have to determine the intention, it was a factor to be considered and was not a conclusion of mixed fact and law.

[25] The Supreme Court of Canada has recognized that the distinction between questions of law and questions of mixed law and fact is difficult (see *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 35). In my opinion, we face the same difficulty when it comes to assessing the nature of the assumptions of fact in a respondent's reply regarding tax matters.

[26] In the context of an appeal relating, in part, to the existence of a sham in *Bemco Confectionery and Sales Ltd. v. The Queen*, 2015 TCC 48 at para. 41, the Honourable Justice Paris stated the following:

> [41] While I agree that the existence of a sham is determined by the application of a legal test to the facts of a taxpayer's situation, I respectfully disagree that the existence of an intention to mislead is a legal conclusion. Both intention and purpose relate to a person's state of mind, which are factual matters. In *Edgington v. Fitzmaurice* (1885) L.R. 29, Ch. D. 459 (CA), Bowen L.J. said that "…the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact" (see also: *Irrigation Industries Ltd. v. The Minister of National Revenue*, [1962] S.C.R. 346 at page 362).
>
> [emphasis added]

[27] Like Justice Paris, I find that what a person does or knows is a question of fact (see *Bemco, supra* at para. 38; see also *Metrobec v. The Queen*, 2019 TCC 250). I am of the view that intention in the context of an appeal on whether the gain from the disposition of a building constitutes business income or a capital gain is a question of fact.

[28] I note that it is settled law that intention is not only a factor, but is also "one of the most important elements in determining whether a gain is of a capital or income nature" (*Happy Valley Farms*, *supra* at para. 14, cited in *Hansen v. The Queen*, 2020 TCC 102). That said, the factor of intention is one of various factors that the courts consider, such as the length of period of ownership and the number of other similar transactions when determining whether the proceeds of a disposition constitute business income or a capital gain. In *Happy Valley Farms*, *supra*, the Federal Court added that intention is inferred from surrounding circumstances and direct evidence. I find that subparagraphs 56(j) and 56(u), which deal with intention, contain allegations of fact. They will not be struck out.

[29] In his oral submissions on subparagraphs 56(s), 56(t), and 56(u) of the Reply to Mr. Hammond's Notice of Appeal, counsel for the applicant argued that these were not facts, but arguments. In his written submissions, he stated that these assumptions were incorrect. He added that even if they were true, they did not make building the house a [TRANSLATION] "business". I hasten to mention one of the principles that has been established in the case law, according to which facts alleged in the impugned pleading are deemed to be true, and it is not open to the party challenging the pleading under section 53 of the Rules to contest their accuracy.

[30] For example, in subparagraph 56(u), in addition to the aspect of the allegation dealing with intention discussed above, the respondent assumed that the house on Wilfrid-Pelletier Street was too large for the needs of the applicant's family. I note that in paragraph 58 of his Notice of Appeal, the applicant stated that [TRANSLATION] "the fourth bedroom that they had planned when the blueprints were being prepared ... was no longer necessary. It made the house bigger than they needed it to be." It seems to me that the two parties do not agree on the size of the house as it relates to the needs of the family, and it will be for the trial judge to determine which version is true and the relevance of this aspect to the issue to be decided. As I have already refused to strike it out for reasons relating to the concept of intention, subparagraph 56(u) will not be struck out for this reason either. For the same reasons, subparagraphs 56(s) and 56(t), which contain allegations of fact concerning the applicant's financial means and the upscale construction of the building on rue Wilfrid-Pelletier, will not be struck out.

Assumptions of fact in group (b)

[31] Group (b) of the impugned assumptions contains subparagraphs 56(j), 56(k), 56(l), 56(m), 56(p), 56(q), 56(r), 56(v), 56(w), 56(y), 56(aa), 56(bb), 56(cc), 56(dd), 56(ee), 56(ff), and 56(gg). Given that the applicant included subparagraph 56(j) in

the assumptions of fact in group (a), this assumption of fact was addressed above and will not be considered in the reasons regarding the assumptions in group (b).

[32] Both in the written submissions and in the arguments at the hearing, counsel for the applicants maintained that, generally and overall, these assumptions of fact therefore disclose no reasonable grounds for opposing the appeal, and counsel did not deal with each assumption of fact individually. Also, while making submissions at the hearing, counsel withdrew the challenge with respect to certain assumptions, for example, subparagraphs 56(aa) and 56(gg).

[33] I find that the assumptions of fact in group (b) (including subparagraph 56(j), which was discussed above) should not be struck out, and I will refer to a few examples to explain why.

