Docket: 2012-2215(IT)G

BETWEEN:

LORRAINE MCINTYRE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Docket: 2012-2216(IT)G

AND BETWEEN:

SIDNEY G. MCINTYRE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Dockets: 2012-2217(IT)G
2012-2223(GST)G

AND BETWEEN:

900214 ALBERTA LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on November 12, 2013 at Edmonton, Alberta

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellants: Jon D. Gilbert

Counsel for the Respondent: Connie Mah

ORDER

UPON Motion by the Appellants for the following relief:

1. The Appellants are applying pursuant to Rule 58 of the *Tax Court of Canada (General Procedure Rules)* that the Court determine a question of law, or mixed law and fact, or a question of fact, raised in the pleadings where the determination of the question will dispose of all or part of the proceeding, substantially shorten the hearing, or result in a substantial savings of costs.

2. The Appellant also applies for leave of the Court to introduce evidence as set out in the Grounds identified below.

(Appellants' Notice of Motion, p. 1)

AND UPON hearing submissions of the parties;

IT IS ORDERED THAT:

The Appellant's motion is dismissed, in accordance with the attached Reasons for Order.

Costs shall be in the cause or as otherwise directed by this Court on the disposition of the hearing.

Signed at Ottawa, Canada, this 9th day of April 2014.

"Diane Campbell"

Campbell J.

Citation: 2014 TCC 111
Date: 20140409
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AND BETWEEN:

900214 ALBERTA LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Campbell J.

[1] The Appellants brought a motion pursuant to Rule 58 of the *Tax Court of Canada Rules (General Procedure)* (the "*Rules*") for the determination of a question, which the Appellants contend will dispose of all or substantially all of the proceedings, substantially shorten the hearing of these appeals, or substantially reduce costs. The Appellants have also requested leave of this Court to introduce evidence if I find that the question is suitable for a determination under Rule 58.

[2] The question is whether the Respondent is bound by an Agreed Statement of Facts (the "Agreed Facts"), entered into as part of a plea bargain, in a prior criminal proceeding. The Appellants' argument is that the principles of issue estoppel, *res judicata* and abuse of process apply in these circumstances to prevent the Respondent from assuming facts in issuing the reassessments that are inconsistent with the Agreed Facts.

The Facts

[3] 900214 Alberta Ltd. (the "Corporation") conducts business as an oilfield contractor and consultant. Sidney Grant McIntyre ("Grant") and Lorraine McIntyre ("Lorraine") are the directors of the Corporation and each are 50 percent shareholders. Grant works for the Corporation as an oilfield contractor and consultant. Lorraine is the Corporation's bookkeeper.

[4] On June 16, 2009, the Minister of National Revenue (the "Minister") issued reassessments (the "First Reassessments") in respect of the Appellants to which they filed Notices of Objection. Prior to this, the Appellants had been selected for audit and, subsequently, the Minister commenced a criminal investigation. This resulted in criminal proceedings against the Appellants for tax evasion pursuant to the *Income Tax Act* ("the *ITA*") in respect of the 2002 to 2007 taxation years. Lorraine and the Corporation agreed to a disposition of the criminal proceedings by entering guilty pleas based upon the Agreed Facts. On March 25, 2011, Lorraine and the Corporation applied to change their pleas to guilty. The Court accepted the Agreed Facts and imposed sentences accordingly. The Information respecting Grant was withdrawn and he was never convicted.

[5] On February 8, 2012, the Minister issued a Notice of Confirmation in respect of the Corporation's First Reassessments issued under the *Excise Tax Act* for its reporting periods October 1, 2002 to September 30, 2007. On March 2, 2012, the

Minister issued a second reassessment in respect of the Corporation's income tax issues for the 2003 to 2007 taxation years with year ending September 30. The Minister also issued further reassessments on March 22, 2012 in respect of Lorraine and Grant for their 2002 to 2007 taxation years under the *ITA*.

[6] In issuing the confirmation and these further reassessments, which were for amounts greater than those established in the Agreed Facts, the Minister refused to be bound by those Agreed Facts.

[7] In their Notices of Appeal, the Appellants argued that any reassessments must be consistent with the Agreed Facts because, otherwise, it would offend the doctrines of issue estoppel, *res judicata* and abuse of process.

