Federal Court of Appeal | Cour d'appel fédérale

Date: 20230928

Dockets: A-30-22
A-161-22

Citation: 2023 FCA 195

CORAM: **STRATAS J.A.**
WEBB J.A.
RENNIE J.A.

Docket: A-30-22

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE

Appellant

and

HIS MAJESTY THE KING

Respondent

Docket: A-161-22

AND BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Toronto, Ontario, on March 30, 2023.

Judgment delivered at Ottawa, Ontario, on September 28, 2023.

REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	STRATAS J.A. RENNIE J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] For several years the Canadian Imperial Bank of Commerce (CIBC), under the name "President's Choice Financial", has been providing credit and banking facilities to customers of Loblaw Companies Limited (Loblaw). As part of the arrangement, certain amounts were paid by CIBC to President's Choice Bank (PC Bank), an indirectly wholly-owned subsidiary of Loblaw.

[2] In a 2009 decision of the Tax Court of Canada (*President's Choice Bank v. The Queen*, 2009 TCC 170, *per* Lamarre J.) (the 2009 Decision), the Tax Court found that, for the purposes of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (ETA), the amounts paid by CIBC to PC Bank for the reporting periods from December 31, 2000 to December 30, 2002 were paid for financial services supplied by PC Bank to CIBC and, therefore, no GST was payable.

[3] In 2010, the definition of financial service was amended retroactive to 1990. In 2016 and 2017, PC Bank was reassessed by the Minister of National Revenue (the Minister) for failing to collect and remit GST on the payments made by CIBC. The reassessments were for the reporting periods commencing after December 30, 2002. In the Minister's view, the supplies made by PC Bank to CIBC were not financial services. PC Bank appealed the reassessment and began to collect GST from CIBC.

[4] CIBC paid the GST and applied for rebates on the basis that the GST was paid in error as PC Bank was supplying financial services to CIBC. The rebate applications covered GST paid

during the reporting periods from January 2003 to February 2016. The Minister issued notices of assessment denying CIBC's requests for rebates. CIBC filed notices of objection and later appealed to the Tax Court.

[5] At the outset of the Tax Court hearing, CIBC brought a motion to allow its appeal on the basis that the substance of the supply made by PC Bank to CIBC had been determined for earlier reporting periods (December 31, 2000 to December 30, 2002) by the 2009 Decision. CIBC also sought an order precluding the Crown from introducing any evidence inconsistent with the 2009 Decision. The Tax Court dismissed this motion (2022 TCC 26, *per* Hogan J.) (the Motion Order).

[6] The Tax Court (2022 TCC 83, *per* Hogan J.) (the Rebate Judgment) also dismissed CIBC's appeal from the assessments made under the ETA that denied CIBC's claims for rebates of the GST and the federal portion of HST paid in relation to the relevant reporting periods.

[7] While both PC Bank and CIBC filed appeals with the Tax Court, the only appeals that were heard by this Court are two appeals filed by CIBC – the appeal from the Motion Order and the appeal from the Rebate Judgment.

[8] For the reasons that follow, I would dismiss these appeals.

I. Background

[9] Loblaw and CIBC entered into two agreements in 1997 that resulted in financial products being provided to Loblaw's customers – the Financial Services Agreement (FSA) and the Loyalty Services Agreement (LSA). The agreements were assigned by Loblaw to PC Bank, its indirectly wholly-owned subsidiary. A number of amendments were made to the agreements from 2001 to 2014.

[10] In paragraph 7 of the partial agreed statement of facts filed with the Tax Court, the parties agreed that the FSA provided that "CIBC would be the exclusive provider of financial services under the name 'President's Choice Financial' and other trademarks identified in the FSA". There are a number of services listed in the partial agreed statement of facts, including securities brokerage services, credit products and credit cards. CIBC initially paid fees to PC Bank "calculated by reference to each new account, or other financial products opened, as well as a fee calculated by reference to the average funds and assets under management by CIBC under the [President's Choice Financial] program" (paragraph 8 of the partial agreed statement of facts). Effective April 1, 2005, the fees payable under the FSA became a revenue sharing payment.

