A-145-23

FEDERAL COURT OF APPEAL

BETWEEN:

Irving Ebert
Richard Herman
P. Philippe Desrosiers

Appellants

and

His Majesty the King

Respondent

NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears below.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at Ottawa.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or, if the appellant is self-represented, on the appellant, WITHIN 10 DAYS after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

(*Date*)

Issued by: Alison Greenspoon Digitally signed by Alison Greenspoon DN: cn=Alison Greenspoon, c=CA, ou=Courts administrative services, email=alison.greenspoon@cas-satj.gc.ca Date: 2023.05.29 14:38:54 -04'00'

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File Number:

FEDERAL COURT OF APPEAL

B E T W E E N

IRVING EBERT, RICHARD HERMAN AND P. PHILIPPE DESROSIERS

Appellants

– and –

HIS MAJESTY THE KING

Respondent

APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the order of the Honourable Justice Don. R. Sommerfeldt dated April 18, 2023 by which the Tax Court did not consider the relevant arguments in considering whether to strike an assumption.

THE APPELLANT ASKS that the Court either strike the relevant pleadings as outlined below or order the Respondent to Amend the Reply to the Notice of Appeal to relate the offensive pleadings to the years under appeal, or any other grounds this Honourable Court deems just.

THE GROUNDS OF APPEAL are as follows:

Background

1. The Respondent relies on an assumption (the "Assumption") that is repeated in each of the Appeals as follows:

   > *The fair market value of the wines donated by the Appellant and appraised by Nico van Duyvenbode was at most 20% (i.e., a ratio of 1/5) of the amount stated on the charitable tax receipts;*

2. In response to a Demand for Particulars, the Respondent provided information about the statistical analysis above (the "Analysis") and stated that[1]:

   > *The auctions took place from 31 May 2001 to 2 December 2004.*

3. The Respondent relies on the Analysis, and any assumptions therein, for the proposition that the wines donated by the Appellants in the years 2005 to 2013 are similarly overvalued.

[1] See Response to Demand for Particulars at Schedule A

4. There are no assumptions pleaded, nor particulars provided, which connect the statistical analysis of the auctions in 2001 to 2004 to either the Appellants or the fair market value of wines in later taxation years[2].

5. The Motions judge held that the pleading in question was made with enough specificity for the Appellants to know the case they need to meet. The Appellants concede that the pleading is specific – although unrelated to matter at hand.

6. The Motions judge held that the Appellant may advance arguments as to why the Minister's determination of the respective fair market values of the donated wines is flawed[3]. The Appellants concede that this option exists – but is not the test to be applied.

7. The Motions Judge apparently did not consider whether the Assumption disclosed reasonable grounds for opposing the appeal, which is the test under Rule 53(d) of the Tax Court Rules.[4] The Appellant submits that this is a plain and obvious error in logic.

Issue in Appeal

8. It is a fundamental rule of economics and human experience that the value of goods fluctuates over time.

9. The Minister's analysis of value does not overlap with the years under appeal.[5] And even taken as a group of assumptions nothing has been pleaded to connect the Analysis to most of the years under appeal.

10. There is no interpretation or deep thinking necessary to see that values from 2001 to 2004 do not automatically apply to values in later years. It is plain and obvious to any reader.

11. Thus, it follows that, even if the Appellants were to concede the Assumption, the reassessment on this point for the years after 2004 must still fail because there are no assumptions to support it.

12. Moreover, clearly the Respondent has either assumed the 2001 – 2004 Analysis (and relevant underlying assumptions) applies to later years, or has otherwise included an irrelevant assumption.

13. If the Minster has assumed the Analysis (and the assumptions underlying the Analysis) are applicable to later years, then that must be pleaded to put the Appellants on notice of the

[2] With the exception of certain donations by the Appellant Ebert in 2003 and 2004. But the rest of the years under appeal of all three Appellants range from 2005 – 2013.
[3] Paragraph 38 of Motions Judgment
[4] Para. 38 of the Motions Judgement does not disclose reasons for the Motions Judge's ruling with respect to this assumption. It reads:
The Appellants' submissions, as set out in paragraph 35 above, are arguments that the Appellants may advance at trial as to why the Minister's determination of the respective fair market values of the donated wines was flawed. However, those submissions are not a basis for striking out the FMV Assumption.
[5] Subject to the exception noted above.

case they need to meet.[6]

14. If the Minister did not assume the applicability of the Analysis to the years after 2004 then, because the value of goods change over time, logic would dictate that the assumption is inapplicable and should be struck as not disclosing reasonable grounds for appeal.

15. Therefore the Assumption in each of the appeals should either be struck, or the Respondent ordered to make additional pleadings to give the Appellants enough information to properly prepare their case.