The Questions

[8] The Appellants posed the following questions for determination:

> a. Do the principles of issue estoppel, res judicata, and abuse of process apply to prevent the Minister from assuming facts inconsistent with the Agreed Facts?
>
> b. Are the Respondent and Appellants bound by the Agreed Facts for the purposes of these Tax Court of Canada appeals, in particular, but not limited to:
>
> i) The Calculation of Lorraine's capital gain associated with the disposition of the Mabel Lake Lot, referred to in paragraphs 8 to 12 of the Agreed Facts;
>
> ii) Whether $61,995.91 received by 900Co from Progress Energy Ltd. and advanced to Grant and Lorraine constitute a shareholder debt under subsection 15(2) of the *Income Tax Act*, as referred to in paragraphs 13 to 19 of the Agreed Facts;
>
> (iii) Whether 900Co's net income (loss) for tax purposes is conclusively determined by virtue of paragraph 32 of the Agreed Facts; and,
>
> iv) Whether Grant and Lorraine's shareholder benefits assessed under subsection 15(1) of the *Income Tax Act* is conclusively determined by virtue of paragraphs 33 to 36 of the Agreed Facts.
>
> (Appellants' Notice of Motion, p. 7)

The Appellants' Position

[9] The Appellants contend that the Agreed Facts, accepted by the Provincial Court in the criminal proceedings, conclusively determine the facts in any subsequent judicial proceeding involving the same parties. According to the Appellants, issue estoppel should still apply even though a judgment granted may not have extended to all issues or where it was granted with the consent of the parties. Consequently, the Minister's reassessments must be in accordance with the Agreed Facts. This will permit finality, consistency and avoid relitigation of facts determined in the prior criminal proceedings. The Appellants' Counsel, in his oral submissions, argued that the Agreed Facts also give rise to issue estoppel in respect of the Corporation's GST appeal and Grant's income tax appeal. Since the underlying factual determinations and issues are the same in all of the appeals, they can apply to Grant's income tax appeal and the corporate GST appeal, even though they were not directly dealt with in the criminal proceedings. The Appellants' Counsel contended that, instead of hearing the issue estoppel argument at the hearing, it should be resolved under Rule 58 "…which I think would give us the complete answer. Either the criminal disposition is binding, or it is not. If it is not, we can forget about it. If it is, then we don't have to revisit and relitigate issues …" (Transcript, p. 10). Almost contrary to that argument, the Appellants' Counsel clarified that the Appellants were,

> … not trying to restrict the CRA to only reassessing the amounts that were covered in the agreed statement of facts in the criminal matter.
>
> As I said, there were lots of items that were reassessed that weren't at issue in the criminal case, and we are not disputing them in the tax case either.
>
> What we have asked for is for the court to issue an order in a Rule 58 motion that would require the Crown to give effect in the civil proceeding to the amounts dealt with in the criminal proceedings.
>
> That is all we've asked for. We are not trying to suggest that this criminal proceeding has anything to do with amounts that weren't covered by the agreed statement of facts.
>
> (Transcript, p. 84)

[10] The Appellants' Counsel also seeks to introduce the criminal record as evidence if the question is appropriate for determination in accordance with Rule 58. Included in this request were the reassessments that were issued, the Informations that were sworn and filed, the entire Agreed Facts, the transcript of the hearing, the sentencing particulars and the Certificates of Conviction.

The Respondent's Position

[11] The Respondent argued that the present question was not a proper one under Rule 58 for several reasons. First, although issue estoppel may apply to civil tax assessments, where there is a criminal conviction, the caselaw has established that issue estoppel does not apply where the prior conviction arises from a plea bargain as opposed to an actual trial with judicial findings of fact. Consequently, the Agreed Facts cannot be determinative of facts in the Appellants' tax appeals and could not dispose of all or part of the appeals. Second, the Agreed Facts and plea bargain did not relate to the corporate GST appeal or to Grant's income tax appeal. Instead they applied only to amounts of income tax evaded by the Corporation and Lorraine under the *ITA*. Therefore, the present tax appeals are not a relitigation of all of these matters. Third, a prior conviction will only estop the parties from relitigating or arguing amounts lower than those established in the criminal conviction. The Minister has reassessed the Appellants for amounts higher than those established in the plea bargain and Agreed Facts. In addition, the corporate GST appeal and Grant's appeal under the *ITA* were not included in the plea bargain. The Minister has also included issues in respect of the appeals of Lorraine and the Corporation, which are also unrelated to the plea bargain.

