Docket: 2017-2758(IT)G

BETWEEN:

ANDRÉ MORISSETTE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Motion to strike heard on September 10, 2018,
at Montréal, Quebec.

Before: The Honourable Justice Guy R. Smith

Appearances:

Counsel for the appellant:	Serge Fournier
Counsel for the respondent:	Simon Petit

ORDER

The Court orders that the respondent's motion to strike the Notice of Appeal under the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a, is dismissed with costs.

The Court also orders that the appellant has thirty (30) days to serve and file an Amended Notice of Appeal, should he so wish, to plead alternatively, his election to treat the dividend in question as a separate taxable dividend. If the appellant elects to file an Amended Notice of Appeal, the respondent has thirty (30) days to serve and file an amended reply.

Signed at Ottawa, Canada, this 9th day of May 2019.

"Guy Smith"

Smith J.

Translation certified true
on this 10th day of February 2020.

François Brunet, Revisor

Citation: 2019 TCC 103
Date: 20190509
Docket: 2017-2758(IT)G

BETWEEN:

ANDRÉ MORISSETTE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR ORDER

Smith J.

I. Overview

[1] The respondent filed a motion to strike the Notice of Appeal on the grounds that it is frivolous and vexatious and is an abuse of the process under paragraphs 53(1)(c) and (d) of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a (the Rules). The appellant opposes the motion.

[2] The core issue of the dispute is whether the amount paid to the appellant by related companies is a capital dividend, and therefore tax-free, or a taxable amount in the form of a separate dividend.

[3] As set out in the Notice of Appeal, the essential facts are as follows:

a. 9102-1600 (hereinafter “9102”) was incorporated on March 16, 2001. The appellant holds 100% of the preferred shares and Fiducie Familiale André Morissette holds 100% of the common shares;

b. 9158-7147 Québec Inc. (hereinafter “9158”) was incorporated on July 15, 2005, as a subsidiary of 9102, which holds 100% of the issued shares;

c. On February 1, 2006, 9102 took out a joint universal life insurance policy on the lives of the appellant and Conrad Morissette, the appellant's father. The beneficiary of the policy is 9158;

d. The appellant's father died on May 5, 2011;

e. Following his death, 9158 cashed a cheque from the AIG insurance company in the amount of $485,447, which was included in its capital dividend account ("CDA");

f. Subsequently, on June 21, 2011, 9158 reported and paid a $485,447 dividend to 9102, which it reported also being paid to its CDA;

g. 9102 added the amount received to its CDA and, on June 21, 2011, paid the full balance of its CDA to the appellant, i.e., $554,552, which included the $485,447 that 9158 paid to 9102.

[4] In the Reply to the Notice of Appeal, the respondent denies that the amount of $485,447 was paid following the death of the appellant's father, denies that 9158 was able to add this amount to its CDA and thus pay a capital dividend to 9102 and, consequently, denies that 9102 was able to pay the appellant a capital dividend amount of $485,447.

[5] At the audit stage, the Minister of National Revenue (the Minister) maintained, *inter alia*, that a portion of the dividend paid to the appellant, i.e., the amount of $485,447, represented the excess dividend subject to tax under Part III of the *Income Tax Act*, RSC, 1985, c. 1 (5th Suppl.) (the Act), that pertains to additional tax on amounts resulting from an election.

[6] However, the amount of $485,447 was not assessed as an excess dividend since, according to the Minister, 9158 made an election under subsection 184(3) of the Act to treat the dividend paid to 9102 as a separate taxable dividend. Moreover, 9102 made an election under the above paragraph to treat the amount of $485,447 (included in the $554,662 dividend) paid to the appellant, as a separate taxable dividend. The shareholders also agreed to the election.

[7] Thereafter, on October 22, 2015, the Minister made a reassessment for the 2011 tax year to tax the appellant in the amount of $485,447, received from 9102, as a separate taxable dividend.

[8] The appellant objected to the assessment, arguing that it was nevertheless a capital dividend. The Minister upheld the assessment, stating that it stemmed from the election made by 9102 under subsection 184(3).

