Docket: 2017-3249(IT)G

BETWEEN:

FU2 PRODUCTIONS LTD.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Motion heard on January 25, 2019 and on September 13, 2021,
at Ottawa, Canada.

Before: The Honourable Justice Sylvain Ouimet

Appearances:

Counsel for the Appellant:	Bruce Harvey
Counsel for the Respondent:	Marie-Ève Aubry (January 25, 2019) Meaghan Mahadeo (September 13, 2021)

ORDER

WHEREAS the motion was heard on January 25, 2019 and on September 13, 2021;

AND UPON hearing from the parties;

In accordance with the attached Reasons for Order, the motion under rule 53 of the *Tax Court of Canada Rules (General Procedure)* (the "Rules") requesting an order to strike out parts of the Notice of Appeal is allowed, with costs.

In accordance with the attached Reasons for Order, the motion under rule 44 of the Rules requesting an order allowing the Respondent to file his reply to the Notice of Appeal within 60 days after the date of the order is allowed, with costs.

Signed at Ottawa, Canada, this 24th day of November 2022.

"Sylvain Ouimet"

Ouimet J

Citation: 2022 TCC 148
Date: 20221124
Docket: 2017-3249(IT)G

BETWEEN:

FU2 PRODUCTIONS LTD.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR ORDER

Ouimet J

I. INTRODUCTION

A. Context

[1] On October 8, 2009, the Appellant and Cardinal Film 11 Inc. (the "Coproducer") acquired the rights to make a film (the "Film").[1]

[2] On October 21, 2009, the Appellant and the Coproducer received $1,900,000 of financing (the "Contribution") from Telefilm Canada ("Telefilm") for the production of the Film.[2]

[3] The Film was produced during the Appellant's taxation years ending on October 31, 2010 and on October 31, 2011.[3]

[4] On March 30, 2010, Telefilm's Contribution was increased to $2,070,863, and an additional $55,387 was provided as a production revenue advance.[4]

[1] Notice of Appeal, Part (c), at para 12.
[2] *Ibid*, Part (c), at para 14.
[3] *Ibid*, Part (c), at para 13.
[4] *Ibid*, Part (c), at para 16.

[5] When the Appellant filed its income tax returns for its 2010 and 2011 taxation years, the Appellant claimed the Canadian Film or Video Production Tax Credit (the "CPTC") in accordance with Form T1131, the Canadian Audio-Visual Certification Office ("CAVCO") CPTC Guidelines (the "Guidelines"), and the Canada Revenue Agency ("CRA") CPTC Guide to Form T1131 (the "Guide").[5] In the returns, the Appellant included Telefilm's Contribution as "Assistance" and reduced the CPTC that was claimed accordingly. In 2013, the Appellant became aware of the fact that the Guidelines and the Guide applied amendments to section 125.4 of the *Income Tax Act*[6] (the "ITA"). The Appellant also became aware that the amendments had not been introduced in the House of Commons and had never been passed into law.[7]

[6] On May 8, 2013, the Appellant filed an amended income tax return for its 2011 tax year. In the income tax return, the Appellant reduced the amount of "Assistance" received from Telefilm and increased the CPTC for the Film by $152,016.[8]

[7] On April 9, 2015, the Minister of National Revenue (the "Minister") issued a notice of reassessment with respect to the Appellant's 2011 taxation year (the "Notice of Reassessment"). The Minister determined that Telefilm's Contribution was "Assistance" pursuant to subsection 125.4(1) of the ITA. Therefore, the Minister increased the amount of "Assistance" received by the Appellant by $147,287 and reduced the Appellant's CPTC by $147,287 plus interest.[9]

[8] On September 29, 2017, the Appellant filed a notice of appeal (the "Notice of Appeal"). In the Notice of Appeal, the Appellant submitted that the Minister had issued the reassessment following the passing of the *Economic Action Plan 2014 Act, No 2* (the "EAP 2014 Act").[10] According to the Appellant, the EAP 2014 Act includes a retroactive amendment to the definition of the word "Assistance" found at subsection 125.4(1) of the ITA. More specifically, the Appellant submits that the EAP 2014 Act was not passed by a valid Parliament as mandated in Part IV of the *Constitution Act, 1867*. The Appellant submits that the EAP 2014 Act is

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[5] *Ibid*, Part (c), at para 25.
[6] *Income Tax Act*, RSC 1985, c 1 (5th Supp) ["ITA"].
[7] *Ibid*, Part (c), at para 26.
[8] *Ibid*, Part (c), at para 27.
[9] *Ibid*, Part (c), at para 29.
[10] *Economic Action Plan 2014 Act, No 2*, SC 2014, c 39 [*EAP*].

unconstitutional legislation, with no force or effect.[11] The Appellant further submits that the amendment to subsection 125.4(1) of the ITA is not valid and that therefore, the Minister could not reassess the Appellant pursuant to the amended version of subsection 125.4(1).[12]

B. The Respondent's Motion

[9] On May 28, 2018, the Respondent filed a notice of motion (the "Notice of Motion") pursuant to rules 44 and 53 of the *Tax Court of Canada Rules (General Procedure)*[13] (the "Rules"). With this motion, the Respondent seeks the following:

1- An order to strike out parts of the Appellant's Notice of Appeal pursuant to paragraphs 53(1)(a) and (d) of the Rules. The Respondent requests that the following parts of the Notice of Appeal be struck out:

   - the second sentence of paragraph 30;
   - paragraphs 32 to 71 in Part (c);
   - paragraph 6 in Part (d);
   - paragraph 9 in Part (e);
   - paragraphs 9 to 17 in Part (f); and
   - paragraphs 4 and 5 in Part (g).

2- An order allowing the Respondent to file a reply to the Notice of Appeal within 60 days after the date of the order and to serve the reply within five days after the 60-day period. The request is made pursuant to paragraph 44(1)(b) of the Rules.

3- An order granting the Respondent costs with respect to the motion.[14]

[10] The parts of the Notice of Appeal that the Respondent requests be struck out relate to an alternative argument made by the Appellant. The argument reads as follows:

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[11] Notice of Appeal, Part (f), at paras 9-18.
[12] *Ibid*, Part (f) at para 18.
[13] *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a [*Rules*].
[14] Respondent's Notice of Motion at 1-2.

> In the alternative, if the Telefilm contribution is deemed "assistance" under the provisions of subsection 125.4(1) that has not been repaid by the Appellant, then the Appellant states that the definition of "assistance" in sub-section 125.4(1) prior to the amendments contained in the Economic Action Plan 2014 Act, No. 2, c.39 should apply to the Sequel Film and its tax years ending October 31, 2010 and 2011.[15]

[11] On January 17, 2019, the Appellant filed a notice of motion.[16] With this motion, the Appellant requested that this Court dismiss the Respondent's motion on the grounds that a notice of constitutional question had not been served on the Attorney General of Canada and on the attorney general of each province, pursuant to subsection 19.2(1) of the *Tax Court of Canada Act*[17] and rule 61.1 of the Rules.

[12] On January 25, 2019, I dismissed the Appellant's motion.

II. ISSUES

[13] The issue is whether the Respondent's motion should be allowed. To answer this question, the Court will determine the following:

1- whether it is plain and obvious that the Appellant's constitutional argument has no reasonable prospect of success; and

2- whether the Respondent should be granted an extension of time to file a reply to the Appellant's Notice of Appeal, pursuant to paragraph 44(1)(b) of the Rules.

III. THE RELEVANT LEGISLATIVE PROVISIONS

[14] The applicable provisions under the Rules are as follows:

> **12(1)** The Court may extend or abridge any time prescribed by these rules or a direction, on such terms as are just.
>
> **(2)** A motion for a direction extending time may be made before or after the expiration of the time prescribed.

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[15] Notice of Appeal, Part (f), at para 9.
[16] On January 21, 2019, the Appellant amended its motion. The amendment was not material.
[17] *Tax Court of Canada Act*, RSC 1985, c T-2.

(3) A time prescribed by these rules for filing, serving or delivering a document may be extended or abridged by consent in writing.

…

44(1) A reply shall be filed in the Registry within 60 days after service of the notice of appeal unless

> **(a)** the appellant consents, before or after the expiration of the 60-day period, to the filing of that reply after the 60-day period within a specified time; or
>
> **(b)** the Court allows, on application made before or after the expiration of the 60-day period, the filing of that reply after the 60-day period within a specified time.

(2) If a reply is not filed within an applicable period specified under subsection (1), the allegations of fact contained in the notice of appeal are presumed to be true for purposes of the appeal.

(3) A reply shall be served

> **(a)** within five days after the 60-day period prescribed under subsection (1);
>
> **(b)** within the time specified in a consent given by the appellant under subsection (1); or
>
> **(c)** within the time specified in an extension of time granted by the Court under subsection (1).

