Docket: 2021-2673(IT)G

BETWEEN:

GILCHRIST PROPERTIES LTD.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Motion to strike the Reply to the Notice of Appeal heard on February 16, 2023 at Montréal, Québec

Before: The Honourable Justice Guy R. Smith

Appearances:

Counsel for the Appellant:	Jonathan Lafrance Michel Gosselin-Trépanier
Counsel for the Respondent:	Christina Ham

ORDER

In accordance with the attached Reasons for Order, the motion to strike the Reply to the Notice of Appeal, is hereby dismissed, with costs to the Respondent.

Signed at Ottawa, Canada, this 26th day of October 2023.

« Guy Smith »

Smith J.

Citation: 2023 TCC 153
Date: 20231026
Docket: 2021-2673(IT)G

BETWEEN:

GILCHRIST PROPERTIES LTD.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR ORDER

Smith J.

I. **Overview**

[1] Gilchrist Properties Ltd. (the "Appellant") filed a Notice of Motion (the "Motion") pursuant to paragraph 53(1)(d) of the *Tax Court of Canada Rules* (General Procedure), SOR/90-688a, (the "Rules") seeking an Order:

1) Striking out the Reply (…) without leave to amend or to file another Reply, on the basis that it discloses no reasonable grounds for opposing the appeal;

2) Allowing the Appeal as filed by the Appellant;

3) Costs as against the Respondent.

[2] As will be seen in greater detail below, subsection 53(1) of the Rules provides that the Court may "strike out or expunge all or part of a pleading (…) without leave to amend" on several grounds including, at paragraph (d), that it "discloses no reasonable grounds for appeal or opposing the appeal." Subsection 53(2) provides that "no evidence is admissible on an application" made pursuant to paragraph (d).

[3] Two issues arise in the context of this Motion:

- Should the Reply be struck without leave to amend?; and

- Should the Motion be dismissed due to the "fresh step rule"?

[4] For reasons set out below, the Court concludes that the Motion should be dismissed on the basis of the "fresh step rule" and further, that it is not plain and obvious that the Reply discloses no reasonable grounds for opposing the appeal.

II. **Background**

[5] The Court has not heard any oral evidence nor considered any affidavit evidence and thus what follows is a summary of the pleadings and the oral and written representations provided in the context of the Motion.

[6] The Appellant is a holding corporation that has been a resident of Canada on a continuous basis since it was incorporated under the *Alberta Corporations Act* in 1963. Its head office is located in Richmond, British Columbia. At all relevant times, its directors and shareholders were also residents of Canada.

[7] On May 28, 2014, the Appellant entered into an agreement for the sale of a property known as 7100 Elmbridge Way, Richmond, British Columbia (the "Property") to an arm's length third party for consideration of $24,550,000.

[8] On June 16, 2015 the Appellant was continued under the laws of the British Virgin Islands ("BVI") and the sale transaction was finally completed on June 23, 2015. The Appellant realized a gain from the sale of the Property.

[9] For the year ending April 30, 2016 (the "2016 taxation year"), the Appellant reported a capital gain of $23,078,192 and a taxable capital gain of $11,539,096.

[10] The Appellant's capital dividend account was credited by the amount of the non-taxable portion of the capital gain, leaving a balance of $11,737,549.

[11] The Appellant reported the taxable capital gain and filed its T2 tax return on April 30, 2016. It declared that it was an "other private corporation."

[12] The Minister of National Revenue (the "Minister") issued an initial assessment in respect of the 2016 taxation year on October 13, 2016.

[13] For the 2019 taxation year, the Appellant declared an aggregate dividend in the amount of $11,737,549, being the balance remaining in its CDA, and elected that it be treated as a non-taxable capital dividend pursuant to subsection 83(2).

[14] On December 23, 2020, the Minister issued a reassessment of the 2016 taxation year (the "Reassessment") taking the position that the Appellant remained a Canadian-controlled private corporation ("CCPC") despite the continuance under the laws of BVI. As a result, the Minister increased the Appellant's Part 1 tax relying on subsections 123.3 and 123.4 of the *Income Tax Act*, RSC 1985 c.1 (5th Supp.) (the "Act") as follows:

Description	**Amount**
Refundable tax on investment income for CCPC (s. 123.3)	$905,538
Disallowed general rate reduction (s. 123.4(2))	$1,438,979
Net increase to the Appellant's Part 1 tax	**$2,344,337**

[15] In the alternative, the Minister relied on the "general anti-avoidance rule" ("GAAR") set out in subsection 245(2) of the Act on the basis that the Appellant had entered into a series of transactions that resulted in an abuse of the Act.

