Docket: 2007-329(IT)G

BETWEEN:

ROBERT STROTHER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on common evidence with the motion in the appeal of ***Sentinel Hill Productions IV Corporation, in its capacity as designated member of Sentinel Hill No. 207 Limited Partnership*** **(2009-2247(IT)G)** and ***Sentinel Hill Productions IV Corporation, in its capacity as designated member of Shaae (2001) Master Limited Partnership*** **(2009-2248(IT)G)** on September 22, 2010 at Toronto, Ontario.

Before: The Honourable Gerald J. Rip, Chief Justice

Appearances:

Counsel for the Appellant:	Warren J.A. Mitchell David Davies
Counsel for the Respondent:	John Shipley Robert Carvalho

AMENDED ORDER

Upon motion by the appellant for leave to make a motion to attack portions of the respondent's Reply to the Notice of Appeal, pursuant to Rule 8 of *Tax Court of Canada Rules* (*General Procedure*) ("the *Rules*");

And upon hearing what was alleged by the parties;

The appellant is granted leave to make a motion pursuant to Rule 53 of the *Rules*;

And upon motion by the appellant for an order pursuant to Rule 53 of the *Rules* striking out portions of the respondent's Reply to the Notice of Appeal;

The following portions of the Reply to the notice of appeal shall be struck:

1) paragraphs 1(e), 1(f), 1(g), 1(k), 1(n), 1(p), 2 to 15, 18, 20, 22, 26, 29, 46(c), 46(h), 46(q), 50(iii); and

2) The quotation marks contained in paragraphs 38 to 42, 46(l), 46(o), 46(p), 46(s), 46(t)(i), 46(t)(ii), 46(t)(iii), 46(jj), 46(qq), 46(vv), 46(ggg) - Title, 46(iii), 46(nnn), 46(qqq), 46(ssss), 46(uuuu), 46(zzzz), 46(ccccc), 48.

The respondent may serve and file its Amended Reply in accordance with the reasons for order herein by June 30, 2011 and the appellant shall have 30 days thereafter to serve and file an Answer to the Amended Reply.

One set of costs shall be awarded to the appellants in the motions heard on common evidence with this motion. Counsel shall make submissions in writing with respect to whether costs shall be awarded on a solicitor-client basis by June 30, 2011 if they cannot agree on a fixed amount of costs in these motions.

This order is issued in substitution of the order issued on May 12, 2011.

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

"Gerald J. Rip"

Rip C.J.

Docket: 2009-2247(IT)G

BETWEEN:

SENTINEL HILL PRODUCTIONS IV CORPORATION,
IN ITS CAPACITY AS DESIGNATED MEMBER OF
SENTINEL HILL NO. 207 LIMITED PARTNERSHIP,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on common evidence with the motion in the appeal of ***Robert Strother*** **(2007-329(IT)G)** and ***Sentinel Hill Productions IV Corporation, in its capacity as designated member of Shaae (2001) Master Limited Partnership*** **(2009-2248(IT)G)** on September 22, 2010 at Toronto, Ontario.

Before: The Honourable Gerald J. Rip, Chief Justice

Appearances:

Counsel for the Appellant:	Warren J.A. Mitchell David Davies
Counsel for the Respondent:	John Shipley Robert Carvalho

AMENDED ORDER

Upon motion by the appellant for an order pursuant to Rule 53 of the *Tax Court of Canada Rules* (*General Procedure*) striking out portions of the respondent's Reply to the Notice of Appeal;

And upon hearing what was alleged by the parties;

The following portions of the Reply to the notice of appeal shall be struck:

1) paragraphs 1(i), 1(k), 1(l), 1(o), 1(r), 1(s), 1(t) 2 to 15, 18 to 23, and 25;

2) the following underlined portion of paragraph 35:

… The equitable doctrine of estoppel is, therefore, not available to the appellant.

3) Paragraphs 46(c) and 46(f); and

4) **The quotation marks contained in paragraphs 22, 36, 41, 46(g), 46(j), 46(m), 46(n), 46(vv) and 46 (bbb).**

The respondent may serve and file its Amended Reply in accordance with the reasons for order herein by June 30, 2011 and the appellant shall have 30 days thereafter to serve and file an Answer to the Amended Reply.

One set of costs shall be awarded to the appellants in the motions heard on common evidence with this motion. Counsel shall make submissions in writing with respect to whether costs shall be awarded on a solicitor-client basis by June 30, 2011 if they cannot agree on a fixed amount of costs in these motions.

This order is issued in substitution of the order issued on May 12, 2011.

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

"Gerald J. Rip"

Rip C.J.

Docket: 2009-2248(IT)G

BETWEEN:

SENTINEL HILL PRODUCTIONS IV CORPORATION,
IN ITS CAPACITY AS DESIGNATED MEMBER OF
SHAAE (2001) MASTER LIMITED PARTNERSHIP,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on common evidence with the motion in the appeal of
Sentinel Hill Productions IV Corporation, in its capacity as designated member of Sentinel Hill No. 207 Limited Partnership **(2009-2247(IT)G)**
and ***Robert Strother*** **(2007-329(IT)G)** on September 22, 2010
at Toronto, Ontario.

Before: The Honourable Gerald J. Rip, Chief Justice

Appearances:

Counsel for the Appellant:	Warren J.A. Mitchell David Davies
Counsel for the Respondent:	John Shipley Robert Carvalho

AMENDED ORDER

Upon motion by the appellant for an order pursuant to Rule 53 of the *Tax Court of Canada Rules* (*General Procedure*) striking out portions of the respondent's Reply to the Notice of Appeal;

And upon hearing what was alleged by the parties;

The following portions of the Reply to the notice of appeal shall be struck:

1) paragraphs 1(i), 1(k), 1(l), 1(o), 1(r), 1(s), 1(t) 2 to 15, 18 to 24;

2) the following underlined portion of paragraph 34:

… The equitable doctrine of estoppel is, therefore, not available to the appellant.

3) Paragraphs 46(c) and 46(f); and

4) **The quotation marks contained in paragraphs 22, 36, 41, 46(g), 46(j), 46(m), 46(n), 46(vv) and 46 (bbb).**

The respondent may serve and file its Amended Reply in accordance with the reasons for order herein by June 30, 2011 and the appellant shall have 30 days thereafter to serve and file an Answer to the Amended Reply.

One set of costs shall be awarded to the appellants in the motions heard on common evidence with this motion. Counsel shall make submissions in writing with respect to whether costs shall be awarded on a solicitor-client basis by June 30, 2011 if they cannot agree on a fixed amount of costs in these motions.

This order is issued in substitution of the order issued on May 12, 2011.

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

"Gerald J. Rip"

Rip C.J.

Citation: 2011 TCC 251
Date: 20110512
Docket: 2007-329(IT)G

BETWEEN:

ROBERT STROTHER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

and

Docket: 2009-2247(IT)G

BETWEEN:

SENTINEL HILL PRODUCTIONS IV CORPORATION,
IN ITS CAPACITY AS DESIGNATED MEMBER OF
SENTINEL HILL NO. 207 LIMITED PARTNERSHIP,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

and

Docket: 2009-2248(IT)G

BETWEEN:

SENTINEL HILL PRODUCTIONS IV CORPORATION,
IN ITS CAPACITY AS DESIGNATED MEMBER OF
SHAAE (2001) MASTER LIMITED PARTNERSHIP,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDERS

Rip C.J.

[1] These are three motions in respect of appeals under the *Income Tax Act* by Robert Strother, Sentinel Hill Productions IV Corporation, in its capacity as designated member of SHAAE (2001) Master Limited Partnership ("SHAAE") and Sentinel Hill Productions IV Corporation, in its capacity as designated member of Sentinel Hill no. 207 Limited Partnership ("Hill No. 207") from determinations of loss issued by the Minister of National Revenue ("Minister") in respect of their 2001 and 2002 taxation years[1]. The motions were heard together.

[2] The appeals relate to investments in film production limited partnerships which were submitted to the Rulings Division of the Canada Revenue Agency ("CRA"). The CRA issued several advance tax rulings which purportedly applied to the particular appellants, partnerships and other interested persons, including the Master Limited Partnerships ("MLPs") and the Production Limited Partnerships ("PLPs"). The appellants state that the CRA decided not to honour these rulings, hence the determinations of loss that do not agree with the losses calculated by the appellants.

[3] Each motion is for:

> 1) An Order pursuant to Rule 53 of the *Tax Court of Canada Rules* (*General Procedure*), ("the *Rules*") striking out all or those portions of the Respondent's Replies, which are enclosed in brackets or, with respect to quotation marks, which are circled[2].

---

[1] The Minister assumed the existence of a partnership in making the determinations in the Strother appeal and the SHAAE and the Hill No. 207 appeals. The main difference in these appeals appears to be that in confirming the Strother determination, the Minister denied the existence of a partnership. However, since the appeals of SHAAE and Hill No. 207 were filed 180 days after the determinations and before the determinations were confirmed it is only in the replies that the respondent denied the existence of the partnerships the Minister assumed in making the determinations. Counsel for the appellants suggested that in the SHAAE and the Hill No. 207 appeals the Minister is appealing from his own determinations. This was not argued and is not a matter before me at this time.

[2] 1) To attach as an appendix each of the Replies to the Notices of Appeal would add over 100 pages to these reasons. Therefore I have prepared Appendices A, B, C, D and E to these reasons:

a) Appendix A sets out the provisions of the reply in the SHAAE appeal that the appellant wants struck. The paragraph numbers and content of this Reply are identical to

2) An Order pursuant to Rules 147(1), (3)(i) and 5(c) of the *Rules* awarding the Appellant solicitor and client costs with respect to the Motions.

[4] The appellants rely on Rule 53 of the *Tax Court of Canada Rules* (*General Procedure*) ("*Rules*") and complain that numerous portions of the Replies to the Notices of Appeal ("Replies") are scandalous, frivolous and vexatious and an abuse of the Court pursuant to Rule 53[3] in that:

A Re: SHAAE and Hill No. 207 replies:

(a) the bracketed and circled portions do not conform to the specifications of Rule 49(1) of the *Rules*;

(b) the bracketed and circled portion of the Reply are, with respect to the section titled "Overview", advanced as legal arguments and not as statements of fact;

(c) the bracketed and circled portion of the Reply advanced as facts assumed by the Minister in assessing and as further assumptions of fact are conclusions of law and mixed fact and law;

(d) the portion of the Reply entitled "Summary of Tax Loss Creation Scheme", paragraphs 2 to 15 inclusive, are neither advanced as facts which the Minister assumed in assessing as in paragraph 46, nor as further assumptions of fact as in paragraph 47. As such, paragraphs 2 to 15 inclusive are simply arguments advanced as fact; and

---

that that of the Hill No. 207 reply and similar to the Strother reply. (Differences in paragraph numbers are noted in these reasons).

b) In Appendix B, a column entitled "Portions of relevant reply appellant wants struck (bracketed portions of relevant reply)" speaks for itself. Another column informs the reader if the disputed portion is struck or not. Section 1 of Appendix B describes the disputed portions in the SHAAE and Hill No. 207 replies and Section 2 of Appendix B describes those in the Robert Strother reply. The portion of the replies with respect to quotation marks are described in these reasons.

c) Appendices C and D include the Overview and paragraphs 2 to 15 inclusive of the Hill No. 27 and Strother replies, respectively, that are attacked.

2) Note that in the Hill No. 207 and SHAAE motions, the appellants ask that paragraphs 1(i), 1(k), 1(l) and 19 of the replies be struck for more than one reason. Strother asks that paragraphs 1(e), 1(f), 1(g), 20, 26 and 29 be struck for more than one reason.

3 Although there were concessions offered by the respondent in respect of the Strother appeal, the offer was to change the statement "were not partnerships in law" to "did not carry on business in common with a view to profit" in several paragraphs of the reply. The appellant did not accept the respondent's offer.

(e) the bracketed and circled portions of the Reply are argumentative, inflammatory or inserted to colour the proceedings and to usurp the function of the Trial Judge.

B Re: Strother reply:

(a) the bracketed and circled portions do not conform to the specifications of Rule 49(1) of the *Rules*;

(b) the bracketed and circled portions of the Reply are, with respect to the section titled "Overview", advanced as legal arguments and not as statements of facts;

(c) the bracketed and circled portions of the Reply advanced as "Facts" and as "Assumptions of Fact", are conclusions of law or mixed fact and law; and

(d) the bracketed and circled portions of the Reply are argumentative, inflammatory or inserted to colour the proceedings and to usurp the function of the Trial Judge.

[5] The Replies are essentially identical; the majority of the numbered paragraphs referred to above are the same in all three Replies, differences are in footnotes.

