

Federal Court of Appeal



Cour d'appel fédérale

Date: 20240208

Docket: A-145-23

Citation: 2024 FCA 27

**CORAM: LASKIN J.A.
ROUSSEL J.A.
BIRINGER J.A.**

BETWEEN:

**IRVING EBERT, RICHARD HERMAN and
P. PHILIPPE DESROSIERS**

Appellants

and

HIS MAJESTY THE KING

Respondent

Heard at Ottawa, Ontario, on February 8, 2024.

Judgment delivered from the Bench at Ottawa, Ontario, on February 8, 2024.

REASONS FOR JUDGMENT OF THE COURT BY:

BIRINGER J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Ottawa, Ontario, on February 8, 2024).

BIRINGER J.A.

[1] The appellants appeal from an interlocutory order of the Tax Court (*per* Sommerfeldt J.):
2023 TCC 49 [Reasons].

[2] In the Tax Court, the appellants brought a motion under the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a to strike assumptions in the Crown's replies. The Tax Court allowed the motion in part, striking out some of the assumptions, with leave to amend.

[3] On appeal, the appellants only challenge the following assumption ("FMV Assumption"), which the Tax Court declined to strike:

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[.]

[4] The Tax Court's decision not to strike the FMV Assumption was discretionary: *Tax Court Rules*, subsection 53(1). The appellate standards of review from *Housen v. Nikolaisen*, 2002 SCC 33 apply: *Canada v. Preston*, 2023 FCA 178 at para. 12; *Kinglon Investments Inc. v. Canada*, 2015 FCA 134 at para. 5.

[5] As the sole issue in this appeal is whether the Tax Court erred in determining that the FMV Assumption did not meet the threshold for striking out pleadings, a question of mixed fact and law, the standard of review is palpable and overriding error: *Kinglon Investments* at para. 5; *Smith v. Canada*, 2022 FCA 91 at para. 16.

[6] The threshold for striking out pleadings is whether it is "plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action": *R. v. Imperial Tobacco*, 2011 SCC 42 at para. 17; *Canadian Imperial Bank of Commerce v. Canada*, 2013 FCA 122 at para. 7; Reasons at para. 19.

[7] Here, the essence of the appellants' submission is that the FMV Assumption does not, or cannot, support the Crown's case. They assert that the Minister arrived at the FMV Assumption by inappropriately relying on statistical data from years (2001–2004) that are not at issue. They seek to have the decision of the Tax Court on the FMV Assumption set aside or, in the alternative, to have the FMV Assumption amended to provide data relevant to the taxation years in question.

[8] The Tax Court judge was alive to the appellants' submission on the data set: Reasons at paras. 86 and 90. Moreover, the appellants' argument goes to the merits of the appeal — whether the FMV Assumption can be proven: *House v. Canada*, 2011 FCA 234 at para. 30. As the Tax Court judge correctly concluded, the factual dispute about the FMV Assumption will be resolved at trial: Reasons at paras. 37-39 and 91. There, with the benefit of discovery, the parties can each adduce evidence that goes to the soundness of the Minister's reassessments, including the methodology underlying the FMV Assumption and the data set to which it was applied. The appellants will have an opportunity to “demolish” the FMV Assumption.

[9] “Whether the evidence substantiates the pleaded facts, now or at some future date, is irrelevant to the motion to strike”: *Imperial Tobacco* at para. 23. In assessing the “plain and obvious” standard, it is assumed that pleaded facts can be proven. It is not for a motion judge to “usurp the function of the trial judge” by making determinations of fact or relevance on a preliminary basis: *Sentinel Hill Productions (1999) Corp. v. The Queen*, 2007 TCC 742 at para. 4; *LBL Holdings v. Canada*, 2016 FCA 17 at para. 5.

[10] Here, it cannot be said that the FMV Assumption, if taken to be true, does not provide a reasonable basis for the reassessment: *CIBC* at para. 7. If the fair market value of the donated wines was “at most 20% ... of the amount stated on the charitable tax receipts,” that goes directly to the grounds for reassessment. Nor is the FMV Assumption “manifestly incapable of being proven”: *Imperial Tobacco* at para. 22; *Operation Dismantle v. The Queen*, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441 at para. 27. It is not at all “plain and obvious” that the FMV Assumption should be struck.

[11] The appellants have not established that the Tax Court made a palpable and overriding error in declining to strike the FMV Assumption. The appeal will be dismissed, with costs fixed at \$3,000, all-inclusive.

“Monica Biringer”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-145-23
STYLE OF CAUSE:	IRVING EBERT, RICHARD HERMAN and P. PHILIPPE DESROSIERS v. HIS MAJESTY THE KING
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 8, 2024
REASONS FOR JUDGMENT OF THE COURT BY:	LASKIN J.A. ROUSSEL J.A. BIRINGER J.A.
DELIVERED FROM THE BENCH BY:	BIRINGER J.A.

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