

Federal Court of Appeal



Cour d'appel fédérale

Date: 20250314

Docket: A-66-24

Citation: 2025 FCA 60

**CORAM: RENNIE J.A.
BIRINGER J.A.
PAMEL J.A.**

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

MARIA CSAK

Respondent

Heard at Toronto, Ontario, on January 21, 2025.

Judgment delivered at Ottawa, Ontario, on March 14, 2025.

REASONS FOR JUDGMENT BY:

BIRINGER J.A.

CONCURRED IN BY:

**RENNIE J.A.
PAMEL J.A.**

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REASONS FOR JUDGMENT

BIRINGER J.A.

[1] This is an appeal of a decision of the Tax Court of Canada (*per* Owen J.) concerning the respondent's liability, pursuant to subsection 160(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (*ITA*), for certain tax debts of her late husband: 2024 TCC 9 (Reasons).

[2] In 1993, the respondent's spouse transferred real property to her when he had unpaid tax and interest owing for the 1988, 1989, 1990 and 1991 taxation years.

[3] The spouse's tax liability arose from partnership losses which were denied by the Minister of National Revenue (Minister). The spouse appealed reassessments for all four tax years to the Tax Court, as part of a group appeal with other members of the partnership. The appeal was dismissed: *Makuz v. The Queen*, 2006 TCC 263 (*Makuz*).

[4] The respondent's spouse died in 2002. In 2012, the respondent was assessed under subsection 160(1) of the *ITA* in respect of her late husband's tax debts. Under subsection 160(1), when a person transfers property to a non-arm's length person for less than fair market value consideration, the transferee becomes jointly and severally liable for the tax debts of the transferor for the year of transfer and prior years. The liability is limited to the excess of the fair market value of the transferred property over the fair market value of the consideration given: *Eyeball Networks Inc. v. Canada*, 2021 FCA 17 at para. 2; *Canada v. Livingston*, 2008 FCA 89 at para. 17.

[5] In 2012, the tax and interest payable pursuant to the underlying reassessments of the respondent's late husband was more than \$4.8 million. In assessing the respondent, the Minister assumed that the fair market value of the property was \$1.2 million when transferred to her and that she had provided no consideration for the property.

[6] The issue before the Tax Court in the decision under appeal was the respondent's derivative liability under subsection 160(1) for the tax debts of her late husband. The respondent challenged the assessment on the basis that: (i) she had provided consideration to her late spouse for the transferred property; and (ii) the underlying reassessments (of her late spouse) for the 1988 and 1989 taxation years were statute-barred and thus there could be no derivative liability regarding those years.

[7] The Tax Court did not accept that the respondent had provided consideration for the property but allowed the appeal on the basis that the reassessments for the 1988 and 1989 tax years were statute-barred. The reassessments for those years had been issued after the end of the normal reassessment period. Pursuant to subparagraph 152(4)(a)(ii) of the *ITA*, the Minister is permitted to reassess after the normal reassessment period if a taxpayer timely files a waiver. The burden of proof was on the Minister to establish that the reassessments were not statute-barred. While waivers for both years had been filed, the Tax Court found insufficient evidence that the 1988 waiver had been timely filed and concluded that the 1989 waiver had been filed one day late.

[8] The Tax Court's finding on the absence of consideration for the transferred property was not appealed. Before this Court, the appellant contests the Tax Court's conclusion on the respondent's ability to challenge the underlying reassessments and the Tax Court's determination that the reassessment for the 1989 tax year was statute-barred. The appellant does not dispute the Tax Court's conclusion on the lack of evidence regarding the 1988 waiver.

I. Analysis

[9] The appellate standards of review apply. Questions of law are reviewable on a standard of correctness, whereas questions of fact or mixed fact and law are reviewable on a standard of palpable and overriding error unless there is an extricable question of law, which is reviewable for correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8, 10 and 36 (*Housen*).

A. *The respondent's ability to challenge the underlying reassessments*

[10] The appellant submits that the Tax Court erred in law by allowing the respondent to challenge the validity of the underlying reassessments for the 1988 and 1989 tax years. It says that the validity and correctness of those reassessments were upheld in the earlier Tax Court proceeding in *Makuz*. The appellant submits that this Court's decision in *Gaucher v. Canada*, 2000 D.T.C. 6678, [2001] 1 C.T.C. 125 (F.C.A.) (*Gaucher*) is distinguishable, and that allowing the respondent to challenge the underlying assessments in her appeal is an abuse of process. The Tax Court rejected this argument.

[11] *Gaucher*, which was confirmed in *Canada v. 594710 British Columbia Ltd.*, 2018 FCA 166, establishes that a taxpayer assessed by way of a derivative assessment under subsection 160(1) of the *ITA* may challenge the underlying assessment on which the derivative assessment is based.

