

BETWEEN:

THE BANK OF NOVA SCOTIA,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Competing Motions to Strike Pleadings
heard on September 24 and 25, 2025 at Toronto, Ontario

Before: The Honourable Justice Randall Boccock

Appearances:

Counsel for the Appellant: Martha MacDonald
Jerald Wortsman

Counsel for the Respondent: Franco Calabrese
Leo Elias
Craig Maw

ORDER

WHEREAS the Respondent brings a motion to strike certain provisions of the notice of appeal on various grounds (the “Respondent’s motion”);

AND WHEREAS the Appellant brings a motion to strike certain provisions of the reply (the “Appellant’s motion”);

AND WHEREAS the Court has delivered its Common Reasons for Order concerning similar motions involving similar appeals and issues;

NOW THEREFORE THIS COURT ORDERS THAT:

1. The Respondent's motion to strike paragraphs 44(b) and 54 of the notice of appeal filed October 1st, 2021, is denied.
2. The Appellant's motion to strike the phrase "... The amounts are also not deductible to the extent that they were claimed in respect of certain compensation payments that BNS received on the equities that were part of the transactions" in paragraph 5 and all of paragraphs 25(n), 26(a), and 28, 29, 30 and 31 of the reply filed October 2, 2024, and reject filing of the draft amended reply dated August 29, 2025, is allowed;
3. On or before June 19, 2026, the Respondent may serve and file a further amended compliant reply, if any, having regard to the directions of the Court in its Common Reasons for Order; and,
4. The Court orders no costs and presently reserves such costs in accordance with the final paragraph of the Common Reasons for Order.

Signed at Ottawa, Ontario this 27th day of May 2026.

"R.S. Bocock"

Bocock J.

BETWEEN:

BMO NESBITT BURNS INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Competing Motions to Strike Pleadings
heard on September 24 and 25, 2025 at Toronto, Ontario

Before: The Honourable Justice Randall Boccock

Appearances:

Counsel for the Appellant:

James Gotowiec
Martha MacDonald
Patrick Reynaud
Jerald Wortsman
Linda M. Plumpton

Counsel for the Respondent:

Shubir Aikat
Franco Calabrese
Lee Sharon
Leo Elias
Craig Maw

ORDER

WHEREAS the Respondent brings a motion to strike certain provisions of the notice of appeal on various grounds;

AND WHEREAS the Court has delivered its Common Reasons for Order concerning similar motions involving similar appeals and issues;

NOW THEREFORE THIS COURT ORDERS THAT:

1. The Respondent's motion to strike paragraphs 48(c) and 58 of the notice of appeal filed October 1, 2021, is denied.
2. The Court orders no costs and presently reserves such costs in accordance with the final paragraph of the Common Reasons for Order.

Signed at Ottawa, Ontario this 27th day of May 2026.

“R.S. Bocock”

Bocock J.

BETWEEN:

BANK OF MONTREAL,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Competing Motions to Strike Pleadings

heard on September 24 and 25, 2025 at Toronto, Ontario

Before: The Honourable Justice Randall Boccock

Appearances:

Counsel for the Appellant:

Martha MacDonald
Jerald Wortsman
Linda M. Plumpton

Counsel for the Respondent:

Franco Calabrese
Natasha Tso
Tanner McInnis
Craig Maw

ORDER

WHEREAS the Respondent brings a motion to strike certain provisions of the notice of appeal on various grounds (the “Respondent’s motion”);

AND WHEREAS the Appellant brings a motion to strike certain provisions of the reply (the “Appellant’s motion”);

AND WHEREAS the Court has delivered its Common Reasons for Order concerning similar motions involving similar appeals and issues;

NOW THEREFORE THIS COURT ORDERS THAT:

1. The Respondent's motion to strike paragraphs 42(b) and 53 of the notice of appeal filed June 13, 2025, is denied.
2. The Appellant's motion to strike the phrase "...The amounts are also not deductible to the extent that they were claimed in respect of certain compensation payments that BMO received on its portfolio of equities", in paragraph 7, and all of paragraphs 28(x), 29(a), and 31, 32 and 33 of the second reply filed July 5, 2024, and reject filing in final form of the draft amended reply dated August 29, 2025, is allowed;
3. On or before June 19, 2026, the Respondent may serve and file a further amended compliant reply, if any, having regard to the directions of the Court in its Common Reasons for Order; and,
4. The Court orders no costs and presently reserves such costs in accordance with the final paragraph of the Common Reasons for Order.

Signed at Ottawa, Ontario this 27th day of May 2026.

"R.S. Bocock"

Bocock J.

Citation: 2026 TCC 75
Date: 20260527
Docket: 2024-1319(IT)G

BETWEEN:

THE BANK OF NOVA SCOTIA,

Appellant,

and

HIS MAJESTY THE KING,

Respondent;

Docket: 2021-2451(IT)G

AND BETWEEN:

BMO NESBITT BURNS INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent;

Docket: 2021-2452(IT)G

AND BETWEEN:

BANK OF MONTREAL,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Competing Motions to Strike Pleadings
heard on September 24 and 25, 2025 at Toronto Ontario

Before: The Honourable Justice Randall Boccock

Appearances:

Counsel for the Appellants
BMO Nesbitt Burns Inc. and
Bank of Montreal

Martha MacDonald
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COMMON REASONS FOR ORDERS

Bocock J.