[16] The Appellant has taken the position that the Reassessment i) is statue-barred because a waiver was not signed and it was established beyond the normal reassessment period of three (3) years for a CCPC or ii) alternatively, that the Appellant was not a CCPC for the 2016 taxation year and finally iii) GAAR does not apply to the subject transaction.

III. **Procedural History**

[17] The procedural history in this appeal to date includes the following steps:

a) The Notice of Appeal was filed on October 20, 2021;

b) The Reply to the Notice of Appeal was filed on April 1, 2022;

c) The parties jointly requested a timetable order on May 2, 2022;

d) The Appellant filed and served its List of Documents on May 20, 2022;

e) The Respondent filed and served its List of Documents on May 20, 2022;

f) Examinations for discovery were held on June 9, 2022;

g) On August 30 and August 31, 2022, the parties satisfied their undertakings;

h) On September 29, 2022, the parties requested an extension of time to communicate with the Court; and

i) On October 31, 2002, the Appellant filed its motion to strike.

IV. **The Motion to Strike**

A. **Position of the Appellant**

[18] The thrust of the Appellant's argument is that the Reassessment was issued beyond the normal period of three (3) years applicable to a CCPC and that before addressing the underlying tax issues (i.e. whether the Appellant was subject to ss. 123.3 and 123.4, or alternatively, whether GARR applies), the Respondent will have the onus of proving that there was a misrepresentation arising from the Appellant's "neglect, carelessness or wilful default" as provided for in subsection 152(4) of the Act.

[19] The Appellant refers to the assumption set out in paragraph 28.1 of the Reply as well as paragraphs 36 and 37 included in the Reply under the section entitled, "Grounds Relied on and Relief Sought". Those sections are as follows:

> 28. At this stage in the proceedings, the AGC relies in the following facts in determining that the Appellant made a misrepresentation attributable to neglect, carelessness or wilful default in filing it tax return for the 2016 taxation year:
>
> 28.1. In filing its tax return for its 2016 taxation year, the Appellant declared that it was an "other private corporation" and not a CCPC.
>
> 28.2. The Appellant knew or ought to have known that it was a CCPC during the entire 2016 taxation year.

> 28.3. The Appellant's misrepresentation was attributable to the Appellant's neglect, careless or wilful default.
>
> […]
>
> 36. In declaring itself as a private corporation other than a CCPC in its 2016 income tax return, the Appellant made a misrepresentation attributable to neglect, carelessness or wilful default.
>
> 37. The Appellant's misrepresentation arose from a lack of reasonable care in preparing its 2016 income tax return.

[20] The Appellant argues that the Reply sets out the appropriate legal test but is silent as to the factual basis that supports the Respondent's position. It adds that paragraph 28.1 is a statement of mixed fact and law and therefore cannot be considered a misrepresentation. Further, there are no actions or omissions identified in the paragraphs that lead to the conclusion that there was neglect, carelessness, or wilful default. They are simply a restatement of the law which is insufficient to establish a factual basis. The Appellant adds that paragraphs 36 and 27 are of no assistance.

[21] The Appellant observes that all pretrial steps have been completed and the Respondent still has not disclosed the facts that would support its position, adding that the Respondent had the opportunity to amend its Reply but did not do so. The Appellant concludes that there are no such facts and that the Reply discloses no reasonable grounds for opposing the appeal. The Appellant adds that procedural fairness dictates that the Reply should be struck now because the Appellant would be called upon to present its case first but would not know the case it has to meet. It is argued that it is not in the interest of justice for the case to proceed to trial.

[22] The Appellant acknowledges that the test to strike a reply is a stringent one but that it is met in this case. It adds that the reference in the Reply to a misrepresentation is not supported by a single statement of fact and that it is therefore plain and obvious that the Respondent has no reasonable prospect of being successful.

[23] In response to the Respondent's reference to the "fresh step rule", the Appellant asserts that the lack of a factual basis in the Reply regarding a fundamental aspect of the appeal for which the Respondent bears the onus is more than a simple

irregularity. It is argued that the "fresh step rule" should not override the Appellant's right to a fair trial.

[24] The Appellant concludes by indicating that the Reply should be struck without leave to amend or to file a new Reply because the existing Reply cannot be cured by an amendment or the filing of a new Reply. It is argued that the Respondent has not put forward a single fact to support its position and had it been able to do so, it would have done so after the filing of this Motion.

