Citation: 2013TCC383
Date: 20131210
Docket: 2012-315(IT)G

BETWEEN:

DAVID GRAMIAK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on April 9, 2013, in Vancouver, British Columbia,
By: The Honourable Eugene P. Rossiter, Associate Chief Justice

Appearances:

Counsel for the Appellant:	Alistair Campbell and Michelle Moriarty
Counsel for the Respondent:	Janie Payette and Julie David

ORDER AND REASONS FOR ORDER

A. Background:

[1] The Appellant's appeal is part of a group known as the Concentra-Olympia group of appeals which all relate to certain purported Registered Retirement Savings Plan "RRSP stripping" transactions. Mr. Gramiak is the lead Appellant for the purposes of the matter at issue in this motion.

[2] Both parties agree that prior to the transactions in question the Appellant opened a self-directed RRSP account that had the Olympia Trust Company ("Olympia") as its trustee. The Respondent alleges that the Appellant transferred

funds into this RRSP account from a similar type of account with another financial institution.

[3] In 2002 and 2003 respectively, $130,500 and $8,500 were removed from the Appellant's RRPS account with Olympia. The Respondent's position is that the Appellant instructed Olympia to use the foregoing amounts to acquire certain debenture units in PI Ventures Inc. ("PI Ventures") in 2002 and 2003. The Appellant previously conveyed to the Canada Revenue Agency ("CRA") that he believed at all material times that the RRSP funds were used to acquire debenture units in PI Ventures. The Notice of Appeal filed now indicates that the Appellant's position is that the debentures were never acquired.

[4] It is now unclear if the RRSP funds were ever actually used to acquire the debenture units in PI Ventures, or were instead transferred into a trust account maintained by a Calgary law firm. Once in the law firm's trust account, the Respondent argues that the amounts were used to invest in certain off-shore corporations, and that the reported yield from these investments were credited to the Appellant's debit card accounts.

[5] There was no agreement between the parties as to whether or not the debenture units in PI Ventures were "qualified investments" for the purpose of the *Income Tax Act ("Act")*, or if they would have been a "qualified investment" if they had been acquired.

[6] In January of 2002, the Appellant received a Proposal Letter from the CRA wherein the CRA proposed to reassess the Appellant for the 2002 and 2003 taxation years.

[7] Further into the audit process, the Minister of National Revenue ("the Minister") obtained waivers from the Appellant with respect to the normal assessment period for the Appellant's 2002 and 2003 taxation years. Both of the waivers were drafted by the Appellant, and were dated March 14, 2006.

[8] The waiver with respect to the 2002 taxation year provided, in part, as follows:

> The normal reassessment period referred to in subsection 152(4) of the *Income Tax Act* … is hereby waived for the taxation year indicated above in respect of:
>
> Income inclusion of $130,500 relating to the acquisition of non-qualified investments (PI Ventures Corporation Convertible Debentures) for an RRSP subject to s. 146(9) and/or s. 146(10).

[9] The waiver in respect to the Appellant's 2003 taxation year is identical to the waiver to the 2002 taxation year except for the value of the income inclusion referred to therein.

[10] The Appellant submits that subsection 146(9) and 146(10) were identified in the waiver based on the Proposal Letter and the Appellant's understanding of the issues and provisions that were relevant for the reassessment.

[11] On January 4, 2007, after the normal reassessment period in respect of the Appellant's 2002 taxation year had expired, but before the normal reassessment period in respect to the Appellant's 2003 taxation year had expired, the Minister reassessed the Appellant to include the amounts of the RRSP funds in the Appellant's income. These reassessments applied subsections 146(9) and 146(10) of the *Act*, which generally apply to a taxpayer when funds or value are diverted out of a taxpayer's RRSP in a certain way.

[12] The Appellant argued for the first time in the Notice of Appeal that they did not in fact acquire the debenture units in question. As such, the Respondent included an alternative argument in which they submitted that if the acquisition of the debenture units did not in fact take place then the Appellant received a benefit from his RRSP such that subsection 146(8) applies.

[13] The Appellant objected to this reassessment, and it was confirmed by the Minister on October 14, 2011.

[14] The Appellant's waivers were subsequently revoked.

