Docket: 2023-1429(IT)G

BETWEEN:

BHUPINDER HARIKA,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Motion heard on September 11, 2024 at Vancouver, British Columbia

Before: The Honourable Justice Jean Marc Gagnon

Appearances:

Counsel for the Appellant:	Alistair G. Campbell
Counsel for the Respondent:	Anatoliy Vlasov

ORDER

UPON reading the Notice of Motion filed by the Appellant on July 22, 2024, and other documentary materials, pursuant to paragraph 53(1)(d) and section 65 of the *Tax Court of Canada Rules (General Procedure)*, seeking an order:

(i) to strike out, without leave to amend, the Respondent's Reply filed on November 28, 2023 as a whole;

(ii) to allow the appeal; and

(iii) to award costs of this motion and the appeal.

AND UPON having read the parties' submissions and having heard their representations;

AND in accordance with the attached reasons;

NOW THEREFORE it is ordered that:

1. The motion is dismissed.

2. The parties shall, no later than July 25, 2025, communicate with the Hearings Co-ordinator and submit a proposed timetable for the completion of all remaining litigation steps.

3. The costs will be in the cause.

Signed this 13th day of June 2025.

"J.M. Gagnon"

Gagnon J.

Citation: 2025 TCC 81
Date: 20250613
Docket: 2023-1429(IT)G

BETWEEN:

BHUPINDER HARIKA,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR ORDER

Gagnon J.

I. Introduction

[1] On July 22, 2024, the Appellant filed a Notice of Motion (Motion) before this Court pursuant to sections 53 and 65 of the *Tax Court of Canada Rules (General Procedure)* (Rules) seeking an order (i) to strike out the Respondent's Reply as a whole and (ii) to allow the appeal, with costs.

[2] The Court notes that a status hearing was scheduled in this appeal given that more than two months had passed since the Reply to the Notice of Appeal had been filed without hearing back from the parties. However, the parties requested that the status hearing be adjourned *sine die* as the Appellant would file a motion under section 53 of the Rules. Therefore, this Court has not yet issued a timetable order with respect to the completion of litigation steps, meaning that the parties have not exchanged lists of documents or conducted examinations for discovery.

[3] Moreover, the Appellant did not make a request under section 8 of the Rules for leave of the Court to bring the Motion, and in opposing the Appellant's Motion the Respondent did not make any reference to section 8 of the Rules, a rule often

referred to as the "fresh step" rule. The Motion was ultimately filed on July 22, 2024, but originally notified to the Court on May 8, 2024. The Court understands that section 8 is not at issue in this case as no further step, apart from the Motion, was taken by the parties after the Reply was filed on November 28, 2023.

[4] For the reasons below, the Appellant's Motion will be dismissed.

II. Facts

[5] The basic facts that led to the appeal do not appear to be in dispute.

[6] The Appellant is an individual resident in Canada for the purposes of the *Income Tax Act*.[1]

[7] On February 15, 2017, the Appellant, together with another individual (Co-Owner), acquired real property (Property) for a purchase price of $570,000.

[8] At all times after acquiring the Property, the Appellant and the Co-Owner co-owned the Property as joint tenants.

[9] Later in that same year, the Appellant and the Co-Owner disposed of the Property to an arm's length purchaser for proceeds of $770,000.

[10] The Appellant, in filing his income tax return for the 2017 taxation year, reported the disposition of his interest in the Property and the resulting gain of $82,512 as a capital gain. The Appellant included one half of the capital gain, being $41,256, as a taxable capital gain in computing his income for the year.

[11] By notice of assessment dated May 10, 2018, the Minister of National Revenue (Minister) assessed the Appellant's 2017 taxation year on the basis on which the return was filed. By notice of reassessment dated May 27, 2022 (Reassessment), the Minister reassessed the Appellant's 2017 taxation year. The Reassessment added business income on the sale of the Property in the amount of $82,512 and reversed the capital gain previously reported on the Property in the amount of $82,512.

---

[1] *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA or Act].

[12] As of May 27, 2022, more than three years had passed since the date that the Minister had issued the original notice of assessment in respect of the Appellant's 2017 taxation year.

[13] The Appellant did not file with the Minister a waiver, as described in subparagraph 152(4)(a)(ii) ITA, in respect of his 2017 taxation year.

[14] On May 27, 2022, the Appellant objected to the Reassessment by serving a notice of objection on the Minister. On April 11, 2023, the Minister confirmed the Reassessment.

[15] The Appellant appealed to the Tax Court of Canada from the Reassessment, raising (i) whether the Reassessment is statute-barred and (ii) whether the Property was capital property to the Appellant or property described in an inventory.

III. Parties' Positions

[16] The Appellant is of the view that the Reply discloses no reasonable grounds for opposing the appeal. Therefore, the appeal should be allowed at this stage. The Appellant's reasons in the Motion may be listed as follows:

> a. A taxpayer's reporting of a gain as being on capital account (as opposed to on income account) is not a misrepresentation for the purposes of subsection 152(4) ITA.
>
> b. A misrepresentation within the meaning of subparagraph 152(4)(a)(i) ITA means a misrepresentation of fact. The characterization of property such as real property as being capital property or property described in an inventory is a question of mixed fact and law. The Appellant's characterization of the gain realized on the disposition of the Property as a capital gain and not profit from a business was therefore not a misrepresentation for the purposes of subparagraph 152(4)(a)(i), and it was not open to the Minister to reassess the Appellant's 2017 taxation year after the normal reassessment period for that year had ended.
>
> c. The reassessment of the Appellant's 2017 taxation year was, accordingly, statute-barred, and the Reply discloses no basis on which the year could be re-opened for reassessment beyond the normal reassessment period.

[17] The Respondent submits that the Appellant has not met the legal threshold required to strike part or all of a pleading pursuant to subsection 53(1) of the Rules in that it is not plain and obvious that the Reply fails to state a reasonable basis for concluding that the reassessment is correct.

[18] The Respondent submits that a misrepresentation for the purposes of subparagraph 152(4)(a)(i) ITA is not limited to questions of fact and that to adopt such a view would lead to absurd consequences unintended by Parliament.