[11] It is not clear from the partial agreed statement of facts whether all the fees under the FSA were paid to PC Bank. The agreed statement of facts states, in paragraph 8, that "[u]ntil April 1, 2005, CIBC was obliged to pay to [Loblaw] (and then PC Bank) fees calculated by reference to each new account …". Paragraph 22 stipulates that PC Bank invoiced CIBC for the GST from January 2003 to September 2007. For each subsequent reporting period, the partial

agreed statement of facts stipulates that PC Bank invoiced CIBC for the GST. Since PC Bank was reassessed for GST for each reporting period, for the purposes of these reasons, it will be assumed that all of the fees in issue were paid by CIBC to PC Bank.

[12] Under the LSA, "Loyalty Points" were issued to customers based on the purchase of eligible President's Choice Financial products. The points, subject to certain terms and conditions, could be redeemed against the purchase of eligible products at any participating Loblaw's location, or any other location as agreed upon by the parties. CIBC paid consideration in respect of the Loyalty Points awarded and administration costs (paragraph 13 of the Partial Agreed Statement of Facts as set out in paragraph 8 of the Reasons attached to the Rebate Judgment).

II. The 2009 Decision

[13] In the 2009 Decision, the Tax Court Judge, in paragraphs 34, 36 and 38 of her reasons, stated:

> [34] … I do not find that PC Bank was paid under the FSA for issuing points or for granting CIBC exclusive use of [President's Choice's] trademark. That is not what the agreement says. Rather, it reflects Loblaw/PC Bank's desire to promote the no-fee bank account or the low-interest mortgages offered to its customers, just to give examples. …
>
> …
>
> [36] … In the present case, Loblaw/PC Bank has negotiated no-fee bank accounts, lower interest rates on mortgages and later on, an Interest Plus savings account for its members. That is equivalent to arranging for favourable special credit terms and benefits to be provided to its customers by CIBC.

…

> [38] … I am satisfied that the service provided by PC Bank to CIBC was that of arranging for the granting of credit or banking facilities to its members on favourable terms. …

[14] The Tax Court Judge's conclusion is stated in paragraph 40:

> As was decided in [*Customs & Excise Commissioners v. Civil Service Motoring Association*, [1998] BVC 21 (E.W.C.A.)], I conclude that the arrangement between CIBC and [PC Bank] under the FSA consisted in arranging for the provision of financial services to the appellant's customers and so constituted an exempt supply as being a financial service within the meaning of paragraph (*l*) of the definition of this term in subsection 123(1) of the ETA.

[15] With respect to the supplies made under the LSA, the Tax Court Judge, in the 2009 Decision, found that "the conclusion must be that the supplies effected under the FSA and under the LSA are both components of a composite whole" (paragraph 53) and that "the supply made under the loyalty program is ancillary to the supply of [President's Choice Financial] products" (paragraph 54). Since there was a single composite supply and the awarding of points was ancillary to the services supplied under the FSA, the services provided by PC Bank to CIBC were exempt supplies of financial services. The amount paid by CIBC for the administration of the loyalty program was also part of the consideration paid by CIBC for the single exempt supply made under the FSA and the LSA.

[16] As a result, no GST was payable in relation to the consideration paid by CIBC to PC Bank under either the FSA or the LSA for the reporting periods from December 31, 2000 to December 30, 2002.

III. The Motion Order

[17] In its motion for an order allowing its appeal from the assessments denying its claim for a rebate of the GST paid after 2002, CIBC argued that under the doctrine of *res judicata* or abuse of process the question of the substance of the supplies provided by PC Bank to CIBC could not be re-litigated before the Tax Court as the substance of the agreements was determined by the 2009 Decision. CIBC's position is that the relevant agreements did not change substantially as a result of any of the amendments that were made to these agreements.