B. Motion to strike:

[15] The Appellant brought a motion for the following:

1. Pursuant to section 53 of the *Tax Court of Canada Rules (General Procedure) ("Rules")*, an Order striking out paragraphs 20 (c) and (d), striking references to "245", "56(2)" and "146(8)", and striking paragraph 21 and paragraphs 26 through 30 inclusively of the Reply, without leave to amend;
2. In the alternative, for an Order pursuant to section 53 of the *Rules* striking out the paragraphs referred to aforesaid, with leave to amend

those paragraphs so as to limit their application to the Appellant's 2003 taxation year only;

3. Pursuant to section 53 of the *Rules*, striking paragraphs 19(d) without leave to amend;
4. Pursuant to section 53 of the *Rules*, an Order striking out the phrase "RRSP stripping mechanisms" in paragraph 18(bb) of the Reply, with leave to amend paragraph 18(bb) so as to refer to a phrase that is not prejudicial to the Appellant;
5. The costs of the motion payable forthwith.

[16] The Respondent also brought a motion for the following:

1. Pursuant to section 54 of the *Rules*, an Order Amending the Reply to include paragraphs 19A and 19B as set out in the Amended Reply.

[17] Prior to the hearing of this motion, the parties have agreed that paragraphs 19(d), 20(d), and references in the Reply to section 245 and subsection 56(2) of the *Act* in paragraphs 21, 26, 27 and 30 are to be removed from the Reply.

[18] The parties further agreed that paragraph 18(cc) would be amended to read as follows:

> The promoters of the scheme had previously been involved in other transactions that the Minister has identified as RRSP stripping transactions.

[19] As a result of the foregoing agreements, the remaining portions of the motions to be addressed are:

A. Should the following parts of the Reply be struck without leave to amend:
   1. Paragraph 20(c);
   2. The reference to section 148(8) in paragraph 21;
   3. Paragraph 28; and
   4. Paragraph 29.

These paragraphs read as follows:

> 20.c: Whether the Appellant constructively received the total amount of the RRSP funds transferred out of his RRSP account.
>
> …
>
> 28: Alternatively, if this Court concludes that the Appellant's RRSP did not acquire the debenture units and/or did not acquire any property during the 2002 and 2003 taxation years, the Respondent submits that by directing Olympia Trust to transfer funds from his RRSP account into Singh Walters Bindal Trust Account, the Appellant constructively received the total amount of the funds transferred.

29. As a consequence, the amounts of $130,500 and $8,500 received by the Appellant constituted a benefit out of or under a RRSP and as such this amount should be included in his income for the 2002 and 2003 taxation years pursuant to subsection 146(8) and paragraph 56(1)(*h*) of the *Act*.

B. Should the Respondent be granted leave to amend the Reply as to include the additional facts in paragraphs 19A and 19B?

These paragraphs read as follows:

19A: During the years 2004 to 2007, the Appellant received the following funds from foreign source as shown on the statements issued by Syndicated Gold Depository and provided by the Appellant to the CRA:

2004: US $ 5,950.00
2005: US $ 32,351.86
2006: US $ 40,000.00
2007: US $ 40,000.00
Total: US $ 118,301.86 (CND $135,297.60)

19B: These amounts represent a return of capital from the Appellant's RRSP investment in PI ventures Inc. as stated by the Appellant tin a declaration dated June 20, 2008.

C. Issues:

A. Appellant's motion: Is the Respondent precluded by subparagraph 152(4.1)(*a*)(ii) and subsections 152(5) and (9) of the *Act* from advancing the alternative argument of the Appellant receiving a benefit out of/under his RRSP in each of the 2002 and 2003 taxation years pursuant to subsection 146(8) of the *Act*?

B. Respondent's motion: Should the Reply be amended to include paragraphs 19A and 19B? In other words, will the proposed amendments aid in the determination of the real question in controversy between the parties at trial without causing injustice or prejudice to the Appellant that cannot be compensated by costs?

D. Position of the parties:

[20] (i) Appellant: The Appellant asserts that the Respondent is precluded from advancing the alternative argument in respect of the Appellant's 2002 taxation year for several reasons.

[21] First, the alternative argument does not meet the conditions of subsection 152(9) of the *Act*. The Appellant argues that the Respondent is relying on transactions in the alternative argument that were not transactions that formed the basis of the reassessment. The Appellant alleges that the "new transactions" introduced by the alternative argument are the transfer of funds out of the RRSP account, and the constructive receipt of the funds. The Appellant submits that the acquisition of the debentures by the RRSP is not only fundamental to the Minister's position in subsections 146(9) and (10), it is the sole transaction relied upon by the Minister in issuing the reassessment. As such, they argue that to allow the Respondent to rely on a transaction that presupposes that debentures were never acquired would force the Minister to abandon the very assumption upon which the reassessment relies, and therefore should not be allowed.