…

53(1) The Court may, on its own initiative or on application by a party, strike out or expunge all or part of a pleading or other document with or without leave to amend, on the ground that the pleading or other document

> **(a)** may prejudice or delay the fair hearing of the appeal;
>
> **(b)** is scandalous, frivolous or vexatious;
>
> **(c)** is an abuse of the process of the Court; or
>
> **(d)** discloses no reasonable grounds for appeal or opposing the appeal.

(2) No evidence is admissible on an application under paragraph (1)(d).

(3) On application by the respondent, the Court may quash an appeal if

> **(a)** the Court has no jurisdiction over the subject matter of the appeal;
>
> **(b)** a condition precedent to instituting an appeal has not been met; or
>
> **(c)** the appellant is without legal capacity to commence or continue the proceeding.

…

147(7) Any party may,

(a) within thirty days after the party has knowledge of the judgment, or

(b) after the Court has reached a conclusion as to the judgment to be pronounced, at the time of the return of the motion for judgment,

whether or not the judgment included any direction concerning costs, apply to the Court to request that directions be given to the taxing officer respecting any matter referred to in this section or in sections 148 to 152 or that the Court reconsider its award of costs.

[15] The applicable provisions under the *Tax Court of Canada Act* are as follows:

19.2(1) If the constitutional validity, applicability or operability of an Act of Parliament or its regulations is in question before the Court, the Act or regulations shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).

Time of notice

(2) The notice must be served at least 10 days before the day on which the constitutional question is to be argued, unless the Court orders otherwise.

Notice of appeal

(3) The Attorney General of Canada and the attorney general of each province are entitled to notice of any appeal made in respect of the constitutional question.

Right to be heard

(4) The Attorney General of Canada and the attorney general of each province are entitled to adduce evidence and make submissions to the Court in respect of the constitutional question.

Appeal

(5) If the Attorney General of Canada or the attorney general of a province makes submissions, that attorney general is deemed to be a party to the proceedings for the purpose of any appeal in respect of the constitutional question.

[16] The applicable provisions under the *Constitution Act, 1867*[18] are as follows:

> **21** The Senate shall, subject to the Provisions of this Act, consist of One Hundred and five Members, who shall be styled Senators.
>
> **22** In relation to the Constitution of the Senate Canada shall be deemed to consist of Four Divisions:
>
> 1. Ontario;
> 2. Quebec;
> 3. The Maritime Provinces, Nova Scotia and New Brunswick, and Prince Edward Island;
> 4. The Western Provinces of Manitoba, British Columbia, Saskatchewan, and Alberta;
>
> which Four Divisions shall (subject to the Provisions of this Act) be equally represented in the Senate as follows: Ontario by twenty-four senators; Quebec by twenty-four senators; the Maritime Provinces and Prince Edward Island by twenty-four senators, ten thereof representing Nova Scotia, ten thereof representing New Brunswick, and four thereof representing Prince Edward Island; the Western Provinces by twenty-four senators, six thereof representing Manitoba, six thereof representing British Columbia, six thereof representing Saskatchewan, and six thereof representing Alberta; Newfoundland shall be entitled to be represented in the Senate by six members; the Yukon Territory, the Northwest Territories and Nunavut shall be entitled to be represented in the Senate by one member each.
>
> In the Case of Quebec each of the Twenty-four Senators representing that Province shall be appointed for One of the Twenty-four Electoral Divisions of Lower Canada specified in Schedule A. to Chapter One of the Consolidated Statutes of Canada.
>
> …
>
> **32** When a Vacancy happens in the Senate by Resignation, Death, or otherwise, the Governor General shall by Summons to a fit and qualified Person fill the Vacancy.
>
> …
>
> **35** Until the Parliament of Canada otherwise provides, the Presence of at least Fifteen Senators, including the Speaker, shall be necessary to constitute a Meeting of the Senate for the Exercise of its Powers.

[18] *Constitution Act, 1867*, 30 & 31 Victoria, c 3 (UK).

> **36** Questions arising in the Senate shall be decided by a Majority of Voices, and the Speaker shall in all Cases have a Vote, and when the Voices are equal the Decision shall be deemed to be in the Negative.
>
> **37** The House of Commons shall, subject to the Provisions of this Act, consist of three hundred and eight members of whom one hundred and six shall be elected for Ontario, seventy-five for Quebec, eleven for Nova Scotia, ten for New Brunswick, fourteen for Manitoba, thirty-six for British Columbia, four for Prince Edward Island, twenty-eight for Alberta, fourteen for Saskatchewan, seven for Newfoundland, one for the Yukon Territory, two for the Northwest Territories and one for Nunavut.

[17] The applicable provisions under the *Supreme Court Act*[19] are as follows:

> **4(1)** The Court shall consist of a chief justice to be called the Chief Justice of Canada, and eight puisne judges.

[18] The applicable provisions under the *Constitution Act, 1982*[20] are as follows:

> **52(1)** The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> **(2)** The Constitution of Canada includes
>
> (a) the *Canada Act 1982*, including this Act;
> (b) the Acts and orders referred to in the schedule; and
> (c) any amendment to any Act or order referred to in paragraph (a) or (b).
>
> **(3)** Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

IV. ANALYSIS

A. The Respondent's Motion under Rule 53 of the Rules

(1) The Respondent's Motion

[19] On May 28, 2018, the Respondent filed the Notice of Motion pursuant to rules 53 of the Rules. Pursuant to paragraphs 53(1)(a) and (d) of the Rules, the

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[19] *Supreme Court Act*, RSC 1986, c S-26.
[20] *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11.

Respondent seeks an order striking certain paragraphs and sentences from the Notice of Appeal.

[20] Paragraphs 53(1)(a) and (d) of the Rules read as follows:

> **53(1)** The Court may, on its own initiative or on application by a party, strike out or expunge all or part of a pleading or other document with or without leave to amend, on the ground that the pleading or other document
>
> **(a)** may prejudice or delay the fair hearing of the appeal;
>
> **(b)** is scandalous, frivolous or vexatious;
>
> **(c)** is an abuse of the process of the Court; or
>
> **(d)** discloses no reasonable grounds for appeal or opposing the appeal.

[21] The passages that the Respondent seeks to have struck out relate to the Appellant's constitutional argument. The Respondent submits that these passages should be struck out on the following grounds: the pleading may prejudice or delay the fair hearing of the appeal, and the pleading discloses no reasonable grounds for appeal or opposing the appeal.[21]

[22] The Appellant's constitutional argument can be summarized as follows:

- The Appellant submits that the *Constitution Act, 1867* defines the Senate and mandates the composition of its members. The Senate is mandated to have 105 senators: 24 senators representing Ontario, 24 senators representing Quebec (specifically, one senator appointed for each of the 24 electoral divisions of Quebec), 10 senators representing Nova Scotia, 10 senators representing New Brunswick, four senators representing Prince Edward Island, six senators representing Manitoba, six senators representing British Columbia, six senators representing Saskatchewan, six senators representing Alberta, six senators representing Newfoundland, one senator representing the Yukon, one senator representing the Northwest Territories, and one senator representing Nunavut.[22]

[21] Respondent's Notice of Motion; Respondent's Written Submissions at para 5.
[22] Notice of Appeal, part f, at paras 11, 12.

- The Appellant submits that the regional representation of senators is a foundational principle of the Constitution of Canada.[23]

- The Appellant submits that Prime Minister Stephen Harper refused to recommend appointees for vacancies created in the Senate after March 25, 2013 to the Governor General.[24] At the time that the EAP 2014 Act passed into law, there were 17 vacant seats in the Senate. The vacancies were distributed as follows: one seat representing British Columbia, three seats representing Manitoba, five seats representing Ontario, two seats representing New Brunswick, one seat representing Prince Edward Island, two seats representing Nova Scotia, and three seats representing Quebec, from the electoral divisions of Gulf, Grandville and De la Vallière.[25]

- The Appellant submits that Prime Minister Stephen Harper's refusal to recommend appointees and the Governor General's failure to fill the vacancies in the Senate unconstitutionally amended fundamental features of the Senate. The Appellant submits that the Senate could not validly act without a full complement of 105 senators appointed from the specified provinces and territories, as required by sections 21 and 22 of the *Constitution Act, 1867*. Therefore, the implementation of the EAP 2014 Act was inconsistent with sections 21 and 22 of the *Constitution Act, 1867*. The EAP 2014 Act is of no force or effect.[26]

- In conclusion, the Appellant submits that the Court should allow its appeal and vacate the reassessment on the basis that the amendments to section 125.4 of the ITA are not applicable to its 2011 taxation year.

