Docket: 2020-843(IT)G

BETWEEN:

IRVING EBERT,

Appellant,

and

HIS MAJESTY THE KING,

Respondent,

Docket: 2020-1559(IT)G

AND BETWEEN:

RICHARD HERMAN,

Appellant,

and

HIS MAJESTY THE KING,

Respondent,

Docket: 2020-2155(IT)G

AND BETWEEN:

P. PHILIPPE DESROSIERS,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Motions disposed of upon consideration of written representations filed by the Appellants on September 24, 2021,
and by the Respondent on October 26, 2021.
By: The Honourable Justice Don R. Sommerfeldt

Representatives :

Counsel for the Appellants:	Adam Aptowitzer
Counsel for the Respondent:	Montano Cabezas
	Allison Lubeck

ORDER

Having reviewed the Appellants' respective Notices of Motion, the Amended Reply to the Amended Notice of Appeal (the "Ebert Reply") in Appeal No. 2020-843(IT)G (in which Irving Ebert is the Appellant), the Reply (the "Herman Reply") in Appeal No. 2020-1559(IT)G (in which Richard Herman is the Appellant), and the Reply to the Amended Notice of Appeal (the "DesRosiers Reply") in Appeal No. 2020-2155(IT)G (in which P. Philippe DesRosiers is the Appellant), and having considered the written representations filed by the Appellants and by the Respondent respectively;

IT IS ORDERED THAT:

1. Subparagraphs 12(k), 12(l) and 12(m) of the Ebert Reply are struck out, with leave to amend, subject to the conditions specified in the attached Reasons for Order.

2. Subparagraphs 14(j) and 14(k) of the Herman Reply are struck out, with leave to amend, subject to the conditions specified in the attached Reasons for Order.

3. Subparagraphs 14(l) and 14(m) of the DesRosiers Reply are struck out, with leave to amend, subject to the conditions specified in the attached Reasons for Order.

4. For greater certainty, the other impugned assumptions in the Ebert Reply, the Herman Reply and the DesRosiers Reply are not struck out.

5. The costs in respect of these Motions will be costs in the cause, unless otherwise determined by the trial judge.

Signed at Edmonton, Alberta this 18th day of April 2023.

"Don R. Sommerfeldt"

Sommerfeldt J.

Citation: 2023 TCC 49
Docket: 2020-843(IT)G
Date: April 18, 2023

BETWEEN:

IRVING EBERT,

Appellant,

and

HIS MAJESTY THE KING,

Respondent,

Docket: 2020-1559(IT)G

AND BETWEEN:

RICHARD HERMAN,

Appellant,

and

HIS MAJESTY THE KING,

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Docket: 2020-2155(IT)G

AND BETWEEN:

P. PHILIPPE DESROSIERS,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR ORDER

Sommerfeldt J.

I. INTRODUCTION

[1] These Reasons pertain to Notices of Motion filed by the three Appellants on September 24, 2021. The Appellants' Motions are each for an Order to strike out

some or all of the Respondent's Replies.[1] While the Notices of Motion did not contain a written request that the Motions be disposed of upon consideration of written representations and without appearance by the parties, and while no separate written request to such effect was filed, as contemplated by section 69 of the *Tax Court of Canada Rules (General Procedure)* (the "Rules"), it seems to have been the intent of the statement in paragraph 1 of each Notice of Motion that the Appellants would make motions in writing, particularly as each Notice of Motion contained summaries of the facts and relevant legal provisions, as well as the Appellants' submissions concerning the application of those provisions to the Respondent's Replies. That intent seems to have been understood by the Respondent, who filed written representations, on October 26, 2021, in response to the Appellants' Motions.

II. BACKGROUND

A. Facts

[2] Based on the Notices of Appeal filed by the Appellants, each of the Appellants:

(a) lives in or near Ottawa, Ontario or Gatineau, Quebec;

(b) is an experienced wine collector;

(c) during each of the taxation years that are the subject of the respective Appeals, donated bottles of wine to registered charities and received an official receipt (as defined in section 3500 of the *Income Tax Regulations*)[2] in respect of each charitable donation; and

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1 In paragraph 1 above, I have used the term *Replies* to refer to either a reply or an amended reply, as the case may be.

2 *Income Tax Regulations*, CRC 1977, c. 945, as amended.

(d) filed his official receipts with the Minister of National Revenue (the "Minister") in support of a deduction of tax credits under subsection 118.1(3) of the *Income Tax Act* (the "ITA").[3]

[3] Some of the wines that were the subject of the charitable donations had been appraised by Nico van Duyvenbode, while other wines were appraised by other appraisers.

[4] In reassessing the Appellants, the Minister took the position that the fair market value of the wines appraised by Mr. van Duyvenbode was equal to only 20% of the amounts shown on the applicable official receipts.

B. Procedural History

1. Irving Ebert

[5] By Notices of Reassessment dated June 5, 2009, the Minister reassessed the tax payable by the Appellant Irving Ebert for the 2005, 2006 and 2007 taxation years. By Notices of Reassessment dated February 24, 2012, the Minister reassessed the tax payable by Mr. Ebert for the 2008 and 2009 taxation years. By Notice of Reassessment dated February 28, 2013, the Minister reassessed the tax payable by Mr. Ebert for the 2011 taxation year. By Notice of Reassessment dated August 26, 2013, the Minister reassessed the tax payable by Mr. Ebert for the 2012 taxation year. By Notice of Reassessment dated October 9, 2014, the Minister reassessed the tax payable by Mr. Ebert for the 2013 taxation year.

[6] Mr. Ebert filed Notices of Objection in respect of each of the Reassessments. The Minister confirmed the 2011 Reassessment on December 11, 2019 and the remaining Reassessments on December 13, 2019.

[7] Mr. Ebert filed a Notice of Appeal on March 10, 2020, an Amended Notice of Appeal on September 28, 2020, and a Fresh as Amended Notice of Appeal on October 7, 2020.

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[3] *Income Tax Act*, RSC 1985, c. 1 (5th Supplement), as amended.

[8] The Respondent filed a Reply to the Amended Notice of Appeal on November 30, 2020 and an Amended Reply (the "Ebert Reply") to the Amended Notice of Appeal on March 5, 2021.

