

FEDERAL COURT OF APPEAL

BETWEEN:

FU2 PRODUCTIONS LTD.

Appellant

and

HIS MAJESTY THE KING

Respondent

FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE	
FILED	DEPOSE
03-FEB-2023	
E. Rabouin	
OTTAWA, ON	1

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 the Federal Court of Appeal in Vancouver.

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: February 3, 2023

Issued by: Elizabeth Rabouin
(Registry Officer)

Address of local office: Pacific Centre
701 West Georgia Street
Third Floor
P.O. Box 10065
Vancouver, British Columbia
V7Y 1B6

TO: ATTORNEY GENERAL OF CANADA
British Columbia Regional Office
Department of Justice Canada
900 – 840 Howe Street
Vancouver, British Columbia

A. François Daigle, Deputy Attorney General of Canada
Marie-Ève Aubry, Director and General Counsel
Meagan Mahadeo

APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the Order of Justice Ouimet of the Tax Court of Canada (the “Motions Judge”) dated November 24, 2022, by which the Respondent’s Motion to strike parts of the Appellant’s Notice of Appeal, Tax Court File No. 2017-3249(IT)G, (the “Original Appeal”) was allowed with costs and the Respondent’s Motion requesting an extension of time to file a Reply was allowed with costs (together the “Order”).

THE APPELLANT ASKS:

1. That its Appeal be allowed;
2. That the first part of the Order allowing the Respondent’s motion to strike parts of the Appellant’s Notice of Appeal with costs be set aside, and that the Respondent’s motion to strike parts of the Appellant’s Notice of Appeal with costs be dismissed;
3. That the second part of the Order allowing the Respondent’s motion requesting an extension of time to file a Reply with costs be set aside, and that the Respondent’s motion requesting an extension of time to file a Reply with costs be dismissed;
4. For its costs of the Respondent’s Motion and the Appeal; and
5. Such other relief as counsel may advise and this Honourable Court may deem just.

THE GROUNDS OF APPEAL are as follows:

Background

1. The Respondent's Motion to strike provisions of the Appellant's Original Appeal, concern the constitutional arguments made by the Appellant supporting the proposition that the *Economic Action Plan 2014 Act, No 2* (the "*EAP 2014 Act*") was not passed by a valid parliament and is therefore null and void. The Appellant's constitutional arguments can be summarized as follows:
 - 1.1. Section 52 of the *Constitution Act, 1982* states that the Constitution is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
 - 1.2. Section 21 of the *Constitution Act, 1867* mandates that the Senate have a minimum of 105 Senators.
 - 1.3. Section 22 of the *Constitution Act, 1867* mandates the specific distribution of the 105 Senators between the provinces and territories.
 - 1.4. On December 16, 2014, there were 17 vacant seats in the Senate resulting from the Prime Minister's refusal to appoint Senators as mandated in Section 32 of the *Constitution Act, 1867*.
 - 1.5. On December 16, 2014, the 88 active members of the Senate purported to pass Bill C-43 to enact the *EAP 2014 Act*.
 - 1.6. The 17 vacancies in the Senate created an invalid Parliament for the passage of legislation.

- 1.7. The *EAP 2014 Act* was not passed by a valid parliament as required by the *Constitution Act, 1867* and is therefore null and void.

The Order Below

2. The Motions Judge erred at law in holding that Sections 21, 22 and 35 of the *Constitution Act, 1867* deal with separate matters and have no bearing on each other. Dreidger's modern principle of statutory interpretation has been adopted by the Supreme Court of Canada as the preferred approach to statutory interpretation. The words of an Act are to be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of parliament. Each section of the Act must be presumed to have a purpose in the scheme of the Act.

- 2.1. Part IV of the *Constitution Act, 1867* sets out the requirements for the constitution of a valid Senate for the passage of legislation. Each of the Sections contained in Part IV of the *Constitution Act, 1867* work harmoniously to achieve the foundational principles of the Senate.

- 2.2. Sections 21 and 22 define the constitution of a valid Senate. Section 21 mandates that the Senate shall have a minimum of 105 Senators. Section 22 mandates that there will be a minimum of 24 Senators from Ontario, 24 Senators from Quebec (one from each of the 24 original Electoral districts of Lower Canada), 10 Senators from each of New Brunswick and Nova Scotia, 4 Senators from Prince Edward Island, 6 Senators from each of Manitoba, Saskatchewan, Alberta and British Columbia, 6 Senators from Newfoundland and one Senator from each of the three Territories to total the 105 Senators in Section 21.