IV. Analysis

[19] The relevant legislative provisions are paragraph 53(1)(d) of the Rules and subparagraph 152(4)(a)(i) ITA:

> 53(1). Striking out a pleading or other document – (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
>
> > …; or
> >
> > (d) discloses no reasonable grounds for appeal or opposing the appeal.
>
> 53(2). No evidence is admissible on an application under paragraph (1)(d).
>
> …
>
> 152(4). Assessment and reassessment - The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if
>
> > (a) the taxpayer or person filing the return
> >
> > > (i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act, or
> > >
> > > …

[20] Paragraph 53(1)(d) of the Rules, specifically, allows this Court to 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 discloses no reasonable grounds for appeal or opposing the appeal. This is a discretionary decision.[2]

[21] With respect to striking out pleadings, the jurisprudence established some general guiding principles. These principles[3] include:

> a. the onus to establish that a pleading should be struck out rests with the person seeking to strike it out;[4]
>
> b. 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 or has no reasonable prospect of success;[5]
>
> c. a reply should not be struck in its entirety unless it is so clearly futile that the positions advanced have no chance of succeeding;[6]
>
> d. a pleading generally should not be struck out without leave to amend unless any defect cannot be cured by amendment;[7] and
>
> e. in the case of pleadings that lack specificity, the appropriate course of action is to demand particulars rather than bring a motion to strike.[8]

[22] Specifically, with respect to paragraph 53(1)(d) of the Rules, the Federal Court of Appeal stated in the *French*[9] decision:

> **25** On a motion to strike pursuant to rule 53(1)(*d*) of the *TCC Rules*, the question which arises is whether it is plain and obvious that the argument has no reasonable prospect of success (*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17).

[23] Paragraph 17 of the Supreme Court of Canada's decision in *Imperial Tobacco* states:

---

[2] See *Canada v Preston*, 2023 FCA 178 [*Preston*].
[3] Bourgard, Gordon and Robert McMechan, *Tax Court Practice*, 2025, Release 1 (2025), c 4, Thomson Reuters Canada Limited.
[4] *Preston, supra* note 2 at para 16.
[5] *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 [2011] 3 SCR 45 [*Imperial Tobacco*] at para 17.
[6] *Cudmore v The Queen*, 2010 TCC 318.
[7] *Preston, supra* note 2 at para 51.
[8] *Bemco Confectionery and Sales Ltd. v The Queen*, 2015 TCC 48, appeal dismissed 2016 FCA 21.
[9] *French v R*, 2016 FCA 64 [*French*].

> The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the B.C. *Supreme Court Rules*. This Court has reiterated the test on many occasions. 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: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. 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: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate; Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.
>
> [Emphasis added.]

[24] As well, in *Mont-Bruno 2018*[10], a case that also concerns a motion to strike the Minister's reply under section 53 of the Rules, cites the following case law for applicable guiding principles:

> 17 As established in the following cases, the test for striking out a pleading is difficult to meet and the threshold to strike is high:
>
> - in *Hunt v. Carey Canada*, [1990] 2 SCR 959, the Supreme Court of Canada stated at page 980 that "only if the action is certain to fail because it contains a radical defect...should the relevant portions of a plaintiff's statement of claim be struck out.";
>
> - in *Odhavji Estate v. Woodhouse*, [2003] 3 SCR 263 at paragraph 15, the Supreme Court of Canada stated that "The test is a stringent one";
>
> - in *Canadian Imperial Bank of Commerce v. R*, 2013 FCA 122 (F.C.A.) at paragraph 7, the Federal Court of Appeal stated that "in the context of a motion to strike the Crown's 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".;
>
> - in *Dyson v. AG*, [1911] 1 KB 410 at paragraphs 418-419, the Court indicated that "this power of arresting an action

[10] *Mont-Bruno C.C. Inc. v The Queen*, 2018 TCC 105 [*Mont-Bruno 2018*]. The appeal in *Mont-Bruno 2018* was subject to the Rules.

> and deciding it without a trial is one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure...our judicial system would never permit a plaintiff to be 'driven from the judgment seat' in this way without any Court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad".

[25] Based on these principles, the Court understands that the legal test for striking pleadings under section 53 of the Rules is a stringent one and generally requires that it is plain and obvious that the arguments within the pleadings have no reasonable prospect of success, if the facts pleaded are taken to be true.

[26] In the motion at hand, it does not appear to the Court that the Appellant established that the Respondent's Reply satisfies this test and thus ought to be struck. The Reply raises reasonable grounds for challenging the Notice of Appeal. The Reply presents the assumptions of fact on which the Minister relied to make the Reassessment and, additionally, submits a set of facts to prove that the Appellant has made a misrepresentation under subparagraph 152(4)(a)(i) ITA to justify the Minister's reassessment of the Appellant beyond the normal reassessment period. The facts advanced by the Respondent to prove misrepresentation include both the assumptions of fact relied on by the Minister to make the Reassessment as well as additional alleged facts in relation to the Appellant's knowledge, experience and relevant activities in the real estate industry. These alleged facts also include that the Appellant is a well-educated and experienced licensed real estate agent in British Columbia and that the Appellant's knowledge of tax matters was beyond that of an ordinary person due to the nature of the Appellant's experience in the real estate industry.

[27] If the facts submitted by the Respondent in the Reply are taken to be true, the Court does not believe that it is plain and obvious that the Respondent has no reasonable prospect of success to establish that the reassessment beyond the normal reassessment period is valid by virtue of paragraph 152(4)(a) ITA. The Court does not have to assess the Respondent's position at this early stage or subject a more thorough review prior to trial. After reviewing the parties' written submissions and hearing their oral representations, the Court is of the view that the test under subsection 53(1) of the Rules is not satisfied and therefore the matter should be allowed to proceed to trial.

[28] The Appellant, however, raises an issue of whether it would be possible for the Respondent to rely on subparagraph 152(4)(a)(i) ITA at all. Given that, as

submitted by the Appellant, a characterization of an amount on account of capital or income could not be a misrepresentation for the purposes of subparagraph 152(4)(a)(i). The Court does not share the Appellant's view. The Court is not convinced that, at this stage of the proceedings, there is no possibility that a misrepresentation by the Appellant could exist under subparagraph 152(4)(a)(i).

[29] In support of his position, the Appellant confirms that the transaction regarding the Property was fully disclosed in filing his 2017 tax return which was initially assessed as filed and that the amounts disclosed in the tax return in respect of the Property are not in dispute. The Appellant cites the decision in *Ver*[11] for his argument that the Respondent cannot assert that he has made a misrepresentation with respect to the way he has characterized the gain on the Property as being on account of capital versus income. The Appellant also refers to the decisions in *Inwest Investments*[12] and *Mont-Bruno 2017*.[13]

[30] The Appellant is of the view that *Ver* is clear and must bind the Court. What is also clear to the Appellant is, in the absence of a misrepresentation, which is the first step of the condition in subparagraph 152(4)(a)(i) ITA, the second step of the condition does not have to be addressed. In other words, if there is no misrepresentation, there is no need to determine whether the misrepresentation was attributable to neglect, carelessness or wilful default.