[12] In *Gaucher*, the appellant was assessed under subsection 160(1) regarding a tax assessment of her former husband that had been confirmed in a proceeding at the Tax Court. The appellant challenged the subsection 160(1) assessment on the grounds that the underlying assessment was statute-barred, an argument that had not been raised by her former husband in his appeal. The Tax Court determined that it was not open to the appellant to raise the defence. This Court overturned that decision, concluding:

[6] I am of the respectful view that the Tax Court Judge was in error in coming to this conclusion. It is a basic rule of natural justice that, barring a statutory provision to the contrary, a person who is not a party to litigation cannot be bound by a judgment between other parties. The appellant was not a party to the reassessment proceedings between the Minister and her former husband. Those proceedings did not purport to impose any liability on her. While she may have been a witness in those proceedings, she was not a party, and hence could not in those proceedings raise defences to her former husband's assessment.

[7] When the Minister issues a derivative assessment under subsection 160(1), a special statutory provision is invoked entitling the Minister to seek payment from a second person for the tax assessed against the primary tax payer. That second person must have a full right of defence to challenge the assessment made against her, including an attack on the primary assessment on which the second person's assessment is based.

[13] The appellant attempts to distinguish *Gaucher* on the facts, as it did at the Tax Court. It submits that the respondent became involved in the Tax Court proceeding in *Makuz* after the death of her spouse, was responsible for making litigation decisions as the executrix of her late husband's estate and was subject to discovery in that capacity. While the appellant acknowledges that the respondent was not herself a party to that litigation, it says that she could have raised the statute-barred argument. It distinguishes *Gaucher* on this basis since the appellant in that case "could not" raise defences to her former husband's assessment: *Gaucher* at para. 6.

[14] Here, the Tax Court found that the respondent's involvement in the *Makuz* group litigation was in a representative capacity only (as executrix of her late husband's estate) and began approximately six years after the litigation had commenced. The Tax Court found that the respondent attended one meeting and paid legal fees but did not understand the nature of the appeal. The Tax Court concluded that for the respondent to be held responsible for raising the statute-barred issue in *Makuz* after her husband's death was "simply not tenable": Reasons at paras. 95 and 101.

[15] Based on these findings, I do not accept the appellant's arguments to distinguish *Gaucher* on the facts. The Tax Court correctly concluded that *Gaucher* supports the respondent's ability to raise the statute-barred defence against her subsection 160(1) assessment.

[16] At the Tax Court, the appellant submitted that issue estoppel and abuse of process were grounds precluding the respondent from raising the statute-barred issue. The Tax Court found this "misguided" in light of *Gaucher* but addressed the submissions. The appellant does not appeal the Tax Court's conclusions on issue estoppel but says that the conclusions on abuse of process were in error. It says that even if *Gaucher* applies (which it does not concede), an abuse of process argument was not before the Court in *Gaucher*, and accordingly, the decision does not give the respondent *carte blanche* to relitigate the underlying assessments.

[17] I acknowledge that there may be cases where, even if *Gaucher* applies to support a challenge of the underlying assessment, the circumstances of the challenge amount to an abuse of process. That is not the case here.

[18] The doctrine of abuse of process is rooted in a court's inherent jurisdiction to prevent misuse of its process that would be unfair to a party or otherwise bring the administration of justice into disrepute. It is a discretionary remedy, characterized by its flexibility and unencumbered by the specific requirements of concepts such as issue estoppel: *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29 at para. 35; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at paras. 35 and 37 (*C.U.P.E.*).

[19] Abuse of process by relitigation may exist where the parties are not the same (which is required to establish issue estoppel) but the litigation is found to be, in essence, an attempt to revisit the "same issue" as in a prior proceeding: *C.U.P.E.* at para. 37. Allowing the litigation to proceed may be considered to violate important principles such as judicial economy, consistency, finality and the integrity of the administration of justice: *C.U.P.E.* at para. 37.

[20] The appellant submits that although the statute-barred issue was not argued in *Makuz*, it goes to the validity of the underlying reassessments and the Tax Court implicitly accepted the validity of those reassessments when it confirmed their correctness. It says that the respondent is relitigating an issue decided by the Tax Court.

[21] The Tax Court determined, and I agree, that whether an assessment is statute-barred (and therefore null and void) is a separate issue from whether an assessment is correct: Reasons at paras. 107-109; see also *Ereiser v. Canada*, 2013 FCA 20 at para. 21; *Rio Tinto Alcan Inc. v. The Queen*, 2017 TCC 67 at paras. 154 and 173. The Tax Court concluded that the principle of abuse of process did not preclude the respondent from raising the statute-barred issue.

[22] I acknowledge the appellant's argument that the validity of an assessment must be established before its correctness comes into play. In this way, it could be said that the validity of the underlying reassessments was effectively, although not explicitly, determined in *Makuz*. Nonetheless, it does not lead me to conclude that there is an abuse of process in this case.