[9] Mr. Ebert's Motion was commenced by a Notice of Motion filed on September 24, 2021. The Notice of Motion implied that Mr. Ebert desired that the Motion be disposed of upon consideration of written representations, which were included in the Notice of Motion. The Respondent filed written representations on October 26, 2021 in respect of Mr. Ebert's Motion, as well as in respect of the Motions of the other two Appellants.

2. Richard Herman

[10] By Notices of Reassessment dated June 5, 2009, the Minister reassessed the tax payable by the Appellant Richard Herman for the 2005, 2006 and 2007 taxation years. Mr. Herman objected to the Reassessments. The Minister confirmed the Reassessments on February 25, 2020.

[11] Mr. Herman filed a Notice of Appeal on May 26, 2020. The Respondent filed a Reply (the "Herman Reply") on November 12, 2020.

[12] Mr. Herman's Motion was commenced by a Notice of Motion filed on September 24, 2021. The Notice of Motion implied that Mr. Herman desired that the Motion be disposed of upon consideration of written representations, which were included in the Notice of Motion. The Respondent filed written representations on October 26, 2021 in respect of Mr. Herman's Motion, as well as in respect of the Motions of the other two Appellants.

3. P. Philippe DesRosiers

[13] By Notices of Reassessment dated May 8, 2009, the Minister reassessed the tax payable by the Appellant P. Philippe DesRosiers for the 2005 and 2006 taxation years. By Notices of Reassessment dated January 5, 2012, the Minister reassessed the tax payable by Mr. DesRosiers for the 2008 and 2009 taxation years. Mr. DesRosiers filed Notices of Objection in respect of each of the Reassessments. By Notice of Confirmation dated January 29, 2020, the Minister confirmed the Reassessments in respect of Mr. DesRosiers.

[14] Mr. DesRosiers filed a Notice of Appeal on October 20, 2020, and an Amended Notice of Appeal and a Fresh as Amended Notice of Appeal on December 2, 2020. The Respondent filed a Reply (the "DesRosiers Reply") to the Amended Notice of Appeal on February 24, 2021.

[15] Mr. DesRosiers's Motion was commenced by a Notice of Motion filed on September 24, 2021. The Notice of Motion implied that Mr. DesRosiers desired that the Motion be disposed of upon consideration of written representations, which were included in the Notice of Motion. The Respondent filed written representations on October 26, 2021 in respect of Mr. DesRosiers's Motion, as well as in respect of the Motions of the other two Appellants.

4. Impugned Assumptions

[16] In addition to various assumptions that are specific to the three Appellants respectively, the Ebert Reply, the Herman Reply and the DesRosiers Reply (collectively, the "Replies") each contain a series of subparagraphs setting out the same ten assumptions of fact that were made by the Minister in determining the particular Appellant's tax liability for the taxation years in issue. As well, the Minister made one additional assumption of fact in determining the tax liability of Mr. Ebert. By means of the Notices of Motion, the Appellants have applied to the Court for Orders to strike out the above-mentioned 11 assumptions of fact (collectively, the "Impugned Assumptions"). Each of the Impugned Assumptions will be discussed below.

III. ISSUES

[17] In general terms, the issues raised by these Motions are the following:

(a) should some or all of the Impugned Assumptions be struck out because they lack precision and accuracy?

(b) should some or all of the Impugned Assumptions be struck out because they are irrelevant?

(c) should some or all of the Impugned Assumptions be struck out because they pertain to third parties or other taxpayers?

(d) should some or all of the Impugned Assumptions be struck out because they pertain to transactions in taxation years preceding those that are in issue in these Appeals?

IV. LEGAL PRINCIPLES

A. Rule 53

[18] Subsection 53(1) of the Rules states:

> **(1)** The Court may, on its own initiative or on application by a party, strike out or expunge all or part of a pleading or other document with or without leave to amend, on the ground that the pleading or other document
>
> (a) may prejudice or delay the fair hearing of the appeal;
>
> (b) is scandalous, frivolous or vexatious;
>
> (c) is an abuse of the process of the Court; or
>
> (d) discloses no reasonable grounds for appeal or opposing the appeal.

B. Motion to Strike

[19] With respect to the applicable test on a motion to strike for not disclosing reasonable grounds for advancing or opposing an appeal, the Supreme Court of Canada has stated the following in *Imperial Tobacco*:

> A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action…. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial.[4]

[20] Some of the general principles applicable to an application to strike out a pleading under section 53 of the Rules were summarized by Chief Justice Bowman in *Sentinel Hill*, as follows:

> I shall begin by outlining what I believe are the principles to be applied on a motion to strike under Rule 53. There are many cases in which the matter has been considered both in this court and the Federal Court of Appeal. It is not necessary to quote from them all as the principles are well established.
>
> (a) The facts as alleged in the impugned pleading must be taken as true subject to the limitations stated in *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441 at 455. It is not open to a party attacking a pleading under Rule 53 to challenge assertions of fact.
>
> (b) To strike out a pleading or part of a pleading under Rule 53 it must be plain and obvious that the position has no hope of succeeding. The test is a stringent one and the power to strike out a pleading must be exercised with great care.
>
> (c) A motions judge should avoid usurping the function of the trial judge in making determinations of fact or relevancy. Such matters should be left to the judge who hears the evidence.[5] [*Footnote omitted.*]

[21] The Appellants take the position that the Impugned Assumptions are:

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4 *The Queen v. Imperial Tobacco Canada Limited et al.*, 2011 3 SCR 45, 2011 SCC 42, ¶17.

5 *Sentinel Hill Productions (1999) Corporation v. The Queen*, 2007 TCC 742, ¶4. I have omitted subparagraph (d) of the above quotation, as it is not relevant to these Motions.

(a) imprecise or inaccurate,

(b) irrelevant, or

(c) relate to the treatment of taxpayers other than the Appellants.

[22] I will summarize the legal principles in respect of each of the above three arguments below.