[34] First, let us consider subparagraphs 56(k), (l), (p), and (v), which read as follows:

> [TRANSLATION]
> 56(k) On December 3, 2014, the building on De la Pérouse Street was put up for sale.
>
> 56(l) On January 30, 2015, the appellant and his spouse accepted an offer to purchase, and the building on De la Pérouse Street was sold for $685,000 on May 15, 2015.
>
> 56(p) Following the sale of the building on De la Pérouse Street, the Minister added $84,403 of business income to the appellant's income for his 2015 taxation year, computed as follows: . . .
>
> 56(v) On November 9, 2016, the building on Wilfrid-Pelletier was put up for sale.

[35] Since the issue is whether the disposition of two buildings produces business income or a capital gain, the respondent should be expected to indicate the facts she considered in computing the business income and making the assessment. However, the assumptions of fact indicating to the appellant that the respondent had considered the date a building was put up for sale, the date on which it was sold, and its sale price allow the appellant to know the facts that he must refute in order to succeed. It seems to me that these facts have a direct bearing on the determination of the validity of the assessment for the taxation years at issue.

[36] The applicant stated the following in paragraph 34 of his written submissions:

> [TRANSLATION]
> In subparagraphs 56(k), 56(l), 56(v), and 56(y), the respondent made a link between business income and the acceptance of an offer to purchase after the first and second residence were put up for sale, as if the offers to purchase had not been sought by the applicant and showed that he intended to sell the houses when he purchased them, whereas these offers came after the applicant and his spouse had put the buildings up for sale;

[37] While I am not sure that I fully understand this statement, it does not appear to contain a challenge against the assumptions of fact as such, but rather an argument regarding the factors to be considered by the trial judge in order to decide the issue, in particular, the issue of intention.

[38] The applicant did not mention subparagraph 56(p) of the Reply to Mr. Hammond's Notice of Appeal in his written submissions or at the hearing. Subparagraph 56(p) provides the appellant with a breakdown of the computation of business income that was added to the appellant's income, which the respondent took into account in determining the assessment for the 2015 taxation year. I note that subparagraph 56(gg) also provides the breakdown of the computation of business income, but for the 2017 taxation year.

[39] The applicant's challenge to subparagraph 56(gg) was eventually withdrawn at the hearing. Nevertheless, his written submissions regarding this subparagraph provide a good illustration of how the appellant's position with respect to his application to strike out subparagraph 56(p), which contains an almost identical assumption except for the numbers, is doomed to fail. The applicant wrote the following regarding this matter:

> [TRANSLATION]
> 35. In subparagraph 56(gg), the respondent suggested that the sale of the second residence therefore generated business income, although the respondent's Reply demonstrated that there was no doubt that the applicant made the distinction between his personal and professional activities when filing his income tax return;

[40] In the memorandum of argument that he submitted at the hearing, the applicant wrote that subparagraph 56(p) described only the construction of the second building at issue. He wrote that subparagraph 56(gg) provided only a breakdown of the amount of the assessment. Given that the respondent added an amount as business income in computing the applicant's income for the 2015 and

2017 taxation years, it is appropriate—even required, in my opinion—that the respondent specify how these amounts were computed.

[41] At the hearing, counsel for the applicants argued that the assumptions in group (b) do not demonstrate that the assessment is correct. I cannot conclude that these assumptions of fact do not state a reasonable basis for finding that the assessment under appeal is correct (see *Canadian Imperial Bank of Commerce*, *supra* at paras. 7 and 21). The assumptions that are part of group (b) will not be struck out.

Assumptions of fact in group (c)

[42] Group (c) of the impugned assumptions contains subparagraphs 56(d), 56(e), 56(f), 56(g), 56(n), 56(o), 56(x), and 56(z).

[43] The applicant argued that subparagraphs 56(d), 56(e), 56(f), 56(g), 56(n), 56(o), 56(x), and 56(z) of the Reply to Mr. Hammond's Notice of Appeal *were irrelevant* to the issue regarding the sale of the buildings. Some of these subparagraphs contain facts that appear to be undisputed. For example, in subparagraph 56(d), the respondent assumed that Ms. Labonté was the appellant's spouse. Other assumptions of fact among those in this group relate to Mr. Hammond and his spouse's work, knowledge, and experience. The applicant's written submissions state that [TRANSLATION] "the respondent erroneously suggests that together, the applicant and his spouse have real estate experience through their respective jobs and/or trades." Although the applicant disagreed with the facts that the respondent considered in making the assessment, this does not mean that those facts were irrelevant.