[23] The Respondent submits that the Appellant's constitutional argument has no reasonable prospect of success on the following grounds:

- the Court does not have jurisdiction to review whether the Senate properly passed the EAP 2014 Act;

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[23] *Ibid*, Part (f), at para 16.
[24] *Ibid*.
[25] *Ibid*, Part (f), at para 17.
[26] *Ibid*, Part (f), at paras 16–17.

- vacancies in the Senate do not preclude the Senate from exercising its powers; and

- even if the Court finds that the Senate was not competent to pass legislation because of vacancies in the Senate, the remedy cannot be to immediately invalidate legislation enacted during the vacancies.[27]

[24] Consequently, the Respondent requests that the following parts of the Notice of Appeal, all pertaining to the constitutional argument, be struck out:

- In Part (c) of the Notice of Appeal, titled "Material facts relied on", paragraph 30 and paragraphs 32 to 71 inclusively. The paragraphs read as follows:

> 30. ... The objection was on the basis that the Economic Action Plan 2014 Act, No. 2, S.C. 2014, c.39 was unconstitutional.
>
> …
>
> 32. In 1995, the 35th Parliament of Canada amended the Income Tax Act to include Section 125.4, the Canadian Film or Video Production Tax Credit;
>
> 33. In December 2002, the Minister of Finance, the Honorable John Manley, released a discussion paper outlining Legislative Proposals and Explanatory Notes Relating to Income Tax including amendments to the Canadian Film and Video Production Tax Credit provisions contained in section 125.4 of the Income Tax Act. Section 63 (1) of the Proposals would require the Minister of Canadian Heritage to issue a certificate certifying that the producers retained an acceptable share of foreign revenue and that public financial support of the production would not be contrary to public policy;
>
> 34. On November 14, 2003, the Minister of Finance, the Honorable John Manley, issued a second discussion paper outlining Legislative Proposals and Explanatory Notes Relating to Income Tax including amendments to the Canadian Film and Video Production Tax Credit provisions contained in section 125.4 of the Income Tax Act. These proposals were more extensive and included a change in the definition of assistance, an increase in the maximum tax credit rate from 12% of budget to 15% of budget, the public policy provisions proposed in 2002 as well as various other amendments. Notwithstanding that these proposals were not introduced as

[27] Respondent's Notice of Motion; Respondent's Written Submissions, Overview at paras 2–3.

a Bill to the House of Commons, the Minister of Finance instructed CAVCO and the CRA to commence implementation of the amendments;

35. In February 2004 the new Minister of Finance, the Honorable Ralph Goodale, issued a third discussion paper outlining Legislative Proposals and Explanatory Notes Relating to Income Tax including amendments to the Canadian Film and Video Production Tax Credit provisions contained in section 125.4 of the Income Tax Act. These proposals were identical to the proposals issued on November 14, 2003. Notwithstanding that these proposals were not introduced as a Bill to the House of Commons, the Minister of Finance instructed CAVCO and the CRA to continue with implementation of the amendments;

36. Neither the 37th nor the 38th Parliament introduced legislation to implement any of the proposed amendments to section 125.4 of the Income Tax Act;

37. In 2005, Section 1106(11) of the Income Tax Regulations was added by SOR/2005-126, s.3 and was made retroactive to 1995. This section excluded the payments from the License Fee Program of the Canada Television and Cable Production Fund or the Canada Television Fund from the definition of assistance in Section 125.4 of the Act. Prior to the addition of section 1106(11), this funding would have fallen under the definition of assistance for the purposes of section 125.4, however CAVCO and CRA had not treated this funding as assistance when calculating tax credits under section 125.4;

38. On November 22, 2006, the Minister of Finance for the newly elected Minority Conservative Government, the Honorable Jim Flaherty, introduced omnibus bill C-33 containing the same amendments to section 125.4 as set out in the November 14, 2003 Proposals. The Bill made its way through the House and received Third Reading on June 15, 2007. At no time during these stages was any debate held on the amendments to section 125.4. First reading of the Bill in the Senate took place on June 18, 2007;

39. The First Session of the 39th Parliament was prorogued on September 14, 2007. The Second Session started on October 16, 2007. Bill C-33 was reintroduced to the House as Bill C-10 on October 29, 2007 and was returned to the Senate for First Reading on October 30, 2007;

40. Debates in the Senate focused extensively on the public policy provisions originally proposed in 2002 by the Finance Minister John Manley. The Senate refused to pass the Bill without amendment and it died on the order paper with dissolution of parliament on September 7, 2008 and the calling of the October 14, 2008 election;

41. On September 6, 2012, the Governor General, on the advice of the Prime Minister, the Right Honorable Stephen Harper, appointed five Senators bringing the total to the constitutionally mandated 105 Senators;

42. On September 17, 2012, Vivienn Poy, Senator for Ontario, resigned from the Senate;

43. On September 23, 2012, Ethel Cochrane, Senator for Newfoundland and Labrador, retired from the Senate;

44. On October 19, 2012, Robert Peterson, Senator for Saskatchewan, retired from the Senate;

45. On November 6, 2012, Gerry St. Germain, Senator for British Columbia, retired from the Senate;

46. On January 10, 2013, Frank Mahovlich, Senator for Ontario, retired from the Senate;

47. On January 18, 2013, Joyce Fairbairn, Senator for Manitoba, resigned from the Senate;

48. On January 25, 2013, The Governor General, on the advice of the Prime Minister, the Right Honorable Stephen Harper, appointed five Senators, leaving the British Columbia seat, vacated by Senator St. Germain's retirement, unfilled;

49. On March 16, 2013, Terry Stratton, Senator for Manitoba, retired from the Senate;

50. On March 22, 2013, Bert Brown, Senator for Alberta, retired from the Senate;

51. On March 25, 2013, The Governor General, on the advice of the Prime Minister, the Right Honourable Stephen Harper, appointed Scott Tannas to take Bert Brown's vacated Alberta seat in the Senate;

52. Scott Tannis was the last Senator appointed to the Upper Chamber by The Governor General, on the advice of the Prime Minister, the Right Honorable Stephen Harper. The Prime Minister refused to make any further Senate appointment recommendations throughout his remaining term in office and the Governor General did not make any further appointments until the spring of 2016, leaving a total of twenty-two seats empty at the end of Prime Minister Harper's term in office;

53. On May 11, 2013, Doug Finley, Senator for Ontario, passed away while in office;

54. On August 2, 2013, Pierre de Bane, Senator for Quebec, retired from the Senate;

55. On August 2, 2013, Rod Zimmer, Senator for Manitoba, resigned his seat in the Senate;

56. On August 26, 2013, Mac Harb, Senator for Ontario, resigned his seat in the Senate;

57. On November 16, 2013, Donald Oliver, Senator for Nova Scotia, retired;

58. On November 30, 2013, Gerald Comeau, Senator for Nova Scotia, resigned his seat in the Senate;

59. On November 30, 2013, David Braley, Senator for Ontario, resigned his seat in the Senate;

60. On April 8, 2014 the new Minister of Finance, the Honorable Joe Oliver, issued a fourth discussion paper outlining Legislative Proposals and Explanatory Notes Relating to Income Tax including amendments to the Canadian Film and Video Production Tax Credit provisions contained in section 125.4 of the Income Tax Act. These proposals were similar to the proposals issued on November 14, 2003, but did not contain the "public policy" provisions;

61. On June 15, 2014, Hugh Segal, Senator for Ontario, resigned his seat in the Senate;

62. On June 17, 2014, Romeo Dallaire, Senator for Quebec, resigned his seat in the Senate;

63. On June 17, 2014, Andree Champagne, Senator for Quebec, retired from the Senate;

64. On July 25, 2014, Catherin Callbeck, Senator for Prince Edward Island, retired from the Senate;

65. On August 10, 2014, JoAnne Buth, Senator for Manitoba, resigned her seat in the Senate;

66. On October 23, 2014, the Minister of Finance, the Honorable Joe Oliver, introduced omnibus Bill C-43 containing the amendments to section 125.4 as set out in the April 8, 2014 Proposals. During debate of the Bill, the only

reference to the amendments to Section 125.4 were to confirm that the public policy test had been removed. There was no discussion on the changes to the definition of assistance and the resulting "grind" on the tax credit, and there was no discussion on the negative effect on previously vested rights resulting from retroactivity. The Bill was not sent to the Standing Committee on Canadian Heritage for review. Notwithstanding that the CRA and the Department of Finance were aware of the retroactive effect on the Appellant and their co-producer, no mention was made to Parliament. The amendments to section 125.4 contained in the bill were described in the summary as "simplifies the rules for the Canadian Film or Video Tax Credit regime";