I. INTRODUCTION

Competing motions to strike

[1] The first issue in these reasons concerns a motion filed by two of the Appellants on June 13, 2025, to strike certain paragraphs from the reply in two appeals: The Bank of Nova Scotia (“BNS”) and Bank of Montreal (“BMO”). In response to this, the Respondent filed a cross-motion on August 18, 2025, to file proposed amended replies. This matter is identified as the “Impugned Provisions Issue.”

[2] The second issue concerns a motion brought by the Respondent to strike certain paragraphs from the notices of appeal in three appeals: BMO Nesbitt Burns Inc. (“NBI”) and again BMO and BNS. The Respondent asserts BNS, NBI and BMO failed to plead material fact and have not complied with the distinct large

corporation rules in the *Income Tax Act* (the “Act”). The issue relating to this motion are referred to as the “Dividend Quantum Issue”.

Factual background to the appeals: The DRA Rules – a little background

[3] The Appellants are involved with the other remaining “big 6” Schedule A Canadian chartered banks (the “Banks”) in tax litigation with the Minister of National Revenue (the “Minister”) concerning various tax years from the last decade. Such appeals concern the dividend rental arrangement rules (the “Bank DRA Rules”) embedded within the Act.

[4] The primary issue in each of the appeals pertains to the reassessments whereby the Minister reduces or denies the Appellants’ claims for dividend deductions in various taxation years because of the Minister’s interpretation and application of provisions of the Bank DRA Rules in subsection 112(2.3) of the Act. In each of the appeals, the Minister denies a dividend deduction on the basis of the existence of disqualifying dividend rental arrangements. Subsection 112(2.3) of the Act explains where no dividend deduction is permitted:

“No deduction may be made under subsection (1) or (2) or 138(6) in computing the taxable income of a particular corporation in respect of a dividend received on a share of the capital stock of a corporation where there is, in respect of the share, a dividend rental arrangement of the particular corporation, a partnership of which the particular corporation is directly or indirectly a member or a trust under which the particular corporation is a beneficiary.”¹

[5] In 2011, the same provision read:

“No deduction may be made under subsection 112(1) or 112(2) or 138(6) in computing the taxable income of a particular corporation in respect of a dividend received on a share of the capital stock of a corporation as part of a dividend rental arrangement of the particular corporation.”²

[6] A dividend rental arrangement is defined as any arrangement under which:

“(b)(i) a corporation at any time receives a particular share a taxable dividend that would, if this Act were read without reference to subsection 112(2.3), be deductible

¹ *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) at 112(2.3) [ITA or the Act].

² *Ibid*, 2011 version, at 112(2.3).

in computing its taxable income or taxable income earned in Canada for the taxation year that includes that time, and

(ii) the corporation or a partnership of which the corporation is a member is obligated to pay another person or partnership an amount

(A) that is compensation for

(I) the dividend described in subparagraph (i),

(II) a dividend on a share that is identical to the particular share, or

(III) a dividend on a share that, during the term of the arrangement, can reasonably be expected to provide to a holder of the share the same or substantially the same proportionate risk of loss or opportunity for gain as the particular share, and

(B) that, if paid, would be deemed by subsection 260(5.1) to have been received by that other person or partnership, as the case may be, as a taxable dividend,

(b.1) any specified hedging transaction, in respect of a DRA share of the person,

(c) any synthetic equity arrangement (other than a specified hedging transaction), in respect of a DRA share of the person, and

(d) one or more agreements or arrangements...entered into by...any combination of the person and connected persons, if

(i) the agreements or arrangements have the effect...of eliminating all or substantially all of the person's risk of loss and opportunity for gain or profit in respect of a DRA share”³

[7] These transactions are typically structured in a manner that permits a taxable person to ‘rent’ shares for their dividend return. In effect, a taxable entity is able to transfer interest income on surplus investment funds to a non-taxable entity in exchange for more favourably taxed dividends on shares owned by that entity.

[8] Where the recipient of a taxable dividend under a dividend rental arrangement is a taxable corporation, subsection 112(2.3) denies the deduction for dividends

³ ITA, *supra* note 1 at 248(1) “dividend rental arrangement”.

received under subsection 112(1) or (2) or 138(6). The denial of the dividend tax credit for dividends received as part of a dividend rental arrangement is realized by first requiring the separate inclusion under paragraph 82(1)(c) of all taxable dividends received from a resident corporation as part of such an arrangement. Paragraph 82(1)(d) further identifies all other taxable dividends received by the taxpayer from corporations resident in Canada that are not taxable Canadian corporations.

[9] Broadly, the Banks have been similarly reassessed for taxation years spanning from 2008 to 2014. Most probably, additional years have not yet been confirmed and are therefore not presently before the Court. All such Bank appeals are case managed under Section 126.1 of the Tax Court of Canada Rules (General Procedure) (the “Rules”).

