

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20240314**

**Docket: A-22-23**

**Citation: 2024 FCA 45**

**CORAM: GLEASON J.A.  
BIRINGER J.A.  
WALKER J.A.**

**BETWEEN:**

**FU2 PRODUCTIONS LTD.**

**Appellant**

**and**

**HIS MAJESTY THE KING**

**Respondent**

Heard at Vancouver, British Columbia, on March 14, 2024.

Judgment delivered from the Bench at Vancouver, British Columbia, on March 14, 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 Vancouver, British Columbia, on March 14, 2024).**

**BIRINGER J.A.**

[1] The appellant appeals from an interlocutory order of the Tax Court (*per* Ouimet J.), 2022 TCC 148 (TCC Reasons), granting the respondent's motion to strike passages from the notice of appeal and allowing the respondent to file its reply within 60 days of the Court's order. The passages in the notice of appeal relate to the appellant's argument on the validity of the

*Economic Action Plan 2014 Act, No. 2*, S.C. 2014, c. 39 [*EAP 2014 Act*]. The Tax Court's decision to allow the respondent to file its reply within 60 days of the Court's order is not being appealed.

[2] The underlying tax appeal concerns the appellant's claim for the Canadian Film or Video Production Tax Credit (CPTC) and whether a contribution by Telefilm Canada was "assistance" for the purposes of subsection 125.4(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.). The *EAP 2014 Act* amended the definition of "assistance" (retroactively) and provided a basis for the Minister's reassessment of the appellant's 2011 taxation year reducing the appellant's CPTC.

[3] The appellant filed an appeal in the Tax Court, challenging, among other things, the validity of the *EAP 2014 Act*. Its position was that when the *EAP 2014 Act* was passed, the Senate had 17 vacancies, rendering the *EAP 2014 Act* invalid, according to the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5. The argument is that there was insufficient representation from the provinces and territories in the Senate, the Senate was not properly constituted and thus could not validly pass legislation.

[4] The respondent successfully moved to strike the passages in the notice of appeal relating to this argument, on the basis that it had no reasonable prospect of success.

[5] The appellate standards of review from *Housen v. Nikolaisen*, 2002 SCC 33 apply to interlocutory decisions of the Tax Court: *Canada v. Preston*, 2023 FCA 178 at para. 12; *Kinglon Investments Inc. v. Canada*, 2015 FCA 134 at para. 5. These standards are correctness for

questions of law, and palpable and overriding error for questions of fact and questions of mixed fact and law, unless there is an extricable question of law, which is reviewable for correctness.

[6] Here, the standard of review is correctness, as the appeal raises a question of law — the Tax Court’s decision to strike the passages was based on its interpretation of sections 21, 22, and 35 of the *Constitution Act, 1867*.

[7] We see no error in the Tax Court’s decision requiring this Court’s intervention. The Tax Court correctly stated and applied the test for striking out pleadings — 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; TCC Reasons at paras. 27-28.

[8] The Tax Court considered the respondent’s arguments in support of its motion to strike: (a) that the Tax Court does not have jurisdiction to review whether the Senate validly passed the *EAP 2014 Act*, as this is within the exclusive jurisdiction of Parliament; and (b) the Senate vacancy argument.

[9] The Tax Court declined to strike the relevant passages on the basis of the jurisdiction argument: TCC Reasons at paras. 30-43. In the absence of sufficient submissions from the parties, and as the Tax Court decision did not turn on this issue, we decline to address the jurisdiction issue. In doing so, we do not endorse the Tax Court’s reasons. The Tax Court, in *obiter*, suggested that it could grant a declaration of invalidity if the appellant’s argument were to

succeed: TCC Reasons at paras. 62-68. For similar reasons, we decline to address this issue, and in doing so do not endorse the Tax Court’s reasons.

[10] On the Senate vacancy issue, we agree with the Tax Court’s reasons: TCC Reasons at paras. 44-61. The Tax Court adopted an interpretation of sections 21, 22, and 35 of the *Constitution Act, 1867* that is consistent with their text, context, and purpose. We disagree with the appellant’s submissions that the Tax Court took a purely textual approach.

[11] As the Tax Court concluded, the language of sections 21 and 22 — which concern the number of senators and the representation of provinces respectively — is “subject to the Provisions of this Act”: TCC Reasons at para. 46. We reject the appellant’s argument that the “subject to” language is limited in its application to sections 26, 27 and 28 of the *Constitution Act, 1867*.

[12] Crucially, section 35 makes it clear that the Senate may exercise its powers notwithstanding any vacancies, as long as there is a quorum of senators:

**Quorum of Senate**

**35** Until the Parliament of Canada otherwise provides, the Presence of at least Fifteen Senators, including the Speaker, shall be necessary to constitute a Meeting of the Senate for the Exercise of its Powers.

**Quorum du Sénat**

**35** Jusqu’à ce que le parlement du Canada en ordonne autrement, la présence d’au moins quinze sénateurs, y compris l’orateur, sera nécessaire pour constituer une assemblée du Sénat dans l’exercice de ses fonctions.

[13] Accordingly, it was plain and obvious that the appellant’s Senate vacancy argument had no reasonable prospect of success: TCC Reasons at para. 61. As noted at the hearing in this

Court, the untenable implication of the appellant's Senate vacancy argument is that any legislation passed by a quorum of the Senate when there are vacancies in the Senate could also be invalid.

[14] The appellant has not established that the Tax Court erred. We will dismiss the appeal, with costs. The parties shall have 30 days to advise the Court as to their agreement on quantum or, failing agreement, to make written submissions on quantum.

“Monica Biringer”

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-22-23

**STYLE OF CAUSE:** FU2 PRODUCTIONS LTD. v. HIS MAJESTY THE KING

**PLACE OF HEARING:** VANCOUVER, BRITISH COLUMBIA

**DATE OF HEARING:** MARCH 14, 2024

**REASONS FOR JUDGMENT OF THE COURT BY:** GLEASON J.A.  
BIRINGER J.A.  
WALKER J.A.

**DELIVERED FROM THE BENCH BY:** BIRINGER J.A.

**APPEARANCES:**

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