II. Submissions of the parties

A. Respondent's submissions

[9] Under the motion, the respondent submits that 9158 made an election under subsection 184(3) to treat the $485,447 dividend paid to 9102 as a separate taxable dividend and that 9102 affirmed this election as a shareholder. Moreover, the respondent submits that 9102 also made an election to treat the same amount as a separate taxable dividend and that the appellant affirmed this election as a shareholder.

[10] According to the respondent, the purpose of the election made under subsection 184(3) was to avoid application of the Part III tax and that the [translation] "consideration of this election . . . is taxing the dividend in the hands of the appellant."

[11] The respondent stated that [translation] "9158 could have elected to appeal from a future assessment of the ITA Part III tax, and thus challenge the proposed qualification of the dividend." The corporation elected for [translation] "another avenue with the appellant's consent," thus, the Minister had to make the assessment.

[12] To reiterate the respondent's arguments, [translation] "taxing this dividend is the inescapable result of 9102, and its wholly owned subsidiary 9158, making the election to consider the amount of $485,447 as a separate taxable dividend."

[13] The respondent ultimately added that the elections made by 9158 and 9102 under subsection 184(3) are not set out in the Notice of Appeal and that the appellant tried to [translation]: "deny reality . . . with a clear goal of obtaining a declaratory judgement regarding the nature of the dividend," on which this Court cannot rule.

[14] In the context of this motion, the respondent submits that the Notice of Appeal does not present any genuine ground, be it a procedure that was certain to fail and therefore frivolous and vexatious and is an abuse of the process of the Court.

B. Respondent's submissions

[15] The appellant submits that, in filing the documentation to make the so-called election and treat the dividend in question as a separate taxable dividend, he was trying to avoid the Part III tax on an excess dividend, without, however, waiving his right to challenge the Minister's claim that it was an excess dividend, and then later establish that it was indeed a capital dividend paid from the CDA of 9158 and 9102.

[16] The appellant submits that an administrative policy now exists known as the "Short-Cut" method, which was not established in 2015, and which allows a taxpayer to make the election under subsection 184(3), which was withheld pending resolution of the dispute. If the Court rules that it is a capital dividend, the form is withdrawn. However, if, on the contrary, the Court rules that it is an excess dividend, the Minister may treat the payment as a separate taxable dividend by accepting the form as is.

[17] In this case, the appellant submits that there is no restriction regarding the possibility of filing an appeal, despite the election in question.

[18] Lastly, the appellant submits that it is not possible to claim that the Notice of Appeal is certain to fail in such a context and that the Court must consider the issue on the merits and determine whether it is a capital dividend or an excess dividend. Secondly, it is useful reviewing the nature of the election to see if it caused the appellant to lose his rights.

III. <u>Relevant rights and legislative provisions</u>

[19] Under subsection 83(2) of the Act, a private corporation may make an election, "in prescribed manner and prescribed form," to treat a dividend as a capital dividend. In particular, this mechanism enables the transfer, from the corporation to the shareholder, of the non-taxable portion of a capital gain.

[20] The amount paid to the shareholder resident in Canada is thereby received tax-free, that is, no part of the amount "shall be included in computing the income" of the shareholder. Subsection 83(2) provides as follows:

> 83(2) Capital dividend — Where at any particular time after 1971 a dividend becomes payable by a private corporation to shareholders of any class of shares of its capital stock and the corporation so elects in respect of the full amount of the

> dividend, in prescribed manner and prescribed form and at or before the particular time or the first day on which any part of the dividend was paid if that day is earlier than the particular time, the following rules apply:
>
> > (a) the dividend shall be deemed to be a capital dividend to the extent of the corporation's capital dividend account immediately before the particular time; and
> >
> > (b) no part of the dividend shall be included in computing the income of any shareholder of the corporation.

[21] As specified in paragraph 83(2)(a), the corporation can pay the capital dividend to the extent of its capital account (or CDA, as specified above), which takes into account various amounts accumulated by the corporation.