[12] The Respondent suggested that, contrary to the Appellants' argument, the only abuse of process that could occur would be if the Minister is restricted to the Agreed Facts in the four civil tax appeals that are before this Court. This unfairness would occur for several reasons: one, the Minister would be prevented from tendering evidence in the Tax Court when no findings of fact were made in the criminal proceedings but instead were negotiated; two, the civil burden of proof, which is based on a "balance of probabilities", would be replaced by the criminal burden of proof, which is based on "beyond a reasonable doubt"; and three, the burden of proof would effectively be shifted from the Appellants to the Minister to prove facts not negotiated in the plea bargain.

[13] Finally, the Respondent opposed the introduction of evidence because it would amount to arguing the tax appeals themselves in a Rule 58 motion, which is more appropriately left to a trial Judge. Portions of the Notices of Appeal contain assertions of fact that are in dispute in the tax appeals and for which the Respondent is entitled to conduct examinations and tender evidence at a hearing.

Law and Analysis

[14] The Appellants bring this motion pursuant to Rule 58 of the *Rules*, the relevant portions of which provide as follows:

> **58.** (**1**) A party may apply to the Court,
> (*a*) for the determination, before hearing, of a question of law, a question of fact or a question of mixed law and fact raised by a pleading in a proceeding where the determination of the question may dispose of all or part of the proceeding, substantially shorten the hearing or result in a substantial saving of costs, or
> […]
>
> (**2**) No evidence is admissible on an application,
> (*a*) under paragraph (1)(*a*), except with leave of the Court or on consent of the parties, or
> […]

[15] The doctrine of *res judicata* involves two branches: cause of action estoppel and issue estoppel. In *Angle v M.N.R.*, [1975] 2 SCR 248 at 254, Dickson J. (as he was then) explained the distinction as follows:

> … The first, "cause of action estoppel", precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a court of competent jurisdiction. We are not here concerned with cause of action estoppel as the Minister's present claim that Mrs. Angle is indebted to Transworld in the sum of $34,612.33 is obviously not the cause of action which came before the Exchequer Court in the s. 8(1)(c) proceedings. The second species of estoppel *per rem judicatam* is known as "issue estoppel", a phrase coined by Higgins J. of the High Court of Australia in *Hoystead v. Federal Commissioner of Taxation* (1921), 29 C.L.R. 537, at p. 561:
>
> > I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue-estoppel").

In addition to the two branches of *res judicata*, courts may apply the doctrine of abuse of process to prevent relitigation.

[16] Cause of action prevents parties from relitigating the same cause of action. Issue estoppel prevents parties from relitigating questions, facts or rights which have previously been adjudicated upon.

[17] In *Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 SCR 460, the legal test for the operation of issue estoppel was reviewed by Binnie J. as follows:

> 25 The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle*, *supra*, at p. 254:
>
> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

These three tests can be summarized briefly as (1) identity of issues, (2) finality and (3) mutuality/privity. Although the Respondent referred me to the four-part test laid down by the Federal Court of Appeal in *Van Rooy v M.N.R.*, 88 DTC 6323, I have relied on the three-part test set down by the Supreme Court of Canada in *Danyluk*. I believe the fourth question in *Van Rooy* (that is, whether the question out of which the estoppel is said to arise must have been fundamental to the decision arrived at in earlier proceedings) is implicit in the three-part test set out in *Danyluk*.

[18] Issue estoppel will only apply to issues that were fundamental to the initial decision in a prior proceeding and it will not apply in respect of a question that must be inferred by argument from the judgment.

[19] Even where a court determines that the legal test for issue estoppel has been satisfied, the court must still decide, as a matter of discretion, whether, in the circumstances, issue estoppel should be applied in any event (*Danyluk*, para 33). In exercising this discretion, which originates from the court's inherent power to prevent the misuse of its procedures, a court's main objective will be to ensure that the application of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in a particular case (*Danyluk*, para 67).