"Fresh Step" objection

[6] The respondent has objected to the motion of the appellant Strother on the basis his motion is a fresh step. Rule 8(*b*) provides that:

A motion to attack a proceeding or a step, document or direction in a proceeding for irregularity shall not be made,	La requête qui vise à contester, pour cause d'irrégularité, une instance ou une mesure prise, un document donné ou une directive rendue dans le cadre de celle-ci, ne peut être présentée, sauf avec l'autorisation de la Cour :
…	…
(*b*) if the moving party has taken any further step in the proceeding after obtaining knowledge of the irregularity,	*b*) si l'auteur de la requête a pris une autre mesure dans le cadre de l'instance après avoir pris connaissance de l'irrégularité.
except with leave of the Court.	

[7] The chronology of events leading to the Strother motion are relevant:

1. January 19, 2007	—	Notice of Appeal for 1998 and 1999 taxation years
2. November 5, 2007	—	Amended Notice of Appeal
3. November 9, 2007	—	Further Amended Notice of Appeal
4. December 18, 2008	—	Another Further Amended Notice of Appeal
5. January 19, 2009	—	Reply to the Further Amended Notice of Appeal dated December 18, 2008.
6. February 13, 2009	—	Appellant's Answer to Respondent's Reply ("The Fresh Step")
7. February 11, 2010	—	Further Further Amended Notice of Appeal
8. February 18, 2010	—	Reply to the Further Further Amended Notice of Appeal dated February 11, 2010.
9. March 26, 2010	—	Appellant filed and served motion to strike.

[8] There are at least two reasons behind the fresh step rule. The first is to prevent prejudice where it is unfair to permit a reversal in approach[4] and the second is based on the idea of an implicit waiver[5]. That is, by proceeding to the next step the party has waived their right to complain of the irregularity. If either underlying factor is not present then there are strong grounds to exercise discretion and grant leave to allow the motion to be heard despite the fresh step.

[9] Both parties rely on Bowman A.C.J.'s (as he then was) statement in *Imperial Oil Limited and Inco Limited v The Queen*:[6]

> The "fresh step" rule is one that has been part of the rules of practice and procedure in Canada and the United Kingdom for many years. There is a great deal of jurisprudence on what constitutes a fresh step but the rule is based on the view that if

---

4 *Vogo Inc v. Acme Window Hardware Ltd*, 2004 FC 851 at para 60.

5 See also *Imperial Oil Limited and Inco Limited v The Queen*, 2003 TCC 46; *GCC Ltd v Thunder Bay*, (1981), 32 OR (2d) 111 (HC); Garry D. Watson and Lynne Jeffrey, *Holmsted and Watson, Ontario Civil Procedure*, (Carswell), Volume 3 at 2-20.

6 *Imperial Oil*, supra note 3 at para 20.

> a party pleads over to a pleading this implies a waiver of an irregularity that might otherwise have been attacked. For two reasons I do not think that the fresh step rule precludes the respondent from bringing the motions. *First, it is clear that by filing replies to the notices of appeal the respondent is not waiving her objections to the filing of the notices of objection and appeal*. The replies clearly state the Crown's objection. *Second, a rather wide ranging attack on the appellant's right to appeal, including allegations that that this court has no jurisdiction, that the appeals are frivolous, vexatious and an abuse of process is hardly an attack on an irregularity*.
>
> [Emphasis added.]

[10] The appellant makes two arguments in respect of why leave should be granted for his motion to strike based on *Imperial Oil*. First the appellant argues that the conclusions of law and repetitive pleadings are beyond a mere irregularity. The facts at bar are not the same as in *Imperial Oil*. There the issue was whether the appellant was entitled to appeal from an initial "quick" assessment, where only the arithmetic was checked, following the expiration of the 90 day period of confirmation. The Crown's argument was that a "quick" assessment did not give rise to a right to object and that it was only after a more thorough assessment that the taxpayer could object. The central issue was whether the Tax Court had jurisdiction to hear an appeal from a "quick" assessment. In that case the fresh step should not prevent the court from making this legal determination.

[11] In this matter, counsel states, the issues in the impugned paragraphs are not determinative of the matter. The criticism that the Reply contains conclusions of law or repetition is more in line with irregularities than determinations regarding the right to appeal. It is not enough that the motion to strike was brought under the heading of frivolous and vexatious proceedings or an abuse of process to fit within Bowman A.C.J.'s statement in *Imperial Oil*. Instead, it must be a substantial attack against the pleading, an attack against the entire appeal itself, and leave should not be granted on this basis.

[12] The appellant's second argument is that the respondent will not experience any prejudice as the issues are the same in the other appeals proceeding along the same timelines. Additionally, no documents have been exchanged and no discovery has been conducted. The respondent has not indicated how she would be prejudiced in this situation other than to say that the fresh step should be considered if a costs decision in the Strother motion is made. That is, as I understand it, "they shouldn't be able to demand costs in regard to Strother when they have taken actions inconsistent with the present position."

[13] The parties have both filed new pleadings since the fresh step, addressing the issues raised in the Answer. They are effectively still at square one. The respondent and the appellant are in no different position than if the Answer had been the final pleading. Both sides are aware that one of the critical issues in all three appeals is the role of the CRA Rulings and both have given their facts surrounding this issue. Accordingly, in the circumstances, it is not obvious the respondent will suffer any prejudice. Leave for the motion is granted.

The Motions

[14] The requirement as to what a reply in an income tax appeal should state is found in Rule 49(1) of the *Rules*:

Subject to subsection (1.1), every reply shall state	Sous réserve du paragraphe (1.1), la réponse indique :
(*a*) the facts that are admitted,	*a*) les faits admis;
(*b*) the facts that are denied,	*b*) les faits niés;
(*c*) the facts of which the respondent has no knowledge and puts in issue,	*c*) les faits que l'intimée ne connaît pas et qu'elle n'admet pas;
(*d*) the findings or assumptions of fact made by the Minister when making the assessment,	*d*) les conclusions ou les hypothèses de fait sur lesquelles le ministre s'est fondé en établissant sa cotisation;
(*e*) any other material fact,	*e*) tout autre fait pertinent;
(*f*) the issues to be decided,	*f*) les points en litige;
(*g*) the statutory provisions relied on,	*g*) les dispositions législatives invoquées;
(*h*) the reasons the respondent intends to rely on, and	*h*) les moyens sur lesquels l'intimée entend se fonder;
(*i*) the relief sought.	*i*) les conclusions recherchées.

[15] Once the respondent has admitted and denied facts and stated she has no knowledge of certain facts alleged in the Notice of Appeal and puts these facts in issue, there are only two more statement of facts for the respondent to plead: the finding or assumptions of fact made by the Minister when making the assessment, and any other material fact. All these statements of fact are to be statements of material fact, not immaterial facts, not statements or principles of law and not statements mixing fact with law. Subparagraphs *f*), *g*) and *h*) of Rule 49 accord the respondent opportunity to describe the issues, state the statutory provisions in play and submit the reasons she is relying on in this appeal.

[16] It is poor and improper pleading when a litigant admits or denies a fact in a pleading but couples the admission or denial with a conclusion of law or some

extraneous comments that add nothing to the process. The assumptions of fact should be facts the Minister relied on in assessing and the facts so relied on should be material facts. Otherwise, why were these facts relied on if they were not material? In *Foss v. The Queen*[7] my colleague Bowie J. explained that:

> The purpose of pleadings is to define the issues between the parties for the purposes of discovery, both documentary and testamentary, and trial. That requires no more than a statement of the "precise findings of fact" that underpin the assessment. It is potentially prejudicial to the appellant to plead more - certainly to plead more by way of assumptions of fact. The appellant is, of course, entitled to particulars of the evidence that the Crown intends to lead at trial, but these are properly obtained on discovery, not disguised as material facts as to which the Crown at trial may claim a presumption of truth. …

I Mixed fact and law

[17] The appellants submit that the ratio of Rothstein J.A. (as he then was) in *The Queen v. Anchor Pointe Energy Ltd.*[8] regarding conclusions of mixed fact and law should be extended to all paragraphs of the Reply which deal with facts:

> [25] I agree that legal statements or conclusions have no place in the recitation of the Minister's factual assumptions. The implication is that the taxpayer has the onus of demolishing the legal statement or conclusion and, of course, that is not correct. The legal test to be applied is not subject to proof by the parties as if it was a fact. The parties are to make their arguments as to the legal test, but it is the Court that has the ultimate obligation of ruling on questions of law.
>
> [26] However, the assumption in paragraph 10(z) can be more correctly described as a conclusion of mixed fact and law. A conclusion that seismic data purchased does not qualify as CEE within the meaning of paragraph 66.1(6)(*a*) involves the application of the law to the facts. Paragraph 66.1(6)(*a*) sets out the test to be met for a CEE deduction. Whether the purchase of the seismic data in this case meets that test involves determining whether or not the facts meet the test. The Minister may assume the factual components that are being assumed so that the taxpayer is told exactly what factual assumptions it must demolish in order to succeed. It is unsatisfactory that the assumed facts be buried in the conclusion of mixed fact and law.

[18] In *Anchor Pointe* the Court opined that the assumptions of fact be factually clear and the Crown should not draft the assumptions of fact in such a way as to exacerbate the appellant's onus of disproving the facts assumed. The appellant does

---

7 2007 TCC 201, [2007] T.C.J. No. 99 (QL).

8 2003 FCA 294, at paras 25-26.

not require this protection in portions of the Reply where the Crown has the onus of proof, for example, paragraphs *a*), *b*), *c*) and *e*) of Rule 49(1).

[19] The form of the Reply set out in Rule 49(1) contemplates the avoidance of commingling facts with law. Facts are required to be plead first through paragraphs 49(1)(*a*)(*b*)(*c*) and (*e*). Rule 49(1)(*d*) restricts the respondent to pleading findings of fact or assumptions of fact made by the Minister in assessing; there are material facts only. Rules 49(1)(*f*) to (*i*) inclusive give the respondent the right to plead matters described in these Rules. This is similar to the rules of practice in common law provinces, including Ontario and British Columbia as well as the Federal Court which allow the pleading of law if the factual underpinnings have been pled[9].

[20] The respondent argues that Rule 49 merely sets out what must be included and does not establish a specific structure. In other words, so long as the requirements of Rule 49 are met, it is possible to intersperse conclusions of law with the facts throughout. To accept the respondent's argument would lead to incoherent, repetitious pleadings as difficult and frustrating as the ones faced with under this motion.

[21] It does not require complex statutory analysis to arrive at the conclusion that a "fact" means a fact in the legal context. The majority of the Supreme Court of Canada took a technical interpretation approach to the word "sale" in the *Income Tax Act* with Major J. stating:[10]

> To apply a "plain meaning" interpretation of the concept of a sale in the case at bar would assume that the *Act* operates in a vacuum, oblivious to the legal characterization of the broader commercial relationships it affects. It is not a commercial code in addition to a taxation statute. Previous jurisprudence of this Court has assumed that reference must be given to the broader commercial law to give meaning to words that, outside of the *Act*, are well-defined. …

[22] In terms of "facts", this word is in the rules of civil procedure and so should be interpreted in the legal context with the relevant distinctions between questions of law, questions of fact and questions of mixed fact and law. The word "facts" excludes conclusions of law and mixed fact and law.

---

9 *Rules of Civil Procedure*, RRO 1990, Reg 194, r 25.06(2); *Supreme Court Civil Rules*, BC Reg 168/2009, r 3-7(9); *Federal Court Rules*, SOR/98-106, r 175.

10 *Will-Kare Paving & Contracting Ltd v. The Queen*, 2000 SCC 36 at para 31, [2000] 1 SCR 915.

[23] The appellants claim that the disputed bracketed portions of the Replies are actually conclusions of law or mixed fact and law. However, the respondent states that these are simply factual assertions.

[24] It is frequently difficult to draw the line between a question of fact and a question of law. It is more difficult when the third category, mixed question of fact and law, is considered. Iacobucci J. of the Supreme Court of Canada recognized this problem and stated the following:[11]

> … Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or *vice versa*.

a) Arm's length relationship

[25] The following portions of these reasons deal with various words, terms and phrases that the appellants view as conclusions of law or mixed fact and law. In an effort to make the reading of these reasons less onerous to the reader, I shall refer to the portions of the SHAAE Reply which have been bracketed or circled by the appellants as well as the portion of the Reply in SHAAE that is entitled "Summary of Tax Loss Creation Scheme", rather than to the same matters in the Strother and Hill No. 207 appeals.

[26] A non-arm's relationship is a question of fact: *Teelucksingh v The Queen*[12]. Bowie J. explained that matters such as:

> … assertions as to value, *that parties do not act at arm's length*, that they did not carry on a business, that expenses were not incurred, or were not incurred for a particular purpose *are assertions of fact*. Certainly those facts have legal

---

11 *Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 SCR 748 at para 35.

12 2010 TCC 94, at para 11; see also *Cameco Corporation v. The Queen*, 2010 TCC 636, at para 40-41.