[18] The Tax Court Judge noted that the doctrine of *res judicata* has two forms: cause of action estoppel and issue estoppel. The Tax Court Judge found that cause of action estoppel does not apply to a tax assessment related to a different taxation year, even if the parties and the issues are substantially the same. Since the reporting periods in the appeal from the assessments denying CIBC's claim for rebates of the GST were not the same reporting periods that were in issue in the 2009 Decision, the Tax Court Judge concluded that cause of action estoppel did not apply. CIBC, in paragraph 47(a) of its memorandum filed in relation to the appeal from the Motion Order, agrees that cause of action estoppel does not apply.

[19] The Tax Court Judge cited the three requirements for issue estoppel as set out by the Supreme Court of Canada in *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248:

> [22] … (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies …

[20] The Tax Court Judge noted, in paragraph 28 of his reasons, that once the three requirements are satisfied, the Court retains the discretion to not apply issue estoppel:

> Essentially, the court's exercise of discretion either to apply or not to apply issue estoppel with respect to a given case, once all three formal requirements are satisfied, must be guided by the underlying policy concerns of *res judicata* and good sense.

[21] The Tax Court Judge noted that cause of action estoppel, issue estoppel and abuse of process are all concerned with similar policy principles. Abuse of process is more flexible as it does not have the same specific requirements as cause of action estoppel or issue estoppel.

[22] For the doctrine of abuse of process, the Tax Court Judge cited, at paragraph 30 of his reasons, the following summary of the decision of the Supreme Court in *Toronto (City) v. Canadian Union of Public Employees, Local 79,* 2003 SCC 63, [2003] 3 S.C.R. 77 in Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 5th ed (Markham: LexisNexis Canada Inc., 2021), c. 1 at §4 (Lexis e-book):

> [30] Lange summarizes the Supreme Court of Canada's analysis in *Toronto (City)* regarding the abuse of process doctrine as follows:
>
> 1. The doctrine is not encumbered by the specific requirements of *res judicata*.
>
> 2. The proper focus for the application of the doctrine is the integrity of the judicial decision-making process.
>
> 3. Relitigation may be necessary to enhance the credibility and effectiveness of judicial decision-making when, for example, there are special circumstances.

> 4. The interests of the parties, who may be twice vexed by relitigation, are not a decisive factor.
>
> 5. The motive of a party in relitigating a previous court decision for a purpose other than undermining the validity of the decision is of little import in the application of the doctrine.
>
> 6. The status of a party, as a plaintiff of defendant, in the relitigation proceeding is not a relevant factor.
>
> 7. The discretionary factors that are considered in the operation of the doctrine of issue estoppel are equally applicable to the doctrine of abuse of process by relitigation.

[23] The Tax Court Judge also noted:

> [31] Citing Justice McLachlin (as she then was) in *R v Scott*, [[1990] 3 S.C.R. 979] the Supreme Court of Canada states in *Toronto (City)* that "abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency."

[24] In arguing the motion before the Tax Court, there was no dispute between the parties that the 2009 Decision was a final decision. The Tax Court Judge also found that CIBC was a privy of PC Bank. Therefore, the second and third requirements for issue estoppel were satisfied.

[25] The remaining question for both issue estoppel and abuse of process was whether the same question was decided.

[26] Although CIBC argued that the 2009 Decision determined what was provided for the consideration paid by CIBC, the Tax Court Judge found that the amendments made to the

definition of financial service in 2010 (which were retroactive to December 17, 1990) required new factual findings to be made to determine whether the new exclusions from the definition of financial service applied (paragraph 46 of his reasons). In the alternative, the Tax Court Judge found that he would exercise his discretion to not apply issue estoppel. For the same reason he declined to find that it would be an abuse of process for him to reconsider the issue of what was supplied by PC Bank to CIBC for the consideration paid by CIBC and, in particular, whether financial services were supplied by PC Bank to CIBC.