[22] Second, the Appellant argues that subparagraph 152(4.01)(*a*)(ii) and subsection 152(5) of the *Act* disallow the alternative argument because it is outside the scope of the waiver. Their position relies on the assertion that the alternative argument does not "reasonably relate" to the matters specified in the waiver. In fact, the Appellant submits that their representative consciously and deliberately drafted the waiver in narrow terms so as to limit its application to only reassessments issued pursuant to subsections 146(9) and (10) of the *Act*.

[23] The Appellant lastly advances that the alternative argument would prejudice the fair hearing of the appeal within the meaning of subsection 53(a) of the *Rules*, and would constitute an abuse of process within the meaning of subsection 53(c) of the *Rules*.

[24] With regard to the Respondent's motion, the Appellant opposes the amendment to permit the inclusion of paragraphs 19A and 19A of the Amended Reply.

[25] (ii) Respondent: The Respondent first submits that the alternative argument is permissible under subsection 152(9) since the facts and transactions upon which the alternative argument relies are the same ones that formed the reassessment. They argue that the alternative argument does not rely on any new transactions, rather the RRSP investment in the PI ventures and the tax consequences from that transaction form the basis of both the reassessment and the alternative argument.

[26] The Respondent further submits that the wording of the waiver is sufficiently broad to prompt a conclusion that the alternative argument "reasonably relates" to the matters outlined in the waiver, such that it should not be struck.

[27] With regard to the new facts included in paragraphs 19A and 19B of their Amended Reply, the Respondent submits that these facts serve only to complete the Reply, they are relevant to all of the provisions upon which the Minister is reassessing the Appellant, and they are material to the determination of the trial judge.

E. Analysis:

Appellant's Motion:
Plain and Obvious Test

[28] The Appellant relies on section 53 of the *Rules* to strike certain portions of the Respondent's Reply. Section 53 provides as follows:

> 53. The Court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,
> (a) may prejudice or delay the fair hearing of the action,
> (b) is scandalous, frivolous or vexation, or
> (c) is an abuse of the process of the Court.

[29] At the outset I will note that trial courts have frequently dealt with the validity of arguments that the Minister was purportedly precluded from advancing by virtue of subparagraph 152(4.01)(*a*)(ii) (see *Fagan v. The Queen*, 2011 TCC 523; *Chafetz v. The Queen*, 2005 TCC 803, affirmed at 2007 FCA 45; *Holmes v. The Queen*, 2005 TCC 403; *Mah v. The Queen*, 2003 TCC 720).

[30] The plain and obvious test has been longstanding and widely accepted in Canadian jurisprudence as the test for motions to strike. In *Sentinel Hill Productions (1999) Corporation, Robert Strother v. the Queen*, 2007 TCC 742, Bowman, C.J., provided a useful overview of the principles that govern the application of Rule 53:

> [4] I shall begin by outlining what I believe are the principles to be applied on a motion to strike under Rule 53. There are many cases in which the

matter has been considered both in this court and the Federal Court of Appeal. It is not necessary to quote from them all as the principles are well established.[1]

(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. [Emphasis added]

(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. [Emphasis added]

(d) Rule 53 and not Rule 58, is the appropriate rule on a motion to strike.

[31] Chief Justice McLachlin wrote for the Supreme Court in *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42:

"This Court has reiterated the test on many occasions. 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 for 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."

Further:

"…The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. Rather, it operates on the assumption that the claim will proceed through the court system in the usual way – in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in *the context of the law and the litigation process*, the claim has no reasonable chance of succeeding."

[32] More recently, this Court applied the plain and obvious test in *Canadian Imperial Bank of Commerce v. R.*, 2011 TCC 568 ("*CIBC*").

[1] Among the cases referred to by counsel are *The Queen v. Enterac Property Corporation*, 98 DTC 6202; *Niagara Helicopters Ltd. v. The Queen*, 2003 DTC 513 at 514; *Gauthier v. The Queen*, 2006 DTC 3050.

> "Only if the position taken in the Reply is certain to fail because it contains a radical defect should the relevant portions of the Respondent's Reply be struck."