B. **Position of the Respondent**

[25] In summary, the Respondent argues that the purpose of pleadings is to define the issues in dispute and that the Reply satisfies that objective. The Motion must fail as the necessary facts are pleaded plainly in the Reply. It is argued that the Motion is also intrinsically flawed as it is contrary to the Appellant's own position that it was not a CCPC. Further, the "fresh step rule" prevents this motion.

[26] The Respondent acknowledges that the normal reassessment period for a CCPC is three (3) years but that paragraph 28.1 of the Reply clearly states that the Appellant's misrepresentation in the tax return was stating that it was an "other private corporation" and not a CCPC. The Appellant argues that this is not a question of fact and cannot be a misrepresentation, but there has been an evolution in the jurisprudence in this regard. Paragraphs 28.2 and 28.3 of the Reply states that the misrepresentation is attributable to negligence, carelessness or wilful default because the Appellant knew, or ought to have known, that it was a CCPC during its 2016 taxation year. The fact that the Appellant knew or ought to have known that it was a CCPC refers to how the Appellant failed to exercise reasonable care in filing its return. The facts presented by the Minister are simple, but the essential facts are there. The Appellant knows the case it has to meet.

[27] With respect to the Appellant's concern that it will have to present its evidence first at trial even though the Minister has the burden for the statue-barred years, the Appellant would be free to request that the order of presentation be changed and that decision would be up to the trial judge. The Respondent argues further that the Appellant is conflating the facts pleaded and the evidence to adduce those facts. On a motion to strike, the facts pleaded must be taken to be true. It is inappropriate in

the context of a motion to strike to ask the Court to draw a negative inference regarding the evidence that the Respondent will be expected to adduce at trial.

[28] In addition, the Appellant's Motion is contrary to its own position that it was not a CCPC. The Appellant contends that it was not a CCPC, but the Motion is predicated on the Appellant being a CCPC. The Motion is thus intrinsically flawed as it is based on the disputed issue of the Appellant's status as a corporation.

[29] Determining whether the Appellant is a CCPC has been identified by both parties as an issue to be determined by the Court. Whether the Reassessment is statute-barred is contingent on whether or not the Appellant is a CCPC. If the Appellant was not a CCPC at the end of its 2016 taxation year, the normal reassessment period would be four (4) years and the Reassessment would not be statute-barred. On this basis alone, it is clear that the Appellant has failed to show that it is plain and obvious that the Reply should be struck and its appeal allowed.

[30] Lastly, the Respondent contends that the "fresh step rule" set out in section 8 of the Rules should bar the Appellant's Motion. Although the Court has the discretion to allow a motion to strike where there have been subsequent steps, there is no reason for the Court to exercise such a discretion in this instance. The Appellant has brought its Motion after the parties have exchanged their list of documents and conducted examinations for discovery. The "fresh step rule" prevents the Appellant from presenting its Motion.

[31] In the event that the Court grants the Motion to strike to a certain extent, the Respondent requests the opportunity to amend its Reply.

V. **Analysis**

A. **The "Fresh Step Rule"**

[32] Section 8 of the Rules prevents a party from attacking an irregularity after the expiry of a reasonable time after it became aware of the irregularity or if the moving party took fresh steps in the proceeding:

Attacking Irregularity	**Irrégularité**

8. A motion to attack a proceeding or a step, document or direction in a proceeding for irregularity shall not be made,	8. La requête qui vise à contester, pour cause d'irrégularité, une instance ou une mesure prise, un document donné ou une directive rendue dans le cadre de celle-ci, ne peut être présentée, sauf avec l'autorisation de la Cour:
a) after the expiry of a reasonable time after the moving party knows or ought reasonably to have known of the irregularity, or	a) après l'expiration d'un délai raisonnable après que l'auteur de la requête a pris ou aurait raisonnablement dû prendre connaissance de l'irrégularité, ou
b) if the moving party has taken any further step in the proceeding after obtaining knowledge of the irregularity,	b) si l'auteur de la requête a pris une autre mesure dans le cadre de l'instance après avoir pris connaissance de l'irrégularité.
except with leave of the Court.	

[33] It allows a party to bring a motion to attack an irregularity contained in "a proceeding or a step, document or direction in a proceeding (…)". The word "document" includes a pleading. In *Chad v. The Queen*, 2021 TCC 45 (para. 11), Sommerfeldt J. noted that "improper pleadings are an irregularity (…)."

[34] As explained by Justice Bowman (as he then was) in *Imperial Oil et al. v. The Queen*, 2003 DTC 199 *("Imperial Oil")*, the purpose of the "fresh step rule" is to ensure the orderly movement of litigation and "implies a waiver of an irregularity that might otherwise have been attacked" (para. 20).