C. Precision and Accuracy

[23] Concerning the requirement that precise and accurate assumptions of fact be pleaded, the Federal Court of Appeal stated the following in *Anchor Pointe*:

> The pleading of assumptions gives the Crown the powerful tool of shifting the onus to the taxpayer to demolish the Minister's assumptions. The facts pleaded as assumptions must be precise and accurate so that the taxpayer knows exactly the case it has to meet. There is no reason why the requirement for precision and accuracy does not apply to the Crown accurately stating the circumstances in which the assumptions arose, that is, on an assessment, reassessment or confirmation.[6]

D. Relevance

[24] The general principle is that the determination of whether an assumption of fact by the Minister is relevant or irrelevant is better determined by the trial judge than by a motions judge. For instance, in *Mungovan*, Associate Chief Justice Bowman (as he then was) stated:

> It is entirely possible … that some of the impugned assumptions are irrelevant. This is a matter for the trial judge to determine after the evidence has been presented. It is not a matter that can or should be determined on a preliminary motion to strike. It may well be that the paragraphs contain allegations that lie exclusively within the respondent's knowledge. It is a matter for the trial judge to determine whether the onus should be cast upon the respondent to establish them.[7]

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6 *The Queen v. Anchor Pointe Energy Ltd.*, 2003 FCA 294, ¶23.

7 *Mungovan v. The Queen*, [2001] 3 CTC 2779, 2001 DTC 691 (TCC), ¶12.

In concluding the reasons for his decision in *Mungovan*, not to strike out the impugned assumptions of fact, Associate Chief Justice Bowman stated:

> I do not think that the pleaded assumptions to which the appellant takes exception are scandalous, frivolous, or vexatious. They may be irrelevant or wrong but, unless the evidence at trial discloses otherwise, they remain nonetheless to be treated as the assumptions on which the Minister acted.[8]

[25] Four years later, in the *Gould* case, Chief Justice Bowman (as he then was) reiterated the point that he had made previously. In *Gould*, he stated:

> Generally speaking, the striking out of portions of a pleading under section 53 of the *Rules* should be reserved for only the most plain and obvious cases. Matters of weight and relevancy are best determined by the trial judge who will have heard all of the evidence.[9]

[26] In *Metrobec*, Justice D'Auray, after considering many of the authorities dealing with assumptions of fact that are allegedly irrelevant, stated:

> … a paragraph or part of a paragraph will only be struck out from a pleading if it is plain and obvious that the alleged facts disclose no reasonable cause of action. When in doubt, it is best to leave the determination of the relevancy of the facts to the trial judge, who, unlike the judge presiding over the motion, will have access to all of the evidence.[10]

[27] Justice Rip (as he then was) was even more direct when he stated the following in *Status-One* in 2004:

> … this Court has stated on several occasions that the question of whether a pleading should be struck out in whole or in part is one for the trial judge to determine, and is not [a] matter to be determined in an interlocutory motion….

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8 *Ibid*, ¶16.

9 *Gould v. The Queen*, 2005 TCC 556, ¶23. In *Gould*, ¶22, Chief Justice Bowman also suggested that, if an assessment is based on irrelevant assumptions, that circumstance could "arguably form a cogent basis for attacking the assessment." He made a similar comment in *Jolly Farmer Products Inc. v. The Queen*, 2008 TCC 124, ¶9, where he concluded that comment by stating, "if an important basis of an assessment is an irrelevancy[,] this may go a considerable way in casting doubt on the assessment itself."

10 *Metrobec Inc. v. The Queen*, 2019 TCC 250, ¶17. See also paragraph 16 of the same decision, and *Heron v. The Queen*, 2017 TCC 71, ¶13; *aff'd*, 2017 FCA 229.

> The trial judge is in a far better position than a judge hearing a preliminary motion to consider which assumptions of fact, if any, should be stuck [*sic*] out. It is up to the trial judge to decide what is relevant and what is not.[11]

E. Assumptions Concerning Other Taxpayers

[28] Concerning the question of whether the Minister may plead assumptions of fact that pertain to other taxpayers or third parties, counsel for the Appellants referred me to *Sinclair*, where Justice Bowie stated that the decision of the Federal Court of Appeal (the "FCA") in *Ludco Enterprises* confirmed that, on an appeal from an assessment of income tax, evidence is not admissible to show that other taxpayers have been assessed more favourably in identical circumstances, and where Justice Bowie also noted that the decision of the FCA in *Hokhold* indicated that the Minister's different treatment of taxpayers in similar circumstances is not the basis for an appeal. Justice Bowie observed that the FCA, in striking out part of a notice of appeal, had noted that invidious consequences would arise if the trial of a particular issue were to become an inquiry into the tax treatment of persons who were not parties to the appeal before the Court.[12]

[29] Concerning the same issue, counsel for the Respondent referred me to the 2005 decision in *Status-One*, where Justice Rip (as he then was) stated that "there may be appeals in which the activities, past and present, of third parties may be relevant to the actions of a taxpayer."[13] In making that statement, Justice Rip was referring to a comment that he had made in a previous decision, which dealt with an earlier motion made in respect of the same appeal,[14] and which was upheld by the FCA, which stated:

> As Mr. Justice Rip indicates, in some cases, it is quite possible that relationships or ties between an appellant and third parties will be relevant to the determination

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11 *Status-One Investments Inc. v. The Queen*, 2004 TCC 473, ¶14, citing *Mungovan*, *supra* note 7, ¶10.

12 *Sinclair v. The Queen*, [2002] 4 CTC 2392, 2002 DTC 1988 (TCC), ¶6, which referred to *Ludco Enterprises Ltd. v. The Queen*, [1996] 3 CTC 74, 95 DTC 5311 (FCAD); and *Hokhold v. The Queen*, [1993] 2 CTC 99, 93 DTC 5339 (FCTD).

13 *Status-One Investments Inc. v. The Queen*, 2005 TCC 766, ¶17; *aff'd*, 2007 FCA 193.

14 *Status-One* (2004 TCC), *supra* note 11, ¶30.