[44] At the hearing, counsel for the applicant argued that these statements were not facts and that the statements should have indicated that the applicants had sold x buildings. Yet the applicant also sought to strike out subparagraph 56(g), in which the respondent wrote the following [TRANSLATION]: "From 2001 to 2018, the appellant and his spouse bought and sold eight buildings ...". On reading these subparagraphs and considering the case law factors that should guide the analysis to determine whether the disposition of a property gives rise to business income or a capital gain, at first glance, I find that they seem to be relevant. That said, I am of the view that it is not for me as the motion judge to determine the relevance of the impugned assumptions.

[45] Subparagraphs 56(n) and (o) are assumptions of fact concerning moisture and mould issues in the building on De la Pérouse Street. I note that the applicant himself made allegations in this regard in paragraph 29 of his Notice of Appeal, an allegation that the respondent denied in paragraph 11 of her Reply. The applicant stated the following in paragraph 36 of his written submissions:

> [TRANSLATION]
> 36. In subparagraphs 56(n) and 56(o), the respondent denied that there were any major moisture, water infiltration and mould problems based on the statement that the applicant made to the purchaser. However, the Notice of Appeal clearly describes the work that the applicant has done to solve the water infiltration problems, including work done after the offer to purchase, which explains the statement that was made when the house was sold.

[46] At the hearing, the applicant argued that the statements in subparagraphs 56(n) and (o) of the Reply were not facts and that these statements were made to undermine the applicant's credibility. I fail to see how an allegation made by the appellant regarding moisture or mould is an allegation of fact, whereas an assumption made by the respondent concerning these same issues loses its factual character. Counsel for the respondent argued that these are facts and that if these facts undermine the applicant's credibility, it is incidental. In my view, these are facts and if the respondent considered them in making the assessment, it is appropriate to include them in the Reply. It will be for the trial judge to determine which party is right about the veracity of these statements. The trial judge will also be responsible for deciding whether they are germane to determining the type of income arising from the sale of the building on De la Pérouse Street.

[47] I would point out that this Court has repeatedly affirmed the principle that after the trial judge has heard the evidence, it is up to him or her to determine whether the assumptions are relevant. In *Mungovan v. The Queen*, [2001] 3 CTC 2779 (TCC), Associate Chief Judge Bowman (as he then was) stated the following:

> [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.
>
> [emphasis added]

[48] The principle stated in *Mungovan* was affirmed by the Federal Court of Appeal in *Kossow v. Canada*, 2009 FCA 83 at paras. 21–23.

[49] Therefore, I find that the assumptions of fact in group (c), i.e., subparagraphs 56(d), 56(e), 56(f), 56(g), 56(n), 56(o), 56(x), and 56(z), should not be struck out.

Conclusion

[50] As indicated above, with respect to the motion relating to Yolaine Labonté's appeal, the same submissions apply to the same assumptions of fact, although the numbers in the Reply may differ from those in the Reply to Mr. Hammond's Notice.

[51] For all the foregoing reasons, both motions are allowed.

[52] Paragraphs 2, 4, 7, 15, 22, 26, and 31 of the Reply to Mr. Hammond's Notice of Appeal are struck out with leave to the respondent to amend them.

[53] Paragraphs 2, 4, 7, 15, 22, 26, and 31 of the Reply to Ms. Labonté's Notice of Appeal are struck out with leave to the respondent to amend them.

[54] The respondent may file Amended Replies to the Notice of Appeal within 30 days following the date of this order.

[55] Costs will be in the cause.

Signed at Fredericton, New Brunswick, this 3rd day of November 2021.

"Gabrielle St-Hilaire"

St-Hilaire J.

Translation certified true
on this 14th day of June 2022.

Melissa Paquette

CITATION:	2021 TCC 72
COURT FILE NOS.:	2020-1606(IT)G 2020-1605(IT)G
STYLE OF CAUSE:	SYLVAIN HAMMOND v. HER MAJESTY THE QUEEN YOLAINE LABONTÉ v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	October 19, 2021
REASONS FOR ORDER BY:	The Honourable Justice Gabrielle St-Hilaire
DATE OF ORDER:	November 3, 2021

APPEARANCES:

Counsel for the Applicant:	Michel Beauchamp Alexandre Rafael
Counsel for the Respondent:	Alain Gareau Audrey Turcotte-Bourgeois (student-at-law)

COUNSEL OF RECORD:

For the Applicants:

Name:	Michel Beauchamp Alexandre Rafael
Law firm:	1000 De la Gauchetière Ouest Street Suite 2400 Montreal, QC H3B 4W5
For the Respondent:	François Daigle Deputy Attorney General of Canada Ottawa, Canada