[33] I will comment that there is jurisprudence that has applied the plain and obvious test in elaborate judgments in which the Court engages in deep and lengthy analysis, and ultimately concludes to strike the pleading in question. I have difficulty reconciling an elaborate and in-depth analysis with the very nature of the "plain and obvious" test. As the name of the test suggests, a pleading is only to be struck if it is obvious that it should be. In my view, an "obvious decision" in both life and law is a conclusion that can be attained without hesitation, and that does not require lengthy deliberation. In my respectful view, if it takes 20 pages to explain why something is obvious, it simply is not obvious.

[34] This being said, the plain and obvious test has yet to be applied to circumstances exactly as they are in this case. There do not appear to be any decisions in which the Court struck pleadings because they contained an argument that the Minister was precluded from advancing by virtue of subparagraph 152(4.01)(*a*)(ii) of the *Act*. None of the decisions cited by the Appellant in the Notice of Motion directly pertain to a motion to strike under Rule 53. *Honeywell v. The Queen*, 2007 FCA 22 and *Walsh v. The Queen*, 2007 FCA 222 pertain to motions to amend pleadings. The same can be said for the authorities submitted by both the Appellant and Respondent in support of their written submissions. While their authorities may analyse subparagraph 152(4.01)(*a*)(ii) of the *Act* in the context of amending pleadings or other, the analysis has not yet been done within the context of the plain and obvious test required by section 53 of the *Rules*.

[35] There is a significant difference between the standards to which are held motions to amend and motion to strike pleadings. *Canderel Ltd v. R*. [1993] 2 CTC 213, [1994] 1 FC 3 establishes that amendments to pleadings are to be allowed so long as they relate to the issue in the appeal and do not prejudice the parties or cause injustice. In contrast, the plain and obvious test applied to striking motions is significantly higher, more stringent, and the courts have ruled that striking pleadings is to be done in only the most exceptional cases.

[36] This therefore limits the applicability of the suggested precedents to the motion at bar. While the analysis of the proposed authorities is relevant as they pertain to subparagraph 154(4.01)(*a*)(ii) of the *Act*, the outcome of these cases are not determinative on the outcome of the instant motion.

[37] Ultimately, in determining whether to grant the motion to strike portions of the Respondent's pleadings, the question is whether it is plain and obvious that the Respondent is not entitled to plead the alternative argument.

[38] In order to determine this, I will first approach the two issues raised by the parties and go through the analysis as effectuated in the precedents submitted to this Court. The two main issues to be determined are whether the alternative argument relies on questions that did not form the basis of the reassessment, and second whether the alternative argument reasonably relates to the waiver. This analysis will then be framed and considered within the context of the plain and obvious test to determine the outcome of the Appellant's motion.

Does the alternative argument rely on transactions that did not form the basis of the reassessment?

[39] Subsection 152(9) of the *Act* reads as follows:

> **Alternative basis for assessment** – The Minister may advance an alternative argument in support of an assessment at any time after the normal reassessment period, unless, on an appeal under this *Act*
>
> > (a) there is relevant evidence that the taxpayer is no longer able to adduce without the leave of the court; and
> >
> > (b) it is not appropriate in the circumstances for the court to order that the evidence be adduced.

[40] It is established in Canadian jurisprudence that the Minister is entitled to rely on subsection 152(9) to advance an alternative argument in certain situations.

[41] The Federal Court of Appeal in *Walsh v. The Queen*, 2007 FCA 222, sets out three relevant limitations.

> 1) the Minister cannot include transactions which did not form the basis of the taxpayer's reassessment;
>
> 2) the right of the Minister to present an alternative argument in support of an assessment is subject to paragraphs 152(9)(*a*) and (*b*), which speak to the prejudice to the taxpayer; and
>
> 3) the Minister cannot use subsection 152(9) to reassess outside the time limitations in subsection 152(4) of the Act, or to collect tax exceeding the amount of the assessment under appeal.

[42] *Anchor Pointe Energy Ltd. v. The Queen*, 2003 FCA 294, and *The Queen v. Loewen*, 2004 FCA 146 further explain that a Respondent is not precluded from relying on subsection 152(9) to advance an alternative argument except in

circumstances where the factual transactions underpinning the alternative argument are different than the ones underpinning the reassessment.

