Docket: 2023-692(IT)G

BETWEEN:

THE ESTATE OF SAMUEL LEVINSON,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Motion heard on June 10, 2024 at Toronto, Ontario

Before: The Honourable Justice Joanna Hill

Appearances:

Counsel for the Appellant:	Bobby Sood Juan Higuera
Counsel for the Respondent:	Peter Basta

ORDER

WHEREAS the Appellant brought a motion seeking:

a. default judgment pursuant to section 63 of the *Tax Court of Canada Rules (General Procedure)*;

b. in the alternative, an order striking paragraphs of the Reply to the Notice of Appeal pursuant to subsection 53(1) of the Rules; and

c. costs on the motion;

UPON CONSIDERATION of the Appellant's affidavit evidence, written outline of argument, and oral submissions, as well as the Respondent's affidavit evidence and oral submissions;

THIS COURT ORDERS THAT, in accordance with the attached Reasons:

1. The Respondent's request for an extension of time to file its Reply to the Notice of Appeal is granted as of the date of this Order, and the Reply dated January 18, 2024 is accepted for filing as of that date;

2. The Appellant's motion for default judgment and for an order striking paragraphs of the Reply is dismissed; and,

3. The Respondent shall pay costs of $1,000 to the Appellant, on or before April 7, 2025.

Signed this 7th day of March 2025.

"Joanna Hill"

Hill J.

Citation: 2025TCC40
Date: 20250307
Docket: 2023-692(IT)G

BETWEEN:

THE ESTATE OF SAMUEL LEVINSON,

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Respondent.

REASONS FOR ORDER

Hill J.

I. Introduction

[1] The present matter originally began as a motion to strike portions of the Reply to the Notice of Appeal. However, shortly before the hearing, counsel for the Appellant realized that the Court had not accepted the Reply because it was not filed within a 60-day Court-ordered deadline. The Appellant therefore amended its motion to include a request for default judgment. In turn, the Respondent argued that the Reply was filed on time, and that the Appellant did not meet the test to strike.

[2] Both parties presented novel, unsuccessful arguments in support of their positions.

[3] The Respondent argued that the Reply was filed on time, on the basis that the winter recess should have been excluded from the calculation of the 60-day Court-ordered deadline, pursuant to section 11(b) of the *Tax Court of Canada Rules (General Procedure)*. This argument fails because Rule 11(b) applies only to deadlines in directions or under the Rules. The Respondent's attempt to extend the definition of a direction to include orders is not supported by the text, or the context and purpose of the Rule and its enabling statute.

[4] However, I am satisfied that the test for extension of time to file the Reply has been met. It would be in the interests of justice for this matter to proceed with a reply

that outlines the Respondent's position and assists in establishing the parameters for the remaining steps in the appeal. The Appellant is not prejudiced by the extension because the Respondent already had the onus of establishing whether the Minister of National Revenue was entitled to issue reassessments beyond the normal reassessment period.

[5] The Appellant's motion for default judgment is therefore moot, though I would have denied that request because the Notice of Appeal does not contain any material facts upon which default judgment could be granted. Furthermore, the Appellant improperly extended the scope of authorities regarding the validity of statute-barred assessments by arguing that they are presumptively *ultra vires*. To the contrary, these assessments are authorized by paragraph 152(4)(a) of the *Income Tax Act* and remain valid until this Court determines whether the Minister met her burden of establishing that the conditions of that provision were met.

[6] The Appellant's arguments in support of its request to strike various paragraphs of the Reply also improperly extend the scope of relevant authorities. Not all deficiencies meet the heavy burden necessary to strike under Rule 53(1). In the present case, to the extent that there are deficiencies in the Reply, they are not prejudicial and do not constitute an abuse of process. The trial judge will be more than capable of applying established legal principles to ensure a fair and proper hearing of the appeal.

II. Background

[7] The Appellant filed its Notice of Appeal for the 2007, 2008, 2009 and 2010 taxation years on March 31, 2023. The pleading consisted of only eleven paragraphs, beginning with an overview stating its positions that the reassessments were statute-barred and that the Appellant did not have unreported income.

[8] The Notice of Appeal did not contain material facts in support of either position.

[9] The Respondent filed a motion to strike the Notice of Appeal, with leave to amend, and asked for 60 days to serve and file a reply.

[10] The Court granted the Respondent's motion, in part. By Order dated November 1, 2023, Justice MacPhee struck two paragraphs and one sentence of the

Notice of Appeal, after the Appellant advised that it would only pursue the issue of whether the Minister was entitled to issue statute-barred reassessments. Justice MacPhee also granted the Respondent an extension of time to file a reply to 60 days from the date of the Order and awarded the Respondent costs of $250 payable forthwith.

[11] On January 18, 2024, the Respondent delivered its Reply to the Court. By letter dated January 19, 2024, the Registry informed the Respondent that the Reply was not filed within the time limit in the November 2023 Order. The letter was copied to counsel for the Appellant, who subsequently requested a hearing date for an unspecified motion. By letter dated January 25, 2024, the Court confirmed that the Appellant's motion would be heard on June 10, 2024.