[31] The Appellant did not convince the Court of this argument. The situation under subparagraph 152(4)(a)(i) ITA, as exposed hereafter, is not so clear and supportive of the Appellant's position as to confirm that 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 valid. The Court is not convinced that this subparagraph cannot apply as proposed by the Appellant. As such, the Court is not satisfied that the threshold under section 53 of the Rules has been met. Therefore, the Respondent should have the right to submit his position before the trial judge.[14]

---

[11] *Ver v The Queen*, 1995 CarswellNat 2093 (TCC) [*Ver*].
[12] *Inwest Investments Ltd. v The Queen,* 2015 BCSC 1375 [*Inwest Investments*].
[13] *Mont-Bruno C.C. Inc. v The Queen,* 2017 CarswellNat 3165 (TCC) [*Mont-Bruno 2017*].
[14] As indicated by the Supreme Court of Canada in Imperial Tobacco, 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

[32] Before addressing the Appellant's decisions, the Court will refer to two recent motions to strike the reply, decided by this Court, relating to the Minister's ability to rely on subparagraph 152(4)(a)(i) ITA to reassess beyond the normal assessment period. These are the decisions in *Mont-Bruno 2018* and in *MacIsaac Consulting*.[15]

[33] In *Mont-Bruno 2018*, Justice Favreau dismissed the appellant's motion to strike a further amended reply by the Minister pursuant to paragraphs 53(1)(c) and (d) of the Rules. The appellant's position was that the further amended reply did not address the deficiencies recognized in Justice Paris' previous order.[16] Similar to the case at hand, the appellant in that case raised the issue of subparagraph 152(4)(a)(i) ITA for purposes of a section 53 motion.

[34] The appellant in *Mont-Bruno 2018* was a non-profit organization operating a golf course. The appellant realized a substantial gain on the disposition of a parcel of land, which was a vacant wooded area segregated from the golf course by a municipal road. The appellant reported the disposition and the gain on its (i) T2 return, at Annex 1, line 113, (ii) T2 return, at Annex 6, (iii) T1044, and (iv) its audited financial statements, but not on its T3 Trust Income Tax and Information Return originally filed. The Minister reassessed the appellant after the normal reassessment period for not reporting the disposition and gain on its T3.

[35] The appellant in *Mont-Bruno 2018* did not report the disposition in its T3 because it believed that the gain on the disposition of the parcel of land was exempt from taxation because the parcel of land was used exclusively and directly for providing dining, recreational or sporting facilities to its members, as required to fit a subsection 149(5) ITA exemption. This is what the Court believes to be the appellant's filing position.

[36] The appellant alleged that its filing position was the reason why it reported the gain in its T1044, which is the form for exempt activities, rather than reporting it in its T3, which is the form for reporting taxable income. The appellant submitted that it did not conceal the gain since the gain was disclosed to the Canada Revenue

---

the respondent will be able to satisfy its onus at trial. This matter is best left to the trial judge. See *Gilchrist Properties Ltd. v The King*, 2023 TCC 153.

[15] *Matthew MacIsaac Consulting Inc. v The Queen*, 2020 TCC 44 [*MacIsaac Consulting*].

[16] The *Mont-Bruno 2018* decision is a decision that followed the *Mont-Bruno 2017* decision. The *Mont-Bruno 2017* decision was cited by the Appellant. Both decisions relate to a common appeal before this Court. Justice Paris, in *Mont-Bruno 2017*, had struck out the Minister's first amended reply, with leave to amend, for not pleading facts that would allow this Court to conclude that the appellant made a misrepresentation pursuant to subparagraph 152(4)(a)(i) ITA.

Agency (CRA) in its T2 return and audited financial statements. In the appellant's view, the proper characterization of the disclosed facts could not be considered a misrepresentation. The appellant in *Mont-Bruno 2018* also referred to paragraph 17 of *Ver* and to the *Inwest Investments* decision, as did the Appellant in the case at hand. The Court believes that the Appellant in the present case would share the view that a filing position and the proper characterization of the disclosed facts cannot be considered a misrepresentation for the purposes of subparagraph 152(4)(a)(i) ITA.

[37] In *Mont-Bruno 2018*, Justice Favreau considered a number of cases on misrepresentation.[17] Ultimately, Justice Favreau's line of analysis suggests that this Court was not convinced that a filing position could not be a misrepresentation for the purposes of subparagraph 152(4)(a)(i) ITA. In particular, Justice Favreau refers to *Dalphond*, where the Federal Court of Appeal held that claiming a deduction to which a taxpayer was not entitled constituted as a misrepresentation, and to *Robertson*, where the Federal Court of Appeal held that a taxpayer's failure to report stock option benefits was a misrepresentation attributable to neglect or carelessness, in spite of the taxpayer's firm—but flawed—belief that such benefits were not taxable.[18]

---

[17] Justice Favreau considered cases including *Ridge Run Developments Inc. v The Queen*, 2007 TCC 68 [*Ridge Run*], *Gestion Fortier Inc. v The Queen*, 2013 TCC 337 [*Gestion Fortier*] (citing *Regina Shoppers Mall Limited v The Queen*, [1990] 2 CTC 183 [*Regina Shoppers*]), *Ver*, *Inwest Investments*, *Petric v The Queen*, 2006 TCC 306 [*Petric*], *Dalphond v The Queen*, 2009 FCA 121 [*Dalphond*], *Minister of National Revenue v Foot*, 1964 CanLII 1088 (CA EXC), [1964] CTC 317 (Can Ex Ct) [*Foot*], *Minister of National Revenue v Taylor*, 1961 CanLII 719 (CA EXC), [1961] CTC 211 (Can Ex Ct) [*Taylor*], *Nesbitt v The Queen*, [1996] CarswellNat 1916 (FCA) [*Nesbitt*] and *Robertson v Canada*, 2016 FCA 303 [*Robertson*].

[18] In order to avoid confusion, the Court would like to add a few comments with respect to the decisions cited in *Mont-Bruno 2018*:

First, this Court in *Mont-Bruno 2018*, at paragraph 29, cites paragraph 73 of *Ridge Run*. It would appear that paragraph 73 of *Ridge Run* refers to the appellant's submissions in that case. The Court confirms that paragraphs 155, 156 and 157 of the decision in *Ridge Run* better represent the holding in that decision. To the same effect, see *Fuhr v The King*, 2024 TCC 43: courts have consistently held that the threshold for establishing misrepresentation is low. In support of this view, in *Francis & Associates v The Queen*, 2014 TCC 137 at paragraph 20, Justice Bocock wrote that a misrepresentation is any statement that is incorrect, referring to *Foot*. He adds that several cases have indicated that "any" error made in a return filed is tantamount to a misrepresentation: *Taylor*, *Nesbitt*, and *Ridge Run*. The court adds that the same conclusion can be read from paragraph 96 of the *Inwest Investments* decision (citing *Ridge Run*).