[43] In this case I find that the transactions underpinning the alternative argument do not appear to be substantially different from those underpinning the reassessments at issue. Indeed, the Minister assumed in issuing the relevant reassessments, among other things, that:

- The debentures for the purchase by the Appellant's RRSP trust had a value at the time of acquisition of nil to nominal; and
- The funds which had purportedly been used to purchase the debentures were ultimately diverted to a law firm's trust account.

[44] In my view a series of transactions through which the Appellant might have *directly* diverted funds from his RRSP to the law firm's trust account is not materially different from the transactions assumed by the Minister. Rather it seems that the only difference between the facts underpinning the alternative argument and the facts underpinning the reassessments relates to the question of whether the Appellant's RRSPs were a legally acquired asset of nominal or nil value.

[45] Further assumptions made by the Minister in reassessing the Appellant are:

- PI Ventures was a shell company.
- The annuitant directed Olympia Trust to transfer the funds held in his RRSP account to the Singh Walters Bindal Trust Account no. 5204448 to obtain access to the said funds.
- The RRSP funds that ended up in Singh Walters Bindal Trust Account were never used for PI Ventures Inc.'s own purpose but were transferred to various companies in or outside of Canada.

[46] It seems clear that the transactions underlying the reassessment and the alternative argument are the alleged transactions undertaken by the Appellant to circumvent tax on his RRSP funds. Naturally, all of the sections of the *Act* in question, subsection 146(8), (9) and (10), are all provisions aimed in part at preventing taxpayers from diverting funds out of their RRSPs on a tax-free basis. It is the transactions relating to the "RRSP stripping", and more particularly the diversion of funds from the RRSP account to the law firm's trust account, that underpin both the reassessment and the alternative argument.

[47] As such, I am of the view that the alternative argument does not "include transactions which did not form the basis of the taxpayer's assessment" as described in *Walsh*, and as purported by the Appellant.

[48] Also, none of the concerns referred to in paragraphs 152(9)(*a*) and (*b*) of the *Act* appear to be present in these circumstances.

Does subsection 146(8) reasonably relate to the matters specified in the waivers?

[49] Section 152 of the *Act* provides the rules relating to the Minister's issuance of assessments and reassessments. Subections 152(4), (4.01) and (5) provide:

> **152(4) Assessment and reassessment.** The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if
>
> (*a*) the taxpayer or person filing the return
>
> (i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act, or
> (ii) has filed with the Minister a waiver in prescribed form within the normal reassessment period for the taxpayer in respect of the year; or
>
> (*b*) the assessment, reassessment or additional assessment is made before the day that is 3 years after the end of the normal reassessment period for the taxpayer in respect of the year and
>
> (i) is required under subsection (6) or (6.1), or would be so required if the taxpayer had claimed an amount by filing the prescribed form referred to in the subsection on or before the day referred to in the subsection,
>
> (ii) is made as a consequence of the assessment or reassessment pursuant to this paragraph or subsection 152(6) of tax payable by another taxpayer,
>
> (iii) is made as a consequence of a transaction involving the taxpayer and a non-resident person with whom the taxpayer was not dealing at arm's length,
>
> (iii.1) is made, if the taxpayer is non-resident and carries on a business in Canada, as a consequence of

(A) an allocation by the taxpayer of revenues or expenses as amounts in respect of the Canadian business (other than revenues and expenses that relate solely to the Canadian business, that are recorded in the books of account of the Canadian business, and the documentation in support of which is kept in Canada), or

(B) a notional transaction between the taxpayer and its Canadian business, where the transaction is recognized for the purposes of the computation of an amount under this Act or an applicable tax treaty.

(iv) is made as a consequence of a payment or reimbursement of any income or profits tax to or by the government of a country other than Canada or a government of a state, province or other political subdivision of any such country,

(v) is made as a consequence of a reduction under subsection 66(12.73) of an amount purported to be renounced under section 66,

(vi) is made in order to give effect to the application of subsection 118.1(15) or 118.1(16).