IV. Rebate Judgment

[27] The Tax Court Judge reviewed the agreements (including the amending agreements) and the testimony of the witnesses. He found that the predominant element of the single compound supply was a "Bundle of Rights" that allowed CIBC to solicit Loblaw's existing and future customers for the purchase of President's Choice Financial products. He defined the "Bundle of Rights" in paragraph 31 of his reasons as:

> … the right to solicit [Loblaw's] clients in [Loblaw's] stores, the right to use trademarks, the right to issue points under the Loyalty Program, and other rights acquired for the purpose of expanding CIBC's nascent fintech banking operations …

[28] He found that the supply of this "Bundle of Rights" was a taxable supply as it was excluded from the definition of financial service by virtue of paragraph (*r.5*) of this definition, which was one of the paragraphs added by the 2010 amendments to the ETA.

V. Definition of Financial Service

[29] "Financial service" is defined in section 123 of the ETA. The relevant parts of this definition, as they read prior to the 2010 amendments and as they read after the 2010 amendments, are set out in the Appendix to these reasons.

VI. Issues and Standards of Review

[30] CIBC, in its appeal from the Motion Order, submits that the Tax Court Judge erred:

(a) in finding that the same issue requirement was not satisfied for the purposes of issue estoppel and abuse of process;

(b) in considering that the retroactive amendments to the definition of financial service allowed him to revisit the substance of the supply;

(c) in his interpretation of service in subparagraph (*l*)(ii) of the definition of financial service; and

(d) by misconstruing the nature and scope of the residual discretion available to him.

[31] In its appeal from the Rebate Judgment, CIBC submits that the Tax Court Judge erred by:

(a) deciding the case on a basis that was not advanced by either party;

(b) concluding that the determination of the substance of supply as found in the 2009 Decision had been rendered obsolete by the retroactive amendments to the

definition of financial service and the decision of this Court in *Canadian Imperial Bank of Commerce v. Canada*, 2021 FCA 96, [2021] D.T.C. 5059; and

(c) in concluding that the substance of the supply under the agreements was a supply of a bundle of rights.

[32] The standard of review for any question of fact or factually suffused question of mixed fact and law is palpable and overriding error and for any question of law is correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235). The same standards of review apply to the discretionary decision of the Tax Court Judge to not apply the doctrine of issue estoppel or abuse of process (which he stated was an alternative basis for dismissing CIBC's motion) (*Decor Grates Incorporated v. Imperial Manufacturing Group Inc.*, 2015 FCA 100, [2016] 1 F.C.R. 246 at para. 29).

VII. Analysis

A. *Motion Order*

[33] The first issue identified by CIBC is the alleged error in finding that the same issue requirement was not satisfied for the purposes of issue estoppel and abuse of process. Since the retroactive amendments played a key role in this finding by the Tax Court Judge, this alleged error is essentially a reframing of the issue identified by CIBC as the second error. The third issue also relates to the retroactive amendments as paragraph (*l*)(ii) was added by these amendments. Since all three issues raised by CIBC relate to the retroactive amendments, these issues will be addressed together in these reasons.

[34] It should be noted, as a preliminary matter, that in its original Notice of Appeal filed with the Tax Court on August 28, 2019 and in its Amended Notice of Appeal filed with the Tax Court on November 7, 2019, CIBC identified only one issue:

> 23. The issue in this appeal is whether the supply to CIBC under the [FSA and LSA], which was determined in the 2009 Decision to be an exempt supply of a financial service of arranging for the granting of credit or banking facilities, lost that exempt status, and became a taxable supply, by virtue of paragraph (r.4) or (r.5) of the Financial Service Definition.

[35] Therefore, it was not evident to CIBC when it filed its original Notice of Appeal and its Amended Notice of Appeal that the same question had been determined by the 2009 Decision. Rather, CIBC was only raising the issue of whether the amendments to the definition of financial service altered the result of the 2009 Decision.