[20] Courts have sometimes applied the doctrine of abuse of process to prevent relitigation in cases where the strict requirements of *res judicata* are not met. Even where the privity/mutuality requirement is not met, relitigation should be precluded if it would violate "such principles as judicial economy, consistency, finality and the integrity of the administration of justice." (*Toronto (City) v C.U.P.E., Local 79*, 2003 SCC 63, [2003] 2 SCR 77 at para 37).

[21] Both doctrines, *res judicata* and abuse of process, engage the same policy grounds: a concern for finality in litigation, preservation of the courts' and the

litigants' resources and a concern for the integrity of the justice system (*Toronto v CUPE*, at para 38).

[22] An application for determination of a question under Rule 58 involves a two-stage process. The first stage, which is before me, involves a review of whether the proposed question is suitable for a determination under Rule 58 ("Stage One"). If it is determined to be a suitable question, it will proceed to the second stage, which is a hearing of that question ("Stage Two").

[23] To be successful at Stage One, the following three technical requirements must be met:

(a) there are questions of law, fact or mixed law and fact;

(b) they are raised by the pleadings; and

(c) the questions may dispose of all or part of the proceeding, may substantially shorten the hearing of the appeal and may result in a substantial savings of costs.

(*HSBC Bank Canada v The Queen*, 2011 TCC 37)

[24] In submissions, the Appellants' Counsel characterized the question before me as "likely a question of mixed law and fact" (Transcript, pp. 7-8). The Respondent made no submissions in this regard. Although I might have characterized it more as a question of law, it nevertheless satisfies the first requirement set out in *HSBC Bank Canada*. The second requirement is also met as the Notices of Appeal raise the question as an issue. This question, however, does not satisfy the third requirement. If I had decided to permit this question to go to Stage Two, there is a potential that it could shorten the hearing and save costs, but that would be assuming that the parties are bound by the Agreed Facts and limited only to the quantum of net income for the Corporation and shareholder benefits for Lorraine.

[25] Beyond the technical requirements, the Court has the discretion to consider other factors, together with all the circumstances of the case, in determining whether the question is appropriate for a Rule 58 determination (*Perera v Canada*, [1998] 3 FC 381 (Fed CA).

[26] Rule 58(1)(*a*) was amended in 2004 to add the words: "a question of fact or a question of mixed law and fact". Prior to that, applications under this Rule were

limited to questions of law. Consequently, much of the jurisprudence, concerning Rule 58, has held that there must be no dispute as to any fact material to the question of law to be determined (*McLarty v Canada*, 2002 FCA 206, at para 7; *Webster v Canada*, 2002 FCA 205, at para 20). Since the amendment to this Rule, the existence of factual disputes is no longer an absolute bar to granting an application but will remain relevant to a question of whether the determination will substantially shorten the hearing or save costs (*Delso Restoration Ltd. v Canada*, 2011 TCC 435 at paras 13-14).

[27] Despite this amendment, a Rule 58 determination should never be a substitute for a hearing and there should never be a dispute as to the material facts underpinning the question of law. As such, a Rule 58 determination should not be an easily accessible alternative to a hearing for contentious disputes (*Jurchison v The Queen*, 2001 FCA 126 at para 8).

[28] In discussing the application of issue estoppel in a Rule 58 determination, Justice Boyle in *Golden et al v The Queen*, 2008 TCC 173, 2008 DTC 3363, at paragraph 25, made the following comments:

> The doctrine of issue estoppel should only be applied in a tax appeal in this Court in respect of a prior criminal tax evasion conviction in clear cases. It should not be applied indiscriminately once the preconditions are met. The Court should be satisfied that the issue of quantum in each particular taxation year was decided in the criminal proceedings.

[29] The doctrine of issue estoppel may be applied in appeals to this Court where there has been a prior criminal conviction for tax evasion in respect of the same tax dispute even though each court has different burdens of proof (*Van Rooy*). However, the Court in *Van Rooy* noted that the converse is not the case, that is, an acquittal from tax evasion charges cannot serve as evidence that a taxpayer is not liable for the tax.