Second, at paragraph 34 of the *Mont-Bruno 2018* decision, the Federal Court of Appeal at paragraph 7 of its decision in *Regina Shoppers* cites the trial judge and appears to be of the same view. A careful review indicates that the trial judge's position accepted by the Federal Court of Appeal relies on the conclusion that no misrepresentation exists where a taxpayer thoughtfully, deliberately and carefully assessed the situation and filed on what he believed to be a *bona fide* proper method. Another way to confirm that the final determination of whether a misrepresentation exists under subparagraph 152(4)(a)(i) will be for the trial judge to decide based on the evidence.

[38] Justice Favreau dismissed the appellant's motion to strike holding that the respondent's further amended reply suggested a potential basis for proving that the appellant's misrepresentation was due to neglect, carelessness or wilful default and, as such, it resolved the past replies' deficiencies. In particular, he noted that the respondent's pleading of facts relating to the business experience of the appellant's directors and their failure to seek professional tax advice were facts on the basis of which a misrepresentation attributable to neglect, careless or wilful default had been made.

[39] In the case at hand, the Respondent's Reply submits facts—including those surrounding the knowledge and experience of the Appellant—that could form a potential basis for proving that the Appellant made a misrepresentation due to neglect, carelessness or wilful default. Assuming the facts pleaded by the Respondent in the Reply are true, the Court does not find it plain and obvious that the Respondent has no prospect of success in arguing his case. This is without reiterating that no evidence is admissible before the Court at this stage.

[40] The Court would also agree with the holding in *Dalphond* and in several other decisions, which could be called precedential, in support of a broader meaning of the term "misrepresentation" for purposes of subparagraph 152(4)(a)(i) ITA. The Court cannot ignore the line of cases where a misrepresentation, including with respect to a filing position, has a broader meaning than the one argued by the Appellant.[19]

Third, the Tax Court in *Mont-Bruno 2018*, at paragraph 37, cites paragraph 96 of *Ridge Run*. It would appear that paragraph 96 of *Ridge Run* refers to the respondent's position in that case and not the Court's. The Court in *Ridge Run*, however, shows comfort with the respondent's position at paragraphs 155, 156 and 157 of the decision (although this Court does not go so far as to confirm that even an innocent misrepresentation is attributable to neglect as is stated at paragraph 96).

Lastly, one could believe that the Tax Court in *Mont-Bruno 2018* cited passages from *Ridge Run*, *Gestion Fortier*, *Ver*, *Inwest Investments* and *Petric* as supporting the appellant's position. The commonality among these cases is that, on assessing the facts of each case, the Tax Court did not find a misrepresentation for the purposes of subparagraph 152(4)(a)(i) ITA. The Tax Court holds that the principles presented by these cases, as to what constitutes a misrepresentation for the purposes of subparagraph 152(4)(a)(i) ITA, are not irreconcilable with the view that a filing position could be a misrepresentation.

[19] See, for example, in *Inwest Investments*, cases where a filing position was considered at issue: *Cameron v R*, 2011 TCC 107 [*Cameron*], *Petric* and *Ver*:

In *Cameron*, the issue was whether the principal residence exemption was available based on a taxpayer's determination as to whether the house they sold was their principal residence or gave rise to a business gain. At paragraph 19, Justice Hogan described such a case as falling within the "grey zone of tax law".

In *Petric*, the issue was whether the fair market value reported by the taxpayer was reasonable. At paragraph 38, Justice Lamarre stated that the question of fair market value was a controversial issue that more closely

[41] Another recent case in which this Court heard a motion concerning the meaning of misrepresentation under subparagraph 152(4)(a)(i) ITA—albeit in the context of section 58 of the Rules—is the *MacIsaac Consulting*, decided by Justice Wong. Although that case was decided under a different rule, the context does not preclude the Court from considering the position adopted by Justice Wong with respect to the meaning and the scope of a provision that has a similar impact on both motions and, more particularly, is discussed in the context of a motion that may dispose of all or part of the proceedings.[20]

[42] In *MacIsaac Consulting*[21], the appellant requested the determination of the following three questions, pursuant to section 58 of the Rules, prior to the eventual hearing of the appeal:

> (a) Whether a misrepresentation (i.e. "présentation erronée des faits") within the meaning of subparagraph 152(4)(a)(i) of the *Income Tax Act* means a misrepresentation of fact, and not mixed law and fact;
>
> (b) Whether the characterization of gains as being on capital versus income account is a question of mixed law and fact and therefore outside the meaning of the subparagraph 152(4)(a)(i) of the *Income Tax Act*; and
>
> (c) Whether the statute-barred reassessments are invalid.

[43] In that case, the appellant submitted that the proposed questions required this Court to determine whether the characterization of a gain as income versus capital could be a misrepresentation for the purposes of subparagraph 152(4)(a)(i) ITA. The appellant also referred to the distinction between the French version of subparagraph 152(4)(a)(i), which reads "…une présentation erronée des faits…", and the English version, which reads "…any misrepresentation…". Like the Appellant in the case at hand, the appellant in *MacIsaac Consulting* submitted that the income versus capital issue was one of mixed law and fact and, as a result, could not constitute a misrepresentation for the purposes of subparagraph 152(4)(a)(i).

---

resembled the situation in *Regina Shoppers* (capital gains versus income) and *1056 Enterprises Ltd. v Canada*, [1989] 2 CTC 1 (FCTD), 1989 CanLII 10167 (FC) [*1056 Enterprises Ltd.*] (whether corporations were associated) than in *Nesbitt* (a mathematical error in the tax return).
In *Ver*, the issue was whether expenses were properly claimed as business expenses. Additionally, see *Dalphond* (claiming of the capital gains deduction for qualified small business corporation shares) and *Savard v R*, 2008 TCC 62 [*Savard*].

[20] With respect to this last point, paragraph 53(1)(d) of the Rules shows a more explicit restrictive test than that under section 58 of the Rules which provides an additional reason to consider Justice Wong's comments on the provision relevant to both motions.

[21] *MacIsaac Consulting* at para 5.

This is another manner to describe that a filing position should not be viewed as a misrepresentation.