PART ONE – MOTIONS TO STRIKE REPLY PORTIONS

Issue #1 – The Impugned Reply Provisions

Specifics of the Appellants’ motions

[10] The Appellants’ motions to strike, without leave to amend, reference the following paragraphs from the Respondent’s replies, both as filed and the proposed amended replies, to the relevant notices of appeal (collectively the “reply” or “replies”). The relevant paragraphs of the Respondent’s replies, both filed and proposed, in respect of BNS and BMO are substantially similar, with only minor differences in wording. The filed and proposed provisions are outlined below, starting with the filed provisions. For ease of comparison, the corresponding provisions are set out below in a single paragraph, with square brackets [] denoting the BNS text and round brackets () denoting the BMO text.

Filed Impugned Reply Provisions

[11] The reply provisions follow:

- a) Paragraph [5] (7) “...The amounts are also not deductible to the extent that they were claimed in respect of certain compensation payments that [BNS] (BMO) received on [the equities that were part of the transactions] (its portfolio of equities)” and

- b) Paragraphs [25(n), 26(a), and 28-31 inclusively] ((28(x), 29(a), and 31-33 inclusively):

[25(n)] (28(x)) not all of the [amounts] (dividends) that [BNS] (BMO) sought to deduct [as dividends] pursuant to subsection 112(1) of the Act in respect of the Acquired CEs [, up to the amount of \$554,012,438,] had been received by [BNS] (BMO) as actual dividends paid to [BNS] (BMO) on the Acquired CEs as dividends;

[26(a)] (29(a)) whether subsection 260(5.1) of the Act applies to deem any compensation payments received by [BNS] (BMO) in respect of the Acquired CEs in the 2012 Taxation Year to have been received by [BNS as taxable dividends] (BMO) in the year;

[28] (31) A deduction may be claimed under subsection 112(1) of the Act in respect of dividends received or dividends deemed to have been received from taxable Canadian corporations;

[29] Not all of the amounts that BNS sought to deduct as dividends pursuant to subsection 112(1) of the Act in respect of the Acquired CEs, up to the amount of \$554,012,438, had been received by BNS as actual dividends paid to BNS on the Acquired CEs as dividends.(Paragraph 29 appears only in the BNS reply.)

[30] (32) Amounts received by a taxpayer as 'SLA compensation payments' or as 'dealer compensation payments' may be deemed to have been received by the taxpayer as taxable dividends in accordance with subsection 260(5.1) of the Act, but not in circumstances in which the compensation payments were received under an arrangement and where it may reasonably be considered that one of the taxpayer's main reasons for entering into the arrangement was to receive amounts as qualifying compensation payments that would be deductible in computing the taxpayer's taxable income;

[31] (33) Any compensation payments received by [BNS] (BMO) in the 2012 Taxation Year in respect of the Acquired CEs are not deemed by subsection **260(5.1)** of the Act to have been received as taxable dividends and are, therefore, not deductible under subsection 112(1) to the extent that:

- (i) they were not received as SLA compensation payments;
- (ii) they were not received as dealer compensation payments; and
- (iii) they were received under arrangements and where it may reasonably be considered that one of [BNS's] (BMO's) main reasons for entering into the

arrangements was to receive amounts that would be deductible in computing its taxable income.

Proposed Impugned Reply Provisions

[12] The proposed reply provisions follow:

- a) Paragraph [5] (7) The amounts are also not deductible to the extent that they were claimed in respect of certain compensation payments that [BNS] (BMO) received on [the equities that were part of the transactions] (its portfolio of equities) "and
- b) Paragraphs [25(n-r), 26(b.1), and 37.1] (28(x-bb), 29(b.1), 39.1)):

The AGC relies on the following material facts:

25(n)] (28(x)) not all of the [amounts] (dividends) that [BNS] (BMO) sought to deduct [as dividends] pursuant to subsection 112(1) of the Act in respect of the Acquired CEs [, up to the amount of \$554,012,438,] had been received by [BNS] (BMO) as actual dividends paid to [BNS] (BMO) on the Acquired CEs as dividends;

[25(o)] (28(y)) the amounts for which [BNS] (BMO) claimed deductions under [s.] (subsection) 112(1) of the Act in respect of the Acquired CEs include amounts that were in relation to compensation payments received [from] (for) lending some or all of the Acquired CEs;

25(p)] (28(z)) such lending and such compensation payments were intended to operate in such a manner as to preserve and in no way detract from the dividend deductions claimed as a result of the Arrangements;

[25(q)] (28(aa)) [BNS] (BMO) undertook the lending of some or all of the Acquired CEs with knowledge of, and in contemplation of, the other transactions or events that comprised the Arrangement; and

[25(r)] (28(bb)) one of [BNS's] (BMO's) main reasons for lending some or all of the Acquired CEs was to enable [BNS] (BMO) to receive compensation payments and to claim deductions in relation to them.