[36] The retroactive amendments to the definition of financial service are an important consideration in determining whether the same issue requirement for issue estoppel and abuse of process is satisfied. The determination of whether PC Bank was supplying financial services to CIBC must be based on the applicable definition of financial service. When viewed through the lens of this definition, as amended, were the supplies made by PC Bank to CIBC financial services? The issue is, therefore, whether CIBC was paying PC Bank for financial services based on the revised definition of financial service adopted in 2010 which was not considered (nor could it have been considered) in the 2009 Decision.

[37] The 2010 amendments included the addition of two paragraphs: (*r.4*) and (*r.5*). Paragraph (*r.4*) excluded certain services from the definition of financial service and paragraph (*r.5*)

excluded the supply of certain property from the definition of financial service. The exclusion of a supply of property from the definition of financial service is notable as "service" is defined in section 123 of the ETA as "anything other than … property":

service means anything other than **(*a*)** property, **(*b*)** money, and **(*c*)** anything that is supplied to an employer by a person who is or agrees to become an employee of the employer in the course of or in relation to the office or employment of that person;	***service*** Tout ce qui n'est ni un bien, ni de l'argent, ni fourni à un employeur par une personne qui est un salarié de l'employeur, ou a accepté de l'être, relativement à sa charge ou à son emploi.

[38] At first blush, it would be expected that it is not necessary to specifically exclude a supply of property from the definition of financial service. However, financial service is a separate defined term whose meaning is to be determined based on the words chosen by Parliament.

[39] The definition of financial service does not start with "financial service means a service" described in the paragraphs that follow, but rather the opening words are "financial service means" what is described in the paragraphs that follow. By adding an exclusion for a supply of property (which Parliament did by adding paragraph (*r.5*)), Parliament must have been concerned that, without the addition of this exclusion, certain supplies of property could be considered to be a financial service. Parliament does not speak in vain (*Canada v. Loblaw Financial Holdings Inc.*, 2021 SCC 51, (2021) 464 D.L.R. (4th) 244, at para. 64).

[40] This specific exclusion of property from the definition of financial service was not present when the 2009 Decision was rendered. As noted by the Tax Court judge in paragraph 67 of his reasons:

> In the instant case, at best, we are left to speculate on what Justice Lamarre would have decided if she had been tasked to consider the scope of application of the new provisions.

[41] I agree with this statement of the Tax Court Judge. We do not know whether the Tax Court Judge, in rendering the 2009 Decision, may have considered that a supply of property by PC Bank to CIBC would not alter the determination of whether PC Bank was supplying financial services to CIBC.

[42] As CIBC submitted, and as the Tax Court Judge acknowledged in his reasons dismissing CIBC's appeal, property referred to in paragraph (*r.5*) is not excluded from the definition of financial service under subparagraph (*l*)(ii).

[43] Paragraph (*l*) provides, in part, that a financial service includes:

> **(*l*)** the agreeing to provide, or the arranging for, a service that is
>
> …
>
> **(ii)** not referred to in any of paragraphs (*n*) to (*t*).
>
> [emphasis added]

[44] Subparagraph (*l*)(ii) is limited to a service referred to in any of paragraphs (*n*) to (*t*). Since paragraph (*r.5*) refers to property, it is not included in the reference to a *service* that is not referred to any of paragraphs (*n*) to (*t*). Therefore, property referred to in paragraph (*r.5*) is not excluded from the definition of financial service as a result of the application of paragraph (*l*)(ii).

[45] However, the definition of financial service provides that a financial service does not include anything specified in paragraphs (*n*) to (*t*). This includes paragraph (*r.5*). Paragraph (*r.5*) excludes from the definition of financial service "property … that is delivered or made available to a person in conjunction with the rendering by the person of a service referred to" in paragraph (*l*). Paragraph (*l*) provides that a financial service will include agreeing to provide, or the arranging for, a service referred to in paragraphs (*a*) to (*i*). Paragraphs (*a*) to (*i*) include various banking and credit services.

[46] Therefore, any property that is delivered or made available to CIBC in conjunction with CIBC arranging to provide banking or credit services will not be a financial service.