16. To leave the pleadings as they are, would be to require unnecessary discovery and hearing costs as well as to unduly complicate matters. [7]

The Standard of Review

1. The decision of the Tax Court Judge to strike part of a reply is a discretionary interlocutory decision. In Imperial Manufacturing Group Inc. v. Decor Grates Inc., 2015 FCA 100 (F.C.A.) (paragraphs 18 to 29), Stratas J.A. of this Court concluded that the standard of review as set out in Housen v. Nikolaisen, [2002] 2 S.C.R. 235, 2002 SCC 33 (S.C.C.), applies to appeals from such decisions.[8]

2. Therefore findings of fact (including inferences of fact) will stand unless it is established that the Tax Court Judge made a palpable and overriding error. For questions of mixed fact and law, the standard of correctness will apply to any extricable question of law and otherwise the standard of palpable and overriding error will apply.[9]

3. "Palpable" means an error that is obvious. Many things can qualify as "palpable." Examples include obvious illogic in the reasons (such as factual findings that cannot sit together), findings made without any admissible evidence or evidence received in accordance with the doctrine of judicial notice, findings based on improper inferences or logical error, and the failure to make findings due to a complete or near-complete disregard of evidence.[10]

4. "Overriding" means an error that affects the outcome of the case. It may be that a particular fact should not have been found because there is no evidence to support it. If this palpably wrong fact is excluded but the outcome stands without it, the error is not "overriding." The judgment of the first-instance court remains in place.[11]

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[6] Kopstein v R, 2010 TCC 448, at para 27.
[7] Basal v. The King, 2022 TCC 154, at para 26.
[8] Kinglon Investments Inc. v. R., 2015 FCA 134, at para 5.
[9] *Ibid.*
[10] Mahjoub v. Canada (Citizenship and Immigration) (2017), 2017 FCA 157, at para 62, Stratas J.A. (Boivin and Woods JJ.A. concurring)
[11] *Ibid* at para 64.

5. Palpable and overriding error is a highly deferential standard of review.[12] When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.[13]

6. The "palpable and overriding error" standard, apart from its resonance, nevertheless helps to emphasize that one must be able to "put one's finger on" the crucial flaw, fallacy or mistake.[14]

The Source of the Error

7. The Appellants asked the Tax Court to either strike the Assumption. They did so under subsection 53(1) of the Tax Court of Canada Rules (General Procedure), SOR/90-688, s. 53 -- Striking out a Pleading or other Document. ("**Rule 53**"). Rule 53 is below:

> **53. 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
> (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.
> (*Emphasis is our own*)

8. In Gramiak v. R., 2013 TCC 383 (T.C.C. [General Procedure]) [Gramiak], upheld by 2015 FCA 40 (F.C.A.)., the Chief Justice of the tax Court, Justice Rossiter, set out the test for motions to strike, referring to the decision of Chief Justice Bowman (as he then was), in Sentinel Hill Productions (1999) Corp. v. R. [2007 CarswellNat 5287 (T.C.C. [General Procedure])] ("**Sentinel Hill Productions**"). In *Sentinel Hill Productions*, Chief Justice Bowman outlined the principles to be applied on a motion to strike under Rule 53 which the Motions Judge referred to in his decision ("**Sentinel Hill Principles**").

9. With regards to the determination of whether a pleading or a document discloses a reasonable ground for appeal, Chief Justice Bowman observed in *Sentinel Hill Productions* that:

    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] 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.

[12] Benhaim v. St-Germain, 2016 SCC 48, [2016] 2 S.C.R. 352 (S.C.C.) ("**St-Germain**"), at para. 38; and L. (H.) v. Canada (Attorney General), 2005 SCC 25, [2005] 1 S.C.R. 401 (S.C.C.) at paras 64-68.
[13] South Yukon Forest Corp. v. R., 2012 FCA 165, 431 N.R. 286 (F.C.A.), at para. 46, cited with approval by the Supreme Court in St-Germain
[14] L. (H.) v. Canada (Attorney General), 2005 SCC 25, at para 70

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.[15]

10. The limitation in Operation Dismantle is that the rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true.[16]

11. Our submissions is with respect to the error are above. It is clear and obvious that values change over time. Nothing has been pleaded to contradict this basic fact. Absent other evidence, this pleading even if conceded would not support the reassessment.

12. The Appellants are prejudiced by a pleading that, on its face, has no bearing on valuations of wine outside of the years analyzed by the Minister. Unless the situation is rectified they will be in the position of hiring experts to and engaging in discoveries and cost to find out what the Minister has apparently already assumed – that the Analysis is somehow relevant to later years.