[35] Although a motion to strike a pleading pursuant to section 53 is a distinct remedy, the jurisprudence has established that section 8 should be considered. Section 53 does not state at what point in the litigation process a motion to strike may be made, but section 8 provides guidance as to when it should not be made.

[36] Paragraph 8(a) refers to "a reasonable time" after the moving party was made aware of the irregularity. The Appellant was served with the Reply on April 1, 2022

and its Motion was filed on October 31, 2022. While the Court may agree that this is not an unreasonable period of time, paragraph 8(b) sets out a further proviso referring to "any further steps in the proceeding" taken after the moving party knew "or ought reasonably to have known of the irregularity."

[37] As the above summary indicates, numerous steps were taken after the close of pleadings including a request for a timetable order, exchanging lists of documents and completing examinations for discovery.

[38] In *Kossow v. Canada*, 2008 TCC 422, the court applied the "fresh step rule" indicating that it was intended "to prevent a party from acting inconsistently with its prior conduct in the proceedings" (para. 21). The Federal Court of Appeal affirmed the decision, finding that by requiring the production of documents and conducting examinations for discovery, the taxpayer had "implicitly accepted the irregularities": *Kossow v. Canada*, 2009 FCA 83 (para. 17).

[39] The Appellant argues that the lack of a factual basis to support the Minister's assumption of a misrepresentation is more than just an "irregularity". Indeed there may be instances where the deficiencies in the pleadings are so egregious that the Court should exercise its discretion and allow the motion to strike, notwithstanding the passage of time or the taking of fresh steps.

[40] In *Kulla v. The Queen, 2005 TCC 136*, the Court observed that "gross deficiencies" may be viewed as "something more than irregularities" (para. 7).

[41] In *Imperial Oil, supra*, Justice Bowman noted that "allegations that this court has no jurisdiction, that the appeals are frivolous, vexatious, and an abuse of process can hardly be viewed as an attack on a irregularity" (para. 20).

[42] And in *Mochizuki v. Canada*, 2008 TCC 526, the court allowed the motion where the appellant's pleadings remained "illogical and barely coherent" (para. 13).

[43] In the present case, the Court is of the view that by undertaking the various steps in the litigation process following the close of pleadings, the Appellant waived any irregularity contained in the Reply. Moreover, despite the able argument of counsel for the Appellant, the Court is not convinced that the alleged defect is "more than an irregularity" such that it should exercise its discretion to allow the Motion.

B. **Motion to Strike**

[44] Despite the Court's finding that the Motion should be dismissed on the basis of the "fresh step rule", I will briefly address the requirements for a motion to strike.

[45] The leading decision remains *Sentinel Hill Productions (1999) Corporation, Robert Strother v. The Queen*, 2007 TCC 742, where Bowman, C.J. reviewed the application of section 53 of the Rules, noting that the principles that govern were well established. He summarized them as follows (para. 4):

> (a) **The facts as alleged in the impugned pleading must be taken as true** subject to the limitations stated in *Operation Dismantle Inc. v. Canada*, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441 at 455. **It is not open to a party attacking a pleading under Rule 53 to challenge assertions of fact**.
>
> (b) **To strike out a pleading or part of a pleading under Rule 53 it must be plain and obvious that the position has no hope of succeeding.** The test is a stringent one and the power to strike out a pleading must be exercised with great care.
>
> c) **A motions judge should avoid usurping the function of the trial judge in making determinations of fact or relevancy.** Such matters should be left to the judge who hears the evidence.
>
> [My Emphasis.]

[46] The Supreme Court of Canada later revisited the matter in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 (*"Imperial Tobacco"*), concluding as follows:

> [17] (…) **A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true**, that the pleading discloses no reasonable cause of action (…) Another way of putting the test is that the claim has no reasonable prospect of success. **Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial.**
>
> […]
>
> [23] (…) **The facts pleaded are taken as true. Whether the evidence substantiates the pleaded facts, now or at some future date, is irrelevant to the motion to strike. The judge on the motion to strike cannot consider what evidence adduced in the future might or might not show.** To require the judge to do so would be to gut the motion to strike of its logic and ultimately render it useless.

[My Emphasis.]