67. On November 27, 2014, Noel Kinsella, Senator for New Brunswick, retired from the Senate;

68. On December 2, 2014, Fernand Robichaud, Senator for Quebec, retired from the Senate;

69. On December 15, 2014, Asha Seth, Senator for Ontario, retired from the Senate;

70. The Senate passed the Bill on December 16, 2014. As of December 16, there were only 88 Senators. There were seventeen vacant seats: one from British Columbia, three from Manitoba, five from Ontario, two from New Brunswick, one from Prince Edward Island, two from Nova Scotia, and three from the electoral districts in Quebec — Gulf, Grandville and De la Valliere;

71. On June 5, 2015, the Standing Committee on Canadian Heritage tabled its report titled the Review of The Canadian Feature Film Industry. The Standing Committee on Canadian Heritage made 11 Recommendations including the following:

    i. Recommendation 1

    The Committee recommends that the federal government continue its overall support for the Canadian feature film industry.

    ii. Recommendation 2

    The Committee recommends that the Department of Canadian Heritage study and review with stakeholders the Canadian feature film industry and look into the problem of federal tax credit dilution (often referred to as "the grind") and the administrative burden involved in claiming these credits.

iii. Recommendation 5

The Committee recommends that the Canadian Radio-television and Telecommunications Commission consider creating a special category for Canadian feature films as programs of national interest in order to guarantee appropriate exhibition, funding and promotion.

iv. Recommendation 6

The Committee recommends that the Canadian Radio-television and Telecommunications Commission consider reviewing its programs of national interest policy with a view to preserving and promoting specifically the production of Canadian feature films and documentaries.

- In Part (d), titled "Issues to be decided", paragraph 6. The paragraph reads as follows:

> 6. Is the Economic Action Plan 2014 Act, No. 2, S.C. 2014, c.39 unconstitutional and invalid legislation;

- In Part (e), titled "Statutory provisions relied on", paragraph 9. The paragraph reads as follows:

> 9. Sections 38, 42, 43, 46, and 52 of the Constitution Act, 1982;

- In Part (f), titled "Reasons the appellant intends to rely on", paragraphs 9 to 17 inclusively. The paragraphs read as follows:

> 9. In the alternative, if the Telefilm contribution is deemed "assistance" under the provisions of subsection 125.4(1) that has not been repaid by the Appellant, then the Appellant states that the definition of "assistance" in sub-section 125.4(1) prior to the amendments contained in the Economic Action Plan 2014 Act, No. 2, c.39 should apply to the Sequel Film and its tax years ending October 31, 2010 and 2011.
>
> 10. Section 17 of the Constitution Act, 1867 states:
>
> There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons;
>
> 11. Section 21 of the Constitution Act, 1867 states:
>
> > The Senate shall, subject to the provisions of this Act, consist of One Hundred and five Members, who shall be styled Senators;

12. Section 22 of the Constitution Act, 1867 states:

> In relation to the Constitution of the Senate Canada shall be deemed to consist of Four Divisions:
>
> 1. Ontario;
> 2. Quebec;
> 3. The Maritime Provinces, Nova Scotia and New Brunswick, and Prince Edward Island;
> 4. The Western Provinces of Manitoba, British Columbia, Saskatchewan, and Alberta;
>
> which Four Divisions shall (subject to the Provisions of this Act) be equally represented in the Senate as follows: Ontario by twenty-four senators; Quebec by twenty-four senators; the Maritime Provinces and Prince Edward Island by twenty-four senators, ten thereof representing Nova Scotia, ten thereof representing New Brunswick, and four thereof representing Prince Edward Island; the Western Provinces by twenty-four senators, six thereof representing Manitoba, six thereof representing British Columbia, six thereof representing Saskatchewan, and six thereof representing Alberta; Newfoundland shall be entitled to be represented in the Senate by six members; the Yukon Territory, the Northwest Territories and Nunavut shall be entitled to be represented in the Senate by one member each.
>
> In the Case of Quebec each of the Twenty-four Senators representing that Province shall be appointed for One of the Twenty-four Electoral Divisions of Lower Canada specified in Schedule A. to Chapter One of the Consolidated Statutes of Canada.

13. Section 32 of the Constitution Act, 1867 states:

> When a Vacancy happens in the Senate by Resignation, Death, or otherwise, the Governor General shall by Summons to a fit and qualified Person fill the Vacancy;

14. By Constitutional convention, the Governor General's power under Section 32 is exercised on the advice of the Prime Minister.

15. Section 11 of the Interpretation Act, RSC 1985, c. I-21 states:

> The expression "shall" is to be construed as imperative and the expression "may" as permissive;
>
> 16. The Appellant states that the refusal by Prime Minister Harper to recommend appointees for vacant Senate seats to the Governor General, and the failure by the Governor General to appoint Senators to replace the vacancies created after March 25, 2013, unilaterally modified the fundamental features of the Senate. The Constitution Act, 1867 entrenches a mandatory requirement to provide regional representation to each of the Provinces and Territories of Canada and to each of the 24 electoral divisions within Quebec; Governmental power cannot lawfully be exercised unless it conforms to the Constitution. A law inconsistent with the manner and form requirements of the Constitution has no force or effect because it is invalid.
>
> 17. On December 16, 2014, the date the Senate passed the Economic Action Plan 2014 Act, No. 2, c.39, there were only 88 Senators. There were seventeen vacant seats: one from British Columbia, three from Manitoba, five from Ontario, two from New Brunswick, one from Prince Edward Island, two from Nova Scotia, and three from the electoral districts in Quebec — Gulf, Grandville and De la Valliere. On December 16, 2014, the Senate did not meet the mandatory requirements for regional representation set forth in the Constitution Act, 1867. The Appellant therefor states that the Economic Action Plan 2014 Act, No. 2, c.39 is unconstitutional and is invalid legislation.

– In Part (g), titled "Relief sought", paragraphs 4 and 5. The paragraphs read as follows:

> 4. In the alternative, if the amount of $1,372,069 provided by Telefilm to the Appellant be deemed not to be "assistance" within the meaning of subsection 125.4(1) of the Income Tax Act and not to have been repaid in full in accordance with the provisions of section 125.4(1) of the Income Tax Act, the Appellant asks that the amendments to section 125.4 of the Act not be applicable to the Sequel Film; and
>
> 5. The Appellant's T1131 for year 31-10-2011 be reassessed as follows:
>
> > i. Confirm the Appellant's share of Production costs - line 421, at $2,687,253;
> >
> > ii. Decrease the Appellant's share of Assistance – line 423 to $736,497;
> >
> > iii. Subtract the Appellant's share of Assistance from the Appellant's share of Production costs and multiply by 48%, deduct the Qualified labour expenditures from 2010 ($328,301), and increase the Production cost limit – line 430 to $608,062;

> iv. Confirm the Appellant's share of Labour – lines 601-618, at $1,105,161;
>
> v. Increase the Appellant's Qualified labour expense to $608,062 and multiply by 25% to get the Canadian film or video production tax credit for tax year ending October 31, 2011 equal to $152,016;
>
> vi. Confirm the refund $147,288 that was paid with interest in 2013.

(2) The Law

[25] Pursuant to subrule 53(1) of the Rules, the Court may, on application by a party, strike out parts of a pleading with or without leave to amend. The grounds on which the Court can strike out parts of a pleading are listed in paragraphs 53(1)(a) to 53(1)(d) of the Rules.

[26] Subrule 53(1) of the Rules reads as follows:

> **53(1)** The Court may, on its own initiative or on application by a party, strike out or expunge all or part of a pleading or other document with or without leave to amend, on the ground that the pleading or other document
>
> > **(a)** may prejudice or delay the fair hearing of the appeal;
> >
> > **(b)** is scandalous, frivolous or vexatious;
> >
> > **(c)** is an abuse of the process of the Court; or
> >
> > **(d)** discloses no reasonable grounds for appeal or opposing the appeal.

[27] The Court will apply the following principles when disposing of a motion under subrule 53(1) of the Rules:

1- To strike out a pleading or part of a pleading, it must be plain and obvious that the position has no reasonable prospect of success.[28]

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[28] *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at para 64 [*Nevsun*]; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17 [*Imperial Tobacco*]; *Odhavji Estate v Woodhouse*, 2003 SCC 69 at para 15 [*Odhavji Estate*].