The issues are:

[26(b.1)] (29(b.1)) for any portion of the disallowed dividend deductions which were in relation to compensation payments in respect of securities loans,

whether subsection 260(5) of the Act precludes payments from being deductible under subsection 112(1) of the Act;

[37.1] (39.1) In any event, for the portions of the disallowed dividend deductions for payments in respect of securities loans, subsection 260(5.1) of the Act does not apply to deem such payments to have the character of dividends because the payments were received under an arrangement and it may reasonably be considered that one of [BNS's] (BMO's) main reasons for entering into the arrangement was to enable [it] (it) to receive compensation payments that would be deductible in computing taxable income, as contemplated by subsection 260(5).

[13] The Appellants rely on sections 49 and 53 of the Rules and Section 260 of the Act.

[14] The Appellants further assert that the Minister did not rely on subsection 260(5.1) as a basis of the assessment of the Appellants' relevant taxation years, and that this new position arose and was identified, not upon reassessment or audit, but only in the replies.

[15] The Appellants served a demand for particulars on November 1, 2024. The Respondent responded on December 2, 2024. In response Appellants allege that the response failed to sufficiently clarify the case to meet (the "deficient particulars").

[16] As a result, the Appellants allege that the Impugned Reply Provisions:

a) fail to meet the rules of pleadings applicable to replies pursuant to Rule 49 of the Rules; and,

b) disclose no reasonable grounds for opposing the appeal under Rule 53(1)(d) of the Rules; may prejudice or delay the fair hearing of the appeal within the meaning of Rule 53(1)(a) of the Rules; and/or constitute an abuse of the Court's process within the meaning of paragraph 53(1)(c) of the Rules.

[17] Furthermore, the Appellants allege that the Proposed Impugned Reply Provisions make no meaningful or curative changes to pleadings in respect of equity swaps and the share repurchase transactions.

The position of the Respondent

[18] The Respondent filed a notice of cross-motion in response to the Appellants' motions to strike the Impugned Reply Provisions. The motion is for leave to file amended replies to the notice of appeal in both appeals.

[19] The Respondent alleges that the proposed amended reply clarifies the facts and arguments that the Respondent relies on under subsection 260(5) of the ITA.

[20] The Respondent argues that the proposed amendments will not cause any prejudice to the Appellants given the timely manner in which the Appellants' concerns have been addressed.

[21] The Appellants, BNS and BMO, state in either case this Court should prohibit the Respondent from adding an entirely new issue about new transactions and new statutory provisions at this litigation stage, without specifying material particulars essential to delineating the case to meet (the "New Issue"). Leave to amend should be withheld because the Respondent has failed to delineate the New Issue in either the reply or the draft amended reply.

[22] The Respondent has failed to provide particulars despite two requests, and despite the same particulars being pleaded by the Respondent in a competitor Bank's appeal.

The detailed position of the Appellants

[23] The Appellants rely on Section 49 of the Rules, which requires the Respondent to respond to factual pleadings in the taxpayer's pleading, to set out the findings or assumptions of fact made by the Minister in making the assessment, to plead any additional material facts, and to specific issues statutory provisions, reasons, and relief sought.

[24] In these appeals, the Minister did not audit for subsections 260(5)-(5.1) of the Act for the 2012 taxation year. Therefore, the Minister made no relevant assumptions at assessment, and the Notice of Appeal contains no pleadings respecting subsections 260(5)-(5.1) to which the Respondent could plead in response. Rather, the New Issue was raised for the first time by the Respondent in the reply, and the Appellants take the position that raising of the New Issue in the reply and draft amended reply is non-compliant with Section 49 of the Rules.

[25] As a result, the Appellant says the Court should refuse to allow the New Issue to proceed by striking it without leave to amend.

The Respondent's retort

[26] The Respondent believes that the Appellants pleaded facts introducing the concept of securities lending. The notices of appeal state that the equity swaps at issue gave rise to new lines of business, including securities lending. The reply pleads no knowledge on whether the Appellant actually received dividends for all of the amounts included in income.

[27] The reply denies whether the Appellants actually received dividends for all of the amounts included in income and that this factual context implies any amounts that are not dividends would be compensation payments from securities lending. As a result, the reply properly reflects this context by referencing securities lending provisions.

[28] Furthermore, the Respondent believes the amended reply reorders and recasts the securities lending issue and the clear factual grounds relied upon with increased precision to better align with the theory of the case for contesting the appeals.

[29] As a result, the Appellants know the case they need to meet, which should assist in resolving disputes in further litigation steps and the Court should dismiss the Appellants' motions.

MOTIONS TO STRIKE PORTIONS OF NOTICE OF APPEAL

Issue 2: The "Dividend Quantum Issue"

Specifics of the Respondent's Motion

[30] The Respondent moves to strike paragraphs 44(b) and 54 in the BNS appeal, paragraphs 42(b) and 53 of the BMO appeal, and paragraphs 48(c) and 58 of the NBI appeals, also without leave to amend. These paragraphs attempt to put in issue the correctness of the quantum of the disallowed cash and deemed dividends. The Respondent asserts these two paragraphs should be struck as the notice of appeal pleads no material facts in respect of this issue. Hence, the basis is:

- a) there are no reasonable grounds of appeal in respect of the issue;
- b) the pleadings is frivolous or vexatious; and,
- c) constitutes an abuse of process, and the two paragraphs should be struck pursuant to paragraphs 53(1)(b), (c), and (d) of the Rules.