- 2.3. Section 23 sets out the qualifications a person must meet in order to become a Senator.
- 2.4. Section 24 defines the term “Senator” as a qualified person that has been summoned by the Governor General to become a member of the Senate.
- 2.5. Sections 26, 27 and 28 deal with the special provisions for increasing the number of Senators by 4 or 8 Members, to a maximum of 113 members, by summons to qualified persons, and the subsequent mandatory reduction to the normal number of 105 members. These are the provisions that the words “subject to the provisions of this Act” in Sections 21 and 22 refer to.
- 2.6. Sections 29, 30, and 31 set out the circumstances, in addition to the death of a Senator, that create vacancies in the Senate: the mandatory retirement of a Senator at age 75 (Section 29); the resignation of a Senator in writing to the Governor General (Section 30); and the disqualification of a Senator (Section 31).
- 2.7. When a vacancy occurs pursuant to the provisions of Sections 29, 30 or 31, or a Senate seat becomes vacant on the death of a Senator, Section 32 mandates the Governor General to summon a qualified person to fill the vacancy ensuring that the mandatory requirements of Sections 21 and 22 are maintained.
- 2.8. Section 33 provides that if a question arises as to whether a Senate seat has become vacant or if a Senator has been disqualified, the Senate is mandated as the body to hear the issue and to determine if the seat is indeed vacant. Upon the Senate ruling that the seat is vacant, Section 32 mandates that it shall be filled by the Governor General. If it is unquestionable that a seat has become vacant, section 33 does not apply

and Section 32 mandates the Governor General to summon a qualified Person to fill the vacancy.

2.9. Sections 34, 35 and 36 provide procedural rules for the appointment of a Speaker, for the establishment of a quorum for the holding of meetings of a valid Senate, and for deciding votes in the meetings. Section 35 allows for absences of Senators from meetings provided the minimum quorum is met. Neither Section 34, 35, or 36 mentions vacancies in the Senate nor do they modify the provisions of Sections 21 and 22. Sections 21 and 22 define a valid Senate and Sections 34, 35 and 36 provide the procedures for conducting meetings of a Senate that meets the requirements of Sections 21 and 22.

3. The Motions Judge erred at law in holding that it is plain and obvious that the provisions of Sections 21 and 22 of the *Constitution Act, 1867* do not mandate a minimum number of Senators and the mandatory distribution of that minimum number of Senators amongst each of the Four Divisions, Ten Provinces and Three Territories of Canada.

3.1. The system of regional representation in the Senate mandated by Section 22 was one of the essential features of the Senate when it was created. Without it, the fundamental character of the Senate as part of the Canadian federal scheme would be eliminated.

3.2. It is not open to Parliament, or the Prime Minister, to make amendments which would affect the fundamental features, or essential characteristics, given to the Senate as a means of ensuring regional and provincial representation in the federal legislative process. The character of the Senate was determined by the British Parliament in response to the proposals submitted by the provinces in order to meet the requirement of the proposed federal system. It was that Senate, created by the

Constitution Act, 1867, to which a legislative role was given.

3.3. The Motions Judge erred at law in his interpretation of the words “subject to the Provisions of this Act” in Sections 21 and 22 as modifying the mandatory minimum requirements set forth in Sections 21 and 22.

3.4. When the modern principles of statutory interpretation are applied to Sections 21 and 22 and the *Constitution Act, 1867* in its entirety is interpreted with a view to discerning the structure of government that it seeks to implement, it becomes clear that the words “subject to the Provisions of this Act” in Sections 21 and 22, refer to the provisions contained in Sections 26, 27 and 28 which provide for a temporary increase from the minimum numbers contained in Sections 21 and 22. These words when interpreted in the full context of the *Constitution Act, 1867*, make it clear that Sections 21 and 22 mandate a minimum number of Senators from each region, province and territory.

4. The Motions Judge erred in law in his interpretation of Sections 33, 35 and 36 of the *Constitution Act, 1867* in determining that these Sections are incompatible with the Appellant’s proposed interpretation of Sections 21, 22, and 32 of the *Constitution Act, 1867* contained in the Original Appeal. The Motions Judge further erred in law in determining that Sections 33, 35 and 36 empower a Senate with a minimum of 15 members, regardless of regional representation, to validly pass legislation.

4.1. Section 33 provides that if a question arises respecting the qualifications of a Senator or a vacancy in the Senate the same shall be heard and determined by the Senate. The Motions Judge erred in interpreting this Section as contemplating the passage of legislation by a Senate with vacancies.

- 4.2. A Senator is defined in Section 24 as a qualified Person summoned by the Governor General to be a Member of the Senate. When there is a question respecting the qualifications of a Senator after being summoned by the Governor General pursuant to Section 31, the question is heard and determined by the Senate in accordance with Section 33. If the Senate determines the Question in favor of the Senator, the place of the Senator does not become vacant. On the other hand, if the Senate determines that the Senator is disqualified pursuant to Section 31 the Senator's seat becomes vacant and the provisions of Section 32 mandate that the Governor General fill the vacancy.
- 4.3. Similarly, if a question arises as to the potential vacancy of a Senate seat, the question is heard and determined by the Senate in accordance with Section 33. If the Senate determines that there is a vacancy the provisions of Section 32 mandate that the Governor General fill the vacancy. If it is unquestionable that a seat has become vacant, section 33 does not apply and Section 32 mandates the Governor General to summon a qualified Person to fill the vacancy.
- 4.4. Nothing in Section 33 contemplates a Senate with vacancies passing legislation. On the contrary, if a question arises concerning the qualifications of a Senator or a potential vacancy in the Senate, the Senate is mandated by Section 33 to hear and determine the question. If a Senator is disqualified, or a vacancy is determined, Section 32 mandates the Governor General to fill the vacancy and restore the number of Senators to that mandated by Sections 21 and 22.
- 4.5. The provisions of Section 33 are fully compatible with the Appellant's proposed interpretation of Sections 21, 22, and 32 contained in the Original Appeal.