[44] Justice Wong dismissed the appellant's motion after addressing the first of the three questions raised by the appellant. As per her decision on the first question stated at paragraph 42 above:

> 21 However, I do not believe that this question is suitable for determination under rule 58. Specifically, I do not believe that where the assessment issue includes an allegation of neglect, carelessness or wilful default, it can be properly determined by a trier of fact without the factual context.
>
> 22 The meaning of the phrase "une présentation erronée des faits" appears to be *prima facie* different from the meaning of the phrase "any misrepresentation".
>
> 23 The English and French versions are of equal force and effect, and there is no basis to prefer one version over the other without further context.
>
> 24 I cannot agree with the Appellant's proposition [at paragraph 9 of the notice of motion] that a question of income versus capital necessarily amounts to a difference in opinion. In my view, the factual circumstances of the appeal will determine whether the issue of income versus capital is purely a difference of opinion or not. Related to that determination will be a determination as to whether there was a misrepresentation under subparagraph 152(4)(a)(i).
>
> 25 The question of whether a misrepresentation under subparagraph 152(4)(a)(i) contemplates fact only or mixed-law-and-fact, should properly remain with the trier of fact to determine in conjunction with the related substantive issues.
>
> 26 In *Pasquale Paletta v. Her Majesty the Queen*, 2016 TCC 171, affirmed by the Federal Court of Appeal in 2017 FCA 33, this Court was asked to consider a proposed rule 58 question which also dealt with subparagraph 152(4)(a)(i). In that instance, seven taxation years were involved, the Appellant proposed to concede the fact of the misrepresentation, and he sought to have the Court determine only the question of whether the misrepresentation was attributable to neglect, carelessness or wilful default.
>
> 27 I agree with this Court's statement at paragraph 32, which reads as follows:
>
> > [T]he issue of whether the conceded misrepresentation is attributable to neglect, carelessness or wilfil [*sic*] default cannot be resolved without an appreciation of all of the circumstances surrounding the filing positions taken by the Appellant in his returns for the Taxation Years. Those circumstances have not been agreed

> upon by the parties and, in fact, are at the heart of the highly contested reassessment issue.
>
> 28 In that appeal, examinations for discovery had not yet been held: see *Paletta*, 2016 TCC 171 at paragraph 2. In the present case, documents have not yet been exchanged nor have discoveries been conducted. Without these steps having been taken or at least in progress, I cannot agree with the Appellant's submission that the facts are largely not in dispute. While the mechanics of the transactions may not be in dispute, the factual circumstances have yet to be determined for the purposes of confirming or rebutting the Minister's assumptions.
>
> 29 Similar to the conclusion reached in *Paletta* at paragraph 43, I am of the view that the proposed approach would not provide a fair and just adjudication of the statute-barred issue.
>
> [Emphasis added.]

[45] The Court shares the approach expressed in *MacIsaac Consulting* in regard to subparagraph 152(4)(a)(i) ITA. For purposes of paragraph 53(1)(d) of the Rules, subsection 53(2) states that no evidence is admissible on an application under paragraph 53(1)(d), and it has been established that the facts pleaded are assumed to be true. In such a context, it becomes even more relevant to let the trial judge be in the position to assess all the circumstances surrounding the filing position taken by the Appellant in his tax return for the taxation year under appeal. The Court does not believe that a filing position argument such as the one in this case—a question of income versus capital—precludes, in and of itself, the existence of a misrepresentation for the purposes of subparagraph 152(4)(a)(i). A review of the jurisprudence indicates that a filing position taken by a taxpayer can be a misrepresentation for the purposes of subparagraph 152(4)(a)(i).[22]

[46] As indicated above, similar to the appellant in *MacIsaac Consulting*, the Appellant in the case at hand raised the argument that there is a distinction in the wording between the English and French versions of subparagraph 152(4)(a)(i) ITA. Subparagraph 152(4)(a)(i) ITA is reproduced, in English and in French, below:

> **Subparagraph 152(4)(a)(i) ITA in English:**
>
> (a) the taxpayer or person filing the return

[22] See footnote 19 for details.

> (i) has made <u>any misrepresentation</u> that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act, or …

Subparagraph 152(4)(a)(i) ITA in French:

a) le contribuable ou la personne produisant la déclaration :

> (i) soit a fait <u>une présentation erronée des faits</u>, par négligence, inattention ou omission volontaire, ou a commis quelque fraude en produisant la déclaration ou en fournissant quelque renseignement sous le régime de la présente loi, …

[Emphasis added.]

[47] The Appellant points out that, in the French version of subparagraph 152(4)(a)(i) ITA, the provision reads "une présentation erronée des faits" while in the English version, the provision reads "any misrepresentation". The Appellant draws attention to the words "des faits" in the French version, which translate to "of the facts" in English.

[48] The Appellant cites the *Daoust*[23] decision for the approach to resolving discrepancies between the English and French versions of a bilingual statute: the first step is to determine whether there is a discordance between the English and French versions of the provision, and if so, to determine whether a shared meaning can be found between both versions, and the second step is to determine whether the shared meaning is consistent with Parliament's intent.[24]

[49] The Appellant is of the view that there is discordance between the French and English versions of subparagraph 152(4)(a)(i) ITA. He submits that the French version is more narrowly worded than the English version, in that it specifies the nature of the misrepresentation to which the provision applies (that is "of the facts"), and that the English version, by contrast, is more broadly worded and does not specify the nature of the misrepresentation. Therefore, in applying the principles of bilingual statutory interpretation, the Court must adopt the narrower version (that is

---

[23] *R v Daoust*, 2004 SCC 6 [*Daoust*].

[24] The Respondent refers to the case of *R v S.A.C.*, 2008 SCC 47 paras 14-16, which similarly cites *Daoust*, as well as *Schreiber v Canada (Attorney General)*, 2002 SCC 62, for guidance in interpreting bilingual statutes.

the French version) in determining the shared meaning of the two versions of the provision.

[50] The Respondent's position is that there is no discordance between the English and French versions of subparagraph 152(4)(a)(i) ITA, and that, if the Court finds that there is discordance, then the English version should be adopted as the less ambiguous version of the two.

[51] In particular, the Respondent submits that the French version of subparagraph 152(4)(a)(i) ITA does not use the phrase "une question de fait" (in English, "a question of fact"), which is used in other sections of the Act.[25] The Respondent appears to suggest that the Appellant is attempting to liken "une présentation erronée des faits" to "une question de fait", such that a misrepresentation for the purposes of subparagraph 152(4)(a)(i) could only apply to questions of fact and not to questions of mixed law and fact. The Respondent submits that, had Parliament intended for subparagraph 152(4)(a)(i) to refer to "a question of fact", it would have legislated accordingly—in both English and in French—as seen in other sections of the Act.

[52] The Respondent goes on to argue that, if a misrepresentation for the purposes of subparagraph 152(4)(a)(i) ITA were to preclude the Minister from reassessing issues pertaining to questions of law and fact, such a consequence would be absurd: the Minister would be precluded from reassessing most, if not all, issues that are statute-barred regardless of the circumstance, given that every item reported in a tax return is a question of mixed law and fact. The Respondent argues that such a consequence could not have been intended by Parliament.

[53] On reading the English and French versions of subparagraph 152(4)(a)(i) ITA, the Court is not convinced that there is discordance in meaning between the two versions. As explained below, the Court is of the view that both language versions of the provision are equivalent and indeed refer to a misrepresentation of the facts.[26] Having said that, however, a misrepresentation of

---

[25] The Respondent refers to subsections 173(1), 174(1) and 251(1) for the use of "une question de fait".