> implications, and some of them use words that are used in the *Act*, but they are nevertheless factual assumptions.
>
> [Emphasis added.]

[27] Accordingly, any mention of non-arm's length relationship cannot be struck on the basis of pleading a conclusion of law. Alternatively, in some cases they can be struck on the basis of being inappropriate for a definition which is discussed below.

> Bracketed portions **not struck** from the Strother appeal:
>
> Paragraphs 24 and 46(llll) – Title, 46(pppp) – Title, as the statements of a non-arm's length relationship are not conclusions of law.

b) Did not carry on business with a common view to profit

[28] The Supreme Court of Canada stated the test for partnership as follows: [13]

> … In other words, to ascertain the existence of a partnership the courts must *inquire into whether the objective, documentary evidence and surrounding facts, including what the parties actually did, are consistent with a subjective intention to carry on business in common with a view to profit.*
>
> Courts must be pragmatic in their approach to the three essential ingredients of partnership. Whether a partnership has been established in a particular case will depend on an analysis and weighing of the relevant factors in the context of all the surrounding circumstances. That the alleged partnership must be considered in the totality of the circumstances prevents the mechanical application of a checklist or a test with more precisely defined parameters.
>
> [Emphasis added.]

[29] Based on Iacobucci J.'s reasoning in *Southam*, the test for a partnership would be a conclusion of mixed fact and law. What the PLPs and MLPs did or did not do are questions of fact; what is the test for partnership is a question of law and whether the facts allow the appellants to satisfy the *Backman* test would be a mixed question of fact and law.

[30] The respondent therefore is required to extricate the legal components of a conclusion of mixed fact and law and only plead the facts where the rule requires facts. The statement that "… did not carry on business with a view to profit" will be struck when commingled with the facts:

---

13 *Backman v. The Queen*, 2001 SCC 12 at para 25-26, [2001] 1 SCR 367.

The paragraphs struck from the SHAAE and Hill No. 207 appeals:

Paragraphs 1(i), (k), (l), 18, 19, 20, 21, 24[14] and 46(f).

Bracketed portions struck from the Strother appeal:

Paragraphs 1(e), (f), (g), 18, 20, 29 and 46(h).

c) The allegations of sham, circular transactions or façade

[31] The allegations of sham, circular transactions and facades are also in issue. The test for the sham doctrine was set forth in *Snook v. London West Riding Investments, Ltd.*:[15]

> ... [Sham] means acts done or documents executed by the parties to the "sham" which are intended by them, to give to third parties or the Court, the appearance of creating between the parties, legal rights and obligations different from the actual legal rights and obligations (if any), which the parties intend to create. … for acts or documents to be a "sham", with whatever legal consequences follow from this, *all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating*. …
>
> [Emphasis added.]

[32] In this case, the facts are the actual rights and responsibilities as well as what the parties did or did not do. However, applying the facts to determine whether there was a common intention to mislead is a conclusion of mixed fact and law as it involves the applications of the facts to the legal test of sham. Again, the respondent is required to extricate the facts and mentions of sham, or façade should be deleted. With respect to this argument, some of the bracketed portions are struck while some are not as they are factual underpinnings and not conclusions.

Bracketed portions struck from the SHAAE and Hill No. 207 appeals.

Paragraphs 19, 22, 24[16] and 46(c).

---

14 Paragraph 24 of the SHAAE appeal and paragraph 25 of Hill No. 207 appeal.

15 [1967] 1 All ER 518 at 529.

16 Paragraph 24 of SHAAE appeal and paragraph 25 of Hill No. 207 appeal.

Bracketed portions struck from the Strother appeal:

Paragraphs 20, 22, 26, 29, 46(c) and (q).

Bracketed portions n**ot struck** from the SHAAE and Hill No. 207 appeals:

Paragraphs 46(a), (b) and (ss) are not struck as they are the factual underpinnings of a sham argument.

Bracketed portions n**ot struck** from the Strother appeal:

Paragraphs 27, 46(a), (b), (o), (dd), (oo), (nnn), (pppp) and (tttt) are not conclusions of law but factual underpinnings sham.

[33] The difficult term here is "circular" and its derivatives. The appellant's main complaint with "circular" is that it is colourable and only in oral submissions did appellants' counsel mention that it could be a legal conclusion. However, "circular" is a factual conclusion; it is a factual description. Therefore, no portions containing this word will be struck on this basis alone. The colourability of these terms, though, will be discussed below.

d) Reasonable expectation of profit ("REOP")

[34] The Supreme Court of Canada replaced the REOP test for deductibility under section 9 with the pursuit of profit test in *Stewart v. The Queen*[17]. It is now a two part test:

(i) Is the activity of the taxpayer undertaken in pursuit of profit, or is it a personal endeavour?

(ii) If it is not a personal endeavour, is the source of the income a business or property?

[35] The Supreme Court of Canada went on to say that "[the] overall assessment to be made is whether or not the taxpayer is carrying on the activity in a commercial manner" with a reasonable expectation of profit being a factor to consider[18].

---

17 2002 SCC 46 at para 50, [2002] 2 SCR 645.

18 *Ibid*, at para 55.

[36] Therefore, the REOP test is still a relevant factor to consider when determining whether the activity was carried on in a commercial manner or alternatively for determining whether a partnership existed. For example, in *Foster v. The Queen,*[19] Angers J. cited no income as one factor in concluding that the partnership was not a partnership in law in the context of SR&ED tax shelter program.

[37] Therefore, reference to REOP is not a conclusion of law and but a fact relied upon by the Minister and as a result its mention should not be struck.

> Bracketed portions **not struck** from the SHAAE and Hill No. 207 appeals:
>
> Paragraph 46(aaa).
>
> Bracketed portions **not struck** from the Strother appeal:
>
> Paragraph 37.

e) Response to rulings allegations

[38] Paragraphs 28 through 34 of the SHAAE appeal and paragraphs 30 through 36 of the Strother appeal are the respondent's response to the appellant's allegation that it had received a favourable ruling in respect of the tax shelter arrangement. The only conclusion of law in these paragraphs is in paragraph 34 of the SHAAE and paragraph 35 of the Hill No. 207 appeals which state that the appellants do not qualify for the equitable defense of estoppel.

> Bracketed portions struck from the SHAAE and Hill No. 207 appeals
>
> Only a portion (the last sentence) of each of paragraph 34 and paragraph 35 is struck from the SHAAE and Hill No. 207 appeals respectively for this reason.

II Should portions of the replies be struck for being repetitive or redundant?

[39] The appellants' alternative argument to strike is based on the repetition and redundancy of the Replies. When reading through redundant and repetitive portions of the Replies it is only a matter of pages before one has the feeling that one of the

---

[19] 2007 TCC 659 at para 34, 2008 DTC 2450, [2008] 4 CTC 2242.

parties is trying to beat the other into submission, never mind the judge who is only just entering the fray. The appellants rely on *Mudrick v Mississauga Oakville Veterinary Emergency Professional Corporation*[20], in which Master Haberman of the Ontario Superior Court of Justice struck out the plaintiff's overview and summary for this very reason. In reaching this conclusion Master Haberman stated:[21]

> The pleading contains a summary, which essentially repeats the overview. This will be unnecessary when the claim is pleaded properly. Including the summary and the overview means the same things are repeated three times in the pleading. They should only be discussed once, in the body of the claim, where they fall chronologically.

In concluding, **she** added the following general comments regarding pleadings in general: [22]

> Repetition should be avoided. Superfluous detail should be eliminated. Editorialized comments should be removed. … This is not "the last chance" to tell the whole story – it is only an overview of what the case will be about. …

[40] Moreover, Bowie J. cited the following passage from *Holmsted and Watson* regarding the rule of pleading: [23]

> This is *the* rule of pleading: all of the other pleading rules are essentially corollaries or qualifications to this basic rule that the pleader must state the material facts relied upon for his or her claim or defence. The rule involves four separate elements: (1) every pleading must state facts, not mere conclusions of law; (2) it must state material facts and not include facts which are immaterial; (3) it must state facts and not the evidence by which they are to be proved; (4) it must state facts concisely in a summary form.

The fourth requirement is particularly relevant to this appeal. A repetitive pleading is not concise. It does nothing to help in understanding the issues.

[41] Orsborn J. (as he then was) of the Newfoundland and Labrador Supreme Court, when faced with repetitive pleadings, explained: [24]

---

20 [2008] O.J. No. 4512 (QL).

21 *Ibid, Mudrick* at para 31.

22 *Ibid, Mudrick*, at para 40.

23 *Foss*, supra note 6 at para 6; see also *Globtek Inc v. The Queen*, 2005 TCC 727 at para 5 and 13.

24 *Duffett v. Canada (AG)* 2004 NLSCTD 58 at para 23, 235 Nfld & P.E.I.R. 321.

> … The pleadings define the case to be made out and to be met, both factually and legally. Loosely defined and unfocussed pleadings are of no benefit to the recipient or to the court. They detract from rather than facilitate the understanding of the legal framework against which the factual circumstances will be assessed. *Unnecessarily verbose and repetitive pleadings create uncertainty*; there is no place for uncertainty when faced with responding to a claim for redress.
>
> [Emphasis added.]

[42] Finally, P.M. Perell J. of the Ontario Superior Court of Justice cited repetition as one of his reasons for striking certain paragraphs of a statement of claim under Rule 25.11 of the Ontario *Rules of Civil Procedure*[25].

> I strike out these paragraphs or words on the grounds that they are *any or all* of immaterial, embarrassing, argumentative, tautological, *redundant, repetitious*, or a pleading of evidence and not a material fact. …[26]
>
> [Emphasis added.]

[43] The excessive repetition within each Reply is superfluous and undermines the goals of conciseness and certainty. The repetitive portions should be struck.

a) Redundancy of Overview and Summary

[44] The most redundant portions of the Replies are the Overview and the Summary which effectively repeat the allegations made in paragraphs 46 and 47. In *Gould v The Queen*[27], Bowman J. refused to strike an overview which described the overall "scheme". To Bowman J. it was a relevant fact that charitable donations were part of a larger pattern involving others. Finally, he allowed it to remain as it served a function of pleadings; to inform the judge of the Crown's position as well as the issues he must decide upon[28]. An overview can be a welcome addition in pleadings, in particular pleadings in a complex matter. It gives the reader a bird's eye view of the issue. It can be analogous to an Executive Summary of a lengthy report so long as it is used as such. That it may be colourful — as long as it is not overtly one-sided — should not unduly concern the opposing party in an appeal before this Court. There is no jury. The judge can readily discern fact from hyperbole. Ideally, however, the overview should present a fair description of the issue in appeal. Inflammatory language in an overview serves mainly to make the litigation less civil. The

---

25 This rule identical to Rule 53.

26 *Robinson v. Medtronic Inc*, 2010 ONSC 1739 at para 19.

27 2005 TCC 556, 2005 DTC 1311.

28 *Ibid*, at para 11-12.

overviews in these Replies are allowed to remain. Like in *Gould*, these appeals also are concerned with a tax shelter program.

[45] The same cannot be said for each Summary. Each repeats the Overview as well as paragraphs 46 and 47 of the Replies. The respondent should choose one or the other. The reader has already been put on alert as to the central issues in the appeal as well as the Crown's position. It is redundant and must be struck in all three appeals as scandalous, frivolous and vexatious.

The paragraphs struck in the SHAAE and Hill No. 207 Appeals.

Paragraphs 2-15(Summary), 19, 20, 23, 24[29].

Bracketed portions struck from the Strother appeal

Paragraphs 2 through 15 (Summary), 20, 22, 26 and 29.

III Should portions of the Replies be struck for use of colourable or embellishing language?

[46] With respect to terms used for colour or to embellish, the respondent submitted *Meditrust Healthcare Inc v. Shoppers Drug Mart* as authority for what is colourable language. There Molloy J. stated:[30]

> … Strong language is not prohibited when appropriate to the context. … That said, distinguishing between particular words or expressions which are merely descriptive, as opposed to inflammatory, is largely a subjective exercise. My own view is that considerable latitude should be given to the style and language chosen by counsel. The Court should only intervene when the expressions used are clearly "over the line".

[47] Justice Molloy then ruled that the following statements did not cross the line: "fraudulent intent", "bogus letter", "warning", "threatened", "vested interest in maintaining dominance", "propagandizing directly and through surreptitious means", "pervert", "predatory practice", "poisoning the marketplace", "poisoning the business of the plaintiff", "modus operandi", and "agent provocateur in the context of an

---

29 Paragraph 24 in SHAAE appeal and paragraph 25 of Hill No. 207 appeal.

30 85 ACWS (3d) 761, 1999 CarswellOnt 5285 at para 33

action for anti-competitive practices". On the other hand he struck the expression "dirty tricks" as inflammatory[31].