[31] A generic, uniform reproduction of the notice of appeal paragraphs involved in the Dividend Quantum Issue is as follows:

The issues to be decided in this appeal are:

1. ...in the alternative, whether the Minister erred in determining the amount of the Cash Dividend Deductions and the Deemed Dividend Deductions.
2. In the further alternative, the Minister erred in determining the amount of the Cash Dividend Deduction and the Deemed Dividend Deduction; and,

The Appellant's Response

[32] The Respondent also alleges that the two paragraphs should be struck on the basis that the Appellants have failed to comply with subsections 165(1.11) and 169(2.1) of the Act relating to the large corporation rules because no such details were described in the notice of objection. The Appellants notices of objection identified the issue but identify no quantum of relief sought in respect of that issue. As such, the Respondent claims that the issue should be struck without leave to amend pursuant to paragraph 53(3)(a) of the Rules.

The Appellants' response

[33] The Appellants take the position that the notices of objection are compliant with the large corporation rules, and in any event, the Respondent has waived any irregularity by taking fresh steps. Further, where a large corporation's objection specifies the main relief sought as a change in a balance, it has been held that alternative relief of a lesser amount need not be separately specified.

[34] In any event, the Fresh Step rule in Section 8 of the Rules means the Respondent affirmed the irregularity.

APPLICABLE LAW GENERALLY

Motions to strike pleadings

[35] The general jurisprudence concerning striking pleadings applies equally, with a few exceptions, to both motions.

[36] This Court has exercised its discretion to strike parts of pleadings, without leave to amend, in the following circumstances:

- a) a pleading is deficient, sometimes asserting a legal position without particularizing material facts;
- b) where a party is seeking, or the Court has ordered missing particulars; and,
- c) the unsatisfied party moves to strike the impugned pleadings.

[37] The first relevant cases are from the same appeal: *Cameco Corporation v. HMQ*⁴ and *Cameco Corporation v. HMQ*⁵. The underlying tax appeal engaged the transfer pricing rules in Section 247 of the Act. Such provisions generally impose arm's length pricing on cross-border transactions between non-arm's length parties. The specific issue related to the purchase and sale of uranium.

[38] In *Cameco #1*, the reply alleged that Cameco's transfer prices failed to meet the arm's length principle. However, the reply failed to plead an arm's length transfer price. Cameco served a demand for particulars requesting the arm's length transfer price. The Crown's response stated: "most of the particulars cannot be known to the respondent until the conclusion of discoveries and/or the exchange of expert reports". Cameco brought a motion to strike, alleging in the impugned pleadings:

- a) constituted an abuse of the process under subsection 53(c) of the Rules;

⁴ *Cameco Corporation v HMQ*, 2010 TCC 636. [*Cameco #1*]

⁵ *Cameco Corporation v HMQ*, 2011 TCC 356. [*Cameco #2*]

b) may prejudice or delay the fair hearing of the action under subsection 53(a) of the Rules; and,

c) failed to conform to the requirements of subsection 49(1) of the Rules.

[39] The Court held in *Cameco #1* that “[t]he appellant is entitled to know what prices are consistent with an arm’s length prices to the extent that such prices cannot be determined by reference to the amount of tax assessed. This paragraph will be struck with leave to amend.”

[40] The Crown then amended the reply without alleging an arm’s length transfer price. Cameco moved to strike a second time, alleging that the relevant paragraphs:

a) failed to comply with the order in *Cameco #1*; and,

b) continued to offend Section 53 of the Rules.

[41] The Court agreed with Cameco and held as follows in *Cameco #2* “[t]he Subject Paragraphs are struck from the amended reply without leave to amend”.

[42] The Court took a similar approach recently in *Canada v. Adboss, Ltd.*⁶, affirming *Adboss, Ltd. v. HMK*⁷. The Crown pleaded as an assumption that “at all material times, the controlling mind and management of Lowfroc was in Canada”. Adboss served a demand for particulars about Lowfroc’s control and management. The Crown’s response was generally that the demand for particulars was improper, and the questions could be pursued at discovery. Adboss moved to strike under paragraphs 53(1)(a) and (c) of the Rules.

[43] In *Adboss TCC*, the Court struck the impugned assumption on the basis that it caused prejudice and constituted an abuse of process within the meaning of the Rule. Leave to amend was refused, although the point was not contentious. The Federal Court of Appeal in *Adboss Appeal* concluded, in upholding the decision, that the Tax Court had made no palpable and overriding error.

⁶ *Canada v Adboss, Ltd.*, 2023 FCA 201. [*Adboss Appeal*]

⁷ *Adboss, Ltd. v The King*, 2022 TCC 125. [*Adboss TCC*]

Delayed decision at request of parties

[44] At the request of the parties, the Court delayed its reasons in these motions to afford brief submissions on a recent Tax Court decision. In *Ingredion Canada Corporation v. The King*⁸, the Court addressed whether the Crown should be granted leave to amend its pleadings to advance a new transfer pricing “repricing” argument. The proposed amendment asserted, in the alternative, that the arm’s length interest rate on an intercompany loan was 0%. Ingredion opposed on the basis that the amendment disclosed no reasonable cause of action and was inadequately pleaded.