[47] More recently, in *Hillcore Financial Corporation v. The King,* 2023 TCC 71, Justice Lafleur summarized the requirements for a motion to strike as follows:

> [24] **The test to be applied for the striking out of pleadings or parts of pleadings is whether it is plain and obvious that it discloses no reasonable claim** (*Main Rehabilitation Co. v. Canada,* 2004 FCA 403, at para.3).
>
> [25] **In the context of a motion to strike a reply in an income tax appeal, the motion will be granted only if it is plain and obvious, assuming the facts as pleaded in the reply are true, that the reply fails to state a reasonable basis for concluding that the reassessment under appeal is correct** (*Canadian Imperial Bank of Commerce v. R, 2013 FCA 122 [CIBC, FCA], at para.7).*
>
> […]
>
> [35] The Court may grant all necessary amendments or relief to secure the just determination of the real matters in dispute. **To strike a pleading without leave to amend, the defect must be incurable by amendment** (see *Simon,* at para 8). Furthermore, the Federal Court determined that for a claim to be struck without leave to amend, **there must not be a "scintilla" of a legitimate cause for action** (*Riabko v. R, 1999 CanLII 8627 (FC),* [1999] FCJ No 1289, 173 FTR 239 [*Riabko*], at para 8).
>
> [36] When **an appellant** makes a motion to strike a reply, it **has the burden of showing that "it would be impossible for the Respondent to amend to support** the reassessment" (see *Mont-Bruno C. C. Inc. v. R, 2018 TCC 105, at para 29).*
>
> [37] **This burden is a heavy one**. As stated by this Court in *Zelinski,* "[a]mendments to pleadings should generally be permitted, so long as that can be done without causing prejudice to the opposing party that cannot be compensated by an award of costs or other terms, as the purpose of the Rules is to ensure, so far as possible, a fair trial of the real issues in dispute between the parties" (at para 4).

[My Emphasis.]

[48] The Appellant complains that the assumption set out in paragraph 28.1 fails to establish the factual basis for the alleged misrepresentation and that, having completed the various steps in the litigation process, it has reached the conclusion that there are no such facts and that the Respondent will be unable to meet its onus. On that basis, it argues that the Reply should be stuck without leave to amend.

[49] This contention must be rejected. As indicated by the Supreme Court of Canada in *Imperial Tobacco, supra* (para. 17), "whether the evidence substantiates the pleaded facts, now or at some future date, is irrelevant to the motion to strike." In other words, it is not the role of the Court in the context of a motion to strike to engage in speculation or conjecture as to whether the Respondent will be able to satisfy its onus at trial. This matter is best left to the trial Judge.

[50] Even if it can be said that paragraph 28.1 is largely a restatement of the test set out in subsection 152(4), the Court agrees with the Respondent that it is possible to extricate the basic facts that support its position that there was a misrepresentation.

[51] Moreover, even if it can be said that the impugned paragraph contains a statement of mixed fact and law, the Federal Court of Appeal has indicated that "[t]here is no principle of law that a statement of mixed fact and law cannot stand": *Canada v. Preston*, 2023 FCA 178 (*"Preston FCA"*) (para. 18).

[52] I will add finally that I agree that the motion is intrinsically flawed because it is contrary to the Appellant's position that it was an "other private corporation" and not a CCPC. The trial judge will have to determine the corporate status of the Appellant. If there is a finding that it was *not* a CCPC, then the Reassessment is not statute-barred and the court will have to consider the issue of GAAR.

VI. **Conclusion**

[53] As confirmed in *Preston FCA, supra,* "a decision to strike out a pleading" (para. 12) is discretionary. The Court is of the view that the motion to strike should be dismissed on the basis of the "fresh step rule" and further, that it is not plain and obvious that the Reply discloses no reasonable grounds for opposing the appeal.

[54] The Motion is dismissed with costs to the Respondent.

Signed at Ottawa, Canada, this 26th day of October 2023.

« Guy Smith »

Smith J.

CITATION:	2023 TCC 153
COURT FILE NO.:	2021-2673(IT)G
STYLE OF CAUSE:	GILCHRIST PROPERTIES LTD. v. HIS MAJESTY THE KING
PLACE OF HEARING:	Montréal, Québec
DATE OF HEARING:	February 16, 2023
REASONS FOR ORDER BY:	The Honourable Justice Guy R. Smith
DATE OF ORDER:	October 26, 2023

APPEARANCES:

Counsel for the Appellant:	Jonathan Lafrance Michel Gosselin-Trépanier
Counsel for the Respondent:	Christina Ham

COUNSEL OF RECORD:

For the Appellant:

Name:	Jonathan Lafrance, Marc-Olivier Plante
Firm:	Norton Rose Fulbright Canada LLP Montréal, Québec

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