[48] The appellant cited *George v. Harris*,[32] for the position that "… portions of a pleading that are irrelevant, argumentative or inserted for colour, or that constitute bare allegations should be struck out as scandalous". However, *George v. Harris* dealt with paragraphs of a notice of motion relating to deficiencies in an affidavit of documents. As such, most of the words related to the conduct of the defendant in failing to comply with discovery. The following are examples of words struck: "deliberately avoids disclosing", "used concealment techniques", "manipulated form and content of affidavit", "deliberateness of documentary disclosure evasions", "evasions" and "deliberate gaps".

[49] The issue here is whether the word "circular" and its derivatives are over the line. This is a subjective determination. In this case, the references to circular transactions do not come close to the offensive terms in *Meditrust* or *George v. Harris*. They are relevant in the context of a tax shelter arrangement and nothing is scandalous if it is relevant[33]. As a result no paragraphs are struck based on colourability.

> Bracketed portions **not struck** from the SHAAE and Hill No. 207 appeals:
>
> Paragraphs 46(j), (p), (q), Page 20 Title and Page 20 Subheading I, 47(f), (g), (kk), (pp) and (pp)(iv).
>
> Bracketed portions **not struck** from the Strother appeal:
>
> Paragraphs 39, 46(l), (p), (r), (s), (t) (v), (v), (zz), (ggg), (hhh), (zzz), (aaaa), (eeee), (ffff)(f), (llll) – Title.

IV Should the qualifications to the definitions be struck?

[50] The respondent has qualified the definitions portion of its Replies to the point where the definitions are useless. This practice should be discouraged. It is no use

---

31 *Ibid*, at para 34.

32 [2000] O.J. No. 1762 (QL), at para 20.

33 *Quizno's Canada Restaurant Corp. v Kileel Developments Ltd*, (2008) 92 O.R. (3d) 347 (CA); *Ontario (A.G.) v Dieleman* (1993), 14 OR (3d) 697 (Gen Div); *Erinco Homes Ltd*, (*Re*) [1977] O.J. No. 1415 (QL) (Ont HC).

having a definition unless the opposing party and the trial judge can easily refer to the definition as well. The practice prevents the other party from relying upon a standard term when the qualification is in dispute. Moreover, it prevents the judge from using the standard term before the finding of fact is made as to the qualification. Definitions are not an explicit requirement under Rule 49; they are permitted because they simplify the pleadings. Where the definition introduces a lack of clarity through qualifications, the ability to include definitions should be curtailed. For example, in *Sun Life Assurance Co. of Canada v. 401700 Ontario Ltd*, the Ontario Court (General Division) held that: [34]

> … defined terms and descriptive phrases in a pleading are generally within the discretion of the party pleading. They are often of assistance to the smooth flow of the pleading. However, defined terms in a pleading should not be inflammatory, nor create an unnecessarily repetitive and prejudicial flavour.

[51] The qualifications here are certainly repetitive and done to be inflammatory. These qualifications only decrease the clarity of pleading. This is not to say that the particular qualifications have no place in the pleadings, simply that they should be pled separately from the definitions. As a result, all qualifications are struck.

> Bracketed portions of the paragraphs to be struck in the SHAAE and Hill No. 207 appeals:
>
> Paragraphs 1(i), (k), (l), (o), (r), (s) and (t).
>
> Bracketed portions of the paragraphs to be struck from the Strother appeal:
>
> Paragraphs 1(e), (f), (g), (k), (n), (p)

V Miscellaneous portions in Strother

[52] Paragraph 50(iii) is not an allegation of law but merely a purported explanation of the Minister's assessment position. It is a self-serving, useless inclusion in the reply that adds absolutely nothing to the issues to be decided.

[53] Footnote to paragraph 43 is not struck as there is nothing offensive with what is contained therein but I question if it is necessary to name these appellants in the pleadings.

---

[34] (1991) 3 O.R. (3d) 684 at 687.

VI Respondent's agreement to delete quotation marks

[54] At trial respondent's counsel agreed to remove the disputed quotation marks throughout the Reply and instead place the word "purported" in their place. Therefore the following portions of the paragraphs are struck with leave to amend:

> Bracketed portions struck from the SHAAE and Hill No. 207 appeals:
>
> Quotation marks contained in the Overview, paragraphs 22, 36, 41, 46(g), (j), (m), (n), (vv) and (bbb).
>
> Bracketed portions struck from the Strother appeal:
>
> Quotation marks in paragraphs 38, 39, 40, 41, 42, 46(l), (o), (p), (s), (t)(i), (t)(ii), (t)(iii), 46(jj), 46(qq), 46(vv), 46(ggg) – Title[35], 46(iii), 46(nnn), 46(qqq), 46(ssss), 46(uuuu), 46(zzzz), 46(ccccc) and 48.

Conclusion

[55] Orders in each motion shall be issued accordingly. The respondent shall have until June 30, 2011 to amend the portions of the Replies struck and serve and file its Amended Replies. The appellants shall have 30 days thereafter to serve and file Answers to the Replies.

[56] One set of costs shall be awarded to the appellants. The appellants asked for costs on a solicitor-client basis and I invite counsel to make submissions in writing if they cannot agree on a fixed amount by June 30, 2011.

Signed at Ottawa, Canada, this 12th day of May, 2011.

"Gerald J. Rip"

Rip C.J.

[35] Not circled by Appellant but I suspect this is oversight.

Appendix A

Provisions of the reply of Sentinel Hill Productions IV Corporation, in its capacity as a designated member of **SHAAE (2001) MASTER LIMITED PARTNERSHIP** that the appellant wants struck.

Overview

U.S. Motion Picture Studios incurred production expenditures in carrying on the business of making movies. Canadian tax shelter promoters rented these expenditures. But, the rental of expenditures does not give rise to a cognizable deduction or loss in Canada.

The Studios and Canadian promoters or their respective designates purported to enter into a series of intricate, circular transactions designed to permit the promoters and their clients to indirectly do what they could not do directly. However, the Studios and the promoters did not deal with the "transactions" as if they were genuine and simply ignored the supposed rights and obligations, when and as required to carry out their real intentions. The "transactions" were designed to create a facade of reality quite different from the disguised reality. The true nature of the relationship between the Studios and the promoters was simply this: the Studios rented to the promoters a portion of the Studios' expenditures.

Neither the SHAAE (2001) Master Limited Partnership (the "MLP") nor any of the 73 Production Limited Partnerships (the "PLPs") in which the MLP "invested" were partnerships in law. While fashioned to have the appearance of possessing the legal attributes of a partnership, the MLP and the PLPs lacked the essential ingredient of carrying on business in common with a view to profit. To the contrary, the *sole* purpose of the MLP and the PLPs was to create tax losses for use by the members.

If the transactions were genuine and the MLP and the PLPs were in fact partnerships at law, the Minister nevertheless correctly concluded that the MLP had failed to demonstrate the losses incurred, if any, exceeded amounts allowed by the determinations or were reasonable in the circumstances.

Summary of Tax Loss Creation Scheme

2. The Studios incurred expenditures in the production of motion pictures. For a fee, the Studios agreed to rent a portion of their production expenses to Canadian promoters who marketed them in Canada as deductible expenses through tax shelters.

3. The promoters and the Studios purported to enter into a series of intricate, circular transactions (collectively referred to as the "tax loss creation scheme"). These transactions were designed to enable the promoters and their clients to do indirectly what they could not do directly: to deduct losses derived from a simple rental of expenditures. Some or all of the transactions comprising this tax loss creation scheme were sham transactions, incomplete, and/or legally ineffective. For example, by the time the production services contracts were executed, the Studios had already incurred part or all of the very expenditures and provided part or all of the very services that the PLPs contracted to provide. In some cases, the production services were already entirely completed.

4. To carry out the tax loss creation scheme, the promoters created the MLP, whose purpose was to acquire Class A units of the PLPs. The PLPs contracted to provide production services respecting motion pictures.

5. The Studios contracted with the PLPs to produce motion pictures. The PLPs contracted back with the Studios the same NCLE Production Services and the Studios provided the services at cost plus a mark-up. With respect to CLE Production Services, the Studios incurred these costs for which they were reimbursed by the PLPs.

6. To create the tax losses, each of the PLPs agreed to provide the PLP Production Services to the Studio for a fee fixed at only 80.02% of the cost of the services. The PLPs fixed that fee at 80.02% of cost without any negotiation, contrary to industry standards and without any business rationale. The PLPs selected 80.02% in an attempt to avoid the matchable expenditures rules in section 18.1 of the *Income Tax Act* (Canada) (the "*Act*") while maximizing the losses created.

7. The PLPs therefore committed to providing the PLP Production Services to the Studios at 80.02% of their cost while agreeing to pay the Studios that cost plus a mark-up to provide some of the same services. To overcome this guaranteed loss and create the appearance of a profit potential, the PLP production services contracts included a Net Profit Participation or NPP clause.

8. While creating an appearance of a profit potential, the Net Profit Participations were structured and intended to be, and were in fact, worthless. There was no prospect that the PLPs would receive any amount from the Net Profit Participation, much less produce a profit. The Net Profit Participations were at best mere window-dressing.

9. The clients of the Promoters, the Investors, acquired units in the MLP and the MLP allocated losses created in the PLPs to the Investors.

10. The Investors acquired units in the MLP through financing arrangements that were as circular as the production services contracts and which guaranteed that no funds beyond their actual cash were ever at risk.

11. The cash contributed by the Investors to acquire units of the MLPs was used to pay the fees of the promoters, the accommodating Studios and other "accommodators," not to pay for production services provided to the Studios. The MLP and PLPs created the appearance of working capital through a series of circular daylight "loans". In fact, there was no working capital.

12. The promoters ensured that any supposed liabilities of the Investors beyond the cash actually contributed was eliminated by inserting into the tax loss creation scheme mandatory acquisition of Class B units in the PLP by the Studios. The acquisition of the Class B units was designed to reduce the risk of loss to the Investors.

13. The units acquired by the Investors were not genuine partnership units in that they were designed and known by the Studios, the promoters and the Investors to be worthless. The scheme was designed to benefit the Investors who purchased tax losses, the promoters who received fees for arranging those purchases, and the Studios who received a premium for renting their expenditures. The tax loss creation scheme was not designed to produce a profit in either the MLP or the PLPs.

14. The transactions comprising the tax loss scheme were designed to create the appearance of persons carrying on business in common with a view to profit when the true relationship was decidedly different. The true relationship of the parties was simply the renting of expenses, which does not give rise to a deductible tax loss.

15. The sole intention and purpose of the MLP, the PLPs and members of the MLP and PLPs was to create losses through an intricate series of circular transactions, and not to carry on business in common with a view to profit.

Paragraphs 1(i), (k) and (l)

the benefit of Strother, Darc, Sherman and Gordon and or members of their respective families, respectively;

(h) **"Sentinel Hill Productions IV Corporation (SHPC)"** is a corporation incorporated under the laws of Ontario and at all material times was the the general partner of the MLP and each of the 73 PLPs. SHPC at all material times was a wholly owned subsidiary of SHVC;

(i) **"General Partner or GP" or the "appellant"** means SHPC, the general partner of the MLP and the 73 PLPs, and though it was at all material times called the general partner of the MLP and each of the PLPs it did not carry on business in common with a view to profit;

(j) **"Sentinel Group"** means the Promoters, SHVC and the General Partner when referred to collectively;

(k) **"SHAAE (2001) Master Limited Partnership or MLP"** is a limited partnership registered under the laws of Ontario on October 27, 2000. Though at all material times it was called a partnership, it did not carry on business in common with a view to profit. Its purpose was to subscribe for Class A units of limited partnership units in a number of production limited partnerships, and as such in 2001 it acquired Class A units in the 73 PLPs. Its first fiscal year-end was December 31st;

(l) **"PLPs"** means the seventy-three production service limited partnerships, which are set out in Schedule "A" to this Reply none of which carried on business in common with a view to profit. Each had a December 31st fiscal year-end;

(m) **"Investors"** means taxpayers resident in Canada who purchased units in the MLP;

Paragraphs 1(o), (r), (s) and (t)

(n) **"Studios"** are one or more affiliates of U.S. major motion picture as set out in Schedule "A" to this Reply;

(o) **"THCs"** collectively refers to companies incorporated under the laws of the Cayman Islands and not dealing at arms length with one of the Studios as set out in Schedule "A" to this Reply;

(p) **"Creditcos"** are either Canadian corporations incorporated and controlled by the Studios or other Canadian corporations which deal at arm's length with the Studios, which in either case were engaged by the Studios for the purpose of providing CLE production services and for certain financing purposes;

(q) **"Scotiabank"** means the Bank of Nova Scotia, a chartered Canadian bank which provided a "daylight overdraft" loan facility to the Veritus III Trust during 2001;

(r) **"Veritus III Trust"** is a trust that acted as a conduit for the circulation of amounts and did not operate at arm's length with the any of the Investors, Sentinel Group, the MLP or any of the PLPs;

(s) **"Emeritus Trusts"** collectively refer to the eight trusts resident in Alberta which acted as conduits for the circularization of funds, and did not operate at arm's length with the any of the Investors, Sentinel Group, the MLP or any of the PLPs. Schedule "A" to this Reply lists the respective Emeritus Trusts;

(t) **"Acceptrusts"** are trusts which acted as conduits for the circularization of funds, and did not operate at arm's length with the any of the Investors, Sentinel Group, the MLP or any of the PLPs. Schedule "A" to this Reply lists the respective Acceptrusts;

Paragraphs 18, 19 and 20

sentence of paragraph 14, 15, 16, 29, 37, 41, 45, 48, 52 and 56 of the Amended Notice of Appeal.