[45] The Court held that motions to amend and motions to strike are closely linked: a proposed amendment must be refused if it would not survive a motion to strike. Applying the *Imperial Tobacco*⁹ test, the Court found that a 0% arm’s length interest rate in a large commercial context was “untenable” and incapable of proof and therefore disclosed no reasonable prospect of success. The proposed amendment to the reply was refused.

[46] Based upon such authorities, the Court may strike an allegation in tax litigation if the allegation fails to sufficiently delineate the case to meet, and if the party making the allegations has no knowledge of, or refuses to disclose, material fact and particulars at the pleadings stage. This approach follows Section 53 of the Rules and respects the direction in Section 4 to facilitate “the just, most expeditious and least expensive determination of every proceeding on its merits.”

ANALYSIS AND ANSWERS TO MOTIONS TO STRIKE

I. Appellant’s Motions to Strike Reply Portions – Issue #1

[47] Based upon the specific reasons below, the Impugned Reply Provisions should be struck, subject to the Respondent’s right to amend, because the reply does not sufficiently plead the facts and reasons for opposing the appeal and essentially regurgitates the statute. Appendix A to these reasons is an illustrative paragraph by paragraph comparison with the statutory provisions beside the Impugned Reply Provisions. The same holds for rejecting the Proposed Impugned Reply Provisions.

⁸ *Ingredion Canada Corporation v The King*, 2026 TCC 3.

⁹ *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42.

To similarly illustrate, Appendix B provides the same comparison, but instead with the relevant statutory provisions beside the Proposed Impugned Reply Provisions.

[48] Going forward, for the Respondent to succeed and subsequently “strike-proof” his reply, he must plead the facts foundationally underlying the reassessment distinct from the legal conclusions and nomenclature contained in the statute.

The Relevant Legal Principles

[49] *Imperial Tobacco*,¹⁰ stands for the proposition that claims are struck when there is no reasonable prospect of success, the defect must be plain and obvious. *Lancan Investments Inc v The Queen*,¹¹ provides that the purpose of Section 49 of the Rules is to provide a truthful, clear, and precise pleading that defines the issues and allows the taxpayer the exact case to be met.

Application

[50] In the context of a motion to strike a reply in an income tax appeal under paragraph 53(1)(d) of the Rules, the motion will be granted only if it is plain and obvious, assuming the facts as pleaded in the reply are true, that the reply fails to state a reasonable basis for concluding that the reassessment under appeal is correct.

[51] As the Court stated during oral argument to Respondent’s counsel, it would place the Impugned Reply Provisions against the statutory provisions of subsections 260(5) and 260(5.1) of the Act to discern fact and assumptions from law and conclusions. Appendix A and B are the comparison of the statute against the Impugned Reply Provisions and Proposed Impugned Reply Provisions; what follows below are the observations and conclusions. For ease of comparison, the corresponding provisions in the BNS and BMO replies are again reproduced in a single paragraph, with square brackets [] denoting the BNS text and round brackets () denoting the BMO text.

Impugned Reply Provisions: Appendix A

¹⁰ *ibid.*

¹¹ *Lancan Investments Inc. v The Queen*, 2015 TCC 27.

[52] Several of the Impugned Reply Provisions closely track the language and structure of subsections 260(5) and 260(5.1) of the Act and, in substance, amount to a summative restatement of the statutory scheme. Paragraph [28] (31) simply reproduces the legal proposition in subsection 112(1) that a deduction is available in respect of dividends received or deemed to have been received. Paragraph [26(a)] (29(a)) frames the issues as whether subsection 260(5.1) applies to deem compensation payments to be taxable dividends, which is merely the operative question posed by the provision itself.

[53] More significantly, paragraphs [30] (32) and [31] (33) substantially mirror the wording and internal structure of subsection 260(5). Paragraph [30] (32) restates that amounts received as “SLA compensation payments” or “dealer compensation payments” may be deemed to be taxable dividends under subsection 260(5.1), but not where they are received under an arrangement and it may reasonably be considered that one of the taxpayer’s main reasons for entering the arrangement was to receive deductible compensation payments. This language marches along with the statutory exception in subsection 260(5), including the “arrangement” and “main reason” formulation. Paragraph [31] (33) also reproduces the same statutory preconditions in negative form, asserting that the amounts are not deemed dividends to the extent they were not SLA or dealer compensation payments, or were received under arrangements with the requisite main-reason purpose. These preceding paragraphs do not particularize the alleged arrangement of the Appellants discovered at audit or plead material facts supporting the main-reason allegation; rather, they restate the statutory test in pleading form.

[54] While paragraphs [25(n)] (28(x)) and [29] are framed as factual allegations, namely, “that not all amounts claimed under subsection 112(1) were received as actual dividends”, they are structured around the statutory provisions rather than articulating distinct material facts to bring the basis of reassessment within its ambit.

Impugned Proposed Reply Provisions: Appendix B

[55] Appendix B is the illustration of the Proposed Impugned Provisions; what follows are the observations and conclusions in similar format.