[12] The Appellant filed its Motion Record on June 2, 2024, seeking an order striking four paragraphs of the "Respondent's Reply filed on January 18, 2024", with or without leave to amend. On June 4, 2024, the Appellant filed an Amended Motion Record seeking default judgment as primary relief and striking portions of the Reply as alternative relief.[1]

[13] In response, the Respondent filed an affidavit on June 5, 2024, outlining that the Appellant had not paid the $250 costs ordered payable forthwith under the November 2023 Order.[2] On June 7, 2024, the Appellant filed an affidavit stating that it sent the payment to the Respondent earlier that day,[3] and the Respondent filed another affidavit in response, outlining that it had not accepted the payment.[4]

[14] The Respondent did not file written submissions or any other material outlining its position on the motion. Instead, counsel raised two new issues in oral submissions. In summary, the Respondent argued that:[5]

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[1] I accepted the Appellant's late-filing of this Amended Motion Record, pursuant to Rules 4, 7 and 9.

[2] Affidavit of Shubhjit Sohal, sworn June 5, 2024.

[3] Affidavit of Marcia Collins, sworn June 7, 2024.

[4] Affidavit of Shubhjit Sohal, sworn June 7, 2024.

[5] The Respondent began its submissions with the argument that the Appellant should not be permitted to bring its motion because it was in default of the November 2023 Order to pay costs

- the Reply was filed on time because the 60-day Court-ordered deadline was extended due to the exclusion of the period from December 21 to January 7, under Rule 11(b);
- in the alternative, the Court should grant the Respondent an extension of time to file the Reply;
- default judgment is not available because the conditions of Rule 63(1) were not met; and
- there is no basis to strike portions of the Reply.

III. Analysis

[15] It is necessary to first address the Respondent's arguments that the Reply was filed on time or should be accepted for filing with an extension.

A. The Reply was not filed on time

[16] The Respondent argued that the Reply should have been accepted for filing on the basis that Rule 11(b) applies to exclude the period between December 21 and January 7 (the "**winter recess**") from the calculation of the 60-day deadline in the November 2023 Order.

[17] However, Rule 11 refers only to the computation of time under the Rules or a direction. The Respondent therefore argued that based on a textual, contextual, and purposive reading, directions should be interpreted to include enforceable directions recorded in court orders.[6] Counsel for the Respondent argued that to make practical sense, Rule 11(b) cannot be limited to directions.

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of $250 forthwith. Counsel for the Respondent did not pursue this argument after I questioned his decision to highlight the Appellant's failure to pay $250 "forthwith" when the Respondent failed to file a reply within the Court-ordered 60-day deadline or take immediate corrective action after the Registry informed him that the Reply was out of time.

[6] The term "enforceable direction" was used in *Andruslek v Andruslek*, 2002 BCCA 161, para 30: "An order of the court must contain enforceable directions to the parties. Paragraph 2 of the order is problematic. Many of the subparagraphs are expressions of hope rather than enforceable orders."

[18] The Respondent did not rely on authorities that directly support this argument. As a result, the proper interpretation of Rule 11 is at issue.

[19] The Rules must be interpreted using a modified version of the modern approach to statutory interpretation.[7] As outlined by the Supreme Court of Canada, regulations must be read in the context of their enabling statute, having regard to the language and purpose of the relevant enabling provisions.[8]

[20] As discussed below, this analysis does not support the Respondent's argument. The Respondent has asked the Court to add the word "order" to Rule 11. However, neither the text nor the context and purpose of the Rule and the *Tax Court of Canada Act* (the "**TCCA**") support an interpretation that ignores the distinction between directions and orders.[9]

The text uses terms with specific legal meanings

[21] Rule 11(b) does not refer to the computation of time under an order. On its face, it applies only to time under the Rules or a direction:[10]

11 In the computation of time under these rules or a direction, except where a contrary intention appears, **(a)** where the time limited for the doing of a thing expires or falls on a holiday or a Saturday, the thing may be done on the day next following that is not a holiday or Saturday, and	**11** À moins que le contexte n'indique une intention contraire, la computation des délais impartis par les présentes règles ou par une directive a lieu selon les dispositions suivantes : **a)** lorsque le délai imparti pour accomplir un acte en vertu de la Loi expire un jour férié ou un samedi, l'acte peut être

[7] *Bristol-Myers Squibb Co. v Canada (Attorney General)*, 2005 SCC 26, paras 98-99. R. Sullivan, *The Construction of Statutes* (7th ed. 2022), para 13.18.

[8] *Ibid*.

[9] Although the Respondent did not rely on this decision, I am aware that in *Gratl v HMTQ*, 2019 TCC 9, paras 26-28, this Court held that the term "direction" in Rule 12 must include orders. With respect, I have chosen not to follow that decision because a statutory interpretation analysis was not conducted.

[10] *Haynes v HMTQ*, 2013 TCC 185 (Informal Procedure), para 7, in response to a taxpayer's attempt to apply Rule 11(b) to the deadline to file a Notice of Appeal.