> of its tax payable. But it is still necessary for the pleadings to indicate precisely how those ties or relationships could serve that purpose.[15]

[30] In *Gould*, Chief Justice Bowman noted that in some situations (particularly charitable donation arrangements), a central component of an assessment might be the existence of a scheme, which, of necessity, involves third parties, such that, "if the existence of a scheme is essential to the Crown's case[,] it should be able to plead and prove all of the components of the scheme."[16] Chief Justice Bowman then went on to say:

> To say, as the appellant does, that *Global* and *Status-One* preclude any reference to third party transactions unless the appellant knows of or is privy to those transactions goes too far. If the existence of a scheme is germane to the disallowance[,] it cannot be ignored[,] whether or not the Minister assumed that the appellant knew about or was a party to the third party transactions that, according to the Reply, were an integral part of the scheme. If any of the facts assumed are truly within only the Crown's knowledge[,] the Crown probably has the onus of proving them[,] although this is ultimately for the trial judge to decide.[17]

[31] On the authority of *Gould*, Justice D'Auray, in *Metrobec*, stated that "nothing prevents the respondent from pleading assumptions of fact relative to third parties, if the Minister used those facts to make the assessment."[18]

V. ANALYSIS

[32] In typical fashion, each Reply pleaded the assumptions of fact on which the Minister relied when issuing the Reassessments. Those assumptions are set out in paragraph 12 of the Ebert Reply, paragraph 14 of the Herman Reply and paragraph 14 of the DesRosiers Reply.

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15 *The Queen v. Status-One Investments*, 2005 FCA 119, ¶19. The FCA affirmed that principle in its decision in 2007 involving the same parties; see *Status-One* (2007 FCA), *supra* note 13, ¶9. In ¶4 of the 2007 decision, the FCA (referencing ¶24 of its reasons in 2005 FCA 119) stated "that if the Minister wants to base an assessment on the actions of third parties, it is his [or her] responsibility to specify the link between these actions and those of the taxpayer in question, so that the taxpayer knows the case it has to meet…."

16 *Gould*, *supra* note 9, ¶21.

17 *Ibid*.

18 *Metrobec*, *supra* note 10, ¶35.

[33] The Appellants seek to strike out the Impugned Assumptions from each Reply. I will consider each of those assumptions in turn.

A. Fair Market Value of Wines

[34] Subparagraph 12(f) of the Ebert Reply, subparagraph 14(e) of the Herman Reply and subparagraph 14(g) of the DesRosiers Reply each pleaded the following assumed fact:

> The fair market value of the wines donated by the Appellant and appraised by Nico van Duyvenbode was at most 20% (i.e., a ratio of 1/5) of the amount stated on the charitable tax receipts; (the "FMV Assumption").

[35] The Appellants submit that the Minister's determination of the respective fair market values of the wines donated by the Appellants was based on an analysis of wines sold at charitable auctions in years preceding the years in which the Appellants donated their wines to the various charities. The Appellants also submit that the Minister's determination of fair market value was based on a statistical analysis and does not specify the actual fair market value determined by the Minister.

[36] The Respondent submits that the FMV Assumption explains why the Minister took the position that the charitable tax credits should be calculated by reference to only 20% of the respective appraised values of the wines in question.

[37] I read the FMV Assumption as indicating that the Minister assumed that the fair market value of each of the respective wines donated by the Appellants was 20% or less of the amount stated on the applicable charitable tax receipt. I would think that each of the Appellants takes the position that the fair market value of the wines donated by him was equal to 100% of the amounts stated on the charitable tax receipts. I do not view the FMV Assumption as not providing the Appellants with enough specificity to enable them to know the case they must meet. I would expect that they will each endeavour to adduce evidence to show that the fair market value of the donated wines was equal to the amounts shown on the charitable tax receipts.

[38] The Appellants' submissions, as set out in paragraph 35 above, are arguments that the Appellants may advance at trial as to why the Minister's determination of the respective fair market values of the donated wines was flawed. However, those submissions are not a basis for striking out the FMV Assumption. If the Minister merely assumed, and acted on, a fair-market-value range (i.e., 0 to 20% of the official-receipt amount), without assuming a precise fair-market-value amount, then that is what should be pleaded.[19]

[39] If an assumption of fact references a flawed methodology used by the Minister in appraising the donated wines, and if the Appellants show that the methodology was indeed flawed, that might be sufficient to demolish the assumption at trial. That might also be a reason, in part,[20] for allowing the Appeals, but it is not a reason for striking out the assumption from the Replies.

[40] Acccordingly, subparagraph 12(f) of the Ebert Reply, subparagraph 14(e) of the Herman Reply and subparagraph 14(g) of the DesRosiers Reply should not be struck out.

B. Wines Sold at Auctions

[41] Subparagraph 12(g) of the Ebert Reply, subparagraph 14(f) of the Herman Reply and subparagraph 14(h) of the DesRosiers Reply each state the following assumption:

> The charities disposed of the wines through their annual fine wine auctions; (the "Auction Assumption").

[42] The Appellants submit that the Auction Assumption lacks specificity and refers to wines that may, or may not, include the wines donated by the respective Appellants.

[43] The Respondent submits that the contents of each Reply, particularly some of the subparagraphs that precede the Auction Assumption, make it clear that the

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19 *Mungovan*, *supra* note 7, ¶16.

20 To succeed at trial, there are likely additional facts that will also need to be proven by the Appellants.

word *wines*, as used in the Auction Assumption, refers to the wines donated by the particular Appellant. The Respondent also submits that the Auction Assumption refers to facts relating to the conditions in which the wines were sold, i.e., through annual auctions of fine wine, and that those conditions were relevant to the determination of fair market value.

[44] I accept the submissions made by the Respondent. In particular, some of the preceding assumptions pleaded in the Replies provide the specificity desired by the Appellants. For instance, subparagraph (b) in each of the "pleaded-assumptions" paragraphs of the Replies states that the "Appellant donated wines to registered charities," and subparagraph (c) of each of those paragraphs refers to "[t]he wines donated by the Appellant." As well, as noted above, the FMV Assumption, which is set out in the subparagraph preceding the Auction Assumption, also refers to "the wines donated by the Appellant." From this, it follows that the word *wines* in subparagraph 12(g) of the Ebert Reply, subparagraph 14(f) of the Herman Reply and subparagraph 14(h) of the DesRosiers Reply refers to specific wines, i.e., the wines donated by the particular Appellant.