(4.01) Assessment to which para. 152(4)(*a*) or (*b*) applies — Notwithstanding subsections (4) and (5), an assessment, reassessment or additional assessment to which paragraph (4)(*a*) or (*b*) applies in respect of a taxpayer for a taxation year may be made after the taxpayer's normal reassessment period in respect of the year to the extent that, but only to the extent that, it can reasonably be regarded as relating to,

(*a*) where paragraph (4)(*a*) applies to the assessment, reassessment or additional assessment,

…

(ii) a matter specified in a waiver filed with the Minister in respect of the year; and

(5) There shall not be included in computing the income of a taxpayer for a taxation year, for the purpose of an assessment, reassessment or additional assessment made under this Part after the taxpayer's normal reassessment period in respect of the year, any amount that was not included in computing the taxpayer's income for the purpose of an assessment, reassessment or additional assessment made under this Part before the end of the period.year; and

…

(emphasis added)

[50] Subparagraph 152(4.01)(*a*)(ii) provides that the Minister can issue a reassessment after the normal reassessment period, to the extent, but only to the extent, that it can reasonably be regarded as relating to "a matter specified in a waiver filed with the Minister in respect of the year". By virtue of *Honeywell*, we know that this rule applies to alternative bases for reassessments advanced during the appeal process. This Court must therefore determine if the alternative argument which cites subsection 246(8) of the *Act*, reasonably relates to the matters specified in the waiver.

[51] Case law has established that for the purposes of subparagraph 152(4.01)(*a*)(ii), a waiver should be interpreted objectively when there is a technical defect or when the intentions of the parties differ, *Chafetz v. The Queen*, 2007 FCA 45, and this interpretation must be performed within the context of the surrounding circumstances of the appeal, *Brown v. The Queen*, 2006 TCC 381.

[52] Similarly, when interpreting a waiver, the text is not necessarily determinative. This issue was discussed by Justice Reed in *Stanley J. Solberg v. M.N.R.*, 92 D.T.C. 6448 (F.C.T.D.) whose reasoning was followed in *Fagan v. The Queen*, 2011 TCC 523. In *Fagan*, Justice Angers emphasized that extrinsic evidence is often relevant when interpreting a waiver. See paragraphs [34] and [35].

Scope of the Waiver:

[53] The waiver signed by the parties for the 2002 taxation year reads as follows:

> Income inclusion of $130,500 relating to acquisition of non-qualified investment (PI Ventures Corporation convertible debentures) for a RRSP subject to s. 146(9) and/or 146(10).

[54] I interpret the waiver as being sufficiently broad as to find that the alternative argument can reasonably be regarded as relating to matters specified in the waiver.

[55] I come to this conclusion in first noting that the alternative argument must only reasonably relate to the matter of the waiver – it does not need to be expressly included in the waiver. I interpret the "matter" specified in the waiver to be the income inclusion and treatment of $130,500 for the 2002 taxation year. In my view it would be too narrow of an interpretation to find that the "matter" of the waiver is an income inclusion resulting exclusively from the acquisition of the debentures in PI Ventures. The matter of the waiver is not limited to specified provisions that explain why the matter might be included as income. The matter of

the waiver is not confined within the parameters of subsections 146(9) and (10); the matter of the waiver is the treatment of the specified income. As such, I find that the alternative argument reasonably relates to the matter set out in the waiver.

[56] As already mentioned, in cases where there is a defect in the waiver, or there is disagreement as to the extent and meaning of a waiver, the analysis turns to whether the meaning of the waiver is wider than the text alone. As we know from *Solberg* and *Fagan*, extrinsic evidence must be analysed when interpreting a disputed waiver. As was highlighted by J. Mogan in *Brown*,

> "Relevant surrounding circumstances are important to determine whether a subsequent reassessment falls within the stated terms of a waiver."

[57] The Appellant appears to be arguing that the waiver limits the Respondent's ability to reassess beyond subsections 246(9) and (10). The Respondent is clearly arguing that they do not share the Appellant's intention as to the scope of the waiver. In such cases of discrepant intentions, an objective interpretation of the waiver and the extrinsic surrounding evidence is the appropriate analysis (*Chafetz)*.

[58] In turning to the extrinsic evidence before the Court in this motion, one cannot escape the fact that the Proposal Letter clearly conveyed to the Appellant that the Minister was investigating an arrangement through which the Appellant received the value of his RRSP funds without paying the appropriate tax. It is worth again highlighting that subsection 246(8), just like subsections 246(9) and (10), works to prevent, in part, taxpayers from diverting funds out of their RRSPs on a tax-free basis.

[59] I have extracted certain passages from the Proposal Letter sent to the Appellant in January of 2006 which outline the Minister's concerns regarding the 2002 and 2003 taxation years. Based on the following excerpts, as well as my interpretation of the Proposal Letter as a whole, the Appellant knew, or ought to have known, that the issue in this case is RRSP stripping, not simply the acquisition of debentures.