(b) the period beginning on December 21 in any year and ending on January 7 of the next year shall be excluded.	accompli le jour suivant qui n'est pas un jour férié ou un samedi; **b)** la période commençant le 21 décembre dans une année donnée et se terminant le 7 janvier de l'année suivante doit être exclue.

[22] The Respondent argued that an order is an enforceable direction and therefore falls under the ambit of Rule 11(b). The crux of the Respondent's argument was that the terms "direction" and "order" are interchangeable in this context. However, the Rule refers to a direction. The question is whether that term includes an order.

[23] Directions are not defined in the Rules or the TCCA. While section 2 of the Rules defines a judgment to include orders, there is no similar definition for a direction or an order.

[24] The use of the terms "direction" and "order" in the Rules and the TCCA is of little assistance to the Respondent's argument because they are not used interchangeably. While several sections of the Rules refer to directions, the TCCA only refers to orders.

[25] With respect to the Rules, the noun and verbs of both terms are used in different provisions. Directions are typically reserved for procedural steps that may be subject to change, while orders typically relate to specific, substantive interlocutory matters. For example, under Rule 58, the Court may grant an order that a question of law be determined before a hearing. In addition to stating the question to be determined, the order shall, for example, give directions relating to the evidence and service and filing of documents:

Question of Law, Fact or Mixed Law and Fact	**Question de droit, de fait ou de droit et de fait**
58 (1) On application by a party, the Court may grant an order that a question of law, fact or mixed law and fact raised in a pleading or a question as to the admissibility of any evidence be determined before the hearing.	**58 (1)** Sur requête d'une partie, la Cour peut rendre une ordonnance afin que soit tranchée avant l'audience une question de fait, une question de droit ou une question de droit et de fait soulevée dans un acte de

(2) On the application, the Court may grant an order if it appears that the determination of the question before the hearing may dispose of all or part of the proceeding or result in a substantially shorter hearing or a substantial saving of costs. **(3)** An order that is granted under subsection (1) shall **(a)** state the question to be determined before the hearing; **(b)** give directions relating to the determination of the question, including directions as to the evidence to be given — orally or otherwise — and as to the service and filing of documents; **(c)** fix time limits for the service and filing of a factum consisting of a concise statement of facts and law; **(d)** fix the time and place for the hearing of the question; and **(e)** give any other direction that the Court considers appropriate.	procédure, ou une question sur l'admissibilité de tout élément de preuve. **(2)** Lorsqu'une telle requête est présentée, la Cour peut rendre une ordonnance s'il appert que de trancher la question avant l'audience pourrait régler l'instance en totalité ou en partie, abréger substantiellement celle-ci ou résulter en une économie substantielle de frais. **(3)** L'ordonnance rendue en application du paragraphe (1) contient les renseignements suivants : **a)** la question à trancher avant l'audience; **b)** des directives relatives à la manière de trancher la question, y compris des directives sur la preuve à consigner, soit oralement ou par tout autre moyen, et sur la méthode de signification ou de dépôt des documents; **c)** le délai pour la signification et le dépôt d'un mémoire comprenant un exposé concis des faits et du droit; **d)** la date, l'heure et le lieu pour l'audience se rapportant à la question à trancher; **e)** toute autre directive que la Cour estime appropriée.

[26] The legal definitions relied on by the Respondent also are not determinative because while there is some overlap, the terms are not interchangeable. The most recent edition of *Black's Law Dictionary* defines a "direction" to include, among other things, "An order; an instruction on how to proceed <the judge's direction to the jury>".[11] Notably, that definition does not broadly apply to the numerous types

[11] B.A. Garner, *Black's Law Dictionary* (12th ed. 2024), definition of "direction".

of orders that may be issued by a court. Furthermore, not all legal dictionaries define directions to include some forms of orders.[12]

[27] While the definition of an "order" refers to directions, including those delivered by a court or judge,[13] the definition of a "direction" is at issue. Since Rule 11 refers to directions, it should be the broader term.

[28] Ultimately, the Respondent's position ignores the important distinction between orders and directions; the former must be complied with while the latter have some flexibility. In *Tetzlaff*, the Federal Court of Appeal outlined the difference:[14]

> The distinction is not purely academic: an order must be complied with and can only be varied by another order or on appeal; a direction may have the same practical effect but allows the Court, and particularly its Chief Justice, the necessary flexibility to deal with the flow of judicial business.

[29] The distinction is reflected in the well-established principle that there is no right of appeal from a direction.[15]

[30] The distinction also is reflected in various provisions of the Rules. Returning to the Rule 58 example, the practical directions on how the Rule 58 determination will proceed can be changed by the Court if needed. However, the substance of the order, that the Rule 58 determination will be heard, can only be varied on appeal.

[31] The distinction has similar application and importance in this proceeding. The November 2023 Order was issued to render a decision on the Respondent's motion

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[12] See the definitions of a "direction" in S. Donahue, *Sanagan's Encyclopedia of Words and Phrases Legal Maxims Canada* (5th ed. 2008), and in N. McCormack, *The Dictionary of Canadian Law* (5th ed. 2020). Earlier definitions also did not include orders, see for example H.C. Black and J.R. Nolan, *Black's Law Dictionary* (6th ed. 1990), and the 1991 edition of D. Dukelow, *The Dictionary of Canadian Law* (1st ed.).