13. If the Minister has indeed made that assumption it must be pleaded, if not the Assumption does not belong in the Replies.

May 5, 2023

_____

(*Signature of solicitor or appellant*)
(*Name, address and telephone and fax numbers of solicitor or appellant*)

[15] In Sentinel Hill Productions (1999) Corp. v. R., 2007 TCC 742, at para 4.
[16] Operation Dismantle Inc. v. R., [1985] 1 S.C.R. 441 (S.C.C.) at page 455

Schedule A

14. The Reply to the Notice of Appeal made the following pleadings:

> …
>
> *f) The fair market value of the wines donated by the Appellant and appraised by Nico van Duyvenbode was at most 20% (i.e., a ratio of 1/5) of the amount stated on the charitable tax receipts;*
>
> *g) The charities disposed of the wines through their annual fine wine auctions;*
>
> *h) The charitable auctions held in the NCR brought a large number of fine wines*
>
> *to the local market, which resulted in a depressing of the market values;*
>
> *i) Most of the wines were sold as lots at the charitable auctions;*
>
> *j) The wines were sold "as is, without recourse" at the charitable auctions;*
>
> ~~*k) Many wine donors actively participated in the charitable auctions;*~~
>
> ~~*1) In some cases, wine donors repurchased the wines they donated;*~~
>
> *m) The Appellant repurchased wines he donated at a profit at charitable auctions held in 2001 and 2004;*

15. In response to a Demand for Particulars the Respondent stated as follows:

> (a) *The Minister assumed that Nico van Duyvenbode's methodology was flawed as it did not conform to generally accepted analytical methodologies and was unsupported by known appraisal doctrines, and was not based on an analysis of market behaviour and actual sales data.*
>
> (b) *The Minister analyzed random sets of samples from 18 different auctions of eight charitable organizations.*
>
> (c) *The auctions took place from 31 May 2001 to 2 December 2004.*
>
> (d) *From the 18 auctions, the Minister sampled a total of 1,167 lots, sold in "block".*
>
> (e) *The lots sampled ranged from 1 to 17 bottles.*
>
> (f) *There were 3,569 bottles in the 1,167 lots sampled.*

(g) *The analysis of the foregoing revealed the following with respect to the appraised values:*

a. The lowest mark-up was 1.25 times the auction sale price.

b. The average mark-up was 5.21 times the auction sale price.

c. The highest mark-up was 20 times the auction sale price.

Schedule B

The Judgement on the Motion stated as follows:

Fair Market Value of Wines

[34] Subparagraph 12(f) of the Ebert Reply, subparagraph 14(e) of the Herman Reply and subparagraph 14(g) of the DesRosiers Reply each pleaded the following assumed fact:

The fair market value of the wines donated by the Appellant and appraised by Nico van Duyvenbode was at most 20% (i.e., a ratio of 1/5) of the amount stated on the charitable tax receipts; (the "FMV Assumption").

[35] The Appellants submit that the Minister's determination of the respective fair market values of the wines donated by the Appellants was based on an analysis of wines sold at charitable auctions in years preceding the years in which the Appellants donated their wines to the various charities. The Appellants also submit that the Minister's determination of fair market value was based on a statistical analysis and does not specify the actual fair market value determined by the Minister.

[36] The Respondent submits that the FMV Assumption explains why the Minister took the position that the charitable tax credits should be calculated by reference to only 20% of the respective appraised values of the wines in question.

[37] I read the FMV Assumption as indicating that the Minister assumed that the fair market value of each of the respective wines donated by the Appellants was 20% or less of the amount stated on the applicable charitable tax receipt. I would think that each of the Appellants takes the position that the fair market value of the wines donated by him was equal to 100% of the amounts stated on the charitable tax receipts. I do not view the FMV Assumption as not providing the Appellants with enough specificity to enable them to know the case they must meet. I would expect that they will each endeavour to adduce evidence to show that the fair market value of the donated wines was equal to the amounts shown on the charitable tax receipts.

[38] The Appellants' submissions, as set out in paragraph 35 above, are arguments that the Appellants may advance at trial as to why the Minister's determination of the respective fair market values of the donated wines was flawed. However, those submissions are not a basis for striking out the FMV Assumption. If the Minister merely assumed, and acted on, a fair-market-value range (i.e., 0 to 20% of the official-receipt amount), without assuming a precise fair-market-value amount, then that is what should be pleaded.19

[39] If an assumption of fact references a flawed methodology used by the Minister in appraising the donated wines, and if the Appellants show that the methodology was indeed flawed, that might be sufficient to demolish the assumption at trial. That might also be a reason, in part,20 for allowing the Appeals, but it is not a reason for striking out the assumption from the Replies.