- "Certain individuals associated with this sale of debentures are known to have previously promoted or facilitated arrangements aimed at extracting cash from RRSPs on a tax free basis."
- "The true purpose of the transactions was to remove the cash within your RRSP without creating a liability for income tax."

- "It is our opinion that the arrangement was intended to, and resulted in, the stripping of value of the RRSP."

[60] These passages show that the issue in the reassessment was not restricted to the acquisition of debentures and that the Appellant was aware of this fact. The waiver is as wide as the matter that it addresses, and these communications indicate that the matter the parties were dealing with was beyond the simple application of subsections 146(9) and (10). As such, I find that a non-textual, objective interpretation of the waiver, keeping in mind the circumstances and extrinsic evidence, also indicates that subsection 246(8) of the *Act* "reasonably relates" to the matters set out in the waiver.

[61] I am also compelled to find that the alternative argument reasonably relates to the matter of the waiver since subsections 146(8), (9) and (10) are all closely connected. These provisions read:

> (8) There shall be included in computing a taxpayer's income for a taxation year the total of all amounts received by the taxpayer in the year as benefits out of or under registered retirement savings plans, other than excluded withdrawals (as defined in subsection 146.01(1) or 146.02(1)) of the taxpayer and amounts that are included under paragraph (12)(*b*) in computing the taxpayer's income.
>
> …
>
> (9) Where in a taxation year a trust governed by a registered retirement savings plan
>
> (*a*) disposes of property for a consideration less than the fair market value of the property at the time of the disposition, or for no consideration, or
>
> (*b*) acquires property for a consideration greater than the fair market value of the property at the time of the acquisition,
>
> the difference between the fair market value and the consideration, if any, shall be included in computing the income for the taxation year of the annuitant under the plan.
>
> …
>
> (10) If at any time in a taxation year a trust governed by a registered retirement savings plan uses or permits to be used any property of the trust as security for a loan, the fair market value of the property at the time it commenced to be so used shall be included in computing the income for the year of the taxpayer who is the annuitant under the plan at that time.

[62] Subsection 146(1) defines "benefit" for the purpose of subsection 146(2) to generally include "any amount received out of or under a retirement savings plan" other than certain enumerated amounts.

[63] Subsections 146(8), (9) and (10) each apply to very similar circumstances. Subsection 146(8) can apply to require an income inclusion where a taxpayer receives an amount directly paid out of his RRSP. Similarly, subsection 146(1) can apply where a taxpayer seeks to avoid the application of subsection 146(8) by, for example, having his RRSP purchase property which he personally holds for an inflated amount. Subsection 146(9) can apply where a taxpayer seeks to avoid the application of subsection 146(8) by having his RRSP pledged as property security for a loan to a taxpayer in order to effectively remove the value from the RRSP assets. The commonalities and links between these provisions are strong.

[64] Moreover, amounts required to be included by virtue of subsections 146(8), (9) and (10) are all brought into income under paragraph 56(1)(*h*) of the *Act*.

[65] This case is unlike that of *Honeywell*, where the Minister reassessed the Appellant on an entirely new basis after receiving new information at the examination for discovery stage; *Honeywell*'s reassessment dealt with new facts, new issues, and new transactions that could not reasonably relate to the matters set out in the waiver. Similarly, the case at bar can also be distinguished from the case in *Mah*, where Chief Justice Rip found that the only relationship between the two provisions was that they were triggered in the same year. In stark contrast, the instant case deals with the same transactions, the same issues, and there is a direct connection between the provisions pleaded.

[66] I will address here the fact that the Appellant had maintained throughout the audit process that he had acquired the debenture units in question, however the Appellant changed his position in the Notice of Appeal, and now claims to have never acquired the units. It would be absurd to disallow the Respondent's alternative argument when one considers that the Appellant drafted the waiver attempting to limit the scope of the reassessment, then advanced a new argument in the Notice of Appeal that contradicts the information provided to the CRA during the audit, and now claims the Respondent cannot respond to their new position since it is outside the scope of the carefully crafted waiver.

[67] Given the relationship between subsections 146(8), (9) and (10) and given the common factual matrix underlining both the alternative argument and the reassessment, I believe that the alternative argument can reasonably be regarded as relating to the matter specified in the waiver. As a result, it is my view that the Respondent should be entitled to raise the alternative argument in their Reply.