[13] B.A. Garner, *Black's Law Dictionary* (12th ed. 2024), definition of "order".

[14] *Tetzlaff v Canada*, [1992] 2 FC 215 at p 232 / para 34, in the context propriety of the contents of a court order.

[15] *Peak Innovations Inc. v Simpson Strong-Tie Co.*, 2011 FCA 81, para 2. *Aga Khan v Tajdin*, 2012 FCA 238, para 4.

to strike under Rule 53. It was an interlocutory order that resolved a substantive dispute between the parties. It was not simply an expression of a direction dealing with the flow of judicial business, or an order issued for administrative convenience.

[32] Counsel for the Respondent also attempted to rely on rules of procedure from other jurisdictions to support his position. However, the examples he provided contain different, more precise language than Rule 11.

[33] The New Brunswick Rules refer to the computation of time under its rules "or under an order or judgment of the court".[16] Although the Respondent did not refer to other jurisdictions, Alberta, British Columbia, Manitoba, Newfoundland, Ontario, Prince Edward Island, and Saskatchewan have rules regarding the calculation of time specifically applicable to orders issued by those courts.[17]

[34] The *Federal Courts Rules* avoids the problem by broadly stating that "a day that falls within the seasonal recess shall not be included in the computation of time for filing, amending, transmitting or serving a document".[18] The previous version was limited to the computation of time under those courts' rules.[19]

The context of the TCCA supports a limited interpretation

[35] As stated above, the enabling statute does not define orders or directions or use the terms interchangeably. However, the TCCA provides important context by

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[16] New Brunswick's *Rules of Court*, NB Reg 82-73, s. 3.01.

[17] *Alberta Rules of Court*, Alta Reg 124/2010, s. 13.2; British Columbia's *Supreme Court Civil Rules*, BC Reg 168/2009, s. 22-4(1); Manitoba's *Court of King's Bench Rules*, M.R. 553/88, s. 3.01; Newfoundland's *Rules of the Supreme Court*, 1986, SNL 1986, c 42, Sch D., s. 3.01; Ontario's *Rules of Civil Procedure*, RRO 1990, Reg 194, s. 3.01; PEI's *Rules of Civil Procedure*, as adopted (RRO 1990, Reg 194), s. 3.01; Saskatchewan's *King's Bench Rules*, as adopted, New. Gaz. 13 Oct. 2023, s. 13-2.

[18] Section 6(3), *Federal Courts Rules*, SOR/2021-244, s 3. Unlike this Court's Rules, "holiday", "order", and "seasonal recess" are defined in s. 2. Furthermore, sections 6(1) and 6(2) also explicitly refer to the computation of time under an order.

[19] Section 6(3), *Federal Courts Rules*, SOR/2004-283, version in place from March 22, 2006 to January 12, 2022.

expressing Parliament's intention regarding the calculation of time in specific, limited circumstances.

[36] Section 15 of the TCCA alters deadlines that fall on a Saturday or holiday.[20] It is similar to Rule 11(a) but applies broadly to "the doing of a thing under this Act", not just under the Rules or a direction.

Time limits and holidays	**Délais et jours fériés**
15 Where the time limited for the doing of a thing under this Act expires or falls on a holiday or a Saturday, the thing may be done on the day next following that is not a holiday or Saturday.	**15** Le délai qui expirerait normalement un jour férié ou un samedi est prorogé jusqu'au premier jour non férié, ou jusqu'au lundi, suivant.

[37] Notably, this section does not exclude the winter recess from the computation of time. For example, an appellant may be required to file a Notice of Constitutional Question between the period from December 21 and January 7, if the deadline does not fall on a weekend or holiday.[21]

[38] By contrast, paragraphs 18.18(1)(a) and 18.18(2)(a) of the TCCA exclude the winter recess from the calculation of deadlines for specific matters under the Informal Procedure. Those provisions do not refer to directions, orders, rules or the time "for doing a thing". Instead, they apply to specific sections of the TCCA including those establishing deadlines to file replies:

Periods excluded	**Exclusion de certaines périodes**
18.18 (1) For the purpose of calculating a time limit for the purpose of section 18.16, 18.17 or 18.22,	**18.18 (1)** Dans le calcul des délais visés aux articles 18.16, 18.17 ou 18.22, la période du 21 décembre au 7 janvier est exclue; …

[20] RSC 1985, c 51 (4th Supp.), s. 5. The term "holiday" is not defined in the TCCA. Section 35 of the *Interpretation Act*, RS, c I-23, s 1, defines "holiday" with respect to Sundays and specific dates.

[21] 10 days prior to the hearing date, under section 19.2(2) of the TCCA.