2- In a motion to strike out a pleading, the burden to show it is plain and obvious that the pleading has no prospect of success rests on the Applicant.[29]

3- Unless the facts are manifestly incapable of being proven, the facts as stated in the Notice of Appeal must be taken as true.[30] The Respondent cannot attack the Notice of Appeal to challenge assertions of fact.[31]

4- A motion judge should avoid usurping the function of the trial judge in making determinations of fact or relevancy. Such matters should be left to the trial judge who hears the evidence.[32]

5- The test to grant a motion to strike is stringent, and the power to strike out a pleading must be exercised with great care.[33] The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.[34]

[28] Therefore, in this case, in order for the Court to strike out parts of the Appellant's Notice of Appeal, the Respondent must show that it is plain and obvious that the Appellant's constitutional argument has no reasonable prospect of success. If the Respondent fails to meet this burden, the Court will deny the Respondent's motion. If the Respondent meets this burden, the Court will strike out the parts of the Notice of Appeal that relate to the constitutional argument, unless these parts also relate to another argument.

[29] The Court will now examine each of the Respondent's submissions. On the basis of them, the Court will determine if it is plain and obvious that the Appellant's constitutional argument has no reasonable prospect of success.

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[29] *Heron v R*, 2017 TCC 71 at para 11, aff'd 2017 FCA 229; *Husky Oil Operations Limited v The Queen*, 2019 TCC 136 at para 16.

[30] *Nevsun, supra* note 28 at para 64, citing *Imperial Tobacco*, *supra* note 28 at para 22; *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at 455, 18 DLR (4th) 481.

[31] *Nevsun, supra* note 28 at para 64; *Imperial Tobacco*, *supra* note 28 at para 22; *Odhavji Estate*, *supra* note 28 at para 15; *Sentinel Hill Productions (1999) Corporation v R*, 2007 TCC 742 at para 4(a) [*Sentinel Hill Productions*].

[32] *Sentinel Hill Productions*, *supra* note 31 at para 4(c).

[33] *Imperial Tobacco, supra* note 28 at para 21.

[34] *Ibid*; *Odhavji Estate, supra* note 28 at para 15.

(3) Is it plain and obvious that the Appellant's constitutional argument has no reasonable prospect of success?

(a) Does the Tax Court of Canada have jurisdiction to review whether the Senate properly passed the EAP 2014 Act?

[30] The Respondent submits that since Parliament has exclusive jurisdiction over its own proceedings, Parliament determines whether the Senate properly passed legislation. Thus, the Courts do not determine if the Senate properly passed legislation.[35]

[31] The Respondent further submits that Parliament still has exclusive jurisdiction to determine if the Senate properly passed legislation even if there are constitutional rules that apply.[36] In this case, the applicable constitutional rules are found at sections 21 and 22 of the *Constitution Act, 1867*. Section 21 of the *Constitution Act, 1867* states that the Senate must comprise at least 105 senators to be competent. Section 22 of the *Constitution Act, 1867* provides for the geographic representation of senators.

[32] I agree with the Respondent's submission. Parliament has indeed exclusive jurisdiction over the exercise of a matter that falls within parliamentary privilege, and courts cannot inquire into questions concerning parliamentary privilege.[37] For example, one matter that falls within parliamentary privilege is Parliament's exclusive jurisdiction over its own debates and proceedings.[38] The Supreme Court of Canada stated in *Mikisew Cree* that "[t]he existence of this privilege generally prevents courts from enforcing procedural constraints on the parliamentary process."[39]

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[35] Respondent's Notice of Motion; Respondent's Written Submissions at paras 14, 28.
[36] Respondent's Notice of Motion; Respondent's Written Submissions at para 27.
[37] *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40, at para 37 [*Mikisew Cree*]; *Canada (House of Commons) v Vaid*, 2005 SCC 30 at paras 4, 29(7), 47, 52 [*Vaid*]; *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 383, 100 DLR (4th) 212 [*New Brunswick Broadcasting Co*].
[38] *Mikisew Cree*, *supra* note 37 at para 37; *Vaid*, *supra* note 37 at para 29(10); *New Brunswick Broadcasting Co*, *supra* note 37 at 385.
[39] *Mikisew Cree*, *supra* note 37 at para 37.

[33] However, the law-making process is not absolutely immune from judicial interference. Some constitutional rules are binding on Parliament, and the failure to comply with those rules will result in legislation being invalid.[40] The Supreme Court of Canada has noted that several judicially enforceable constitutional rules are contained in Part IV of the *Constitution Act, 1867*.[41] Sections 21 and 22 of the *Constitution Act, 1867* fall under Part IV of that Act.

[34] The Respondent relies on six decisions to submit that since Parliament has exclusive jurisdiction over its own proceedings, it is Parliament that determines whether the Senate properly passed legislation. The six decisions are *Wauchope*,[42] *Irwin*,[43] *PHLF*,[44] *Authorson*,[45] *Heckendorn*,[46] and *Mikisew*.[47] These decisions do not address the issue of whether an Act was enacted by a competent Parliament. Rather, the issue in these decisions is whether the challenged Act was properly enacted in the procedural sense. Therefore, a trial judge could very well distinguish those decisions from the present case. In my view, on the basis of these decisions, I cannot conclude that it is plain and obvious that the Appellant's constitutional argument has no reasonable chance of success.

[35] In *Wauchope*, the House of Lords ruled that an Act was not invalid for the reason that a party did not receive a notice prior to the Act being enacted, even if the Act would affect the party's rights. The House of Lords concluded that:

> All that a Court of Justice can do is to look to the Parliamentary roll: if from that it should appear that a bill has passed both Houses and received the Royal assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses. I trust, therefore, that no such inquiry will gain be entered upon in any Court in Scotland,

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[40] *Ibid*, at para 96; *Re Manitoba Language Rights*, [1985] 1 SCR 721 at 724, 19 DLR (4th) 1 [*Manitoba Language Rights*].
[41] *Mikisew Cree*, *supra* note 37 at para 123.
[42] *Edinburgh and Dalkeith Railway Company v John Wauchope*, [1842] UKHL J12, 8 ER 279 [*Wauchope*].
[43] *R v Irwin*, [1926] Ex CR 127, 1926 CarswellNat 15 [*Irwin*].
[44] *PHLF Family Holdings Ltd v Canada*, [1994] GSTC 41, [1994] TCJ No 445 (TCC – Informal Procedure) [*PHLF*].
[45] *Authorson v Canada (Attorney General)*, 2003 SCC 39 [*Authorson*].
[46] *Heckendorn v Canada*, 2005 FC 802 [*Heckendorn*].
[47] *Mikisew*, *supra* note 37.

> but that due effect will be given to every Act of Parliament … upon what appears to be the proper construction of its existing provisions.[48]

[36] The issue in *Wauchope* pertained to parliamentary procedure. The constitutional competence of the British Parliament in *Wauchope* was not at issue.

[37] In *Irwin*, the Exchequer Court of Canada refused to invalidate an Act even though section 54 of the *Constitution Act, 1867* may not have been followed. The Exchequer Court of Canada stated the following:

> It is a matter of elementary law that when a statute appears on its face to have been duly passed by a competent legislature, the courts must assume that all things have been rightly done in respect of its passage through the legislature, and cannot entertain any argument that there is a defect of parliamentary procedure lying behind the Act as a matter of fact.[49]

[38] In *Irwin*, the Exchequer Court of Canada clearly states that Parliament's exclusive jurisdiction applies if the challenged Act has been passed by a competent legislature. However, the Appellant's argument is precisely that the EAP 2014 Act has not been passed by a competent legislature.

[39] In *PHLF*, the appellant argued that Part IX of the *Excise Tax Act* was not validly enacted because of the use of Standing Orders 57 and 78 of the Standing Orders of the House of Commons.[50] Standing Orders 57 and 78 placed time limits on debates in the House of Commons.[51] The issue in *PHLF* was unrelated to Parliament's competence. Moreover, *PHLF* is a Tax Court of Canada informal procedure decision with no precedential value.[52] While informal procedure decisions may still be considered, it is up to the trial judge to make that determination.[53]

[40] In *Authorson*, the Supreme Court of Canada concluded that "[t]he due process protections of property in the *Bill of Rights* do not grant procedural rights in the process of legislative enactment."[54] The issue in *Authorson* also pertained to

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[48] *Wauchope*, *supra* note 42 at 285.
[49] *Irwin*, *supra* note 43 at para 7.
[50] *PHLF*, *supra* note 44 at para 10.
[51] *Ibid*, at para 8.
[52] *Supra*, note 17 at s 18.28.
[53] *Lavrinenko v Canada*, 2019 FCA 51 at para 17.
[54] *Authorson*, *supra* note 45 at para 62.

parliamentary procedure, not to parliamentary competence. Additionally, unlike the issue in the present case, the issue in *Authorson* did not relate to constitutional rules; rather, the issue pertained to the *Canadian Bill of Rights*,[55] which is a declaratory statute.[56]

[41] In *Heckendorn*, a Federal Court of Canada prothonotary relied on *Irwin* to conclude that the Court could not invalidate an Act even if the Act was not given Royal Assent nor published in the *Canada Gazette*.[57] The issue in *Heckendorn* was yet again a question of legislative procedure, and not of constitutional competence.