[22] However, if the capital dividend paid exceeds the corporation's CDA balance, it may be required to pay tax equal to 60% of the excess under subsection 184(2), which provides as follows:

> 184(2) Tax on excessive elections — If a corporation has elected in accordance with subsection 83(2), 130.1(4) or 131(1) in respect of the full amount of any dividend payable by it on shares of any class of its capital stock (in this section referred to as the "original dividend") and the full amount of the original dividend exceeds the portion of the original dividend deemed by that subsection to be a capital dividend or capital gains dividend, as the case may be, the corporation shall, at the time of the election, pay a tax under this Part equal to 3/5 of the excess.

[23] To avoid additional tax, the corporation may opt for the mechanism set out in subsection 184(3):

> 184(3) Election to treat excess as separate dividend — If, in respect of an original dividend payable at a particular time, a corporation would, but for this subsection, be required to pay a tax under this Part in respect of an excess referred to in subsection (2), and the corporation elects in prescribed manner on or before the day that is 90 days after the day of sending of the notice of assessment in respect of the tax that would otherwise be payable under this Part, the following rules apply:
>
> > (a) the portion of the original dividend deemed by subsection 83(2), 130.1(4) or 131(1) to be a capital dividend or capital gains dividend, as the case may be, is deemed for the purposes of this Act to be the amount of a separate dividend that became payable at the particular time;

> (b) if the corporation identifies in its election any part of the excess, that part is, for the purposes of any election under subsection 83(2), 130.1(4) or 131(1) in respect of that part, and, where the corporation has so elected, for all purposes of this Act, deemed to be the amount of a separate dividend that became payable immediately after the particular time;
>
> (c) the amount by which the excess exceeds any portion deemed by paragraph (b) to be a separate dividend for all purposes of this Act is deemed to be a separate taxable dividend that became payable at the particular time; and
>
> (d) each person who held any of the issued shares of the class of shares of the capital stock of the corporation in respect of which the original dividend was paid is deemed:
>
> > (i) not to have received any portion of the original dividend, and
> >
> > (ii) to have received, at the time that any separate dividend determined under any of paragraphs (a) to (c) became payable, the proportion of that dividend that the number of shares of that class held by the person at the particular time is of the number of shares of that class outstanding at the particular time except that, for the purpose of Part XIII, the separate dividend is deemed to be paid on the day that the election in respect of this subsection is made.

[24] As stated at the start, the respondent relies on section 53 of the Rules, which provides as follows:

> Striking out a Pleading or other Document
>
> 53(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
> >
> > . . .

IV. Analysis

[25] As indicated above, in the context of this motion, the issue is whether the Notice of Appeal is “scandalous, frivolous or vexatious” within the meaning of paragraph 53(1)(b) or “an abuse” within the meaning of paragraph 53(1)(c) of the Rules.

[26] This provision, in particular the nature of a motion to strike, was examined in *Gramiak v. The Queen*, 2013 TCC 383 (upheld by the Federal Court of Appeal, 2015 FCA 40), in which Chief Justice Rossiter states as follows:

> [30] The plain and obvious test has been longstanding and widely accepted in Canadian jurisprudence as the test for motions to strike. In *Sentinel Hill Productions (1999) Corporation, Robert Strother v. the Queen*, 2007 TCC 742, Bowman, C.J., provided a useful overview of the principles that govern the application of Rule 53:
>
> > [4] I shall begin by outlining what I believe are the principles to be applied on a motion to strike under Rule 53. There are many cases in which the matter has been considered both in this court and the Federal Court of Appeal. It is not necessary to quote from them all as the principles are well established.
> >
> > > (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 CanLII 74 (SCC), [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.
> > >
> > > (b) <u>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.</u>
> > >
> > > c) <u>A motions judge should avoid usurping the function of the trial judge in making determinations of fact or relevancy. Such matters should be left to the judge who hears the evidence.</u>
> > >
> > > (d) Rule 53 and not Rule 58, is the appropriate rule on a motion to strike.
> > >
> > > [Emphasis added.]
>
> [31] Chief Justice McLachlin wrote for the Supreme Court in *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 (CanLII):

> 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

Further:

> "…The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. Rather, it operates on the assumption that the claim will proceed through the court system in the usual way – in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in *context of the law and the litigation process*, the claim has no reasonable chance of succeeding."