(a) the period beginning on December 21 in any year and ending on January 7 of the next year shall be excluded; … **Calculation of time limits** **18.18(2)** For the purpose of calculating a time limit for the purposes of section 18.3003 or 18.3005, the following periods shall be excluded: **(a)** the period beginning on December 21 in any year and ending on January 7 of the next year; …	**Calcul des délais** **18.18(2)** Dans le calcul du délai visé aux articles 18.3003 ou 18.3005, les périodes suivantes sont exclues : **a)** la période du 21 décembre au 7 janvier; …

[39] The winter recess is not excluded from the time required (a) for a notice of a hearing,[22] (b) to request that an order dismissing an appeal for failure to appear be set aside,[23] or (c) to request an appeal be moved to the General Procedure.[24]

[40] The TCCA does not address the computation of time for General Procedure matters. Instead, subsection 20(1) authorizes the issuance of rules for regulating the pleadings, practice and procedure in the Court.

There is no stated purpose that extends the meaning of a direction

[41] It is difficult to determine the purpose of the Rules because there is no public debate or deliberations in the House of Commons or the Senate.[25] There are no speeches or technical notes related to any specific provision. Rather, the Rules are

[22] 30 days under section 18.19.

[23] 180 days under section 18.21(3)(b).

[24] 60 days under section 18.3002(2).

[25] *Georgeson Shareholder Communication Canada Inc. v HMTQ*, 2019 TCC 148, para 59.

made by a rules committee and are subject to the approval of the Governor in Council before coming into effect on publication in the *Canada Gazette*.[26]

[42] This lack of stated purpose reinforces the need to rely on the specific use of the term "direction" in Rule 11(b), in the context of an enabling statute that also contains provisions regarding the computation of time. The TCCA broadly excludes deadlines that fall on weekends and holidays. The statute then contains a limited exclusion related to the winter recess for the Informal Procedure deadlines for filing replies, setting hearing dates, and rendering judgments. With respect to the General Procedure, Rule 11 excludes weekends, holidays, and the winter recess, but only for deadlines under the rules and directions.

[43] It is not sufficient for the Respondent to argue that Rule 11(b) makes no practical sense if it does not include orders. The Court cannot and should not add the word "order" to the Rule for three important reasons.

[44] First, an interpretation that does not reflect the words of the Rule would create uncertainty in how it applies. Parties, in particular self-represented litigants, should be able to rely on the words of the Rule without reference to other sources extending the meaning of the word "direction".

[45] Second, the Rule should be given a meaning that is respectful of judicial independence, including the ability of the Court to issue orders with deadlines tailored to the specific circumstances of any given case.[27]

[46] Finally, the Court should respect the power delegated to the Rules Committee under section 20 of the TCCA. Rule 11 does not list orders or contain language broad enough to apply to orders. To the extent that there is a gap or deficiency in the Rules in this regard, that is for the Rules Committee to remedy according to the process set out in the TCCA.

B. An extension of time to file the Reply is warranted

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[26] *Tax Court of Canada Act*, s. 20.

[27] Re: Section 6 of the *Time Limits and Other Periods Act (COVID-19)* enacted by *An Act Respecting Further Covid-19 Measures*, SC 2020, C 11, S 11, 2020 FCA 137, para 19.

[47] In the alternative, the Respondent requested an extension of time to file the Reply, in part based on Rules 7 and 9. However, the Respondent is once again caught by the wording of those provisions, which speak to remedying non-compliance with the Rules, not orders. While I can and have waived the requirement for the Respondent to file a motion in this regard, I cannot set aside or ignore the requirements of the November 2023 Order.

[48] That being said, I have the authority to grant an extension of time further to this Court's implied jurisdiction to manage and control matters before it, to ensure orderly and effective proceedings.[28] The deadline in the November 2023 order can be varied because it is a procedural component that does not alter the primary, substantive relief granted by Justice MacPhee.

[49] To obtain an extension of time, the Respondent must demonstrate (i) a continuing intention to pursue the appeal, (ii) the appeal has some merit, (iii) there is no prejudice to the Appellant, and (iv) there is a reasonable explanation for the delay.[29] Not all four factors need to be in the Respondent's favour, if the extension of time is in the interests of justice.[30]

[50] As outlined below, I have concluded that three of the factors, as well as the interests of justice, favour granting the extension of time.

(i) continuing intention to pursue the appeal

[51] The Respondent's continued intention to pursue the appeal is demonstrated by the attempt to file the Reply on January 18, 2024, under the mistaken belief that the deadline was extended by the winter recess.

(ii) merit in the proceeding

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[28] *407 International Inc. v HMTQ*, 2019 TCC 245, paras 16-17; *Canada v Dow Chemical Canada ULC*, 2022 FCA 70, para 90;

[29] *FU2 Productions Ltd. v HMTK*,2023 TCC 148, para 70-4, & *Metrobec Inc. v HTMQ*, 2018 TCC 115, paras 23-24, both citing the Federal Court of Appeal decision in *Canada (Attorney General) v Hennelly*, [1999] FCJ No 846 (FCA).

[30] *FU2 Productions Ltd.*, paras 71-74.

[52] The Reply demonstrates that the proceeding has merit. It outlines the basis for the reassessments, including the Respondent's position that the statute-barred reassessments were issued pursuant to subparagraph 152(4)(a)(i) of the *Income Tax Act*.

(iii) prejudice is limited

[53] The Respondent argued that there is no prejudice to the Appellant that could not be compensated by costs. I agree.