[42] In *Mikisew Cree*, the Supreme Court of Canada concluded that the Crown's duty to consult when Indigenous rights under section 35 of the *Constitution Act, 1982* may be adversely affected does not extend to Parliament and the law-making process.[58] The competence of Parliament was not at issue in that case. Moreover, as mentioned before, the Supreme Court of Canada alluded to the fact that courts have jurisdiction on many matters found in Part IV of the *Constitution Act, 1867*, regardless of Parliament's exclusive jurisdiction on its own proceedings.[59]

[43] In conclusion, I am of the view that all of the decisions cited by the Respondent can be distinguished because none of them pertain to parliamentary competence. Therefore, on the basis of these decisions, the Respondent did not show that it is plain and obvious that the Appellant's constitutional argument has no reasonable prospect of success.

(b) Do vacancies in the Senate preclude the Senate from exercising its powers?

[44] The Appellant submits that the EAP 2014 Act was not passed by a constitutionally competent Parliament. According to the Appellant, in order for a law to be passed, section 21 of the *Constitution Act, 1867* requires the Senate to have at least 105 appointed senators. Also, section 22 of that Act requires that the senators be representative of the provinces, the territories, and the 24 electoral divisions

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[55] *Canadian Bill of Rights*, SC 1960, c 44.
[56] *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 342-343, 18 DLR (4th) 321.
[57] *Heckendorn*, *supra* note 46 at para 18.
[58] *Mikisew Cree*, *supra* note 37 at paras 2, 16.
[59] *Ibid*, at para 123.

within Quebec. The Appellant submits that sections 21 and 22 ensure the constitutional mandate of the Senate, which is to protect regional interests. The Appellant further submits that vacancies are required to be immediately filled pursuant to section 32 of the *Constitution Act, 1867*. Sections 21, 22 and 32 of the *Constitution Act, 1867* read as follows:

> **21** The Senate shall, subject to the Provisions of this Act, consist of One Hundred and five Members, who shall be styled Senators.
>
> **22** In relation to the Constitution of the Senate Canada shall be deemed to consist of Four Divisions:
>
> 1. Ontario;
> 2. Quebec;
> 3. The Maritime Provinces, Nova Scotia and New Brunswick, and Prince Edward Island;
> 4. The Western Provinces of Manitoba, British Columbia, Saskatchewan, and Alberta;
>
> which Four Divisions shall (subject to the Provisions of this Act) be equally represented in the Senate as follows: Ontario by twenty-four senators; Quebec by twenty-four senators; the Maritime Provinces and Prince Edward Island by twenty-four senators, ten thereof representing Nova Scotia, ten thereof representing New Brunswick, and four thereof representing Prince Edward Island; the Western Provinces by twenty-four senators, six thereof representing Manitoba, six thereof representing British Columbia, six thereof representing Saskatchewan, and six thereof representing Alberta; Newfoundland shall be entitled to be represented in the Senate by six members; the Yukon Territory, the Northwest Territories and Nunavut shall be entitled to be represented in the Senate by one member each.
>
> In the Case of Quebec each of the Twenty-four Senators representing that Province shall be appointed for One of the Twenty-four Electoral Divisions of Lower Canada specified in Schedule A. to Chapter One of the Consolidated Statutes of Canada.
>
> …
>
> **32** When a Vacancy happens in the Senate by Resignation, Death, or otherwise, the Governor General shall by Summons to a fit and qualified Person fill the Vacancy.

[45] The Respondent submits that section 21 of the *Constitution Act, 1867* does not requires the Senate to have at least 105 appointed senators in order to pass a law. The Respondent submits that this would be inconsistent with sections 33, 35, 36, and

37 of the *Constitution Act, 1867* and with subsection 4(1) of the *Supreme Court Act*.[60] Sections 33, 35, 36, and 37 of the *Constitution Act, 1867* read as follows:

> **33** If any Question arises respecting the Qualification of a Senator or a Vacancy in the Senate the same shall be heard and determined by the Senate.
>
> …
>
> **35** Until the Parliament of Canada otherwise provides, the Presence of at least Fifteen Senators, including the Speaker, shall be necessary to constitute a Meeting of the Senate for the Exercise of its Powers.
>
> **36** Questions arising in the Senate shall be decided by a Majority of Voices, and the Speaker shall in all Cases have a Vote, and when the Voices are equal the Decision shall be deemed to be in the Negative.
>
> **37** The House of Commons shall, subject to the Provisions of this Act, consist of three hundred and eight members of whom one hundred and six shall be elected for Ontario, seventy-five for Quebec, eleven for Nova Scotia, ten for New Brunswick, fourteen for Manitoba, thirty-six for British Columbia, four for Prince Edward Island, twenty-eight for Alberta, fourteen for Saskatchewan, seven for Newfoundland, one for the Yukon Territory, two for the Northwest Territories and one for Nunavut.

[46] Sections 21, 22 and 32 of the *Constitution Act, 1867* use the word "shall". The word "shall" is to be construed as imperative.[61] However, "shall" is used in conjunction with the words "subject to the Provisions of this Act" in both sections 21 and 22 of the *Constitution Act, 1867*. Therefore, the Court must determine if sections 33, 35, 36, and 37 of the *Constitution Act, 1867* are incompatible with the Appellant's proposed interpretation of sections 21, 22 and 32 of that Act.

[47] The Respondent submits that sections 33, 35 and 36 of the *Constitution Act, 1867* contemplate the situation where the Senate has vacancies but is still able to exercise its powers and vote.[62] Section 33 of the *Constitution Act, 1867* gives exclusive jurisdiction to the Senate to assess the status of its members,[63] including

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[60] *Supra*, note 19.
[61] *Manitoba Language Rights*, *supra* note 40 at 737.
[62] Respondent's Notice of Motion; Respondent's Written Submissions at para 35.
[63] William H. McConnell, *Commentary on the British North America Act* (Toronto: Macmillan of Canada, 1977) at 77; William Henry Pope Clement, *The Law of the Canadian Constitution*, 2nd ed (Toronto: The Carswell Co Ltd, 1904) at 118.

"[q]uestion[s] ... respecting the Qualification of a Senator or a Vacancy in the Senate".[64] The practice under the *Rules of the Senate of Canada*[65] is that when a question arises with respect to a vacancy and the Senate decides in favour of vacancy, the Senate seat is "declared vacant"[66] or the Senate "determines ... the place of the Senator shall become vacant".[67]

[48] The Respondent further submits that the Senate must be able to have vacancies, otherwise section 33 of the *Constitution Act, 1867* is meaningless. If the Senate cannot have vacancies, then a Senate with fewer than 105 appointments cannot adjudicate questions regarding the qualifications of a new senator or a vacancy in the Senate.

[49] The Appellant, however, is not arguing that one vacancy renders the Senate constitutionally incompetent. There were 17 vacant seats and only 88 senators at the time that the EAP 2014 Act was passed. The Appellant submits that with 17 vacant seats, the Senate did not meet the mandatory requirements for regional representation pursuant to sections 21 and 22 of the *Constitution Act, 1867* when the EAP 2014 Act was passed.

[50] The Appellant proposes a purposive approach to interpreting sections 21 and 22 of the *Constitution Act, 1867*, claiming that a primary purpose of the Senate is to afford protection to regional interests.[68] However, in *Canada Trustco Mortgage Co.*, the Supreme Court of Canada confirmed that a textual approach dominates if the words of a provision are precise and unequivocal:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play[s] a dominant role in the

[64] *Constitution Act, 1867*, 30 & 31 Victoria, c 3 (UK), at s 33.
[65] *Rules of the Senate of Canada*, September 2017, updated July 2022.
[66] *Ibid*, at r 15-1(2).
[67] *Ibid*, at para 15-5(2)(c).
[68] Transcript for the hearing held at the Tax Court of Canada in Ottawa, Ontario on September 13, 2021, at 68–71.

> interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.[69]
>
> [Emphasis added.]

[51] Additionally, the Supreme Court of Canada in *Celgene Corp* affirmed *Canada Trustco Mortgage Co.* at paragraph 21:

> [S]tatutory interpretation involves a consideration of the ordinary meaning of the words used and the statutory context in which they are found … . The words, if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute.[70]

[52] The Court is of the view that the words of sections 21, 22 and 35 of the *Constitution Act, 1867* are precise, clear and unequivocal. Thus, the words should dominate the statutory interpretation process.

[53] Section 21 of the *Constitution Act, 1867* states that the Senate shall, subject to the provisions of that Act, consist of 105 senators, nothing more. Section 22 requires regional representation. Section 35 requires a minimum of 15 senators, including the Speaker, to be present for the Senate to constitute a meeting for the exercise of its powers, nothing more. Section 35 does not mention a mandatory requirement for regional representation or any other requirements.