[30] The Respondent argued that the question posed by the Appellants is inappropriate for a Rule 58 determination because criminal plea bargains do not constitute issue estoppel. The Respondent's argument is based on the distinction between criminal convictions resulting from trials with judicial findings of fact and those arising from plea bargains resulting from negotiations between counsel with no judicial findings of fact. The Respondent relied on the decisions in *Harris v The Queen*, 2005 TCC 501, 2005 DTC 1179; *Pontarini v The Queen*, 2009 TCC 395, 2009 DTC 1268 and *Lai v The Queen*, [2001] GSTC 24 to support this distinction.

[31] In *Hagon v The Queen*, 99 DTC 336, Justice Bowie considered the effects of a conviction from a plea bargain in criminal proceedings on a subsequent proceeding at paragraphs 9 to 11:

> [9] It is well settled that a conviction under the *Income Tax Act* may, in proper circumstances, give rise to an estoppel in later civil proceedings under the Act: *Van Rooy v. M.N.R.* In the present case there is no problem of identity of issue, as there was in Van Rooy; the conviction was as to the amount of $7,134.51, which is not all, but is an identifiable part, of the income added by the reassessment under appeal for 1989.
>
> [10] Nevertheless, it is my view that this is not a proper case in which to permit an estoppel to be raised. The evidence shows that the conviction arises out of a plea bargain, a process in which there is necessarily some give and take on both sides. This is the sort of circumstance that Blair, J.A. had in mind in the *Del Core* case, where he said of a conviction in criminal proceedings that:
>
> > ... such evidence constitutes *prima facie* and not conclusive proof of the fact of guilt in civil proceedings. The prior conviction must of course be relevant to the subsequent proceedings. Its weight and significance will depend on the circumstances of each case. ...
>
> He then went on to point out that the effect of a conviction may be mitigated by explanation of the circumstances surrounding the conviction.
>
> [11] In the present case, the fact that the conviction arose out of a guilty plea which was part of a plea bargain is significant. There may have been very sound practical reasons other than guilt that motivated the plea. Counsel has not referred me to any authority dealing with the effect to be given to a bargained plea of guilty, and absent such authority, I am not inclined to find that the Appellant is estopped in this case.

[32] In *Harris*, Justice Sheridan held that a prior plea bargain and guilty plea, resulting from joint submissions, as opposed to judicial findings on the merits, could not constitute issue estoppel. Consequently, she refused to consider issue estoppel as a preliminary issue at the outset of the hearing.

[33] In *Pontarini*, at paragraph 23, Justice Boyle concluded that the taxpayer's guilty plea to tax evasion was only one factor that should be considered and weighed by the Court. The Court concluded that it provided "…some possible evidence of his intention to make the false statements and omissions. It is not incontrovertible evidence by reason of either issue estoppel or abuse of process because he pleaded guilty."

[34] In *Lai*, an informal procedure case, Justice Beaubier noted the different burden of proof in criminal proceedings as opposed to civil tax proceedings. He concluded that a charge of tax evasion required the Crown to prove its case beyond a reasonable doubt while a GST assessment required that the taxpayer bring forward evidence to dispute the Minister's assumptions respecting the assessment.

[35] I agree with the Respondent's analysis of the caselaw. It confirms that prior convictions in criminal proceedings resulting from plea bargains, although a factor that may go to weight in a civil tax proceeding, are not determinative of the relevant facts and issues in a subsequent tax appeal.

[36] Generally, courts have been reluctant to apply issue estoppel or abuse of process to relieve taxpayers from having to prove facts allegedly determined in a prior criminal proceeding. In *Wong v The Queen*, 2010 TCC 171, 2010 DTC 1129, Justice V. Miller, in considering whether issue estoppel or abuse of process applied to prevent the Minister from relitigating issues decided in the criminal trial, was not convinced that the issues in the tax evasion proceedings were the same as those in the tax appeal before this Court and, consequently, dismissed the Rule 58 motion.