[47] In the 2009 Decision, the Tax Court Judge's conclusion is stated in paragraph 40:

> … the arrangement between CIBC and [PC Bank] under the FSA consisted in arranging for the provision of financial services to [PC Bank's] customers …

[48] The service provided by PC Bank to CIBC was described in paragraph 38 of the 2009 Decision as:

> … I am satisfied that the service provided by PC Bank to CIBC was that of arranging for the granting of credit or banking facilities to its members on favourable terms. …

[49] In paragraph 36 of her reasons in the 2009 Decision, the Tax Court Judge stated:

> … Loblaw/PC Bank has negotiated no-fee bank accounts, lower interest rates on mortgages and later on, an Interest Plus savings account for its members. That is equivalent to arranging for favourable special credit terms and benefits to be provided to its customers by CIBC.

[50] The favourable terms for Loblaw's customers were "no-fee bank accounts, lower interest rates on mortgages and later on, an Interest Plus savings account". While arranging for credit or banking facilities on favourable terms was a benefit that Loblaw's customers obtained under the arrangements with CIBC, it is far from clear why CIBC would pay PC Bank to earn less revenue on credit facilities or pay more interest on deposits than CIBC would if the credit facilities or deposits were provided to individuals who were not Loblaw's customers. Rather, it would be logical for CIBC to pay fees to PC Bank to gain access to PC Bank's and Loblaw's customers.

[51] PC Bank and Loblaw provided CIBC access to Loblaw's stores to allow CIBC to solicit business from Loblaw's customers through kiosks set up in these stores. The Tax Court Judge, in the 2009 Decision, did not address whether this right of access was provided in conjunction with CIBC rendering banking and credit services to Loblaw's customers.

[52] In paragraph 34 of her reasons in the 2009 Decision, the Tax Court Judge stated:

> … I do not find that PC Bank was paid under the FSA for issuing points or for granting CIBC exclusive use of [President's Choice's] trademark …

[53] These findings only relate to the issuance of points and the exclusive use of trademarks. There is no reference to allowing CIBC access to Loblaw's premises for the purposes of soliciting customers.

[54] In paragraph 13 (r) of the Minister's reply filed with the Tax Court, the Minister included the following assumption of fact:

> r) [PC Bank] was to provide access to its highly regarded trademark, its customer base and provide channel distribution through its store facilities to CIBC.

[55] The Tax Court Judge, in paragraph 60 of his reasons dismissing CIBC's motion, noted that the access to Loblaw's customer base and the provision of a channel of distribution through the store facilities was not inconsistent with any factual findings made in the 2009 Decision. As noted, the 2009 Decision only addressed the issue of whether payment was made for the trademarks and issuance of points.

[56] In the Tax Court Judge's view, the addition of new paragraphs (*r.4*) and (*r.5*) to the definition of financial service, as CIBC indicated in its Amended Notice of Appeal, raises a new issue of whether, in light of these new provisions, PC Bank was providing a financial service to CIBC. I agree with the Tax Court Judge.

[57] Since the Tax Court Judge did not err in finding that the same issue requirement was not satisfied for the purposes of issue estoppel or abuse of process, this is sufficient to dismiss CIBC's appeal from the Motion Order.

B. *Rebate Judgment*

[58] The first issue raised by CIBC in the appeal from the Rebate Judgment was whether the Tax Court Judge erred by deciding the case on a basis not advanced by either party. In paragraph 40 of its memorandum, CIBC states:

> The Trial Judge did not adopt or even refer to the Crown's argument on why he should not follow Lamarre J.'s finding on the substance of the supply. Instead, the Trial Judge embarked on an independent analysis after the hearing and founded his decision on a theory that was not raised by either party.

[59] CIBC does not identify the "theory" adopted by the Tax Court Judge that was not raised by either party. Since the substance of the supply is a question of fact or mixed fact and law, CIBC is submitting that in making a finding of fact (or mixed fact and law), the Tax Court Judge is restricted to only the "theories" concerning the alleged facts as proposed by either party.