[54] As illustrated by the preceding paragraph, sections 21, 22 and 35 of the *Constitution Act, 1867* deal with separate matters. The requirements found at sections 21 and 22 have no bearing on section 35, and vice versa.

[55] Furthermore, the *Rules of the Senate of Canada* are relevant and should therefore be considered by this Court.

[56] For a law to be enacted with the Senate's consent, the *Rules of the Senate of Canada* must be followed. The basic stages of the legislative process for passing a

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[69] *Canada Trustco Mortgage Co. v R*, 2005 SCC 54 [*Canada Trustco Mortgage Co.*] at para 10.
[70] *Celgene Corp v Canada (Attorney General)*, 2011 SCC 1 at para 21.

bill through the Senate are as follows: a bill is introduced and receives first reading;[71] the principle of a bill is usually debated on second reading;[72] and the bill is passed on third reading and typically shall not be further debated or amended.[73]

[57] The first, second and third readings of bills occur at sittings of the Senate. The *Order Paper and Notice Paper* is a document that guides the deliberations of the Senate and lists items of business currently before the Senate.[74] The items of business include, but are not limited to, the first,[75] second[76] and third readings[77] of bills. A senator must bring forth a motion to add a first,[78] second[79] or third reading[80] of a bill to the *Order Paper and Notice Paper*. Generally, any item of business not called when the Senate adjourns, including the readings of bills, is carried over to the Senate's next sitting.[81]

[58] Motions for a third reading of a bill are debatable.[82] Furthermore, questions arising in the Senate are decided on the majority of votes cast by the senators attending the sitting.[83] As well, a quorum of 15 senators, including the Speaker, is required for the Senate to sit and conduct business pursuant to section 35 of the *Constitution Act, 1867*.[84] These rules apply to third readings of bills since third readings are an item of business, and there are no voting or quorum rules specific to third readings. Thus, in order to pass a bill on third reading at a sitting of the Senate,

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[71] *Supra*, note 65 at r 10-1, 10-3.
[72] *Ibid*, at r 10-4.
[73] *Ibid*, at r 10-6.
[74] Senate of Canada, "Order Paper and Notice Paper", online: *Senate of Canada: Order Paper and Notice Paper Issue 79, Tuesday, November 15, 2022, 2 p.m.* <sencanada.ca/en/content/sen/chamber/441/orderpaper/079op_2022-11-15-e>.
[75] *Supra*, note 65 at r 4-5.
[76] *Ibid*, at r 4-13(2), r 4-14.
[77] *Ibid*, at r 4-13(2), r 4-14.
[78] *Ibid*, at r 5-1, r 5-7(j).
[79] *Ibid*, at r 5-1, r 5-6(1)(f).
[80] *Ibid*, at r 5-1, r 5-5(b).
[81] *Ibid*, at r 4-15.
[82] *Ibid*, at r 5-8(1)(h).
[83] *Ibid*, at r 9-1.
[84] The *Constitution Act, 1867* is incorporated by reference pursuant to r 3-7(1) of the *Rules of the Senate of Canada*.

there must be at least 15 senators present at the sitting, including the Speaker, and the majority of the votes cast at the sitting must be in favour of passing the bill.

[59] Once both the Senate and the House of Commons have passed the bill in exactly the same wording, the bill is presented to the Governor General (or the Governor General's appointed representative) for Royal Assent.[85]

[60] The Court concludes that the *Rules of the Senate of Canada* also clearly indicate the following: in order for the Senate to vote on whether a bill will be passed at a sitting, the only requirement is that at least 15 senators be present at the sitting, including the Speaker.

[61] I therefore agree with the Respondent's submission that sections 33, 35 and 36 of the *Constitution Act, 1867* contemplate the situation where the Senate has vacancies. Section 35 allows the Senate to exercise its powers and vote in the event of vacancies. On that basis, I have concluded that it is plain and obvious that the Appellant's constitutional argument has no reasonable chance of success.

(c) If the Court concludes that the EAP 2014 Act is invalid, can the remedy be to immediately invalidate the legislation amended by the EAP 2014 Act?

[62] The Respondent submits that if the Court concludes that the EAP 2014 Act is invalid, then all changes made to the legislation referred to in the EAP 2014 Act, such as other amendments to the *Income Tax Act*, the *Excise Tax Act*, the *Excise Act, 2001*, the *Industrial Design Act*, and the *Patent Act*, would also be invalid. According to the Respondent, invalidating the EAP 2014 Act would mean that the positive legal order, which had purportedly regulated the affairs of Canadians since December 16, 2014, would be annihilated and the rights, obligations and other effects arising under these laws would be invalid and unenforceable. The Respondent further submits that this would also offend the rule of law because if the Appellant's constitutional argument succeeds, all legislation enacted whenever there was a vacancy in the Senate would be invalid. The Respondent submits that this would cause legal chaos and offend the rule of law.[86]

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[85] *Royal Assent Act*, SC 2002, c 15.
[86] Respondent's Notice of Motion; Respondent's Written Submissions at paras 44–45.

[63] The Respondent further submits that if the Court concludes that vacancies in the Senate render legislation unconstitutional, any remedy should be suspended in accordance with the Supreme Court of Canada approach in *Re Manitoba Language Rights*. In *Re Manitoba Language Rights*, legislation was enacted only in English despite constitutional requirements to enact the legislation in both English and French. In that decision, the Supreme Court of Canada did not immediately declare the legislation to be invalid and held that such a remedy would violate the rule of law. Instead, the Supreme Court of Canada came to the following ruling:

> All rights, obligations and any other effects which have arisen under Acts of the Manitoba Legislature which are purportedly repealed, spent, or would currently be in force were it not for their constitutional defect, and which are *not* saved by the *de facto* doctrine, or doctrines such as *res judicata* and mistake of law, are deemed temporarily to have been, and to continue to be, enforceable and beyond challenge from the date of their creation to the expiry of the minimum period of time necessary for translation, re-enactment, printing and publishing of these laws.[87]
> [Emphasis in original.]

[64] Accordingly, the Respondent submits that even if the Court concludes that the EAP 2014 Act was not properly passed, the Court should suspend the invalidity of the EAP 2014 Act and give Parliament an opportunity to cure any procedural deficiency before granting a remedy that would undermine the rule of law. Therefore, the remedy sought by the Appellant should not be granted as requested.[88]

[65] I do not agree with the Respondent's submission. It is true that when a law is inconsistent with the Constitution, the general rule is that such a law is invalid pursuant to subsection 52(1) of the *Constitution Act, 1982*. Subsection 52(1) of the *Constitution Act, 1982* reads as follows:

> **52 (1**) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[66] However, the remedy of a suspension of declaration of invalidity proposed by the Respondent is an exceptional remedy that should only be used by courts when

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[87] *Manitoba Language Rights*, *supra* note 40 at 768.
[88] Respondent's Notice of Motion; Respondent's Written Submissions at paras 46–48.

the preservation of society and the maintaining of the rule of law is at risk.[89] In this case, only the validity of the EAP 2014 Act is at issue, and the jurisdiction of the Court in constitutional matters is limited to challenges affecting the validity of the reassessment under appeal.[90] Therefore, the declaration of invalidity would only apply to the EAP 2014 Act. Even if the Appellant's argument could be used by others to invalidate other legislation, given the nature of the remedy, it is not certain that a suspension of declaration of invalidity of the EAP 2014 Act would be granted by the courts.

[67] Also, the litigant bringing forward a constitutional challenge generally benefits from the invalidity, while the invalidity is only suspended for others.[91] In this instance, the Appellant is bringing forward the constitutional challenge. Therefore, even if this Court grants a suspension of the declaration of invalidity, the Court could still vacate the CRA's reassessment pertaining to the Appellant's 2011 taxation year.

[68] In conclusion, it is not plain and obvious that if the Court concludes that the EAP 2014 Act is invalid, a declaration of invalidity would not be an available remedy for the Appellant. This is because of the exceptional nature of a suspended declaration of invalidity, and that even in such cases, the individual who has brought forward the constitutional challenge generally receives the immediate benefits of the ruling.

B. The Respondent's Motion under Rule 44 of the Rules

[69] Under paragraph 44(1)(b) of the Rules, a reply to a notice of appeal must be filed in the Registry of the Court within 60 days after service of the notice of appeal unless the Court allows, on application made before or after the expiration of the 60-

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[89] *Manitoba Language Rights*, *supra* note 40 at 763; *Ontario (Attorney General) v G*, 2020 SCC 38 at paras 225–228.