18. He has no knowledge of and therefore does not admit the allegations of fact stated in the second sentence of paragraph 14 of the Amended Notice of Appeal and puts the appellant to the strict proof thereof. He states further that neither the MLP nor any of the 73 PLPs carried on business in common with a view to profit.

19. He denies the allegations of fact stated in paragraphs 9, 10 and 30 of the Amended Notice of Appeal and puts the appellant to the strict proof thereof. He states that neither the MLP nor any of the PLPs carried on business in common with a view to profit. He states further that the MLP and PLPs were each exclusively formed for the purpose of entering into a series of circular transactions designed to create tax losses for the Investors and to siphon off the only cash into the hands of the Promoters and Studios. He states further that some or all of the "transactions" were designed to create a facade of reality quite different from the disguised reality.

20. With respect to paragraph 11 of the Amended Notice of Appeal, he admits only that the MLP purported to issue 52,233.6033 units to 2,200 Investors at a price of $16,200 per unit. He specifically denies the Investors carried on business in common with a view to profit. He states further that of the total subscription proceeds of $846,184,373, only $94,020,486 was in cash and that the balance of $752,163,887, representing 89% of the Investors cumulative contribution for units in the MLP, was financed. He states further that that the circular character of the underlying "transactions" insured the investors would risk only their cash contributions. He states further the transactions were *designed* to eliminate any prospect of profit by the Investors except insofar as they might be able to acquire tax losses.

21. With respect to paragraph 18 of the Amended Notice of Appeal, he denies that the appellant and the Investors carried on business in common with a view to profit, and says that the document speaks for itself.

Paragraphs 22, 23 and 24

22. With respect to paragraphs 31 and 32 of the Amended Notice of Appeal, he admits only that the each of the named parties purportedly contracted as alleged but otherwise denies the said paragraphs. He states further that the alleged contracts were sham transactions, incomplete and/or legally ineffective. He specifically denies that the PLPs provided any services whatsoever under the "contracts".

23. He denies the allegations of fact made in paragraph 33 of the Amended Notice of Appeal. He states that the purported acquisition of Class B units in the PLPs was part of a series of circular transactions each of which was pre-ordained. Specifically, the following was pre-determined:

(a) the PLPs would purportedly issue Class B units for an aggregate purchase price equal to the outstanding balance of the Investor Loans as of January 15, 2003;

(b) the purchase price for the Class B units had to be "financed" by way of a promissory note bearing the same rate of interest and due dates for interest and principal payments as were the terms associated with the Investor Loans; and

(c) the payments of interest and principal under the promissory note would be made to the PLPs and distributed to the MLP which in turn would fulfill the interest and principal obligations under the Investor Loans.

24. With respect to paragraphs 35, 36, 38, 39, 48, 49 and 50 of the Amended Notice of Appeal, he admits only that the PLPs and the MLP reported losses as alleged but denies they were correct in doing so. He further denies that the PLPs and the MLP incurred any business losses in 2001 and 2002. He repeats that neither the MLP nor any of the PLPs carried on business in common with a view to profit. He states further that the MLP and PLPs were each exclusively formed for the purpose of participating in a series of circular transactions designed to create tax losses for the Investors and to siphon off the only cash into the hands of the promoters, Studios and other accommodators. He states further that some or all of the "transactions" were

Paragraph 28

designed to create a façade, one that differed greatly from reality. He otherwise denies the allegations of fact set out in those paragraphs.

25. With respect to paragraphs 40 and 51 of the Amended Notice of Appeal, he admits only that the PLP and the MLP reported having received interest income, but otherwise denies the allegations of fact made in paragraphs 40 and 51.

26. Except insofar as the alleged manner in which the Minister issued the Determinations, he admits the allegations of fact stated in paragraphs 42, 43, 53 and 54. He further states that what is at issue in tax appeals in the correctness of the Minister's Determinations and not the conduct of officials of the Canada Revenue Agency (the "CRA").

Response to Rulings Allegations

27. He denies paragraphs 12, 13, 17, 23, 24, 25, 26, 27 and 28 of the Amended Notice of Appeal. He states further that an advance tax ruling respecting the specific transactions at issue in this appeal was neither sought by anyone nor given by CRA. He states further that the CRA had no correspondence or discussions in respect to the specific transactions at issue in this appeal upon which the appellant, the Sentinel Group, the Investors, the MLP or the PLPs might have relied.

28. With respect to paragraphs 2, 3, 4, 5, 19, 20, 21, 22 and 34 of the Amended Notice of Appeal, he admits only that the Rulings Division of the CRA issued an advance income tax ruling dated December 13, 2000 and that a fee was paid in respect of the ruling. He states further that the taxpayer seeking the December 13, 2000 ruling did not disclose all of the relevant facts. Had the taxpayer seeking the December 13, 2000 ruling fully and accurately disclosed the relevant facts, the Rulings Directorate may have either refused to rule on the transactions or may have provided an unfavourable ruling. He otherwise denies the allegations of fact set out in those paragraphs.

Paragraphs 29, 30, 31, 32, 33 and 34

29. He states further that the Sentinel Group, the MLP, the PLPs and the Investors knew or ought to have known that the advance tax ruling only extended to transactions specifically described in the ruling. He further states that Sentinel Group, the MLP, the PLPs and the Investors knew or ought to have known the ruling was obtained without full disclosure of all of the relevant facts and that the specific transactions at issue in this appeal would, in any event, fail to satisfy the various caveats and limitations contained within the ruling.

30. He denies paragraphs 46, 47, 57 and 58 of the Amended Notice of Appeal. He states further that the ruling related to only those transactions specifically described therein and was obtained without full disclosure of all of the relevant facts and that the specific transactions at issue in this appeal would, in any event, fail to satisfy the various caveats and limitations contained within the ruling.

31. He states that the Determinations regarding the 2001 and 2002 fiscal periods of the MLP were not issued in contravention of any ruling. Advance income tax rulings apply only to the transactions specified in the ruling. No ruling was obtained in respect of the specific transactions at issue.

32. In any event, the Determinations are consistent with the Minister's interpretation of the law contained in the December 13, 2000 ruling.

33. He states the transactions by which several of the PLPs purported to contract to provide production services are purported to have been entered into prior to December 13, 2000, the date on which the ruling was issued.

34. The appellant and its agents abused the advanced income tax rulings process by obtaining the ruling through false representations of fact and material omissions of fact. The equitable doctrine of *estoppel* is, therefore, not available to the appellant.

Paragraphs 36 and 41

Tax Reporting and Assessment

2001 Fiscal Period

35. During its fiscal period ended December 31, 2001, the MLP acquired 100% of the Class A units in the PLPs at a time when each of the PLPs was in a loss position and had no reasonable expectation of ever recovering the loss, let alone an expectation of profit.

36. For their fiscal periods ended December 31, 2001, the PLPs allotted cumulative "business losses" in the amount of $334,144,126 to the MLP.

37. For the fiscal period ended December 31, 2001, the MLP reported a net business loss of $335,506,103 and interest income of $3,528,976.

38. By the Determination dated March 29, 2005 regarding the MLP's 2001 fiscal year, the Minister determined the net business loss of the MLP to be no more than $199,404,223, interest income as reported of $3,528,976 and reduced the limited partner's at-risk amount to $439,900,353.

39. The appellant filed a Notice of Objection to the 2001 Determination on June 27, 2005.

40. The appellant filed this appeal prior to the Minister making a decision on the Notice of Objection in respect of the 2001 Determination.

2002 Fiscal Period

41. For their fiscal periods ended December 31, 2002, the PLPs allotted cumulative "business losses" in the amount of $73,585,345 to the MLP.

42. For the fiscal period ended December 31, 2002, the MLP reported a net business loss of $74,425,025 and interest income of $13,991,820.

Paragraphs 46(a), (b) and (c)

43. By the Determination dated March 30, 2005 regarding the appellant's 2002 fiscal year, the Minister determined the net business loss of the MLP to be $30,640,652, interest income as reported of $13,991,820 and reduced the limited partner's at-risk amount to $250,954,148.

44. The appellant filed a Notice of Objection to the 2002 Determination on June 27, 2005.

45. The appellant filed this appeal prior to the Minister making a decision on the Notice of Objection in respect of the 2002 Determination.

46. In addition to the facts the Minister assumed in issuing the determinations for the 2001 and 2002 fiscal periods of the MLP, such facts being detailed in paragraph 47 below, the respondent also relies on the following facts:

The Real Arrangement

(a) the Sentinel Group sought to purchase the NCLEs of the Studios. The Studios agreed to receive a fee equal to a negotiated percentage of the Films' budget for renting its production expenses to the Investors indirectly through the PLPs and the MLP;

(b) the purchase and sale of PLP Production Expenses was the real arrangement between the Studios and the Sentinel Group;

(c) to carry out the tax loss creation scheme, the Sentinel Group, the Studios, the MLP, the PLPs and other accommodators entered into a series of "transactions" that did not reflect the true relationship of the parties;

Paragraphs 46(f) and (g)

Activities of the MLP

(d) the amended and restated partnership agreement between the MLP and the Investors dated October 27, 2000 defines its business activities as:

i. investing in Class A units of limited partnership interest in one or more PLPs,

ii. providing financing, through investments in such Class A units of each PLP, for expenditures incurred by each such PLP in performing or providing production services for or to the Studio under a PLP Production Service Agreement, and

iii. investing the funds of the Partnership in certificate of deposit and interest bearing accounts of Canadian chartered banks or such other investments as the General Partner determines;

(e) the business activities referred to in the above subparagraphs (ii) and (iii) were not in fact at any time materially carried on by the MLP. The financing for any of the purported expenditures of the PLPs was provided by either the Creditco or the Studios but not by the MLP. Further, the funds of the MLP were not invested in the manner so contemplated in paragraph (iii) above, so as to provide any material receipts to the MLP. Rather, the only activity undertaken by the MLP in relation to its stated business activities was its acquisition of its alleged partnership interests in the 73 PLPs;

(f) the MLP and the members of the MLP did not carry on business in common with a view to profit;

(g) the only "investment" of the MLP was in the PLPs;

Paragraphs 46(j), (m), and (n)#

(h) at the time of the MLP's investment in the PLPs, all of the PLPs showed significant losses and could only look to the Net Profit Participation to recover those losses;

(i) the Net Profit Participation of each PLP was worthless and not intended by the parties to generate any profits;

(j) the Net Profit Participation of each PLP was merely "window dressing" designed to give the MLP the appearance of investing in property of value when the property was in fact worthless;

(k) neither the management of the MLP nor the management of the PLPs made any independent analysis to determine whether it was reasonable to assume the films would generate revenue in addition to the fees already earned;

(l) neither the management of the MLP nor the management of the PLPs undertook any analysis to show that overall, the portfolio of films could reasonably be expected to break-even, much less generate a profit;

(m) the MLP never intended to profit from its "investment" in the PLPs but rather the MLP's sole intention was to acquire the losses resulting from the PLPs structure;

(n) the MLP did not have even an ancillary purpose of earning a profit from the "investment" in the PLPs;

(o) none of the PLPs had even an ancillary purpose of earning a profit from the provision of the PLP Production Services;

Page 20 (Titles) and paragraphs 46(p) and (q)

The Production Service Agreements were both circular and contrary to market

I. **Circularity of PLP Production Service obligations**

(p) the contractual obligation to provide the PLP Production Services was entirely circular;

(q) the Studios are in the business of producing and distributing movies. However, with respect to the 82 theatrical motion pictures or television projects (collectively referred to as the "Films," which are listed in Schedule "A" to this Reply) the Studios or their affiliates contracted with each of the 73 PLPs under the PLP Production Services Agreements to provide and pay for all the PLP Production Services in respect of the Picture. The PLPs in turn contracted back to the Studio the obligation to provide the very same PLP Production Services;