[32] More recently, this Court applied the plain and obvious test in *Canadian Imperial Bank of Commerce v. R.*, 2011 TCC 568.

> Only if the position taken in the Reply is certain to fail because it contains a radical defect should the relevant portions of the Respondent's Reply be struck.

[Emphasis added.]

[27] After examining the criteria that applies to motions to amend a pleading, Chief Justice Rossiter stated that, "In contrast, the plain and obvious test applied to striking motions is significantly higher, more stringent, and the courts have ruled that striking pleadings is to be done in only the most exceptional cases." (paragraph 35).

[28] The respondent cited *Hryniak v. Mauldin*, 2014 SCC 6, [2014] 1 SCR 87 (*Hryniak*), on appeal from a decision by the Court of Appeal of Ontario, regarding application of a rule of provincial procedure (Rule 20 in Ontario) pertaining to summary judgments. The Supreme Court of Canada explained that the rules of procedure for all provinces, except Quebec, include a mechanism for a summary judgment and that "Generally, summary judgment is available where there is no genuine issue for trial." (paragraph 34.)

[29] Although certain parallels exist, in particular, the notion of proportionality and access to justice, as mentioned in *Hryniak* (or the *Inwest Investments Ltd. v.*

The Queen decision, 2015 BCSC 1375, also cited by the respondent), I am not convinced that Rule 53 on striking pleadings is the equivalent of a rule permitting the Court to render a summary judgment. Moreover, I note that subsection 171(1) of the Act, which grants the Court jurisdiction to rule on a tax appeal, does not implicitly or explicitly include the notion of "summary judgment."

[30] Indeed, the doctrine of *Hryniak* is necessarily limited because, on several occasions, that Court found no provision for a summary judgment. In *Alan W. Cockeram and E. Anne Cockeram Trustees of the Cockeram Family Trust v. The Queen*, 2003 TCC 510, 2003 DTC 1201, D. Campbell J. stated as follows:

> [13] So let me first address the issue of whether in fact there is any provision in the *Tax Court of Canada Act* or the *Tax Court of Canada Rules (General Procedure)* which would allow me to grant summary judgment or the equivalent of summary judgment in the circumstances of this case.
>
> [14] Neither the *Act* nor the *Rules* contain any provision permitting summary judgment. The Appellants state that, because the rules are to be applied liberally (Rule 4), I have authority to grant this application. Section 171 of the Act clearly establishes how this Court can dispose of an appeal. Section 171 states:
>
> > 171(1) Disposal of appeal – The Tax Court of Canada may dispose of an appeal by
> >
> > (a) dismissing it; or
> >
> > (b) allowing it and
> >
> > (i) vacating the assessment,
> >
> > (ii) varying the assessment, or
> >
> > (iii) referring the assessment back to the Minister for reconsideration and reassessment.

[31] The respondent also cited *Telus Communications (Edmonton) Inc. v. Canada*, 2005 FCA 159 (*Telus*), in which the Federal Court of Appeal ruled that a taxpayer cannot add a cause of action or ask the Tax Court of Canada to "deal with an issue that was not properly raised in the notice of objection" (paragraph 17) which raised an issue of jurisdiction. A motion to strike under Rule 53 was therefore admissible. (paragraph 24).

[32] In this case, no information was submitted regarding the content of the Notice of Objection or the circumstances under which the appellant allegedly made the election under subsection 184(3), which seems to limit the application of *Telus* in the context of this motion.

[33] I also note that subsection 184(3) of the Act in question requires that the election be made "in prescribed manner" and that subparagraph 2601(a)(i) of the *Income Tax Regulations* (C.R.C., c. 945) requires "a letter stating that the corporation elects under subsection 184(3) of the Act in respect of the said dividend." The Court is not aware of the contents of this letter, nor comments, if any, that could shed light on the corporation's intention, which may have an impact on the appellant's election in this case.