[26] Only the French version was amended post 1970 with the objective to ensure that both legislative texts do not differ in scope. The amendment to the *Income Tax Act*, RSC 1952, c 148, s 1 (Revised Statutes of Canada 1970) that introduced "des faits" into the French version of the Act was made by way of Bill C-259, Chapter 63 of the Public General Acts (Annual Statutes of Canada; Acts of the Parliament of Canada), from the 3rd Session of the 28th Parliament (1970-1972). Per section 9 of Chapter 63, the amendment applies to the 1972 and subsequent taxation years. The debates pertaining to this session of Parliament do not discuss the amendment.

the facts does not preclude questions of law and fact or filing positions from falling within the scope of subparagraph 152(4)(a)(i).

[54] First, a close examination of the words used in the English and French versions of the provision supports that the bilingual versions are equivalent in meaning. In the English version of the provision, the exact word used is "misrepresentation". According to *Black's Law Dictionary* (12th ed, 2024), the definition of "misrepresentation" is:[27]

> **Misrepresentation,** *n*. (17c) 1. The act or an instance of making a materially false or misleading assertion about something, usu. with the intent to deceive… 2. The assertion so made; a materially incorrect, unfair, or false statement; an assertion that does not accord with the facts…
>
> [Emphasis added.]

[55] Similarly, the online *Oxford English Dictionary* defines "misrepresentation" as follows:[28]

> 1. Wrong or incorrect representation of facts, statements, the character of a person, etc.; the action of misrepresenting someone or something…
>
> [Emphasis added.]

[56] Given the definitions above, the single English word "misrepresentation", in and of itself, already appears to mean a false assertion or false representation of facts. That is, the word "misrepresentation" in English, alone, encapsulates the concept of a false, misleading, wrong or incorrect representation in relation to facts. Put in another way, to say the phrase "a misrepresentation of the facts" would be redundant.

[57] Contrast this with the French version of the provision, where one can be of the view that the same meaning does not apply. In French, the relevant phrase can be broken down into the words "présentation erronée" and "des faits". The expression "présentation erronée" alone is not as specific as the word "misrepresentation" in English, and, on its own, could mean an erroneous presentation with respect to a number of things. Due to the broadness of possibilities that could accompany the expression "présentation erronée", the phrase must

---

[27] Bryan A. Garner, J.D., LL.D., *Black's Law Dictionary*, 12th ed, (St. Paul, Minn: Thomson Reuters, 2024) *sub verbo* "misrepresentation".
[28] *Oxford English Dictionary*, 2nd ed, *sub verbo* "misrepresentation".

necessarily be qualified with the additional words “des faits” to specify its meaning and reconcile the French version with the English version. In effect, the full expression “présentation erronée des faits” in French is therefore equivalent to the lone word “misrepresentation” in English.

[58] Having said this and having established that a misrepresentation for the purposes of subparagraph 152(4)(a)(i) ITA indeed means a misrepresentation [of the facts], the Court clarifies that such a finding does not preclude questions of law and fact—or filing positions—from being misrepresentations.

[59] In the Court’s view, a misrepresentation for the purposes of subparagraph 152(4)(a)(i) ITA encompasses a situation where a taxpayer’s characterization of a set of underlying facts does not accord with a reasonable characterization of those facts. That is, if the underlying facts of a taxpayer’s situation are unreasonably estimated, focused, underplayed, narrowed, measured or evaluated, then there is a misrepresentation [of the facts], and such a misrepresentation leads to an erroneous tax characterization. This situation can exist in various circumstances. Because the filing position of a taxpayer involves the disclosing, reporting or characterization of the taxpayer’s underlying factual situation, any false, misleading, incorrect or incomplete disclosure, reporting, or characterization of those facts could constitute a misrepresentation [of the facts]. For that reason, a characterization issue concerning a question of mixed law and fact can constitute a misrepresentation [of the facts].

[60] In the present case, the Respondent’s position, as expressed in the Reply, could lead to such a finding of misrepresentation, and only a thorough search and review by the trial judge of the facts and evidence on their merits will determine whether a misrepresentation exists. Where a misrepresentation exists, it will then be examined in the context in which it was made to determine whether negligence, carelessness or wilful default was present.

[61] Speaking to the requirement for negligence, carelessness or wilful default, the Appellant submits, in light of his position, that a question of capital gain versus business income cannot come within the meaning of misrepresentation for the purposes of subparagraph 152(4)(a)(i) ITA since the first condition of the misrepresentation test is not met. It is therefore irrelevant to consider the second condition of the test: whether the Appellant was negligent or careless.

[62] Having established that the first step of the condition in subparagraph 152(4)(a)(i) ITA does not outright preclude questions of mixed law and fact from being a misrepresentation, it follows that the second condition could be of relevance in the determination of whether the Minister is allowed to reassess the Appellant beyond the normal reassessment period. In particular, when the determination of whether a misrepresentation exists relates to whether a taxpayer's filing position is reasonable (see discussion below), such factors as negligence or carelessness could play a role.

[63] In *Ver*, raised by the Appellant, the issue under that appeal was whether the Minister was entitled to reopen the 1988 taxation year to reassess the appellants' income beyond the normal reassessment period. The Appellant's Motion and the Appellant's Memorandum of Fact and Law specifically refers to paragraph 17 of the *Ver* decision by Justice Bowman, as he then was. The Court believes that a reproduction of paragraphs 17 and 18 in full is more appropriate:

> 17 I do not think the respondent has established the Minister's right to reassess the appellants' 1988 taxation year beyond the normal reassessment period. Therefore I propose to allow the appeals and vacate the assessments of March 23, 1993. My reasons are as follows:
>
> (a) The respondent has not established that there was a misrepresentation in the returns of income. A misrepresentation within the meaning of subparagraph 152(4)(*a*[])(i) means a misrepresentation of fact. The French version uses the words "une présentation erronée des faits". There is no evidence and no suggestion that any of the figures in the statement of income and expense were falsified, that the goods were not bought and sold in the amounts disclosed or that the amounts claimed as expenses were not in fact incurred. The respondent's criticism of the reporting of the loss is based upon certain propositions of law or mixed law and fact that the amounts were "not laid out for the purpose of gaining or producing income" that there was "no reasonable expectation of profit" and that the expenses were "personal or living expenses". These points might be arguable in support of the merits of the assessments and they might form a basis for disallowance of some of the expenses, but matters of judgement such as allocation of expenses between business and personal are one thing that the Minister ought to pick up in the normal assessment process and within the three years that are given him. They are not the subject of misrepresentation within the meaning of subparagraph 152(4)(*a*)(i).

(b) As a corollary to the first point the appellants' returns were before the departmental officials from the time that they were filed. If the claims were originally subject to challenge as excessive it should have been obvious from an examination of the returns. It has not been established that the taxpayers suppressed any material facts. The purpose of the provision permitting the Minister to reopen statute-barred years is to allow a review of returns to be made beyond the normal reassessment period where facts have been deliberately or negligently omitted, suppressed or misstated. That is not the case here. In reaching this conclusion I find support in the observations of Mr. Justice MacGuigan in *The Queen v. Regina Shoppers Mall Limited*, 91 D.T.C. 5101.