(r) in particular, between March 20, 2000 and December 1, 2001,

i. the Studios entered into Production Services Agreements with the PLPs ("PLP Production Services Agreements") to the PLP Production Services, including both the NCLE Productions Services and the CLE Production Services, in respect of the Films,

ii. each of the PLPs, in turn, entered into Services Agreements with the Studios ("Studio Services Agreements"), subcontracting back to the Studios the obligations to provide the NCLE Production Services in respect of the Films, and

iii. each of the PLPs and the Studios enter into CLE Production Services Agreements with a Creditco ("CLE Production Agreements"), pursuant to which a Creditco provides the CLE

Paragraphs 46(ss) and (vv)

prepared with respect to the relevant provincial laws. The Financial Overview provided to Investors was prepared on the basis that only the 80.02% Fees were earned by the PLPs. It only provided the losses, which would be apportioned to each Investor for the 2001 and 2002 taxation years as a subscriber for units in the MLP;

(ss) all that the MLP was marketing was a scheme to access the expenses of the Studios through the PLPs, and not a true investment in the movie or television industries. The receipt of only the 80.02% Fees by the PLPs would be what is commonly called in the investment industry a "worst case scenario";

(tt) no effort was made by the MLP or its management to provide the Investors with "median" or "best" case scenarios, if in fact the PLPs did earn some or sufficient Net Profit Participation amounts to allow the PLPs to earn a profit from their respective PLP Agreements;

(uu) the Investors acquired their respective partnership interests in the MLP on closing dates at various times throughout the 2001 calendar year, with no closings taking place after December 31, 2001. On each of the closing dates, the MLP acquired 100% of the Class A units of particular PLP until it had by year end acquired all Class A units in the 73 PLPs;

(vv) at the time the MLP acquired its interest in the PLPs, arrangements were put into place such that the account receivables in respect of the 80.02% Fees would be paid in full and the PLPs' liabilities to the Studios would be extinguished by no later than December 31, 2003, such that the sole remaining "asset" of each of the PLPs was the worthless Net Profit Participation respecting the each Film or group of Films;

(ww) after the MLP acquired its interests in all 73 PLPs, none of the PLPs carried on any further business of providing PLP Production Services in respect of any further motion pictures. Further, the PLPs did not carry on

Paragraph 46(aaa)

any other activities, and did not incur any further liabilities with respect to any further activities. There were no management duties in respect of the Net Profit Participations of the PLPs;

(xx) neither the PLPs nor their agents expended anything other than nominal time, attention or labour on their Net Profit Participations, nor did they incur any liabilities in respect of the Net Profit Participations or any other business;

(yy) pursuant to the PLP Production Services Agreements, the PLPs would not have or claim to have any rights in the Films. The Studios would be the first and sole and exclusive owners in perpetuity of all right, title, and interest in and to the Films;

(zz) the Studios would have the right to use, exploit, advertise, exhibit, and otherwise turn to account the Films, or any portion thereof in any media, as the Studio, in its sole and absolute discretion, determined. In summary the PLPs have no rights with respect to whether or not any of the Films are released, or how they are marketed or otherwise exploited Rather, the Studios had the sole discretion as to whether or not a particular Film is released for theatrical or otherwise distributed or otherwise exploited;

(aaa) the pricing policy adopted by the management of the PLPs at the time that they entered into the PLP Production Services Agreements was not intended to provide the PLPs with a "profit" from the provision of the production services, but rather it was intended to generate an operating loss for the PLPs. This was because of the significant deficiency between the 80.02% Fee expected to be earned from the provision of the PLP Production Services, and the anticipated NCLEs and CLSFR the PLPs were obligated to pay. As such, it could not be reasonably be expected by the management of the PLPs that the Net Profit Participations would provide sufficient returns to allow the PLPs to earn a profit from the provision of PLP Production Services; and

Paragraph 46(bbb)

(bbb) before December 31, 2001, when the MLP acquired its interests in each of the PLPs, each of the PLPs held two assets, their account receivable in respect of the 80.02% Fee and their respective Net Profit Participations;

47. In issuing the determinations for the December 31, 2001 and December 31, 2002 fiscal periods of the MLP, the Minister made the following assumptions of fact:

Financing Structure

I. Investor Payment of Subscription Price

(a) the subscription price of each partnership unit in the MLP was $16,200. For every unit, each Investor contributed $1,800 in cash ($1,150 paid in 2001 and $650 paid on February 15, 2002). The $14,400 balance of the subscription price per unit was required to be financed by a loan arranged through the Promoters;

(b) the Promoters sold a total of 52,233.6033 limited partnership units in the MLP to 2,200 investors for total subscription proceeds of $846,184,373 of which only $94,020,486 ($60,068,644 in 2001 and $33,951,842 on February 15, 2002) was in cash. The balance of the subscription proceeds of $752,163,887 was financed, representing 90% of the Investors' cumulative contribution for units in the MLP (the "Investor Loans");

(c) for every unit, each Investor paid by way of cheques post-dated February 15, 2002 a further $1,000 in cash to the MLP to fund interest and financing costs, with the MLP further receiving in the aggregate, $52,233,603;

(d) on a unit basis, the only amount of the subscription price paid in cash for each limited partnership unit in the MLP was $1,800;

Paragraphs 47(f) and (g)

(e) the amount of $1,800 per Class A unit or $94,020,486 in the aggregate was the only amount ever put at risk by the Investors in acquiring the units;

II. Day-light Loan Financing of Investors and Production Services

(f) the financing of the Investors non-cash investment in the MLP and the financing of the PLP Production Services were both circular and accomplished by daylight loans. The series of daylight-loans did not add any additional cash beyond the Investor cash contribution of $1,800 per unit;

(g) while the circularization of funding was accomplished through the use of day-light loans, the extinguishment of the loans was achieved through a series of pre-ordained set-off transactions;

(h) in summary, the loans, in aggregate, occur as detailed in the following paragraphs;

III. Investor Loans—Stage One

(i) on the date of the various MLP Closings in 2001, Scotiabank, by daylight overdraft loan facility, loaned amounts cumulatively totaling $752,163,887 to the Veritus III Trust;

(j) on the date of the various MLP Closings in 2001, the Veritus III Trust loaned the Investors the total amount of $752,163,887 on a 10 year term, with interest payable annually at 11% from the MLP Closing date until January 15, 2003 and from January 16, 2003 until the loan was repaid in 2011, at an annual interest rate equal to the greater of

i. the prime rate as reported by the Royal Bank of Canada from time to time plus one and one-half percent, and

Paragraph 47(kk)

XII. Investor Loans - Stage Two

(ii) on January 15, 2003, the aggregate amount of $421,690,992 was to have been distributed by the PLPs to the MLP (of which only $414,808,717 may have been distributed), such payments having been made from the proceeds of the Fixed Fee payment made by the Acceptrusts;

(jj) from the aggregate amount of $421,690,992 that was to have been distributed by the PLPs to the MLP (of which again only $414,808,717 may have been distributed) the Investors in the MLP were entitled to a pro rata share, the General Partner was to have repaid to the Veritus III Trust $382,160,445 in respect principal on the Investor Loans (of which only $375,278,170 may have been so paid) and $39,530,547 to satisfy the accrued interest thereon, leaving a balance of $370,003,442 on the Investor Loans on January 15, 2003;

XIII. Investor Loans- Stage Three

(kk) the Veritus III Trust made annual interest payments to the Emeritus Trusts in respect of Emeritus Loans. This started a circular flow of funds which ensured that the annual interest obligation on the Investor Loans would be satisfied;

(ll) the Veritus III Trust made annual interest payments to the Emeritus Trusts totaling $186,677,351 as follows:

i. $3,526,657 was paid on or before February 28, 2002,

ii. $13,986,873 was paid on or before February 28, 2003,

iii. $147,312,053 in the aggregate or $21,044,579 annually was paid or payable on or before January 15th in each year from 2004 through to 2010, and

Paragraphs 47(pp) and (pp)(iv)

ii. $13,986,873 was paid on or before February 28, 2003,

iii. $147,312,053 in the aggregate or $21,044,579 annually was paid or payable on or before January 15th in each year from 2004 through to 2010, and

iv. $21,851,768 is payable on January 15, 2011;

XIV. Investor Loans – Stage Four

(pp) in 2011, the Veritus III Trust is expected to make payments in the aggregate of $370,003,442 to the Emeritus Trusts in respect of Emeritus Loans, that will set off a circular flow of funds that will allow the remaining balance of Investor Loans to be satisfied as follows:

i. the Veritus III Trust will pay $370,003,442 to the Emeritus Trusts in full satisfaction of the Emeritus Loans,

ii. the Emeritus Trusts will pay to the PLP the aggregate of $370,003,442 in full satisfaction of the subscription price for the Class B units in the PLPs,

iii. the PLPs plan a mandatory distribution of $370,003,442 to the MLP upon receipt of the payment of Class B units by the Emeritus Trusts, and

iv. the General Partner of the MLP will pay $370,003,442 to the Veritus III Trust in full satisfaction of the remaining balance under the Investor Loans, thus completing the circular flow of funds in respect to the Investor Loans;

Appendix B – Chart of Disputed Statements and Paragraphs

Section 1

Sentinel Hill Productions IV Corporation, in its capacity as a designated member of SHAAE (2001) MASTER LIMITED PARTNERSHIP and in its capacity as designated member of SENTINEL HILL NO. 207 LIMITED PARTNERSHIP 2009-2248(IT)G and 2009-2247(IT)G

Paragraph in Sentinel Hill 207	**Paragraph in SHAAE (2001)**	**Portions of Relevant Reply Appellant Wants Struck (Bracketed Portions of Relevant Reply)** (Where [] used, only portion contained in [] is in dispute)	**Strike**	
Overview	Overview	Entirety reproduced in Appendix B for SHAAE and Appendix C for Sentinel Hill 207.	No	
1(i)	1(i)	"General Partner or GP"…[it did not carry on business in common with a view to profit]		Yes
1(k)	1(k)	"SHAAE (2001) Master Limited Partnership or MLP"…[Though at all material times it was called a partnership, it did not carry on business in common with a view to profit]		Yes
1(l)	1(l)	"PLPs"…[none of which carried on business in common with a view to profit].		Yes
1(o)	1(o)	"THCs"…[and no dealing at arms length with one of the Studios]		Yes
1(r)	1(r)	"Veritus III Trust"…[that acted as a conduit for the circulation of amounts and did not operate at arm's length with any of the Investors, Sentinel Group, the MLP or any of the PLPs]		Yes
1(s)	1(s)	"Emeritus Trusts"…[which acted as conduits for		Yes

		the circularization of funds, and did not operate at arm's length with any of the Investors, Sentinel Group, the MLP or any of the PLPs]		
1(t)	1(t)	"Acceptrusts"…[which acted as conduits for the circularization of funds, and did not operate at arm's length with any of the Investors, Sentinel Group, the MLP or any of the PLPs]		Yes
2-15	2-15	Summary of Tax Loss Creation Scheme reproduced in Appendix B for SHAAE and Appendix C for Sentinel Hill 207		Yes
18	18	No knowledge…[He states further that neither the MLP nor any of the 73 PLPs carried on business in common with a view to profit]		Yes
19 - Slight immaterial wording difference.	19	Denies allegations…[He states that neither the MLP nor any of the PLPs carried on business in common with a view to profit. He states further that the MLP and PLPs were each exclusively formed for purpose of entering into a series of circular transactions designed to create tax losses for the Investors and to siphon off the only cash into the hands of the Promoters and Studios. He states further that some or all of the "transactions" were designed to create a façade of reality quite different from the disguised reality]		Yes
20 (Different dollar values and slight immaterial wording difference.)	20	[He specifically denies the Investors carried on business in common with a view to profit. He states further that of the total subscription proceeds of $846,184,373, only $95,020,486 was in cash and that the balance of $752, 163,887, representing 89% of the Investors cumulative contribution for units in the MLP, was financed. He states further that that		Yes

		the circular character of the underlying "transactions" insured the Investors would risk only their cash contributions. He states further the transactions were *designed* to eliminate any prospect of profit by the Investors except insofar as they might be able to acquire tax losses.]		
21	21	[…he denies that the appellant and the Investors carried on business in common with a view to profit…] * *Not circled but suspect this is oversight.		Yes
22	22	[He states further that the alleged contracts were sham transactions, incomplete and/or legally ineffective]		Yes
23	23	[He states that the purported acquisition of Class B units in the PLPs was part of a series of circular transactions each of which was pre-ordained. Specifically, the following was pre-determined: (a) the PLPs would purportedly issue Class B units for an aggregate purchase price equal to the outstanding balance of the Investor Loans as of January 15, 2003; (b) the purchase price for the Class B units had to be "financed" by way of a promissory note bearing the same rate of interest and due dates for interest and principal payments as were the terms associated with the Investor Loans; and		Yes