[45] I decline to strike out subparagraph 12(g) of the Ebert Reply, subparagraph 14(f) of the Herman Reply and subparagraph 14(h) of the DesRosiers Reply.

C. Depressed Market Values

[46] Subparagraph 12(h) of the Ebert Reply, subparagraph 14(g) of the Herman Reply and subparagraph 14(i) of the DesRosiers Reply each state:

> The charitable auctions held in the NCR [i.e., the National Capital Region] brought a large number of fine wines to the local market, which resulted in a depressing of the market values; (the "Depressed-Value Assumption").

[47] The Appellants submit that the Depressed-Value Assumption refers to a group of facts which may or may not pertain to a particular Appellant and that it lacks specificity.

[48] The Respondent submits that the Depressed-Value Assumption provides context about sales conditions and thus is relevant to the determination of the fair market value of the wines in question.

[49] I accept that the Depressed-Value Assumption relates to the applicable market conditions, and is thus an acceptable assumption to plead.

[50] Subparagraph 12(h) of the Ebert Reply, subparagraph 14(g) of the Herman Reply and subparagraph 14(i) of the DesRosiers Reply should not be struck out.

D. Wines Sold as Lots

[51] Subparagraph 12(i) of the Ebert Reply, subparagraph 14(h) of the Herman Reply and subparagraph 14(j) of the DesRosiers Reply each state:

> Most of the wines were sold as lots at the charitable auctions; (the "Sold-As-Lots Assumption").

[52] The Appellants submit that the Sold-As-Lots Assumption refers to a group of facts which may or may not pertain to the particular Appellant, and that the assumption lacks specificity.

[53] The Respondent submits that the Sold-As-Lots Assumption provides additional context in respect of the sales conditions, and is relevant to the determination of fair market value.

[54] As noted above, the Depressed-Value Assumption, which immediately precedes the Sold-As-Lots Assumption, refers to "a large number of fine wines [that were brought] to the local market." This phrase, rather than the phrase "the wines donated by the Appellant," might be the antecedent of the word *wines* in the Sold-As-Lots Assumption. Therefore, there might be a lack of clarity. However, I do not think that this possible lack of clarity is so great as to displace my view that the Sold-As-Lots Assumption provides context for the Minister's determination of the fair market value of each Appellant's wines.

[55] I accept the Respondent's submission that the Sold-As-Lots Assumption sets out a fact that may be applicable to the determination of fair market value. However, I also recognize that each Appellant may not have information

concerning the manner in which wines donated by other donors were sold at the auctions, which may pose an evidentiary challenge for the Appellants. I point out, as stated above, that it is open to the trial judge to require that the burden of proving facts not within the knowledge of the Appellants is to be put on the Respondent.[21]

[56] Subparagraph 12(i) of the Ebert Reply, subparagraph 14(h) of the Herman Reply and subparagraph 14(j) of the DesRosiers Reply should not be struck out.

E. Wines Sold As Is, Without Recourse

[57] Subparagraph 12(j) of the Ebert Reply, subparagraph 14(i) of the Herman Reply and subparagraph 14(k) of the DesRosiers Reply each state:

> The wines were sold "as is, without recourse" at the charitable auctions; (the "Sold-As-Is Assumption").

[58] The Appellants submit that the Sold-As-Is Assumption refers to a group of facts, which may or may not pertain to a particular Appellant, and that the assumption lacks specificity.

[59] The Respondent submits that the Sold-As-Is Assumption provides additional context in respect of the relevant sale conditions, and is relevant to the determination of fair market value.

[60] Similar to the above discussion of the Sold-As-Lots Assumption, there might be some lack of clarity, given that the word *wines* in the Sold-As-Is Assumption could refer to the "large number of fine wines" that are mentioned in the Depressed-Value Assumption or to "the wines donated by the Appellant" that are described in the FMV Assumption. However, overall, I am of the view that, notwithstanding this possible lack of clarity, the Sold-As-Is Assumption provides context for the Minister's determination of the fair market value of each Appellant's wines.

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[21] See paragraphs 24 and 30 above; *Mungovan*, *supra* note 7, ¶12; and *Gould*, *supra* note 9, ¶21.

[61] Subparagraph 12(j) of the Ebert Reply, subparagraph 14(i) of the Herman Reply and subparagraph 14(k) of the DesRosiers Reply should not be struck out.

F. Donors' Participation in Auctions

[62] Subparagraph 12(k) of the Ebert Reply, subparagraph 14(j) of the Herman Reply and subparagraph 14(l) of the DesRosiers Reply each state:

> Many wine donors actively participated in the charitable auctions; (the "Participation Assumption").

[63] The Appellants submit that the Participation Assumption refers to a group of donors, which may, or may not, include a particular Appellant. The Appellants also submit that there is a lack of specificity.

[64] The Respondent submits that the Participation Assumption suggests a link between the donors' behaviour (i.e., their active participation in the auctions) and the alleged independence of the appraiser who appraised the wines donated by the Appellants. The Respondent also submits that the occurrences of some donors repurchasing the wines that they had donated (which presumably indicates that those donors actively participated in the auctions) shows artificiality in the appraisals and donation process. Finally, the Respondent submits that, in the case of Mr. Ebert and Mr. DesRosiers, in respect of whom penalties under subsection 163(2) of the ITA were assessed, the Participation Assumption has some application to those penalties, even though the Appellants have not specifically mentioned penalties in their Notices of Appeal, and thus, do not appear to be challenging the penalties.