[54] Counsel for the Appellant argued that prejudice has occurred due to the Respondent's conduct and delays, including:

a. obtaining the Appellant's consent to an extension of time until June 30, 2023 to file a reply;

b. bringing a motion to strike instead of filing a reply within that timeframe; and

c. failing to file a reply within the 60-day Court-ordered deadline, which included additional time between the oral decision of October 11, 2023 and the issuance of the order on November 1, 2023.

[55] I agree with the Appellant that the Respondent took too long to respond to a very brief Notice of Appeal. However, the Appellant's position that the delay is prejudicial is undermined by its own conduct. The Appellant incorrectly assumed that the Reply was filed in January 2024 and requested a hearing date for an unspecified motion without communicating its position to the Respondent. This led to a further delay until June 2024, when the Appellant finally disclosed the basis for its motion shortly before the hearing date.

(iv) explanation for the delay

[56] The Respondent assumed that the Appellant requested the motion hearing date to seek default judgment as suggested in the Court Registry's letter of January 19, 2024 copied to the Appellant:

> Consequently, the Appellant may apply on motion to the Court for judgment in respect to relief sought in the Notice of Appeal pursuant to s. *63(1) of the Tax Court of Canada Rules for General Procedure*. [sic]

[57] The Respondent also assumed that the filing of the Reply would be addressed at the Appellant's motion.

[58] This factor does not favour the Respondent because those assumptions were incorrect and the delay could have been shortened had counsel contacted the Appellant directly. Counsel for the Respondent also did not explain why he did not take immediate action to remedy the problem, especially since the Appellant's motion was not scheduled to be heard until almost five months later.

Interests of Justice

[59] The interests of justice favour granting the extension of time. The Appellant has effectively conceded that Mr. Levinson had unreported taxable income of over $660,000. The Appellant is not prejudiced by the extension because the Respondent already had the burden to justify the statute-barred reassessments. This matter will proceed more efficiently with a Reply that outlines the Respondent's position and assists the parties in establishing the parameters for document disclosure and discovery.

C. Default judgment is not appropriate

[60] Although the motion for default judgment is now moot because the Reply has been accepted for filing, the Appellant's position warrants a brief analysis. Even if I had denied the application for an extension of time, I would not have exercised my discretion to grant default judgment because the Notice of Appeal does not allege facts that entitle the Appellant to that relief.

[61] Further to the November 2023 Order, the Notice of Appeal now consists of only ten paragraphs. The "Facts" section has three paragraphs stating:

- the address of the Appellant is in care of its counsel,[31]

[31] Notice of Appeal, para 2.

- the reassessments for the four taxation years at issue were made beyond the normal reassessment period under the *Income Tax Act*,[32] and

- the disputed reassessments increased the Appellant's income to include alleged unreported income from investments and to assess late-filing penalties.[33]

[62] The three paragraphs under the heading of "Reasons" contain legal argument that the reassessments are *ultra vires* because the Minister did not satisfy her onus of proof to justify the statute-barred reassessments.[34]

[63] In support of the request for default judgment, the Appellant took this position even further by arguing that the reassessments are presumptively *ultra vires*, without authority and invalid.

[64] However, this is not a factual position upon which default judgment should be based. It is a legal position, one that happens to be incorrect.

[65] A statute-barred reassessment is not beyond the Minister's powers under the *Income Tax Act* because it is explicitly authorized by paragraph 152(4)(a). The Minister assessed the Appellant beyond the normal reassessment period on the basis that the Appellant made misrepresentations attributable to neglect, carelessness or wilful default within the meaning of subparagraph 152(4)(a)(i).

[66] The Appellant's argument is premature because it was made before the Respondent filed a reply and presumes that the Minister will not be able to satisfy her onus at trial.

[67] More significantly, the Appellant's argument conflates the Minister's onus with the validity of a statute-barred assessment. Subparagraph 152(4)(a)(i) authorizes the Minister to assess beyond the normal reassessment period. If a taxpayer subsequently challenges that statute-barred assessment to this Court, the Minister has the onus to justify the application of subparagraph 152(4)(a)(i).

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[32] Notice of Appeal, para 3.

[33] Notice of Appeal, para 4.

[34] Notice of Appeal, paras 7-9.

The reassessments will only be upheld if the Minister establishes on a balance of probabilities that a taxpayer made a misrepresentation attributable to neglect, carelessness or fraud, in filing their return.[35]

[68] The following paragraph from the Federal Court of Appeal decision in *Canadian Marconi* outlines the distinction between onus and the validity of a statute-barred reassessment:[36]

> The Minister is not required to prove misrepresentation before he sends out a notice of reassessment which is dated beyond the 4 year time period provided for in the statute. Misrepresentation must be proved only if the matter goes to trial. When a taxpayer receives a notice of reassessment he has two choices; he can pay it or he can object. If he agrees with the reassessment he will normally take no further steps and pay the amount claimed; if he disagrees with it he will object and take the matter to trial; at which point in a case such as the present the Minister has the onus of proving misrepresentation.