		(c) the payments of interest and principal under the promissory note would be made to the PLPs and distributed to the MLP which in turn would fulfill the interest and principal obligations under the Investor Loans.		
25 (Slight immaterial wording difference)	24	[He repeats that neither the MLP nor any of the PLPs carried on business in common with a view to profit. He states further that the MLP and PLPs were each exclusively formed for the purpose of participating in a series of circular transactions designed to create tax losses for the Investors and to siphon off the only cash into the hands of the promoters, Studios and other accommodators. He states further that some or all of the "transactions" were designed to create a façade, one that differed greatly from reality]		Yes
29	28	[He states further that the taxpayer seeking the December 13, 2000 ruling did not disclose all of the relevant facts. Had the taxpayer seeking the December 13, 2000 ruling fully and accurately disclosed the relevant facts, the Rulings Directorate may have either refused to rule on the transactions or may have provided an unfavourable ruling]	No	
30	29	[He states further that the Sentinel Group, the MLP, the PLPs and the Investors knew or ought to have known that the advance tax ruling only extended to transactions specifically described in the ruling. He further states that Sentinel Group, the MLP, the PLPs and the Investors knew or ought to have known the ruling was obtained without full	No	

		disclosure of all of the relevant facts and that the specific transactions at issue in this appeal would, in any event, fail to satisfy the various caveats and limitations contained within the ruling.]		
31	30	[He states further that the ruling related to only those transactions specifically described therein and was obtained without full disclosure of all of the relevant facts and that the specific transactions at issue in this appeal would, in any event, fail to satisfy the various caveats and limitations contained within the ruling]	No	
32	31	He states that the Determinations regarding the 2001 and 2002 fiscal periods of the MLP were not issued in contravention of any ruling. Advance income tax rulings apply only to the transactions specified in the ruling. No ruling was obtained in respect of the specific transactions at issue.	No	
33	32	In any event, the Determinations are consistent with the Minister's interpretation of the law contained in the December 13, 2000 ruling.	No	
34	33	He states the transactions by which several of the PLPs purported to contract to provide production services are purported to have been entered into prior to December 13, 2000, the date on which the ruling was issued.	No	
35	34	The appellant and its agents abused the advance income tax rulings process by obtaining the ruling through false representations of fact and material omissions of fact. <u>The equitable doctrine of *estoppel* is, therefore, not available to the appellant</u>.	Non-underlined portion is not struck	Yes; underlined portion is struck.
46(a) – (c)	46 (a) – (c)	The Real Arrangement	(a) and (b) are not struck	(c) is struck

		(a) the Sentinel Group sought to purchase the NCLEs of the Studios. The Studios agreed to receive a fee equal to a negotiated percentage of the Films' budget for renting its production expenses to the Investors indirectly through the PLPs and the MLP; (b) the purchase and sale of PLP Production expenses was the real arrangement between the Studios and the Sentinel Group; (c) to carry out the tax loss creation scheme, the Sentinel Group, the Studios, the MLP, the PLPs and other accommodators entered into a series of "transactions" that did not reflect the true relationship of the parties;		
46(f)	46(f)	The MLP and the members of the MLP did not carry on business in common with a view to profit		Yes
46(j)	46(j)	Window dressing	No	
Page 19 – Title	Page 20 – Title	[both circular and]	No	
Page 19 – Subheading	Page 20 I	[Circularity of]	No	
46(p)	46(p)	[the contractual obligation to provide the PLP Production Services was entirely circular]	No	
46(q)	46(q)	[The PLPs in turn contracted back to the Studio the obligation to provide the very same PLP Production Services;]	No	
46(ss)	46(ss)	[all that the MLP was marketing was a scheme to	No	

		access the expenses of the Studios through the PLPs, and not a true investment in the movie or television industries.]		
46(aaa)	46(aaa)	[As such, it could not be reasonably be expected by the management of the PLPs that the Net Profit Participations would provide sufficient returns to allow the PLPs to earn a profit from the provision of PLP Production Services]	No	
47(f)	47(f)	[both circular]	No	
47(g)	47(g)	[while the circularization of funding was accomplished through the use of day-light loans, the extinguishment of the loans was achieved through a series or pre-ordained set-off transactions;]	No	
47(kk)	47(kk)	[circular]	No	
47(pp)	47(pp)	[circular]	No	
47(pp)(iv)	47(pp)(iv)	[circular]	No	

Section 2

The Robert Strother Appeal 2007-329(IT)G

Paragraph	**Portions of Relevant Reply Appellant Wants Struck (Bracketed Portions of Relevant Reply)** (Where [] used, only portion contained in [] is in dispute)	**Strike?**	
Overview	Entirety reproduced in Appendix D for Robert D. Strother	No	
1(e)	Was not a partnership in law		Yes
1(f)	…were not partnerships in law;		Yes
1(g)	…though was not a partner in law		Yes

1(k)	…and each is a corporation which did not operate at arm's length with the Studios;		Yes
1(n)	…which acted as a conduit for the circulation of funds, and did not operate at arm's length with the Investors, the Sentinel Group, the MLP or any of the PLPs;		Yes
1(p)	"Emeritus Trust" …which acted as a conduit for the circulation of funds, and did not operate at arm's length with the Investors, the Sentinel Group, the MLP or any of the PLPs;		Yes.
2 – 15	"Summary of Tax Loss Creation Scheme" reproduced in Appendix D for Robert D. Strother.		Yes
18	…since each lacked the essential ingredient of carrying on business in common with a view to profit…		Yes
20	…He states that neither the MLP nor any of the PLPs was a partnership in law since each lacked the essential ingredient of carrying on business in common with a view to profit. He states further that the MLP and PLPs were each exclusively formed for the purpose of entering into a series of circular transactions designed to create tax losses for the Investors and to siphon off the only cash into the hands of the promoters and Studios. He states further that some or all of the "transactions" were designed to create a façade, one that differed greatly from reality.		Yes
22	…He states further that that the circular character of the underlying "transactions" insured the investors would be exposed only to the extent of their cash contribution. He states further the transactions were *designed* to eliminate any prospect of profit by the Investors except insofar as they might be able to acquire tax losses.		Yes
24	…If in fact the Lender did make such loans, the Lender was not acting at arm's length with the MLP	No	
26	…He states further that the alleged contracts were sham transactions, incomplete and/or legally ineffective. He specifically		Yes

	denies that the PLPs provided any services whatsoever under "contracts". He states further that the Net Profit Participation clauses were each structured and intended to be worthless and were, in fact, worthless		
27	…He states further that the purported options were not genuine options. Rather, to fulfill the real agreement of renting their expenses, the Studios treated the "options" as if they were mandatory. The "options", when exercised, would be set off against and eliminate any liability on the part of the Investors in excess of their cash contributions. He specifically denies that the option price for the Class B units was set at a fair market value and states further that the fair market value of the Class B units was nil.	No	
29	…since each lacked the essential ingredient of carrying on business in common with a view to profit. He states further that the MLP and PLPs were each exclusively formed for the purpose of entering into a series of circular transactions designed to create tax losses for the Investors and to siphon off the only cash into the hands of the promoters and Studios. He states further that some or all of the "transactions" were designed to create a façade, one that differed greatly from reality.		Yes
30	…He states further that an advance tax ruling respecting the transaction described in the Further Amended Notice of Appeal was neither sought by anyone nor given by Canada Revenue Agency ("CRA"). He states further that the CRA had no correspondence or discussions in respect to the transactions described in the Further Amended Notice of Appeal upon which the appellant, the Sentinel Group, the Investors or the MLP might rely.	No	
31	…He states further that the taxpayers seeking the October 6, 1998 ruling did not disclose all of the relevant facts. Had the taxpayers seeking the October 6, 1998 ruling fully and accurately disclosed	No	

	the relevant facts, the Rulings Directorate may have either refused to rule on the transactions or may have provided an unfavourable ruling. He otherwise denies the allegations of fact set out in those paragraphs.		
32	He states further that the appellant, the Sentinel Group, the Investors or the MLP knew or ought to have known that no advance tax ruling was ever sought by anyone or given by the CRA with respect to the transactions described in the Further Amended Notice of Appeal. He states that the appellant, the MLP, PLPs and the Investors knew or ought to have known that the ruling related to different transactions and difference taxpayers, was obtained without full disclosure of all of the relevant facts and that the transactions described in the Further Amended Notice of Appeal, in any event, would not satisfy the various caveats and limitations contained within the ruling.	No	
33	…and states further that the statement of facts given to Rulings by the appellant was found by the auditor to be materially different than the transactions in issue.	No	
34	…He states further that the ruling related to different transactions and different taxpayers, was obtained without full disclosure of all of the relevant facts and that the transactions described in the Further Amended Notice of Appeal in any event would not satisfy the various caveats and limitations contained within the ruling.	No	
35	He states that the reassessments regarding the appellant's and the Investors' 1998 and 1999 taxation years were not issued in contravention of any ruling. Advance income tax ruling apply only to the transactions specified in the ruling. No ruling was obtained in respect of the transactions at issue.	No	
36	In any event, the reassessments are consistent with the Minister's interpretation of the law contained in the October 1998 ruling.	No	
37	…at a time when each of the PLPs was in a loss position and each	No	

	had no reasonable expectation of profit or of even recovering its loss.		
39	…so-called…	No	
43 – Footnote 2	With respect to the inducement payment of $571,026 paid by the MLP to some of the Investor's [*sic*], some appellant's [*sic*] were allocated the income inclusion, but were not reassessed by the Minister. The appellants include Gus Baril ($24,000) Leslie Baril ($24,000); Malcolm MacLean ($5,559); Magic Bullet Enterprise Limited ($125,000) and Parian Holding Limited ($5,000)	No	
46 (a),(b) & (c)	The Real Arrangement (a) the Sentinel Group sought to purchase the NCLEs of the Studios. The Studios agreed to receive a fee equal to a negotiated percentage of the Films' budget for renting its production expenses to the Investors indirectly through the PLPs and the MLP; (b) the purchase and sale of PLP Production expenses was the real arrangement between the Studios and the Sentinel Group; (c) to carry out the tax loss creation scheme, the Sentinel Group, the Studios, the MLP, the PLPs and other accommodators entered into a series of "transactions" that did not reflect the true relationship of the parties;	(a) and (b) are not struck	(c) is struck
46 (h)	The MLP and the members of the MLP did not carry on business in common with a view to profit		Yes
46(l)	…at best "window dressing"…	No	
46 (o)	The MLP never intended to profit from its "investment" in the PLPs but rather the MLP's sole intention was to acquire the losses resulting from the tax loss creation scheme;	No	
46(p) –	…circular and	No	

Title			
46(p) Sub-heading	Circularity of…	No	
46(q)	The Studios and the Sentinel Group created a series of "contracts" and "agreements" which did not reflect the true relationship between the parties;		Yes
46(r)	The "contractual" obligation to provide the NCLE production services was circular;	No	
46(s)	…back the obligation…	No	
46(t)(v)	…thus completing the circle of contractual obligation to provide NCLE production services;	No	
46(v)	…conjured up…	No	
46(dd)	It is widely understood among participants in the movie and television industries that net profit participants rarely, if ever, earn any amounts from their net profit participations;	No	
46(oo)	The MLP and the Sentinel Group marketed nothing more than a scheme to access the expenses of the Studios through the PLPs, not a genuine investment in the movie or television industries.	No	
46(zz)	…the very same NCLE…that the PLPs had contracted to provide to the THC under the NCLE Agreements;	No	
46(ggg)	The financing of the Investors' non-cash investment in the MLP and the financing of the NCLE production services were both circular and accomplished by a series of pre-ordained set-off transactions;	No	
46(hhh)	The series of set-off transactions did not add any additional cash beyond the Investor cash contribution of $288.36 per unit. Rather, the circularization of "funding" and the extinguishment of loans was simply achieved through a series of Directions to Pay and Acknowledgements of Receipt;	No	
46(nnn)	$127,374,310 is "borrowed" by the PLPs [indirectly] from [the	No	

	Studios through] the THC on a non-interest bearing basis…		
46(zzz) – title	All outstanding debt obligations settled by set off	No	
46(aaaa)	The outstanding debt obligations and the corresponding interest obligations of the Emeritus Trust, the Veritus Trust and the Investors are all settled by circular set-offs;	No	
46(eeee)	…thus completing the circle[6] All of the "payments" in the circle described were accomplished by a mere direction to pay. Neither the Veritus Trust nor the Emeritus Trust had the ability to make the annual payment in respect of their respective interest obligations. Neither Trust even maintained a bank account from which payment might be made.	No	
46(ffff)(f)	…thereby completing the circle;	No	
46(llll) – title	Subsection 96(2.2)(c) – [non-arm's length loan and circular loan transactions]	No	
46(pppp)	…that, through its trustee, the Veritus Capital Corp. ("VCC"), acted as a conduit for the circulation of funds.	No	
46(pppp) – title	Non-Arm's Length Investor Loans	No	
46(tttt)	The Sentinel Group carried on the stated business activities of the Veritus Trust;	No	
50(iii)	The entire loss claimed by the MLP ought to have been disallowed but, in light of subsection 152(1.4) of the *Act*, the loss determined was not reduced by the confirmation;		Yes

Appendix C

Overview and Paragraphs 2-15 ("Summary of Tax Loss Creation Scheme") in the Reply for Sentinel Hill Productions IV Corporation in its capacity as designated member of **SENTINEL HILL NO. 207 LIMITED PARTNERSHIP**

Overview

U.S. Motion Picture Studios incurred production expenditures in carrying on the business of making movies. Canadian tax shelter promoters rented these expenditures. But, the rental of expenditures does not give rise to a cognizable deduction or loss in Canada.