[34] The respondent also cited *Pintendre Autos Inc. v. Canada*, 2003 TCC 818 (*Pintendre*), a case decided by this Court; the Crown sought to "strike out a notice of appeal" if the Court came to the conclusion that it could not address an issue falling under the *Civil Code of Québec*. Justice Paris confirmed that the Court does not have the power "to give declaratory relief" and "may dispose of income tax appeals only in the manner laid down in subsection 171(1)" of the Act (paragraph 43). Having found that the Notice of Appeal disclosed "no reasonable ground for appeal" and that it had "no chance of success," the motion to strike was granted.

[35] Is the appellant in this case requesting declaratory relief? I am not convinced of this. As stated by Paris J. in *Pintendre*, citing the Federal Court of Appeal in *A.G. Canada v. Webster*, 2003 FCA 388, "the jurisdiction of the Tax Court is limited to determining whether the assessments are correct in law." (paragraph 37) and that ". . . The assessment . . . is the summation of all the factors representing tax liability, ascertained in a variety of ways, and the fixation of the total after all the necessary computations have been made." (paragraph 35).

[36] It seems clear to me, on the face of the Notice of Appeal, that the appellant is contesting the October 22, 2015 assessment and that the Court has the jurisdiction to establish whether the election made by the appellant was valid and that, lastly, the amount paid was a capital dividend or a separate taxable dividend.

V. <u>Conclusion</u>

[37] The respondent's problem is that the mechanism set out under subsection 184(3) of the Act presupposes the sending of a notice of assessment for additional tax under subsection 184(2). The subsection provides as follows: "and

the corporation elects in prescribed manner . . . after the day of sending of the notice of assessment in respect of the tax that would otherwise be payable under this Part . . ." (Emphasis added). However, it seems obvious that the Minister did not make this assessment.

[38] It is possible that the administrative practice described above is designed to simplify the steps by giving the taxpayer some sort of prior notice, possibly through a proposal letter as part of the audit, allowing him to make the election in question. However, the Court is not bound by administrative practices (*Douziech v. The Queen*, [2001] T.C.J. No. 325, Bowie J.). Therefore, the Court cannot disregard a legislative provision that requires the Minister to have made an assessment later, thereby allowing the taxpayer to make an election. This is the mechanism set out in the Act.

[39] I also note that under clause 2106(a)(iv)(A) of Regulation 2106 above, the taxpayer is required to indicate "the date of the notice of assessment of the tax that would, but for the election, have been payable under Part III of the Act." Since there was no assessment within the meaning of subsection 184(3) of the Act, the Court can presume that this information was not available to the appellant and was not included with the documentation.

[40] It is not for this Court, in the context of this motion, to come to a conclusion regarding the validity of the election made by the appellant and corporations 9102 and 9158, under subsection 184(3). However, the Court cannot ignore the very language of the Act as written by Parliament: Douzieh, paragraph 5.

[41] In the words of Chief Justice Rossiter in *Gramiak*, the facts in the Notice of Appeal must be presumed to be true and, second, the Court must avoid usurping the functions of the trial judge and drawing conclusions of fact or ruling on its relevance.

[42] Ultimately, the Court cannot conclude that the Notice of Appeal "has no reasonable chance of succeeding" or that it is "plain and obvious" that the Notice of Appeal is certain to fail.

[43] Consequently, the motion to strike must be dismissed, with costs.

[44] The Court also orders that the appellant has the option of thirty (30) days to serve an Amended Notice of Appeal, to plead alternatively, or electing to treat the dividend in question as a separate taxable dividend.

[45] The respondent has 30 days thereafter to file an amended reply.

Signed at Ottawa, Canada, this 9th day of May 2019.

"Guy Smith"

Smith J.

Translation certified true
on this 10th day of February 2020.

François Brunet, Revisor

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REASONS FOR ORDER BY:	The Honourable Justice Guy R. Smith
DATE OF ORDER:	May 9, 2019

APPEARANCES:

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