[56] The Proposed Impugned Reply Provisions similarly adopt, in substantial part, the language and analytical structure of subsections 260(5) and 260(5.1) of the Act. Proposed paragraph [25(o)] (28(y)) alleges that the amounts in respect of which

deductions were claimed included compensation payments received in relation to the lending of the Acquired CEs. While framed as factual assertions, the provision merely restates the statutory linkage between compensation payments, securities lending arrangements, and deductions claimed under subsection 112(1). Proposed paragraph [26(b.1)] (20(b.1)) likewise frames the issue as to whether subsection 260(5) precludes the deduction of compensation payments in relation to securities loans, which simply restates the operative legal question arising from the provision itself.

[57] Proposed paragraphs [25(p)] (28(z)), [25(q)] (28(aa)), and [25(r)] (28(bb)) also substantially reproduce the statutory concepts embedded in subsection 260(5). In particular, these provisions assert that the lending transactions and compensation payments operated so as to preserve the dividend deductions, that the lending occurred with knowledge of and in contemplation of the surrounding arrangement, and that one of the Appellants' main reasons for lending the Acquired CEs was to receive compensation payments and claim deductions in relation to them. These allegations closely track the statutory language concerning arrangements and the taxpayer's "main reasons" for entering into them. Although expressed as factual allegations, they largely restate the statutory preconditions required to engage the exception in subsection 260(5), without particularizing the material facts said to support the existence of the relevant arrangement or the alleged main-reason purpose.

[58] Proposed paragraph [37.1] (39.1) continues this same pattern. The provision alleges that subsection 260(5.1) does not apply to deem the compensation payments to have the character of dividends because the payments were received under an arrangement and one of the Appellants' main reasons for entering into the arrangement was to receive deductible compensation payments. Again, the provision substantially reproduces the statutory formulation in subsection 260(5), including the "arrangement" and "main reasons" language, rather than pleading the material facts underlying the Minister's assumptions or the factual basis said to support the reassessments.

[59] By contrast, a properly particularized pleading (or at least one that may be factually discernible by the taxpayer) might identify the specific "arrangement" relied upon, described its material terms, and set out the factual basis upon which the Respondent alleges that one of the taxpayer's main reasons for entering that arrangement was to obtain deductible compensation payments. For example, the

Respondent could have pleaded the structure of the securities lending transaction, the timing of the acquisition and disposition of the relevant securities, the absence of economic exposure to divide risk, any offsetting agreements, or internal documentation evidencing the tax-driven purpose of the transactions. Such factual allegations, if pleaded, would move the replies beyond recitations of the statutory language and toward concrete assertions of material fact capable of supporting the application of subsection 260(5) and the denial of the subsection 112(1) deduction.¹²

Summary

[60] It is plain and obvious, assuming the facts as pleaded in the replies are true, and more precisely because of the scarcity of specific facts, that neither of the Impugned Reply Provisions nor the Impugned Proposed Reply Provisions state a reasonable basis, for concluding that the reassessment under appeal are correct.

[61] In either case, such missing facts are logically essential and necessary. The litmus test for identifying the issue in dispute before the Court is the presence of facts. If they exist, they must be pleaded. If they do not, there is no basis for reassessment, or contest and the issue should be discarded. That ultimate decision is now in the hands of the Respondent through the final opportunity to compliantly amend his replies.¹³

II. The Respondent's motions to strike portions of notices of appeal – Issue #2

[62] The leading legal principle extracted from case law is settled: an additional ground that would yield greater relief than pleaded is treated as a new issue; an argument yielding the same or lesser relief is subsumed within in the larger subsisting firstly pleaded issue.

[63] In *Devon Canada Corporation v The Queen*¹⁴, Devon's objection sought a full deduction under Section 9 for stock option cancellation payments. The respondent argued that Devon could not later claim a partial deduction because that was not expressly stated. The Tax Court disagreed saying, "if a large corporation objects on

¹² *Canada v. O'Dwyer*, 2013 FCA 200 at paragraphs 29, 30 and 31.

¹³ *Cameco #2*, *Supra*, at paragraphs 22 and 23.

¹⁴ *Devon Canada Corporation v. The Queen*, 2014 TCC 255.

the basis that an expense is fully deductible, it is not precluded from arguing on appeal that the item is partially deductible.”

[64] Regarding the Fresh Step argument raised by the Appellant, it is important to note that gross deficiencies in pleadings are not mere irregularities, as is required under the Fresh Steps rule: *Propak Systems Ltd v The King*¹⁵, articulated this proposition. However, the Fresh Step rule is not applicable since the issue is decided above on other grounds.

[65] The Dividend Quantum Issue does not seek greater relief than that claimed under the primary argument. Therefore, it is an alternative issue and does not constitute a new issue, which is consistent with the reasoning in *Devon Canada*.

Conclusion and Costs

[66] Generally, the results of the motions are somewhat mixed given leave to amend now granted to the Respondent and opposed by the Appellants. As such, the Court will not award costs, but reserves any such determination:

- a) for subsequent issues arising from leave granted to the Respondent to amend his replies; and
- b) for any trial judge in the context of final cost awards;

with obvious opportunity for any party to reference these motion reasons and results at such time.