[65] Rather than focusing on the activities of the respective Appellants, the Participation Assumption references the activities of many of the wine donors. As noted above, in the discussion of the *Status-One* decisions, a court must exercise caution when the Crown seeks to include the actions of third parties in the pleadings.[22] Where the actions of third parties are alleged, the relevance or

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[22] *Status-One* (2004 TCC), *supra* note 11, ¶30; *Status-One* (2005 FCA), *supra* note 15, ¶22; and *Status-One* (2007 FCA), *supra* note 13, ¶4.

irrelevance of those allegations should be assessed in light of the pleadings.[23] Furthermore, it is incumbent upon the Minister to specify the link between the actions of the third parties and the actions of the specific taxpayer.[24]

[66] There is nothing in any of the three Replies that suggests a connection, let alone a specific link, between a particular Appellant and the other wine donors. In the Respondent's Written Representations, the Respondent submits that the Participation Assumption "suggests a link between the donors' behaviour (that is, their active participation in the auctions) and the appraiser's independence."[25] However, as stated in *Status-One*, a link, if any, between a specific taxpayer and third parties is to be determined by reference to the pleadings, and not by reference to written submissions filed in respect of a motion. Furthermore, the link between the actions of the third parties and the actions of the taxpayer must be specified, and not merely suggested. Accordingly, it is my view that the Respondent has not shown that there is a link between the active participation of many wine donors in the charitable auctions and the actions of the three Appellants.

[67] If the Minister assumed that each of the Appellants actively participated in the auctions, it seems to me, without having researched, considered or analyzed this point thoroughly, that it would have been sufficient for the Respondent's purposes if the Respondent had pleaded something like the following:

> The Appellant actively participated in the charitable auctions.

In any event, my research, consideration and analysis of the jurisprudence (as set out, in part, in paragraphs 28 through 31 above) has persuaded me that the Participation Assumption, as written, is too broad.

[68] Subparagraph 12(k) of the Ebert Reply, subparagraph 14(j) of the Herman Reply and subparagraph 14(l) of the DesRosiers Reply are struck out, with leave to amend, provided that any such amendment either is limited to the actions of the

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23 *Status-One* (2005 FCA), *supra* note 15, ¶17.
24 *Ibid*, ¶24; and *Status-One* (2007 FCA), *supra* note 13, ¶4.
25 Respondent's Written Representations, filed October 26, 2021, p. 15-16, ¶49.

particular Appellant or clearly specifies the link between the actions of that Appellant and the active participation of the other wine donors in the auctions.

G. Donors Repurchased Donated Wines

[69] Subparagraph 12(l) of the Ebert Reply, subparagraph 14(k) of the Herman Reply and subparagraph 14(m) of the DesRosiers Reply each state:

> In some cases, wine donors repurchased the wines they donated; (the "Repurchase Assumption").

[70] The Appellants submit that the Repurchase Assumption refers to a group of donors, which may, or may not, include a particular Appellant. The Appellants also submit that there is a lack of specificity.

[71] The Respondent takes the same position in respect of the Repurchase Assumption as in respect of the Participation Assumption.

[72] Similar to the comment that I made in paragraph 67 above, it seems to me that it would have been sufficient if the Respondent had pleaded:

> The Appellant repurchased some or all of the wines he donated.

[73] The comments that I made above in respect of the Participation Assumption apply to the Repurchase Assumption, as well. Thus, in my view, the Repurchase Assumption, as written, is too broad.

[74] Subparagraph 12(l) of the Ebert Reply, subparagraph 14(k) of the Herman Reply and subparagraph 14(m) of the DesRosiers Reply are struck out, with leave to amend, provided that any such amendment either is limited to the actions of the particular Appellant or clearly specifies the link between the actions of that Appellant and the repurchase of wines by the other donors.

H. Repurchase of Wines at a Profit at Auctions in 2001 and 2004

[75] Subparagraph 12(m) of the Ebert Reply states:

> The Appellant repurchased wines he donated at a profit at charitable auctions held in 2001 and 2004; (the "Profit Assumption").

A corresponding provision was not pleaded by the Respondent in the Herman Reply or the DesRosiers Reply.

[76] Mr. Ebert submits that the Profit Assumption is irrelevant, as it relates to alleged activities in 2001 and 2004, whereas the taxation years that are in issue in his Appeals are 2005 through 2013 inclusive. He further submits that the Profit Assumption is scandalous and was included merely to cast aspersions on him.

[77] The Respondent submits that the Profit Assumption suggests a link between Mr. Ebert's behaviour and the appraiser's independence, and also supports the Minister's understanding of artificiality in the appraisals and donation process. In addition, the Respondent submits that the Profit Assumption relates to the penalties assessed under subsection 163(2) of the ITA.

[78] The Profit Assumption is, in my view, ambiguous. It is not clear whether the Respondent assumed that Mr. Ebert, at previous charitable auctions, repurchased wines at a profit or donated wines at a profit. In other words, the antecedent of the phrase *at a profit* is not clear. Is that antecedent the prior repurchase of wines or the prior donation of wines? Given that the phrase *at a profit* immediately follows the word *donated* and not the words *repurchased wines*, the usual rules of grammar suggest that *at a profit* modifies *donated*.

[79] If the phrase *at a profit* refers to the donation of wines, a further difficulty arises. Given that a donation or gift is, by definition, without consideration, it is not clear how a donation can be made at a profit. Perhaps the Minister had in mind that the amount of the tax credit arising from the charitable gift was greater than the fair market value of the wines that were the subject of the gift. However, it is not clear that this is what the Profit Assumption is pleading.

[80] If it was the repurchase of wines that was allegedly done at a profit, again there is a lack of clarity, as a profit usually arises on a sale or disposition of property, rather than on a repurchase of property (although there may be exceptions, such as in a short sale). Perhaps the Minister was assuming that, when

Mr. Ebert donated wines to charities in 2001 and 2004, those wines were appraised at a fair market value greater than the price that he subsequently paid to repurchase the same wines at the auctions. However, that is by no means clear from the Profit Assumption, as written.