[60] In this matter, once CIBC's motion for an order allowing its appeal and precluding the Crown from introducing evidence inconsistent with the 2009 Decision was dismissed, it was open to the Tax Court Judge, based on the evidence presented at the hearing, to determine the substance of the supply made by PC Bank to CIBC.

[61] The determination of what was supplied by PC Bank for the consideration paid by CIBC is a question of fact or mixed fact and law to be determined by the Tax Court Judge. The evidence presented at the hearing included the agreements and the testimony of the witnesses. The interpretation of the contracts is a question of mixed fact and law (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 50).

[62] It was the Tax Court Judge's role to determine, as a question of fact or mixed fact and law, the substance of the supply made by PC Bank to CIBC and whether, based on the amended definition of financial service, the supply was a financial service. Factual findings (including findings of mixed fact and law) are made by evaluating the evidence presented at the hearing. While each party may have its own theory of what factual findings should be made, the determination of the facts is made by the Tax Court Judge. There is no merit to CIBC's argument that the Tax Court Judge erred in determining the substance of the supply on a basis not argued by the parties.

[63] The second argument raised by CIBC is that the Tax Court Judge erred by concluding that the 2009 Decision was rendered obsolete by the amendments to the definition of financial service. Essentially, this is a recharacterization of the argument for allowing its appeal from the order dismissing its motion on the basis of issue estoppel or abuse of process. Since, for the reasons stated above, I would dismiss CIBC's appeal from this order, there is no merit to this argument. Since neither issue estoppel nor abuse of process apply, it was open to the Tax Court Judge to make his own determination of what was supplied by PC Bank to CIBC.

[64] CIBC's final argument relates to the Tax Court Judge's finding with respect to the substance of the supply made by PC Bank to CIBC. The Tax Court Judge made his findings based on his review of the applicable agreements and the testimony of the witnesses. The applicable standard of review for this finding is palpable and overriding error.

[65] As noted by the Supreme Court in *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352:

> [38] It is equally useful to recall what is meant by "palpable and overriding error". Stratas J.A. described the deferential standard as follows in *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31, at para. 46:
>
> > Palpable and overriding error is a highly deferential standard of review ... . "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.
>
> [39] Or, as Morissette J.A. put it in *J.G. v. Nadeau*, 2016 QCCA 167, at para. 77 (CanLII), [TRANSLATION] "a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions."

[66] CIBC repeatedly argued that the Tax Court Judge found that CIBC was renting premises from PC Bank and that this finding was a palpable and overriding error. However, this is not what the Tax Court Judge found.

[67] The Tax Court Judge found that PC Bank supplied a "Bundle of Rights" to CIBC. This "Bundle of Rights" included the right to solicit Loblaw's customers at Loblaw's stores.

It was the right for CIBC's employees to be on Loblaw's premises for the purpose of soliciting customers, it was not the rental of premises by CIBC. PC Bank does not dispute that CIBC was granted the right to have its employees on Loblaw's premises to solicit business from Loblaw's customers. There is no merit to CIBC's argument that the Tax Court Judge found that CIBC was renting premises.

[68] CIBC has failed to establish that the Tax Court Judge committed any palpable and overriding error in his finding that PC Bank supplied the "Bundle of Rights" to CIBC.

[69] As a result, I would dismiss CIBC's appeal from the Tax Court's Judgment dismissing its appeal.

VIII. Conclusion

[70] As a result, I would dismiss these appeals with costs.

"Wyman W. Webb"
J.A.

"I agree.
David Stratas J.A."

"I agree.
Donald J. Rennie J.A."