[69] Notably, the Appellant did not rely on authorities to support its broad position that statute-barred reassessments are presumptively *ultra vires*.

[70] The limited cases that speak to this issue do so in the specific context of reassessments that had previously been successfully challenged in court. For example, in *Blackburn Radio*, this Court held that a reassessment issued after the court vacated a statute-barred reassessment is void and cannot be saved by the presumption of validity in subsection 152(8) of the *Income Tax Act*.[37] A further reassessment could not be made under those circumstances.

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[35] The authorities relied on by the Appellant confirm the Minister's ability to discharge that onus. See for example, *Fukushima v Canada*, [1999] TCJ No 82, para 11, and *Lacroix v HMTQ*, 2008 FCA 241, para 26.

[36] *HMTQ v Canadian Marconi*, 91 DTC 5626 at 5628 (FCA), quoting *Davis v HMTQ*, 84 DTC 6518 at 6519 (FCTD).

[37] *Blackburn Radio v HMTQ*, 2012 TCC 255, paras 32-62.

[71] Notably, both the Court in *Blackburn* and the Federal Court of Appeal in a subsequent decision otherwise generally held that a statute-barred reassessment is not void if the Minister alleges misrepresentation or fraud.[38]

[72] The Appellant's failure to appreciate this distinction also impacts part of its argument with respect to its motion to strike.

D. The Appellant has not met the test to strike

[73] The Appellant asked the Court to strike various paragraphs of the Reply on the basis that they may prejudice the fair hearing of the appeal and are an abuse of process.

[74] In considering this request, I have relied heavily on principles articulated by the Federal Court of Appeal in *Preston*.[39] The Court of Appeal held that not all deficiencies meet the heavy burden necessary to strike under Rule 53(1). A deficient pleading may be allowed to stand in certain circumstances, including when the facts are relatively simple, there is little or no debate about the applicable legal principles, or there is little risk that the other party will be prejudiced or will be obliged to waste resources.[40]

[75] While the Appellant relied on general principles from other Court decisions,[41] my analysis is based on the pleadings and issues in this particular matter, bearing in mind the need to facilitate a just and expeditious determination of the appeal.[42] In this regard, I have concluded that it is not plain and obvious that the paragraphs at issue will prejudice the fair hearing of the appeal or are an abuse of the Court's process.

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[38] *594710 British Columbia Ltd. v HMTQ*, 2018 FCA 166, para 89; *Blackburn Radio*, para 62.

[39] *Preston v HMTQ*, 2023 FCA 178.

[40] *Preston*, para 32.

[41] The Appellant's reliance on *Hillcore Financial Corporation v HMTK*, 2023 TCC 71, and *LBL Holdings Ltd. v HMTQ*, 2015 TCC 115, was of little assistance because those decisions dealt with more complex, lengthy pleadings compared to those in the present matter.

[42] *Preston*, para 37.

Paragraphs 1(a), 1(b) and 2(c)

[76] The first two paragraphs of the Reply are not deficient or overreaching. The Respondent simply and succinctly responded to two paragraphs in the Notice of Appeal by stating its overall position and by clarifying which assessments are properly at issue.

Paragraph 10 – the assumptions paragraph

[77] Paragraph 10 of the Reply is the typical assumptions paragraph, outlining the facts the Minister relied on when reassessing Mr. Levinson for unreported income.

[78] In support of its argument that this paragraph should be struck, the Appellant relied on the general principle that the Respondent is not allowed to rely on assumptions of fact in discharging her burden to assess a statute-barred taxation year. The problem with this argument is that the Respondent has not violated this established principle.

[79] As is typical in these appeals, the Reply contains two factual paragraphs: (1) paragraph 10, the assumptions paragraph in support of the correctness of the reassessments, and (2) paragraph 11, listing the facts upon which the Minister relied on in determining that Mr. Levinson made misrepresentations attributable to neglect, carelessness or wilful default, including those already stated in paragraph 10.

[80] The Appellant conceded that this structure is common but asked the Court to consider whether it is correct. The Appellant broadly argued that the Minister is not permitted to rely on any assumptions of fact at all for statute-barred reassessments. Counsel for the Appellant relied on paragraph 26 of the Federal Court of Appeal decision in *Lacroix* in support of this position. However, the opening words of that paragraph support the distinction in how these replies are drafted:[43]

> Although the Minister has the benefit of the assumptions of fact underlying the reassessment, he does not enjoy any similar advantage with regard to proving the facts justifying a reassessment beyond the statutory period, or those facts justifying the assessment of a penalty for the taxpayer's misconduct in filing his tax return.

[43] *Lacroix v HMTQ*, 2008 FCA 241, para 26.

> The Minister is undeniably required to adduce facts justifying these exceptional measures. [emphasis added]

[81] Notably, both the correctness of the assessments and the Minister's ability to assess statute-barred years were at issue in *Lacroix*. The Federal Court of Appeal did not broadly hold that no assumptions of fact were permitted at all.

[82] In the present case, the formulaic Reply does not take into account that the Appellant is no longer challenging the correctness of the assessments.[44] In these circumstances, a more precise pleading would not contain an assumptions paragraph and the facts in paragraph 10 would be moved to paragraph 11.