(c) It has not been established by the respondent wherein the claiming of expenses was excessive or unreasonable. The selling of household products in one's home necessarily entails the use of one's home and the incurring of entertainment expenses. If the amounts claimed were excessive or unreasonable it was up to the Minister to show in what respect they were. It is insufficient for the respondent, who has the onus of proving misrepresentation, to plead, without evidence, that the Minister "assumed" that there was "no reasonable expectation of profit" or that the amounts were not laid out for the purpose of gaining or producing income. It was incumbent upon the Minister to inform the appellants "here you miss, or there exceed the mark" and to do so with specificity.

(d) Even if the appellants' failure to anticipate the Crown's theories, and to report their income on a basis that would have conformed with the Minister's view of the application of concepts in paragraphs 18(1)(*a*), 18(1)(*b*) and the definition of personal and living expenses in subsection 248(1), constitutes a misrepresentation - a notion that I find impossible to accept - it has not been established that such "misrepresentation" was attributable to neglect or carelessness. It was not contended that either wilful default or fraud are involved here. The appellants gave their receipts to a preparer of tax returns whom they trusted. They are not well educated people and their understanding of tax and financial matters is rudimentary if it exists at all. Their reliance upon a person whom they regarded as professional and trustworthy was, for them, reasonable and did not constitute neglect or carelessness.

(e) Even if the conduct or state of mind of the person who prepared the appellants' returns can appropriately be visited upon the

> appellants themselves -- a point which, incidentally, was not argued -- no evidence has been adduced to show that that person acted with either neglect or carelessness.
>
> (f) Finally, the Reply to the Notice of Appeal is inadequate in a case of this type. Bald assertions that the Minister "assumed" a misrepresentation are inappropriate where the Minister must prove a misrepresentation. The precise misrepresentation alleged to have been made must be set out with particularity in the reply and proved with specificity. Three essential components must be alleged in pleading misrepresentation:
>
> (i) the representation;
>
> (ii) the fact of its having been made; and
>
> (iii) its falsity.
>
> 18 None of the above was pleaded and, for the reasons set forth earlier, none was proved.
>
> [Emphasis added.]

[64] The Appellant contends that *Ver* appears to be a case that holds that questions of mixed fact and law could not be a misrepresentation [of fact] for the purposes of subparagraph 152(4)(a)(i) ITA. The Court is not convinced.

[65] First, *Ver* was an appeal under the informal procedure.[29] This is certainly a factor to take into account from a precedent standpoint. Second, the reasons in support of Justice Bowman's decision followed his hearing of the two appeals on the merits and therefore not in the context of a motion. This is important as the objective herein is to address the motion in the strict context of section 53 of the Rules before any documents have been exchanged or discoveries conducted. Third, the Court is not persuaded that the position expressed by Justice Bowman leads to the Appellant's position and that it very clearly supports that a misrepresentation [of facts] for the purposes of subparagraph 152(4)(a)(i) ITA precludes a misrepresentation [of facts] in a recharacterization case.

[66] Subparagraph 17(a) of Justice Bowman's decision confirms his position that misrepresentation relates to facts. The Court notes that he did not elaborate on a

[29] Section 18.28 of the *Tax Court of Canada Act* states that judgments on informal appeals shall not be treated as a precedent for any other case.

possible discrepancy between the wording employed in the two official versions of subparagraph 152(4)(a)(i) ITA.[30] In addition, subparagraphs 17(a) and (c) could lead one to believe that Justice Bowman's primary concern was to severely criticize the respondent's attack of the taxpayer under subparagraph152(4)(a)(i) ITA, wherein such an attack by the respondent was clearly incorrect, and did not convey that a misrepresentation by the taxpayer could not possibly be established for the purposes of subparagraph 152(4)(a)(i), especially in cases where expenses are in dispute. Justice Bowman relied on the evidence before him to support his position. This aspect should not be ignored.

[67] In subparagraphs 17(a) and (b) he underlined that the evidence was not satisfactory, that no facts were suppressed and that the interpretation of the facts did not constitute neglect or carelessness. In subparagraph 17(c), he effectively states, that the respondent has not met his burden of proof to establish a misrepresentation on the part of the appellants. And in subparagraphs 17(d), (e) and (f) the main focus is on the test and the conditions of subparagraph 152(4)(a)(i) that have not been satisfied under the specific facts of the case. Therefore, the application of subparagraph 152(4)(a)(i) is denied not because meeting the test under this subparagraph is forbidden, rather because the evidence and the position of the respondent did not support the burden of proof that the respondent ultimately must meet.

[68] In paragraph 18 of *Ver*, Justice Bowman reconfirms his final position listed in paragraph 17 for denying the respondent's right to rely on subparagraph 152(4)(a)(i) ITA.

[69] The Court is of the view that, when paragraphs 17 and 18 of the *Ver* decision are considered as a whole, the perspective of Justice Bowman appears, more likely than not, to address the respondent's position adopted in the appeals and the respondent's lack of rigour—rather than to preclude, outright, questions of law and fact from falling within the scope of subparagraph 152(4)(a)(i). The absence of the respondent proving misrepresentation is also reiterated by Justice Bowman and remains a material factor today. The Court is not convinced that this case confers unconditional support on the Appellant's position, particularly in the context of a section 53 motion.

[30] The Court has reconciled earlier in these Reasons the apparent discrepancy between the bilingual statutes.

[70] In addition, it should be noted that most cases citing *Ver* are referring to subparagraph 17(f) of the decision.[31] Subparagraph 17(f) confirms that (i) the precise misrepresentation alleged by the respondent to have been made must be set out with particularity in the reply and proved with specificity, and (ii) three essential components must be alleged in pleading misrepresentation.

[71] From the Court's perspective, the *Ver* decision responds, first and foremost, to the actual situation as it existed in that case. In Justice Bowman's opinion, it is reasonable to conclude that the facts and circumstances alone could not have allowed the respondent to succeed. In the present case, it is too early to make that determination. The trial judge will make that determination.

[72] The Appellant also raises the case of *Inwest Investments*, a case decided by the British Columbia Supreme Court in 2015.

[73] In *Inwest Investments*, the appellant corporation brought an application for summary trial under the *British Columbia Supreme Court Civil Rules* on the preliminary issue as to whether the Minister was statute-barred from reassessing the appellant on its 2002 provincial income tax. The issue was whether the appellant corporation had a "permanent establishment" in British Columbia.