The Studios and Canadian promoters or their respective designates purported to enter into a series of intricate, circular transactions designed to permit the promoters and their clients to indirectly do what they could not do directly. However, the Studios and the promoters did not deal with the "transactions" as if they were genuine and simply ignored the supposed rights and obligations, when and as required to carry out their real intentions. The "transactions" were designed to create a facade of reality quite different from the disguised reality. The true nature of the relationship between the Studios and the promoters was simply this: the Studios rented to the promoters a portion of the Studios' expenditures.

Neither the SHAAE (2001) Master Limited Partnership (the "MLP") nor the 73 Production Limited Partnerships (the "PLPs"), including Sentinel Hill No. 207 Limited Partnership ("PLP-207"), in which the MLP "invested" were partnerships in law. While fashioned to have the appearance of possessing the legal attributes of a partnership, the MLP and the PLPs lacked the essential ingredient of carrying on business in common with a view to profit. To the contrary, the *sole* purpose of the MLP and the PLPs was to create tax losses for use by the members.

If the transactions were genuine and the MLP and the PLPs were in fact partnerships at law, the Minister nevertheless correctly concluded that the MLP had failed to demonstrate the losses incurred, if any, exceeded amounts allowed by the determinations or were reasonable in the circumstances.

Summary of Tax Loss Creation Scheme

2. The Studios incurred expenditures in the production of motion pictures. For a fee, the Studios agreed to rent a portion of their production expenses to Canadian promoters who marketed them in Canada as deductible expenses through tax shelters.

3. The promoters and the Studios purported to enter into a series of intricate, circular transactions (collectively referred to as the "tax loss creation scheme"). These transactions were designed to enable the promoters and their clients to do indirectly what they could not do directly: to deduct losses derived from a simple rental of expenditures. Some or all of the transactions comprising this tax loss creation scheme were sham transactions, incomplete, and/or legally ineffective. For example, by the time the production services contracts were executed, the Studios had already incurred part or all of the very expenditures and provided part or all of the very services that the PLPs contracted to provide. In some cases, the production services were already entirely completed.

4. To carry out the tax loss creation scheme, the promoters created the MLP, whose purpose was to acquire Class A units of the PLPs. The PLPs contracted to provide production services respecting motion pictures.

5. The Studios contracted with the PLPs to produce motion pictures. The PLPs contracted back with the Studios the same NCLE Production Services and the Studios provided the services at cost plus a mark-up. With respect to CLE Production Services, the Studios incurred these costs for which they were reimbursed by the PLPs.

6. To create the tax losses, each of the PLPs agreed to provide the PLP Production Services to the Studio for a fee fixed at only 80.02% of the cost of the services. The PLPs fixed that fee at 80.02% of cost without any negotiation, contrary to industry standards and without any business rationale. The PLPs selected 80.02% in an attempt to avoid the matchable expenditures rules in section 18.1 of the *Income Tax Act* (Canada) (the "*Act*") while maximizing the losses created.

7. The PLPs therefore committed to providing PLP Production Services to the Studios at 80.02% of their cost while agreeing to pay the Studios that cost plus a mark-up to provide some of the same services. To overcome this guaranteed loss and create the appearance of a profit potential, the PLP production services contracts included a Net Profit Participation or NPP clause.

8. While creating an appearance of a profit potential, the Net Profit Participations were structured and intended to be, and were in fact, worthless. There was no prospect that the PLPs would receive any amount from the Net Profit Participation, much less produce a profit. The Net Profit Participations were at best mere window-dressing.

9. The clients of the Promoters, the Investors, acquired units in the MLP and the MLP allocated losses created in the PLPs to the Investors.

10. The Investors acquired units in the MLP through financing arrangements that were as circular as the production services contracts and which guaranteed that no funds beyond their actual cash were ever at risk.

11. The cash contributed by the Investors to acquire units of the MLPs was used to pay the fees of the promoters, the accommodating Studios and other "accommodators," not to pay for production services provided to the Studios. The MLP and PLPs created the appearance of working capital through a series of circular daylight "loans". In fact, there was no working capital.

12. The promoters ensured that any supposed liabilities of the Investors beyond the cash actually contributed was eliminated by inserting into the tax loss creation scheme mandatory acquisition of Class B units in the PLP by the Studios. The acquisition of the Class B units was designed to reduce the risk of loss to the Investors.

13. The units acquired by the Investors were not genuine partnership units in that they were designed and known by the Studios, the promoters and the Investors to be worthless. The scheme was designed to benefit the Investors who purchased tax losses, the promoters who received fees for arranging those purchases, and the

Studios who received a premium for renting their expenditures. The tax loss creation scheme was not designed to produce a profit in either the MLP or the PLPs.

14. The transactions comprising the tax loss scheme were designed to create the appearance of persons carrying on business in common with a view to profit when the true relationship was decidedly different. The true relationship of the parties was simply the renting of expenses, which does not give rise to a deductible tax loss.

15. The sole intention and purpose of the MLP, the PLPs and members of the MLP and PLPs was to create losses through an intricate series of circular transactions, and not to carry on business in common with a view to profit.

Appendix D

Overview and Paragraphs 2-15 ("Summary of Tax Loss Creation Scheme") in the Reply for **Robert C. Strother**

Overview

U.S. Major Motion Picture Studios incurred production expenditures in carrying on the business of making movies. Canadian tax shelter promoters rented these expenditures. But, the rental of expenditures does not give rise to a cognizable deduction or loss in Canada.

The Studios and Canadian promoters or their respective designates purported to enter into a series of intricate, circular transactions designed to permit the promoters and their clients to indirectly do what they could not do directly. However, the Studios and the promoters did not deal with the "transactions" as if they were genuine and simply ignored the supposed rights and obligations, when and as required to carry out their real intentions. The "transactions" were designed to create a facade of reality quite different from the disguised reality. The true nature of the relationship between the Studios and the promoters was simply this: the Studios rented to the promoters a portion of the Studios' expenditures.

Neither the Sentinel Hill 1998 Master Limited Partnership (the "MLP") nor any of the three Production Limited Partnerships (the "PLPs") in which the former "invested" were partnerships in law. While fashioned to have the appearance of possessing the legal attributes of a partnership, the MLP and the PLPs lacked the essential ingredient of carrying on business in common with a view to profit. On the contrary, the *sole* purpose of the MLP and the PLPs was to create tax losses for use by the members.

In addition, in the 1999 taxation year, the appellant received an inducement payment in respect of his acquisition of units in the MLP. The appellant incorrectly characterizes the payment as a rebate and a capital receipt.

On objection, the Minister concluded that his reassessment of the appellant's 1998 and 1999 taxation years had been *too generous* as the MLP and PLPs had never been partnerships and thus the appellant should have been permitted *no* losses. In his confirmation, the Minister did not reduce the appellant's losses but merely confirmed that the losses, if any, did not exceed the losses reassessed.

If the transactions were genuine and the MLP and PLPs were in fact partnerships at law, the Minister nevertheless correctly concluded that the appellant had failed to demonstrate the losses incurred, if any, exceeded amounts allowed by the reassessment or were reasonable in the circumstances.

Summary of Tax Loss Creation Scheme

2. The Studios incurred expenditures in the production of motion pictures. For a fee, the Studios agreed to rent a portion of their production expenditures to Canadian promoters who marketed them in Canada as deductible expenses through tax shelters.

3. The promoters and the Studios purported to enter into a series of intricate, circular transactions (collectively referred to as "tax loss creation scheme") designed to enable the promoters and their clients to do indirectly what they could not do directly: to deduct losses derived from a simple rental of expenditures. Some or all of the transactions comprising this tax loss creation scheme were sham transactions, incomplete, and/or legally ineffective. For example, by the time the production services contracts were executed, the Studios had already incurred part or all of the very expenditures and provided part or all of the very services that the PLPs contracted to provide. In some cases, the production services were already entirely completed.

4. To carry out the tax loss creation scheme, the promoters created the MLP, whose purpose was to acquire Class A units of the PLPs. The PLPs contracted to provide production services respecting motion pictures.

5. The Studios contracted with THCs to produce motion pictures. The THCs then contracted with the PLPs to provide production services. The PLPs contracted back with the Studios and the Studios provided the services at cost plus a mark-up.

6. To create the tax losses, each of the PLPs agreed to provide the production services to the THCs for a fee fixed at only 80.1% of their cost. The PLPs fixed that fee at 80.1% of cost without any negotiation, contrary to industry standards and without any business rationale. The PLPs selected 80.1% in an attempt to avoid the matchable expenditures rules in section 18.1 of the *Act* while maximizing the losses created.

7. The PLPs therefore committed to providing production services to the THCs at 80.1% of their cost while agreeing to pay the Studios that cost plus a mark-up to provide those services. To overcome this guaranteed loss with the appearance of a profit potential, the PLP production services contracts included a Net Profit Participation or NPP clause.

8. While creating an appearance of a profit potential , the Net Profit Participations were structured and intended to be, and were in fact, worthless. There was no prospect that the PLPs would receive any amount from the Net Profit Participation must less produce a profit. The Net Profit Participations were at best mere window-dressing.

9. The clients of the Promoters, the Canadian resident Investors, including the appellant, acquired units in the MLP and the MLP allocated losses created in the PLP to the Investors as detailed in Schedule A to this Reply.

10. The Investors acquired units in the MLP through financing arrangements that were as circular as the production services contracts and which guaranteed that no funds beyond their actual cash were ever at risk.

11. The cash contributed by the Investors to acquire units of the MLPs was used to pay the fees of the Promoters, the accommodating Studios, and other "accommodators," not to pay for production services provided to the THCs. The MLP and PLPs created the appearance of working capital through a series of circular daylight "loans". In fact, there was no working capital.

12. The Promoters ensured that any supposed liabilities of the Investors beyond the cash actually contributed was eliminated by inserting into the tax loss creation scheme "options" in favour of the Studios. These "options" were sham transactions designed to mislead the CRA as to the genuine nature of the transactions. These "options" were designed to limit the amount at risk of the Investors. The "options" were not optional. Rather, the parties treated the "options" as mandatory in order to fulfill the real agreement of renting the Studio's expenditures.

13. The units acquired by the Investors were not genuine partnership units. They were known by the Studios, the promoters and the Investors to be worthless. The scheme was designed to benefit the Investors who purchased tax losses, the promoters who received fees for arranging those purchases, and the Studios who received a premium for renting their expenditures. The tax loss creation scheme was not designed to produce a profit in either the MLP or the PLPs.

14. The transactions comprising the tax loss scheme were designed to create the appearance of a genuine partnership in pursuit of profit when the true relationship was decidedly different. The true relationship of the parties was simply the renting of expenses, which does not give rise to a deductible tax loss.

15. As the sole intention and purpose of the members of the MLP and the PLPs was to create losses through an intricate series of circular transactions, and not to carry on business in common with a view to profit, the MLP and PLPs were not partnerships in law.

CITATION:	2011 TCC 251
COURT FILES NOS.:	2007-329(IT)G, 2009-2247(IT)G and 2009-2248(IT)G
STYLES OF CAUSE:	ROBERT STROTHER v. THE QUEEN SENTINEL HILL PRODUCTIONS IV CORPORATION, IN ITS CAPACITY AS DESIGNATED MEMBER OF SENTINEL HILL NO. 207 LIMITED PARTNERSHIP v. THE QUEEN SENTINEL HILL PRODUCTIONS IV CORPORATION, IN ITS CAPACITY AS DESIGNATED MEMBER OF SHAAE (2001) MASTER LIMITED PARTNERSHIP v. THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 22, 2010
REASONS FOR ORDER BY:	The Honourable Gerald J. Rip, Chief Justice
DATE OF ORDER:	May 12, 2011

APPEARANCES:

Counsel for the Appellants:	Warren J.A. Mitchell David Davies
Counsel for the Respondent:	John Shipley Robert Carvalho

COUNSEL OF RECORD:

For the Appellant:

Name:	Warren J.A. Mitchell
Firm:	Thorsteinssons Vancouver, British Columbia

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