[81] As noted above, Mr. Ebert takes issue with the Respondent's pleading of transactions that occurred in taxation years preceding the taxation years that are the subject of Mr. Ebert's Appeals. In situations that might be viewed as somewhat reversed, where a taxpayer argues that in a subsequent taxation year the Minister should extend the same treatment to the taxpayer as was extended in previous years, the courts have stated that "[a]n assessment is conclusive as between the parties only in relation to the assessment for the year [in] which it was made."[26] In a situation concerning the deductibility, in a particular taxation year, of expenses that are similar to expenses that were allowed by the Minister in preceding taxation years, the court is "not bound by how the respondent may have treated similar claims in previous years."[27] As was stated in *Hawkes*:

> … the fact that the Minister has assessed one return of a taxpayer in a different way from another return … is not proof that any particular assessment is incorrect. That is a matter for determination on appeal.[28]

[82] In this Motion, I am dealing with a different situation, but I believe that an analogy may be drawn from the principles set out above. The question of whether Mr. Ebert may have "repurchased wines he donated at a profit at charitable auctions held in 2001 and 2004" (whatever that phrase may mean) does not seem to be indicative of what he may have done during the period 2005 to 2013 inclusive. I have not found anything in the Ebert Reply that explains a connection between the 2001 and 2004 transactions and the donations of wine that are the subject of Mr. Ebert's Appeals.

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[26] *Ludco Enterprises*, *supra* note 12, ¶12, referencing *First Torland Investment Ltd. v. MNR*, [1969] CTC 134, 69 DTC 5109 (Ex. Ct.), *aff'd*, 70 DTC 6354 (SCC), and *Admiral Investment Ltd. v. MNR*, [1967] CTC 165, 67 DTC 5114 (Ex. Ct.).

[27] *Ludco Enterprises*, *supra* note 12, ¶13, referencing *Gelber v. MNR*, [1991] 2 CTC 2319, 91 DTC 1030 (TCC).

[28] *Hawkes v. The Queen*, [1997] 2 CTC 133, 97 DTC 5060 (FCAD), ¶9.

[83] It is not clear whether the assumed facts referenced in the Profit Assumption, if put into evidence, would be viewed as similar-fact evidence in support of propensity reasoning, or as circumstantial evidence relating to the assessments in issue in respect of the 2005 through 2013 taxation years.[29] Nor is it clear whether the assumed facts, if put into evidence, would be too distant in time from the facts that are the subject of the Reassessments.[30] To summarize, the Ebert Reply does not show "a real and substantial nexus or connection between the act or allegation made [i.e., the gifts of wines in 2005 to 2013 inclusive], … and facts relating to previous … transactions [i.e., the repurchase of wines in 2001 and 2004]."[31]

[84] Subparagraph 12(m) of the Ebert Reply is struck out, with leave to amend, provided that any such amendment:

(a) clearly, and without ambiguity, identifies and explains the transactions in 2001 and 2004 that were the subject of the assumption made by the Minister in reassessing Mr. Ebert in respect of the 2005 through 2013 taxation years;

(b) specifies a real and substantial nexus or connection between the transactions in 2001 and 2004 and the donations of wines in 2005 through 2013; and

(c) does not invoke propensity reasoning.[32]

I. Wines Sold for 20% of Appraised Value

[85] Subparagraph 12(n) of the Ebert Reply, subparagraph 14(l) of the Herman Reply and subparagraph 14(n) of the DesRosiers Reply each state:

> The wines appraised by Nico van Duyvenbode were sold at the charitable auctions, on average, for 20% of the appraised value; (the "20% Assumption").

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[29] *R. v. Balla*, [2010] 4 CTC 181, 2010 DTC 5113 (BCSC), ¶41-43.

[30] *Teelucksingh*, 2011 TCC 22, ¶5.

[31] *Erlich v. The Queen*, [1999] 2 CTC 2069, 99 DTC 572 (TCC), ¶25, referencing *MacDonald v. Canada Kelp Co.*, (1973) 39 DLR (3d) 617 (BCCA).

[32] See *Balla*, *supra* note 29, ¶41.

[86] The Appellants submit that the 20% Assumption is based on an irrelevant statistical analysis from taxation years preceding the years that are the subject of the Appeals. Furthermore, according to the Appellants, the 20% Assumption lacks specificity, as it refers to an average of values found in another context.

[87] The Respondent submits that the 20% Assumption relates to the Minister's determination of the fair market value of the donated wines, and that it references the Minister's understanding of artificiality in the appraisals and donation process. In addition, the Respondent asserts that the 20% Assumption is particularly applicable to Mr. Ebert and Mr. DesRosiers, who were assessed penalties under subsection 163(2) of the ITA.

[88] As Justice Boyle noted in *McCuaig Balkwill*, there are three markets in which an individual resident in Ontario may sell, or otherwise dispose of, wine:

a) auctions of collectible wines, hosted by the Liquor Control Board of Ontario ("LCBO");

b) non-LCBO global consignment auctions and sellers; and

c) donations to charities, to be sold in charitable auctions.[33]

[89] After identifying the above markets, Justice Boyle then said:

> Prices for a purchase and sale in these markets are obviously relevant to, but not necessarily determinative of, a wine's fair market value determination by this Court.[34]

Hence, I do not consider the reference in the Respondent's pleadings to the prices at which particular wines were sold at charitable auctions to be improper or irrelevant.

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33 See *McCuaig Balkwill v. The Queen*, 2018 TCC 99, ¶17 & 21. With respect to the third market mentioned above, Justice Boyle used the term *charity auction*. In these Appeals and Motions, the Respondent has used the term *charitable auction*, which has been copied by the Appellants in their respective Notices of Motion. For the purposes of these Reasons, I consider the two terms to be synonymous.

34 *Ibid*, ¶21.

[90] Thus, in my view, the 20% Assumption is permissible, as it indicates that the price at which wines were sold at the charitable auctions was a factor considered by the Minister in determining the fair market value of those wines. As sales of wines at charitable auctions appear to be acceptable comparables that may be considered by an appraiser when appraising wines, the 20% Assumption should be allowed to stand. However, even if the Appellants were to show that a charitable auction sale is not an acceptable comparable,[35] the 20% Assumption would not prejudice the Appellants, as they could refer to the assumption to show that the Minister's appraiser relied on an unacceptable comparable, and thus used an inappropriate appraisal methodology.