Plain and obvious analysis:

[68] My foregoing conclusions, first that the alternative argument does not rely on new transactions that did not form the basis of the reassessment, and second that the alternative argument reasonably relates to the matter in the waiver, demonstrate that the Appellant's arguments fail and the alternative argument should proceed to the trial judge. Notably, the Appellant's arguments failed on the basic analysis of these questions which were developed in the context of amending pleadings, rather than striking them. It goes without saying that if the amending standard is not met, the striking standard is certainly not met. To have been successful in this Motion, the Appellant would have had to not only demonstrate how the foregoing analysis supports their argument, but also how coming to this conclusion is "plain and obvious." In my view, it is inconceivable that the pleadings should be struck, not alone plain and obvious.

Prejudice:

[69] I fail to see how allowing the alternative argument to remain in the Respondent's pleadings could prejudice or delay the fair hearing of the appeal within the meaning of subsection 53(a) of the *Rules*, or result in the abuse of the process of the Court within the meaning of subsection 53(c) of the *Rules*.

[70] I reference J. Angers, who wrote in *Fagan* :

> "The cases referred to above also confirm that a reassessment can reasonably be regarded as relating to the terms of the waiver if the evidence shows that the taxpayer was not surprised by the basis of the reassessment or if the basis of the reassessment was known to both the parties. In other words, the Courts have found that, in such circumstances, affirming the validity of the waiver will not result in prejudice to either party." [Emphasis Added]

[71] In this case, the Appellant could not have been reasonably surprised by the alternative argument advanced in the Reply since it was included in the Respondent's pleadings in simple response to the Appellant's new position in the Notice of Appeal.

[72] The Appellant's motion is therefore dismissed.

Respondent's Motion:

[73] The Respondent is seeking to amend the Reply to include two additional facts, namely the facts included in paragraphs 19A and 19B of the Amended Reply. The Appellant opposes the proposed amendments.

[74] Paragraph 19A sets out the exact amounts allegedly received by the Appellant in years 2004 through to 2007 from the Syndicated Gold Depository, totalling at $135,297.60 CAN. Paragraph 19B claims that these funds were a return from the Appellant's RRSP investment in PI ventures, as stated by the Appellant in a declaration dated June 20, 2008.

[75] It is important to first note that the Respondent's motion is a motion to amend under Rule 52 of the *Tax Court of Canada Rules (General Procedure)*, rather than a motion to strike under Rule 53. I have already established that the distinction between these two tests is significant. The law for amending pleadings was set out by the Federal Court of Appeal in *Canderel*. Justice Decary wrote:

> "… the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties. Provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice."

[76] It is clear to me that the facts set out in the new paragraphs relate to the heart of the appeal at bar. The paragraphs include facts relating to the tracing of funds from the Appellant's self-directed RRSP, which is clearly material and relevant to the issue of this appeal which is whether or not there was stripping of the Appellant's RRSP, resulting in the acquisition of the funds on a tax-free basis.

[77] I cannot imagine how the Appellant would be prejudiced in any way by the addition of these facts given that it was made clear to the Appellant since the very beginning of the audit that the CRA was investigating what they believed to be an RRSP stripping scheme. The Appellant has been anticipating this very argument from the Minister, and nothing with regard to the Respondent's position has changed with the addition of the new paragraphs. They are material facts that simply complete the Respondent's pleadings.

[78] Further, the CRA was not made aware of the facts set out in paragraphs 19A and 19B during the audit stage, and did not have these facts when the reassessments were issued in 2007. It is reasonable that they now seek to include these facts in their pleadings.

[79] In my view the Minister has acted correctly in bringing this motion early in the proceedings. I believe that any delay that may result from granting this motion will be minimal, and I have a hard time imagining how any resulting delay would be of the magnitude to cause an injustice worthy of refusing the amendment. As such, I find that the interest of justice is best served by allowing the Respondent's motion.

[80] The Respondent's motion is therefore granted, and the Amended Reply will now include paragraphs 19A and 19B.

[81] The Respondent is awarded costs on the dismissed Appellant's motion and on the Respondent's successful motion.

Signed at Ottawa, Canada, this 10th day of December, 2013.

"E.P. Rossiter"

Rossiter A.C.J.

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PLACE OF HEARING:	Vancouver, British Columbia
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REASONS FOR ORDER BY:	Associate Chief Justice E.P. Rossiter
DATE OF ORDER:	December 10, 2013

APPEARANCES:

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For the Respondent:	Janie Payette and Julie David

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