[74] The appellant in *Inwest Investments* argued that it took a filing position on the issue of whether it had a "permanent establishment". The corporation submitted that its position was reasonable, and in such circumstances the Minister is not permitted to assess a taxpayer outside of the limitation period because he disagrees with the taxpayer's filing position.[32] Furthermore, the appellant argued that it demonstrated due diligence efforts and that it was not neglectful or careless in filing its return.[33]

[75] Justice Fitzpatrick addressed the question of whether the Minister was statute-barred from issuing a reassessment due to subparagraph 152(4)(a)(i) ITA. In her analysis, Justice Fitzpatrick, provided a detailed review of many of the same cases that Justice Favreau discussed in *Mont-Bruno 2018*.

---

[31] *Gardner v R*, [2001] 4 CTC 2868, *Dachkov v The Queen*, 2009 TCC 403, *Kozar v The Queen*, 2008 TCC 200, *Cameco Corporation v The Queen*, 2010 TCC 636, *Jencik v The Queen*, 2004 TCC 295. This list excludes the reference made to *Ver* in *Mont-Bruno 2018*. The Court did not find a reference to *Ver* in a Federal Court of Appeal decision.

[32] *Inwest Investments* at para 77.

[33] *Inwest Investments* at para 78.

[76] A review of these authorities led Justice Fitzpatrick to draw the following general conclusions:

> 126. I conclude from the foregoing authorities:
>
> a) a statement of fact on a tax return can be a misrepresentation;
>
> b) a statement of a filing position that, even if that position may be incorrect, involves a determination of law or mixed fact and law will not be a misrepresentation if that filing position is reasonable;
>
> c) the requirement that the filing position is reasonable will involve a consideration of the legal/factual issues and the actions of the taxpayer, including obtaining any professional advice, in the consideration of those issues;
>
> d) the fairness objective of the legislation is achieved if that reasonable filing position is evident from the tax return so that the Minister may consider that position. In turn, the objectives of certainty and finality compel the Minister to consider that filing position within the normal reassessment period; and
>
> e) a difference of opinion between the CRA and the taxpayer is not sufficient to amount to a misrepresentation. Accordingly, if the Minister has a differing opinion on matters of legal interpretation or the legal characterization of the facts, it is obliged to reassess the tax return within the normal reassessment period.
>
> [Emphasis added.]

[77] The Court is of the view that the conclusions reached by Justice Fitzpatrick are in line with the Court's analysis above. In particular, subparagraphs 126(b) and (c) of Justice Fitzpatrick's conclusions contemplate that a filing position—which may involve a determination of mixed law and fact and the consideration of legal/factual issues—could constitute a misrepresentation: it is only in circumstances where the filing position is found reasonable that it would be excepted from being a misrepresentation.

[78] In the Court's view, a reasonable filing position would be one where, upon review of all of the facts and circumstances that underlie a taxpayer's situation (fully

and accurately addressed), the Minister and the taxpayer could arrive at reasonable—albeit different—conclusions or positions based on a characterization of (or an application of the law to) such facts. Indeed, such an instance would be what Justice Fitzpatrick has termed a mere "difference of opinion between the CRA and the taxpayer" at subparagraph 126(e) of her decision. The Court would agree that, where there is simply a "difference of opinion" between the Minister and the taxpayer, such a difference would not be sufficient to allow the Minister to re-open a statute-barred issue and that the reassessment ought to be conducted within the normal reassessment period.[34]

[79] The Court refers back to *MacIsaac Consulting*, where Justice Wong states at paragraph 24:

> 24 I cannot agree with the Appellant's proposition [at paragraph 9 of the notice of motion] that a question of income versus capital necessarily amounts to a difference in opinion. In my view, the factual circumstances of the appeal will determine whether the issue of income versus capital is purely a difference of opinion or not. Related to that determination will be a determination as to whether there was a misrepresentation under subparagraph 152(4)(a)(i).
>
> [Emphasis added.]

[80] In the case at hand, the Court cannot agree with the Appellant's proposition that a question of income versus capital necessarily amounts to a mere difference of opinion. The reasonableness of the Appellant's filing position—and relatedly, whether a misrepresentation has been made—ought properly to be put before the trial judge.

[81] The Court notes that, in making a determination as to whether the appellant in *Inwest Investments* had made a misrepresentation, Justice Fitzpatrick had the benefit of all the evidence before her in the context of an application for summary trial.[35] Under the present section 53 motion—in particular, where all the facts pleaded are

---

[34] The Court emphasizes that a fact remains a fact. The fact is first disclosed, then considered and may lead to or support a conclusion of law. In *Dalphond*, the Federal Court of Appeal stated that claiming a deduction to which a taxpayer is not entitled (in law) counts as a misrepresentation. In that case, the taxpayer failed to inquire about the status of a corporation relating to a capital gain deduction claimed by the taxpayer. In other words, the taxpayer did not apply the legal test properly as the relevant facts did not reasonably support his legal conclusions. A conclusion of law based on a review of facts can be a misrepresentation.

[35] Justice Fitzpatrick ultimately held that the negligence requirement was absent within the meaning of subparagraph 152(4)(a)(i) ITA. She concluded at paragraphs 183 and 184 that, even assuming that the 2002 income tax return was a misrepresentation, no neglect or carelessness had been established by the CRA within the meaning of subparagraph 152(4)(a)(i).

assumed to be true and where subsection 52(2) of the Rules precludes the admissibility of evidence—it would be less than appropriate to dispose of the matter now.

[82] Considering all of the foregoing, the Court does not believe it appropriate at this stage to grant the relief sought by the Appellant. The Court is not persuaded by the Appellant that his characterization of the gain realized on the disposition of the Property as a capital gain, and not profit from a business, cannot be a misrepresentation for the purposes of subparagraph 152(4)(a)(i) ITA. Such a position is not determinable at such an early stage in the appeal. The trial judge will make that determination under subparagraph 152(4)(a)(i).

V. Conclusion

[83] For all the above reasons, the Court orders as follows:

(a) The motion is dismissed.

(b) The parties shall on or before July 25, 2025 submit a proposed timetable for the completion of all remaining litigation steps.

(c) The costs will be in the cause.

Signed this 13th day of June 2025.

"J.M. Gagnon"

Gagnon J.

CITATION:	2025 TCC 81
COURT FILE NO.:	2023-1429(IT)G
STYLE OF CAUSE:	BHUPINDER HARIKA v. HIS MAJESTY THE KING
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	September 11, 2024
REASONS FOR ORDER BY:	The Honourable Justice Jean Marc Gagnon
DATE OF ORDER:	June 13, 2025

APPEARANCES:

Counsel for the Appellant:	Alistair G. Campbell
Counsel for the Respondent:	Anatoliy Vlasov

COUNSEL OF RECORD:

For the Appellant:

Name:	Alistair G. Campbell
Firm:	Legacy Tax + Trust Lawyers Vancouver, British Columbia

For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Ontario