[91] It seems that each Appellant, on the one hand, and the Respondent, on the other hand, are alleging that the other's appraiser used a flawed appraisal methodology. More specifically, the Notices of Motion state that, in response to a Demand for Particulars, the Respondent indicated that the Minister's allegation, to the effect that Mr. van Duyvenbode's appraisal methodology was flawed, was based on the Minister's analysis of random sets of samples from 18 different auctions of eight charitable organizations, from May 31, 2001 to December 2, 2004. According to the Minister, that analysis showed that the appraised values determined by Mr. van Duyvenbode were, on average, 5.21 times greater than the auction sale price. It appears that the Minister's allegation is premised on a further allegation that Mr. van Duyvenbode used the same appraisal methodology for the appraisals of wines donated between 2005 and 2013 inclusive as he had used in respect of the wines donated between 2001 and 2004 inclusive. For their part, the Appellants allege that the Minister's appraisal methodology was flawed because it used data from 2001 to 2004, rather than from 2005 to 2013. However, if the Minister's appraiser used a flawed appraisal methodology, that is an argument that may be advanced by the Appellants at trial, but it is not a reason for striking out the 20% Assumption.[36]

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35 For instance, there may be a perception among some individuals who attend a charitable auction that they will have an opportunity to purchase items for prices well below fair market value.

36 See also a similar discussion in the context of the FMV Assumption in paragraphs 38 and 39 above.

[92] Subparagraph 12(n) of the Ebert Reply, subparagraph 14(l) of the Herman Reply and subparagraph 14(n) of the DesRosiers Reply should not be struck out.

J. Mr. van Duyvenbode's Activities

[93] Subparagraph 12(o) of the Ebert Reply, subparagraph 14(m) of the Herman Reply and subparagraph 14(o) of the DesRosiers Reply each state:

> Nico van Duyvenbode solicited potential donors, provided the appraisals, collected the wine bottles, grouped them into lots, delivered them to the charities, and was involved as a bidder at the auctions; (the "Activities Assumption").

[94] The written representations included in the Notices of Motion filed by the Appellants do not set out any specific submissions in respect of the Activities Assumption, other than perhaps to imply that the wine bottles referenced therein were not collected from the Appellants specifically, but rather, were collected from some or all of the wine donors in general.

[95] The Respondent submits that the Activities Assumption pertains to the allegation in each of the Notices of Appeal to the effect that the appraiser (i.e., Mr. van Duyvenbode) was an independent appraiser. The Respondent also submits that the Activities Assumption relates to the Minister's understanding of the artificiality in the appraisals and donation process.

[96] I accept the Respondent's submission that the Activities Assumption addresses the allegation in each of the Notices of Appeal that Mr. van Duyvenbode was an independent appraiser. I acknowledge that the Appellants may not have personal knowledge of the activities of Mr. van Duyvenbode, and thus, may not be in a position to lead evidence to demolish this assumption. It will be for the trial judge to determine whether the Respondent should bear the burden of proof in respect of the Activities Assumption.

[97] Subparagraph 12(o) of the Ebert Reply, subparagraph 14(m) of the Herman Reply and subparagraph 14(o) of the DesRosiers Reply are not to be struck out.

K. Payments to Mr. van Duyvenbode

[98] Subparagraph 12(p) of the Ebert Reply, subparagraph 14(n) of the Herman Reply and subparagraph 14(p) of the DesRosiers Reply each state:

> The charities paid Nico van Duyvenbode 10% of the hammer prices for which the wines were sold at the auctions; (the "Payment Assumption").

[99] The Appellants' written representations set out in their Notices of Motion do not make any specific submissions in respect of the Payment Assumption, although there is a general submission that, apart from the FMV Assumption, to the extent that the other Impugned Assumptions refer to *wines*, those references do not refer to the wines donated by the Appellants, but rather, refer to the wines that were the subject of the Minister's statistical analysis.

[100] The Respondent submits that the facts assumed in the Payment Assumption provide a basis to question the independence of Mr. van Duyvenbode as the appraiser of the wines donated by the Appellants (as well as the appraiser of many of the other donated wines).

[101] I accept the Respondent's submission that the Payment Assumption, like the Activities Assumption, questions the independence of Mr. van Duyvenbode, and thus challenges the statement in each of the Notices of Appeal to the effect that Mr. van Duyvenbode was an independent appraiser.

[102] As the Appellants may not have any knowledge of any payments made by any charity to Mr. van Duyvenbode, it will be for the trial judge to determine whether the Respondent should bear the burden of proof in respect of the Payment Assumption.

[103] I acknowledge that there is a question as to whether the word *wines* in the Payment Assumption refers to only the wines donated by the Appellants, to the wines that were the subject of the Minister's statistical analysis, or to some or all of the wines donated by some or all of the donors. This is a question to be left to the trial judge, who will have the opportunity to hear and consider all of the evidence.

[104] I decline to strike out subparagraph 12(p) of the Ebert Reply, subparagraph 14(n) of the Herman Reply and subparagraph 14(p) of the DesRosiers Reply.

VI. CONCLUSION

[105] The Impugned Assumptions that are struck out are summarized below:

(a) Subparagraphs 12(k), 12(l) and 12(m) of the Ebert Reply are struck out, with leave to amend, subject to the conditions specified in these Reasons.

(b) Subparagraphs 14(j) and 14(k) of the Herman Reply are struck out, with leave to amend, subject to the conditions specified in these Reasons.

(c) Subparagraphs 14(l) and 14(m) of the DesRosiers Reply are struck out, with leave to amend, subject to the conditions specified in these Reasons.

[106] For greater certainty, the other Impugned Assumptions in the Ebert Reply, the Herman Reply and the DesRosiers Reply are not struck out.

[107] The costs in respect of these Motions will be costs in the cause, unless otherwise determined by the trial judge.

Signed at Edmonton, Alberta this 18th day of April 2023.

"Don R. Sommerfeldt"

Sommerfeldt J.

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COURT FILE NO.:	2020-843(IT)G, 2020-1559(IT)G, 2020-2155(IT)G
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REPRESENTATIVES:

Counsel for the Appellant:	Adam Aptowitzer
Counsel for the Respondent:	Montano Cabezas Allison Lubeck

COUNSEL OF RECORD:

For the Appellant:

Name:	Adam Aptowitzer
Firm:	Drache Aptowitzer LLP Kanata, Ontario

For the Respondent:	Shalene Curtis-Micallef Deputy Attorney General of Canada Ottawa, Canada