APPENDIX

1. The relevant parts of the definition of "financial service", prior to the 2010 amendments, are as follows:

financial service means	***service financier***
(*a*) the exchange, payment, issue, receipt or transfer of money, whether effected by the exchange of currency, by crediting or debiting accounts or otherwise,	***a*)** L'échange, le paiement, l'émission, la réception ou le transfert d'argent, réalisé au moyen d'échange de monnaie, d'opération de crédit ou de débit d'un compte ou autrement;
(*b*) the operation or maintenance of a savings, chequing, deposit, loan, charge or other account,	***b*)** la tenue d'un compte d'épargne, de chèques, de dépôt, de prêts, d'achats à crédit ou autre;
…	[…]
(*d*) the issue, granting, allotment, acceptance, endorsement, renewal, processing, variation, transfer of ownership or repayment of a financial instrument,	***d*)** l'émission, l'octroi, l'attribution, l'acceptation, l'endossement, le renouvellement, le traitement, la modification, le transfert de propriété ou le remboursement d'un effet financier;
…	[…]
(*f*) the payment or receipt of money as dividends (other than patronage dividends), interest, principal, benefits or any similar payment or receipt of money in respect of a financial instrument,	***f*)** le paiement ou la réception d'argent à titre de dividendes, sauf les ristournes, d'intérêts, de principal ou d'avantages, ou tout paiement ou réception d'argent semblable, relativement à un effet financier;
…	[…]
(*g*) the making of any advance, the granting of any credit or the lending of money,	***g*)** l'octroi d'une avance ou de crédit ou le prêt d'argent;

…	[…]
(*l*) the agreeing to provide, or the arranging for, a service referred to in any of paragraphs (*a*) to (*i*), …	***l*)** le fait de consentir à effectuer un service visé à l'un des alinéas *a*) à *i*) ou de prendre les mesures en vue de l'effectuer;
…	[…]
but does not include	La présente définition exclut :
…	[…]
(*t*) a prescribed service;	***t*)** les services visés par règlement.

2. As part of the 2010 amendments, paragraph (*l*) was amended and paragraphs (*r.4*) and (*r.5*) were added to the definition of financial service. The other paragraphs listed above were not amended. The relevant parts of the definition of "financial service" that were amended or added read as follows:

financial service means	***service financier***
…	[…]
(*l*) the agreeing to provide, or the arranging for, a service that is	***l*)** le fait de consentir à effectuer, ou de prendre les mesures en vue d'effectuer, un service qui, à la fois :
(i) referred to in any of paragraphs (*a*) to (*i*), and	**(i)** est visé à l'un des alinéas *a*) à *i*),
(ii) not referred to in any of paragraphs (*n*) to (*t*),…	**(ii)** n'est pas visé aux alinéas *n*) à *t*);
but does not include	La présente définition exclut :
…	[…]
(*r.4*) a service (other than a prescribed service) that is preparatory to the provision or the	***r.4*)** le service, sauf un service visé par règlement, qui est rendu en préparation de la prestation

potential provision of a service referred to in any of paragraphs (*a*) to (*i*) and (*l*), or that is provided in conjunction with a service referred to in any of those paragraphs, and that is

effective ou éventuelle d'un service visé à l'un des alinéas *a*) à *i*) et *l*), ou conjointement avec un tel service, et qui consiste en l'un des services suivants :

(i) a service of collecting, collating or providing information, or

(i) un service de collecte, de regroupement ou de communication de renseignements,

(ii) a market research, product design, document preparation, document processing, customer assistance, promotional or advertising service or a similar service,

(ii) un service d'étude de marché, de conception de produits, d'établissement ou de traitement de documents, d'assistance à la clientèle, de publicité ou de promotion ou un service semblable;

(r.5) property (other than a financial instrument or prescribed property) that is delivered or made available to a person in conjunction with the rendering by the person of a service referred to in any of paragraphs (*a*) to (*i*) and (*l*),

r.5) un bien, sauf un effet financier ou un bien visé par règlement, qui est livré à une personne, ou mis à sa disposition, conjointement avec la prestation par celle-ci d'un service visé à l'un des alinéas *a*) à *i*) et *l*);

…

[…]

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-30-22
STYLE OF CAUSE:	CANADIAN IMPERIAL BANK OF COMMERCE v. HIS MAJESTY THE KING
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