- 4.6. Section 35 states that until the Parliament of Canada otherwise provides, the presence of at least 15 Senators, including the Speaker, shall be necessary to constitute a meeting of the Senate for the exercise of its powers.
- 4.7. Section 35 refers to the “presence” of at least 15 Senators. This term refers to the attendance of Senators at a meeting and does not refer to the existence of Senators or make any reference to vacant seats in the Senate.
- 4.8. When the modern principles of interpretation are applied to Section 35 and the underlying architecture of the Constitution and fundamental features of the Senate are considered, it becomes clear that the reference to a meeting of the Senate must refer to a valid Senate as mandated by Sections 21 and 22. To hold otherwise would frustrate the purposes of Sections 21, 22 and 32.
- 4.9. Section 35 is the only section in Part IV of the *Constitution Act, 1867* that includes the words “until the Parliament of Canada otherwise provides”. The Supreme Court has held that Parliament can amend the provisions of Section 35 without the support of the provinces pursuant to the provisions of Section 44 of the *Constitution Act, 1982*. The same Court also held that Section 42 (c) of the *Constitution Act, 1982* requires the support of 7 provinces representing 50% of the population of all the provinces to amend the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators. The interpretation applied by the Motions Judge would put these two sections in contradiction to each other. The modern principles of interpretation require that Section 35 be interpreted as referring to members of a valid Senate as mandated by Sections 21, 22 and 32. To hold otherwise would frustrate the purpose of Section 42 (c) of the *Constitution Act, 1982*.

- 4.10. *Section 38(2) of the Constitution Act, 1982* requires a resolution supported by a majority of the 105 Senators for any amendment made under Section 38(1) of the same Act if the amendment derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province. Reducing the minimum number of Senators to 88 frustrates the purpose of this Section.
- 4.11. The amending formulas contained in Part V of the *Constitution Act, 1982* clearly support the Appellant's proposed interpretation of Sections 21, 22, and 32 contained in the Original Appeal.
- 4.12. The provisions of Section 35 are fully compatible with the Appellant's proposed interpretation of Sections 21, 22, and 32 contained in the Original Appeal.
- 4.13. Section 36 provides that questions arising in the Senate shall be decided by a majority of votes, that the Speaker shall have a vote and in the case of a tie the decision shall be deemed to be in the negative.
- 4.14. The provisions of Section 36 are fully compatible with the Appellant's proposed interpretation of Sections 21, 22, and 32 contained in the Original Appeal.
5. The Motions Judge erred in law in his application of the provisions of Rule 53 of the *Tax Court of Canada Rules* in finding that it was plain and obvious that the Appellant's constitutional argument had no reasonable chance of success.
- 5.1. The test for striking out pleadings is whether, assuming the facts pleaded by the Appellant in the Original Appeal to be true, it is plain and obvious that the pleadings disclose no reasonable cause of action or have no

reasonable prospect of success. If there is a chance that the Appellant might succeed, then the pleadings should not be struck. Neither the length and complexity of the issues, the novelty of the Appeal, nor the potential for the Respondent to present a strong counter argument should prevent the Appellant from proceeding with its case. Only if the argument is certain to fail because it contains a radical defect ranking with the defects contained in the other provisions of Rule 53, such as an abuse of the process of the Court or is scandalous, frivolous or vexatious, should the relevant portions of the Appeal be struck.

5.2. The Motions Judge erred in law in weighing the Appellant's constitutional argument against the counter arguments of the Respondent and in failing to show a radical defect in the Appellant's constitutional argument ranking with the defects set out in the other provisions of Rule 53.

6. The Motions Judge erred in law by striking paragraphs of the Original Appeal that are relevant to other arguments contained in the Original Appeal. The facts pleaded in the Original Appeal should not be struck as the Appellant has not had the opportunity of proving the facts and demonstrating their relevance to the arguments other than the validity of the *EAP 2014 Act*.

7. The Appellant relies upon:

7.1. Section 27 of the *Federal Court Act*;

7.2. Rule 53 of the *Tax Court of Canada Rules*;

7.3. Sections 17, 18, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, and 91 of the *Constitution Act, 1867*;


7.4. Sections 38, 42 and 52 of the *Constitution Act, 1982*;

7.5. Section 4 of the *Parliament of Canada Act*; and

7.6. Such other grounds as counsel for the appellant may advise and the court may permit.

8. The Appellant proposes that this Appeal be heard in Vancouver.

Dated in Vancouver, this 11th day of January 2023



(Signature of solicitor or appellant)

Bruce Harvey

Barrister & Solicitor

1768 Cook Street, Suite 505

Vancouver, BC

V5Y 0N3

Ph: (403) 818-1930

Fx: (604) 200-0905

Email: illusions@bell.net

Counsel for FU2 Productions Ltd.