Signed at Ottawa, Ontario, this 27th day of May, 2026.

“R.S. Bocock”

Bocock J.

¹⁵ *Propak Systems Ltd v The King*, 2022 TCC 153.

CITATION: 2026 TCC 75

COURT FILE NOs.: 2024-1319(IT)G
2021-2451(IT)G
2021-2452(IT)G

STYLE OF CAUSE: THE BANK OF NOVA SCOTIA, BMO
NESBITT BURNS INC., BANK OF
MONTREAL AND HIS MAJESTY THE
KING

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 24 and 25, 2025

REASONS FOR ORDER BY: The Honourable Justice Randall Boccock

DATE OF ORDER: May 27th, 2026

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Appendix “A”+

Statutory Provisions

s. 260(5): Scope of provision Subsection (5.1) applies to a taxpayer in respect of an amount received in the year as: (a) an “*SLA compensation payment*”; or (b) a “*dealer compensation payment*”.

s. 260(5): Main purpose carve-out Subsection (5.1) does not apply where amounts are received under an *arrangement* and it may reasonably be considered that one of the *main reasons* for entering into the arrangement was to receive deductible compensation payments.

Impugned Reply Provisions

Paragraphs 30–31
Amounts received as “*SLA compensation payments*” or “*dealer compensation payments*” may be deemed dividends... Any compensation payments... are not deemed dividends to the extent that: (a) they were not received as *SLA compensation payments*; (b) they were not received as *dealer compensation payments*.

Paragraphs 30–31 ...but not in circumstances in which the compensation payments were received under an arrangement where it may reasonably be considered that one of the taxpayer’s main reasons... was to receive amounts... deductible...
...they were received under *arrangements* where it may reasonably be considered that one of BNS’s *main reasons*... was to receive amounts

that would be deductible...

s. 260(5.1): Deeming rule

Where applicable, compensation payments are deemed to be: (a) a *taxable dividend* (in certain cases); (b) trust income/distributions; or (c) interest.

Paragraphs 26 & 30

Whether subsection 260(5.1) applies to *deem* compensation payments to have been received as *taxable dividends*. ...may be deemed to have been received... as *taxable dividends in accordance with subsection 260(5.1)*.

Dividend requirement (s. 112(1) context) Deduction available only for *dividends received or deemed to have been received*

Paragraphs 25, 28, 29

Not all amounts... were received as *actual dividends*. A deduction may be claimed under subsection 112(1)... in respect of *dividends received or deemed to have been received*. Not all amounts... had been received as *actual dividends*.

Application of scheme (combined effect) Only qualifying compensation payments (that meet statutory conditions) are deemed dividends and

Paragraph 31 (conclusion)

Compensation payments are *not deemed* to be taxable dividends and are therefore *not deductible under subsection 112(1)*

deductible under
subsection 112(1).

where the statutory
conditions are not met.

*(No direct statutory
analogue —
conclusion/assertion)*

Paragraph 5 “the
amounts are also not
deductible... in respect of
certain compensation
payments...”

Appendix “B”

Statutory Provisions

Subsection 260(5): “...an amount received by a person under an arrangement where it may reasonably be considered that one of the main reasons for the person entering into the arrangement was to enable the person to receive an SLA compensation payment... or a dealer compensation payment, that would be deductible in computing the taxable income...”

Subsection 260(5):
“...under an arrangement...”

Subsection 260(5):
“...one of the main reasons for the person entering into the arrangement...”

Impugned Reply Provisions

[25(p)] (28(z)) “such lending and such compensation payments were intended to operate in such a manner as to preserve and in no way detract from the dividend deductions claimed as a result of the Arrangements;”

[25(q)] (28(aa)) “[BNS] (BMO) undertook the lending of some or all of the Acquired CEs with knowledge of, and in contemplation of, the other transactions or events that comprised the Arrangement;”

[25(r)] (28(bb)) “one of [BNS’s] (BMO’s) main reasons for lending some or all of the Acquired CEs was to enable [BNS] (BMO) to receive compensation payments

and to claim deductions in relation to them.”

Subsection 260(5.1):

“...the particular amount is deemed... to have been received by the taxpayer... as a taxable dividend...”

[25(o)] (28(y)) “...the amounts for which [BNS] (BMO) claimed deductions under [s.] (subsection) 112(1) of the Act in respect of the Acquired CEs include amounts that were in relation to compensation payments received [from] (for) lending some or all of the Acquired CEs;”

Subsection 260(5.1):

“...the particular amount is deemed... to have been received by the taxpayer... as a taxable dividend...”

[26(b.1)] (29(b.1)) “...whether subsection 260(5) of the Act precludes payments from being deductible under subsection 112(1) of the Act;”

Subsection 260(5):

“...where it may reasonably be considered that one of the main reasons...”

[37.1] (39.1) “subsection 260(5.1) of the Act does not apply to deem such payments to have the character of dividends because the payments were received under an arrangement and it may reasonably be considered that one of [BNS’s] (BMO’s) main reasons for entering into the arrangement was to enable it to receive compensation payments that would be

deductible in computing
taxable income...”