[83] The question is whether this warrants the Court's intervention. I have concluded that it does not. In the circumstances of this appeal, this deficiency does not result in prejudice or an abuse of the Court's process. The only issue in the appeal is whether the Minister was entitled to reassess the statute-barred years. Paragraph 10 consists of seventeen paragraphs that state general, broad facts regarding Mr. Levinson and his sources of income. The Minister may have to prove those facts to meet the requirements of subparagraph 152(4)(a)(i).

[84] There is no prejudice because the Minister's burden remains the same. If the Respondent attempts to argue that it does not have the onus with respect to any of the facts in paragraph 10, the trial judge will apply the established principles in *Lacroix* and other authorities.

Paragraphs 10(d), (e), (g) and (o)

[85] The Appellant also argued that paragraphs 10(d), (e), (g) and (o) should be struck on the basis that they improperly plead conclusions of law, or mixed fact and law. I do not agree. Those paragraphs concisely state the Respondent's position regarding Mr. Levinson's holdings and assets.

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[44] That being said, the Notice of Appeal is still somewhat ambiguous. For example, paragraph 9 asserts that the Minister failed to prove that the reassessed amounts were actually income of the Appellant.

[86] Aside from the use of the phrase “taxable capital gains” in paragraph 10(o), they are not conclusory legal statements that paraphrase provisions or determinations under the *Income Tax Act*.

[87] In any event, as stated by the Federal Court of Appeal in *Preston*, there is no principle of law that a statement of mixed fact and law cannot stand as an assumption.[45] Not all assumptions of mixed fact and law are prejudicial or are an abuse of process.[46] An assumption that is a statement of mixed fact and law does not put any additional onus on the taxpayer because the Court has the sole responsibility for determining the validity of an assessment.[47] The trial judge will be in the best position to decide what effect assumptions should be given based on all the evidence presented, and provide relief to an appellant, if necessary.[48]

Paragraphs 10(b), (c), (f), (h), (i) and (q)

[88] The Appellant further argued that paragraphs 10(b), (c), (f) and (h) are irrelevant and 10(f), (h), (i), and (q) are vague and lack specificity. Again, I disagree with the Appellant’s characterizations because the Respondent stated broad facts (as opposed to evidence) regarding assets Mr. Levinson held with his wife. Any uncertainties can be corrected through documentary disclosure and discoveries. With respect to alleged prejudice in this regard, an invalid or irrelevant assumption does not create an onus on a taxpayer just because it was pleaded.[49]

E. Costs are awarded to the Appellant

[89] Both parties requested $2,000 in costs on the motion. Both parties did so with limited reference to the factors in Rule 147 and without reference to amounts that could be awarded under Tariff B.

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[45] *Preston*, para 19.

[46] *Preston*, para 36.

[47] *Preston*, para 20.

[48] *Preston*, para 38.

[49] *Preston*, para 20.

[90] I have concluded that the Respondent is required to pay costs to the Appellant because its conduct unnecessarily delayed the proceeding and extended the scope of the motion. The Respondent did not take steps to remedy its default in filing the Reply in a timely manner.

[91] After receiving the Court's letter dated January 19, 2024 indicating that the Reply was not accepted for filing, the Respondent did not communicate its position regarding the application of Rule 11(b) to the Court or the Appellant. It did not file its own motion to address the issue or file responding materials in advance of the Appellant's motion. Instead, the Respondent filed affidavits regarding the outstanding payment of $250 in costs and raised its arguments for the first time in oral submissions at the hearing of the motion. Moreover, the Respondent did not request an extension of time until prompted by the Court at the hearing of the Appellant's motion.

[92] That being said, the full amount requested by the Appellant is not justified because it was not successful in this motion.

[93] In light of the above, I have concluded that the Respondent should pay the Appellant $1,000 in costs, by April 7, 2025.

IV. Conclusion

[94] The Respondent is granted an extension of time until the date of this Order and the Reply previously delivered to the Court on January 18, 2024 is accepted for filing as of that date. The Appellant's motion for default judgment, or an order striking portions of the Reply, is denied. The Respondent shall pay the Appellant $1,000 in costs, on or before April 7, 2025.

[95] I believe that the foregoing expresses my view that the parties should carefully consider the propriety of any future motions and focus on moving the appeal forward in a timely manner. The Court is available to assist the parties in this regard now that this appeal is under case management.

Signed this 7th day of March 2025.

"Joanna Hill"

Hill J.

CITATION:	2025TCC40
COURT FILE NO.:	2023-692(IT)G
STYLE OF CAUSE:	The Estate of Samuel Levinson v. His Majesty The King
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 10, 2024
REASONS FOR ORDER BY:	The Honourable Justice Joanna Hill
DATE OF ORDER:	March 7, 2025

APPEARANCES:

Counsel for the Appellant:	Bobby Sood Juan Higuera
Counsel for the Respondent:	Peter Basta

COUNSEL OF RECORD:

For the Appellant:

Name:	Bobby Sood Juan Higuera
Firm:	Davies Ward Phillips & Vineberg LLP Toronto, Ontario

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