[37] In *Warawa v The Queen*, 2002 DTC 1264, Justice Mogan dealt with a Rule 58 application in which the taxpayer alleged that the Minister's assessments should be vacated because they were based upon evidence obtained in violation of his *Charter* rights. At paragraph 9, the Court noted that the basic problem facing the taxpayer in that motion related to the significant difference between criminal and civil litigation. After reviewing relevant caselaw, where other courts, including the Supreme Court of Canada and the Federal Court of Appeal, have distinguished civil from criminal proceedings, Justice Mogan concluded that the rights and expectations of individuals charged criminally are very different from the rights and expectations of individuals who institute an appeal of an assessment to this Court. Therefore, he concluded that the motion questions were best left to the trial Judge.

[38] In *MacIver v The Queen*, 2005 TCC 250, 2005 DTC 654, Justice Hershfield also concluded that a question is best left to the trial Judge where the motion is merely to estop a party from contesting certain facts that will not dismiss an entire appeal. As noted in his reasons, unless such a question can fully dispose of an appeal by finding that issue estoppel applies, a Rule 58 determination would do little more than split an appeal and tie the hands of the trial Judge.

[39] The Appellants' Counsel suggested that, if issue estoppel applies and the Agreed Facts are binding on the parties, the entire dispute in all appeals could be

disposed of. That suggestion is simply wrong. The Agreed Facts deal only with the income tax appeals of the Corporation and Lorraine. In addition, they relate only to their 2004 and 2007 taxation years. They do not address the 2002 and 2003 taxation years, which are still at issue in the present appeals. Also, the Agreed Facts do not deal with the Corporation's GST appeal or with Grant's income tax appeals. The details of the corporate GST assessment are extensive and are detailed in three Schedules attached to the Minister's Reply. The Agreed Facts do not address gross negligence penalties that were assessed in the GST corporate appeal and against some of the Appellants in the income tax appeals. In fact, in submissions, the Appellants' Counsel suggested that the Appellants would "likely" drop the penalty issue (Transcript, p. 9) if the Agreed Facts are held to be binding. That supports my conclusion that the Agreed Facts are not dispositive of the issues before this Court. In these circumstances, it cannot be said that, if issue estoppel applied, then the Agreed Facts could, in any manner, dispose of the entire substantive tax matters in these appeals.

[40] The caselaw suggests that moving to estop a part of an appeal is not appropriate in an interlocutory motion pursuant to Rule 58. Instead of splitting an appeal in such circumstances, the impact of the plea bargain, the Agreed Facts and the weight to be assigned to these is best left to the trial Judge.

[41] There is insufficient identity of issues between the prior criminal proceedings and the present appeals before this Court. Again, this precludes the application of issue estoppel. In considering the application of issue estoppel, where civil proceedings may be affected by the results of a prior criminal proceeding, Justice McArthur in *Belfast Lime Services Ltd. v The Queen*, [1997] GSTC 108 stated at paragraph 10:

> … it must be a clear and obvious case that there is sufficient identity of issues before a taxpayer's rights become barred from the jurisdiction of this Court. … The issue estoppel doctrine cannot be partially applied to the period within the Appellant's conviction, or within the quantum of net tax convicted upon, without greater certainty in the trial judge's adjudication upon the facts. The Appellant cannot be said to have accepted, implicitly or explicitly, the Minister's reassessments for this period when it pleaded guilty. …
> (Emphasis added)

In criminal prosecutions, where the burden of proof is a more onerous one than in civil tax appeals, it may be that only the quantum of tax that can be fully supported in respect of this higher burden will be addressed in a plea bargain, contrary to the quantum that may be able to be supported in issues in civil tax appeals.

[42] In this motion, even if the Agreed Facts addressed all of the Appellants' appeals, which they do not, it is clear that the criminal conviction addresses only a portion of the period of time in some of the appeals that are before this Court. This again precludes the application of issue estoppel.

[43] Although the Agreed Facts clearly identify the quantum of net income for the Corporation and the consequent shareholder benefits to Lorraine for the 2004 to 2007 taxation years, the Minister is not estopped from reassessing the Appellants subsequently for amounts higher than those established in the Agreed Facts. That was the issue in *Mortensen/Kristensen v The Queen*, 2010 TCC 177/178. There, Justice Little held that a taxpayer was estopped from arguing that he did not earn income or incur expenses that formed the basis of the criminal proceedings but was not estopped from arguing that he did not earn other income or incur additional expenses at issue in the appeal.