[90] *Supra*, note 6 at ss 169(1), 171(1); *Ballantyne v Canada*, 2013 FCA 30 at para 5; *Lassonde v Canada*, 2005 FCA 323 at para 3; *Sutcliffe v Canada*, 2004 FCA 376 at para 15; *Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54 at para 28; *Shawn Davitt v Canada (National Revenue)*, 2012 FCA 27 at para 8; *Canada (Attorney General) v Campbell*, 2005 FCA 420 at para 23.

[91] *R v Demers*, 2004 SCC 46 at paras 102–103; *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at 286, 173 DLR (4th) 1; *R v Campbell*, [1998] 1 SCR 3 at 20, 155 DLR (4th) 1.

day period, the filing of the reply after the 60-day period and within a specified time. Under paragraph 44(3)(c) of the Rules, the reply must be served within the time specified in an extension of time granted by the Court under subrule 44(1) of the Rules.

[70] In *Hennelly*,[92] the Federal Court of Appeal of Canada described the test that courts must apply when reviewing an application for an extension of time. According to this test, a court must determine whether the applicant has demonstrated the following:

1- a continuing intention to pursue his or her application;

2- that the application has some merit;

3- that no prejudice to the respondent arises from the delay; and

4- that a reasonable explanation for the delay exists.[93]

[71] As stated by the Court in *Cobuzzi v The Queen*, in determining whether the applicant has demonstrated the four factors listed above in paragraph 57, the Court must consider the following:

1- that the purpose of these four criteria is to guide the Court in determining whether the granting of an extension of time is in the interests of justice;

2- that the criteria are not exclusive; and

3- that their relative importance is variable and that not all four questions need necessarily be resolved in the moving party's favour.[94]

[72] In *Larkman*, the Federal Court of Appeal provided a further explanation on applying the test to determine whether an extension of time should be granted. The Federal Court of Appeal stated the following:

> **61** The parties agree that the following questions are relevant to this Court's exercise of discretion to allow an extension of time:

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[92] *Canada (Attorney General) v Hennelly*, [1999] FCJ No 846, 244 NR 399 [*Hennelly*].
[93] *Ibid*, at para 3; *Attorney General (Canada) v Larkman*, 2012 FCA 204 [*Larkman*] at para 61.
[94] *Cobuzzi v The Queen*, 2017 TCC 27 at para 34.

> (1) Did the moving party have a continuing intention to pursue the application?
>
> (2) Is there some potential merit to the application?
>
> (3) Has the Crown been prejudiced from the delay?
>
> (4) Does the moving party have a reasonable explanation for the delay?
>
> See Grewal v. Canada (Minister of Employment & Immigration), [1985] 2 F.C. 263 (C.A.); Muckenheim v. Canada (Employment Insurance Commission), 2008 FCA 249 at paragraph 8.
>
> **62** These questions guide the Court in determining whether the granting of an extension of time is in the interests of justice: *Grewal*, *supra* at pages 277-278. The importance of each question depends upon the circumstances of each case. Further, not all of these four questions need be resolved in the moving party's favour. For example, "a compelling explanation for the delay may lead to a positive response even if the case against the judgment appears weak, and equally a strong case may counterbalance a less satisfactory justification for the delay": *Grewal*, at page 282. In certain cases, particularly in unusual cases, other questions may be relevant. The overriding consideration is that the interests of justice be served. See generally *Grewal*, at pages 278-279; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 at paragraph 33; *Huard v. Canada (Attorney General)*, 2007 FC 195, 89 Admin LR (4th) 1.[95]

[73] Also, any determination of whether or not an applicant's explanation justifies the granting of the necessary extension of time will turn on the facts of each particular case.[96]

[74] The *Hennelly and Larkman* decisions are not tax cases. Nevertheless, the Federal Court of Appeal has applied the test set out in *Hennelly* in tax cases.[97]

[75] Given the Respondent's submissions, there is no doubt that the Respondent has always had a continuing intention to pursue the appeal and file a reply to the Notice of Appeal. The extension of time is requested only because the Respondent filed a motion to strike out passages from the Appellant's Notice of Appeal.

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[95] *Larkman*, *supra* note 93 at paras 61–62.
[96] *Hennelly*, *supra* note 92 at para 4.
[97] *Stanfield v R*, 2005 FCA 107 at paras 1–3; *Akanda Innovation Inc v The Queen*, 2018 FCA 200 at para 19.

Otherwise, the Respondent conducted himself in a manner indicating his continuing intention to reply to the Notice of Appeal.

[76] The Respondent has provided an acceptable explanation for the delay in filing a reply. The extension of time is necessary because common sense dictates that, given the nature of the Respondent's motion, it makes more sense to wait until the Court hears the motion and renders a decision before filing a reply. This is because the Court's decision with respect to the Respondent's motion might have a considerable impact on the issues that will be litigated, and therefore on the contents of the Respondent's reply.

[77] Finally, the Appellant failed to demonstrate that it would be prejudiced if the extension of time was granted.

[78] For all these reasons, the Court concludes that it is in the interests of justice to grant the Respondent's request for an extension of time.

C. The Appellant's Request for Costs

[79] If the Respondent's motion is denied, the Appellant requests an award of costs on a solicitor–client basis. Indeed, the general rule in civil litigation is that the successful party is entitled to receive costs unless there are exceptional circumstances.[98]

[80] Pursuant to subrule 147(7) of the Rules, any party can apply to the Court to request that directions be given to the taxing officer in respect of any matter referred to in rule 147 of the Rules or that the Court reconsider its award of costs. Subrule 147(7) reads as follows:

> **147(7)** Any party may,
>
> > **(a)** within thirty days after the party has knowledge of the judgment, or

[98] Janet Walker & Lorne Mitchell Sossin, *Civil Litigation* (Toronto, Ontario: Irwin Law, 2010) at 34; Mark M. Orkin & Robert G. Schipper, *The Law of Costs*, 2nd ed (Toronto, Ontario: Thomson Reuters, 1987) (looseleaf updated October 2021, release 6) at §2:1; G.D.

> **(b)** after the Court has reached a conclusion as to the judgment to be pronounced, at the time of the return of the motion for judgment,
>
> whether or not the judgment included any direction concerning costs, apply to the Court to request that directions be given to the taxing officer respecting any matter referred to in this section or in sections 148 to 152 or that the Court reconsider its award of costs.

[81] Consequently, I am of the view that the Appellant's request for an award of costs on a solicitor–client basis is premature. This is because, pursuant to rule 2 and subrule 147(7) of the Rules, such an application should be made either within 30 days after the party has knowledge of a judgment, or after the Court has reached a conclusion as to the judgment to be pronounced. Rule 2 of the Rules states that a judgment includes an order. The Court also notes that the Appellant's submissions with respect to the issue were inadequate and incomplete. Consequently, even if the Respondent's motion had been denied, the Court could not have considered the Appellant's request for costs.

V. CONCLUSION

[82] I have concluded that sections 33, 35 and 36 of the *Constitution Act, 1867* contemplate the situation where the Senate has vacancies and that section 35 allows the Senate to exercise its powers and vote in the event of vacancies. On that basis, I have concluded that it is plain and obvious that the Appellant's constitutional argument has no reasonable chance of success.

[83] Consequently, the Respondent's motion under rule 53 of the Rules requesting an order to strike out parts of the Notice of Appeal is allowed, with costs. The following parts of the Appellant's Notice of Appeal are struck out:

- the second sentence of paragraph 30;
- paragraphs 32 to 71 in Part (c);
- paragraph 6 in Part (d);
- paragraph 9 in Part (e);
- paragraphs 9 to 17 in Part (f); and
- paragraphs 4 and 5 in Part (g).

[84] I have also concluded that the Respondent has always had a continuing intention to pursue the appeal and file a reply to the Notice of Appeal. The Respondent has provided an acceptable explanation for requesting a delay to file a reply. On that basis, the Respondent's motion under paragraph 44(1)(b) of the Rules, is allowed, with costs.

[85] The Respondent shall file a reply within 60 days of the date of this order. The Respondent shall serve the reply within five days after the said 60-day period.

[86] Finally, because the Respondent's motion is allowed, the Appellant's request for an award of costs on a solicitor–client basis is denied.

Signed at Ottawa, Canada, this 24th day of November 2022.

"Sylvain Ouimet"

Ouimet J

CITATION:	2022 TCC 148
COURT FILE NO.:	2017-3249(IT)G
STYLE OF CAUSE:	FU2 PRODUCTIONS LTD. v HIS MAJESTY THE KING
PLACE OF HEARING:	Ottawa, Canada
DATE OF HEARING:	January 25, 2019 and September 13, 2021
REASONS FOR ORDER BY:	The Honourable Justice Sylvain Ouimet
DATE OF ORDER:	November 24, 2022

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