[44] In summary, issue estoppel may be applied to prevent a party from relitigating an issue when that same issue has been determined in prior proceedings in another court. The Agreed Facts address only the tax appeals of the Corporation and Lorraine. Since the Agreed Facts do not involve Grant's income tax matters or the corporate GST appeal, there is no relitigation of these two matters and, as a consequence, the preconditions for issue estoppel are not met. Although the corporate *ITA* appeal and Lorraine's appeal satisfy the mutuality of parties, the remaining two preconditions for issue estoppel are not met because there were issues in their tax appeals that were not dealt with in the prior criminal proceedings and plea bargain. Thus, there can be no finality of issues as required in issue estoppel. In addition, amounts dealt with in criminal proceedings are minimum amounts with respect to the civil proceedings. Therefore, the Minister is able to reassess amounts for income tax purposes in excess of the quantum of tax evaded and in respect of issues not determined in the criminal proceedings. It is clearly not a proper question to have it proceed to a Rule 58 determination under Stage Two where the Minister would be restricted in four tax appeals to a set of negotiated facts which resulted from a criminal plea bargain. This is particularly true where two of those four appeals are not addressed in the Agreed Facts. Caselaw has clearly established that issue estoppel does not apply in circumstances where the prior criminal conviction arises from a plea bargain. Such agreed facts arising from a plea bargain cannot be determinative of the facts in subsequent tax appeals. The distinction, between criminal convictions arising from evidentiary findings resulting from a hearing and those convictions arising from plea bargains, is an important one. The latter do not constitute issue estoppel. As acknowledged by Justice Bowie in *Hagon*, the reality of convictions

based on plea bargains is that they do not arise as the result of a trial on the merits with judicial consideration and weighing of evidence and consequent findings of fact. Instead, they are based on the parties' negotiations for the purposes of a plea bargain and sentencing. In these circumstances, there can be no relitigation because there was no litigation of the initial criminal charges in the first instance and the basis of the plea bargain may contain considerations beyond the merits of the case.

[45] For these reasons, this is not a proper question for a Stage Two inquiry pursuant to Rule 58. The matter is best left to the trial Judge, including the Appellants' request to introduce some of the materials from the criminal proceedings. Even if I had permitted the question to go to Stage Two, I would be hesitant to grant leave to introduce that evidence for the purpose of this motion. It would have all the trappings of splitting the appeals and the motion would have the semblance of a trial. Caselaw has established that a Rule 58 motion is not a substitute for a trial nor should it be regarded as an easily accessible alternative to a trial.

[46] Finally, I conclude that to restrict the Minister in the civil tax appeals before this Court to the Agreed Facts, established pursuant to a plea bargain, would constitute an abuse of process. Otherwise, unfairness would result because the parties would effectively be prohibited from tendering evidence in the appeals before this Court when no evidence was tendered or weighed in the prior criminal proceedings and no judicial findings of fact were made. My reasoning is applicable to all four appeals but particularly to the corporate GST appeal and Grant's *ITA* appeal, which were never addressed at all in the prior proceedings. The negotiated Agreed Facts are not determinative of the issues in the appeals that are before this Court and to conclude otherwise would negatively affect the preservation of the integrity and particularly the effectiveness of the Court. Fairness dictates that the administration of justice would be best served by dismissing this motion for a determination of a question pursuant to Rule 58 rather than permitting a Stage Two proceeding to proceed under this Rule.

[47] Although neither party addressed costs, I am ordering costs in the cause or as otherwise directed by this Court on the disposition of the appeals.

Signed at Ottawa, Canada, this 9th day of April 2014.

"Diane Campbell"

Campbell J.

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COURT FILE NOS.:	2012-2215(IT)G 2012-2216(IT)G 2012-2217(IT)G; 2012-2223(GST)G
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PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	November 12, 2013
REASONS FOR ORDER BY:	The Honourable Justice D. Campbell
DATE OF ORDER:	April 9, 2014

APPEARANCES:

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Counsel for the Respondent:	Connie Mah

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