[23] Ultimately, there must be a balancing of interests. In some cases, the second litigation may enhance the integrity of the judicial system because fairness dictates that the original result should not be binding in the new context: *C.U.P.E.* at para. 52; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 80. Here, the statute-barred issue in respect of the underlying reassessments was not before the Tax Court in *Makuz*, the respondent was not a party to that litigation and the Tax Court determined that it was "untenable" to expect her to have raised the issue. The respondent's personal liability is now at issue. Fairness and respect for the "basic rule of natural justice" referred to in *Gaucher* outweigh concerns for possible inconsistency in the decisions.

[24] I conclude that the respondent is not precluded from raising the statute-barred issue for the underlying reassessments of the 1988 and 1989 taxation years. This ends the analysis for the 1988 tax year. As the Tax Court determined that there was insufficient evidence that a waiver was timely filed for that year, and the reassessment was issued after the end of the normal reassessment period, it was statute-barred. Whether the reassessment for the 1989 tax year was statute-barred turns on the analysis below.

B. *The application of section 26 of the Interpretation Act to the filing of a waiver*

[25] The appellant submits that the Tax Court erred in law when it concluded that the reassessment for the 1989 tax year was statute-barred. There was no dispute that the reassessment for that year was issued after the end of the normal reassessment period. The issue before the Tax Court was whether a waiver had been timely filed pursuant to subparagraph 152(4)(a)(ii) of the *ITA*, allowing the Minister to reassess when it did. The respondent, relying on the reasons and conclusion of the Tax Court, says that the 1989 waiver was filed late and the reassessment for the year was statute-barred.

[26] Subsection 152(4) of the *ITA* allows the Minister to assess or reassess a taxation year after the normal reassessment period in certain listed scenarios. Subparagraph 152(4)(a)(ii) concerns the filing of a waiver within the normal reassessment period and provides:

(4) The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if

(a) the taxpayer or person filing the return

(4) Le ministre peut établir une cotisation, une nouvelle cotisation ou une cotisation supplémentaire concernant l'impôt pour une année d'imposition, ainsi que les intérêts ou les pénalités, qui sont payables par un contribuable en vertu de la présente partie ou donner avis par écrit qu'aucun impôt n'est payable pour l'année à toute personne qui a produit une déclaration de revenu pour une année d'imposition. Pareille cotisation ne peut être établie après l'expiration de la période normale de nouvelle cotisation applicable au contribuable pour l'année que dans les cas suivants :

a) le contribuable ou la personne produisant la déclaration :

...

[...]

(ii) has filed with the Minister a waiver in prescribed form within the normal reassessment period for the taxpayer in respect of the year;

(ii) soit a présenté au ministre une renonciation, selon le formulaire prescrit, au cours de la période normale de nouvelle cotisation applicable au contribuable pour l'année;

[27] The normal reassessment period for the 1989 tax year ended on Sunday, May 30, 1993 and the waiver for that year was filed with the Minister on Monday, May 31, 1993. The Tax Court found that it was a day late. The appellant submits that by virtue of section 26 of the *Interpretation Act*, R.S.C. 1985, c. I-21, the time for filing the 1989 waiver was extended to the Monday and accordingly the waiver was timely filed.

[28] Section 26 of the *Interpretation Act*, is one of several rules in that statute to be applied when interpreting an Act of Parliament, including the *ITA*. Section 26 of the *Interpretation Act* provides:

26 Where the time limited for the doing of a thing expires or falls on a holiday, the thing may be done on the day next following that is not a holiday.

26 Tout acte ou formalité peut être accompli le premier jour ouvrable suivant lorsque le délai fixé pour son accomplissement expire un jour férié.

Pursuant to subsection 35(1) of the *Interpretation Act* (general definitions), Sunday is a “holiday”.

[29] The Tax Court rejected the appellant’s argument on the application of section 26 of the *Interpretation Act*. For the reasons discussed further below, the Tax Court concluded that:

...it would be inconsistent with the text, context and purpose of section 26 of the *Interpretation Act* and of subparagraph 152(4)(a)(ii) to apply section 26 to deem a waiver to have been filed within the normal reassessment period when the benefit of the rule accrues solely to the Minister—a person who has done nothing—and the taxpayer is deprived of an important right under the ITA.

Reasons at para. 157.

[30] The appellant says that the Tax Court erred.

[31] As the Tax Court noted, the application of section 26 of the *Interpretation Act* to subparagraph 152(4)(a)(ii) of the *ITA* is a novel question of statutory interpretation. The standard of review for a statutory interpretation issue is correctness: *Housen* at para. 8.

[32] The Tax Court approached the statutory interpretation issue with appropriate reference to the guidance provided by the Supreme Court in *R. v. Breault*, 2023 SCC 9 (citing *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21) and *Canada v. Loblaw Financial Holdings Inc.*, 2021 SCC 51 (citing *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 at para. 10 and *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20 at para. 22). A textual, contextual and purposive analysis is required of both subparagraph 152(4)(a)(ii) of the *ITA* and section 26 of the *Interpretation Act*.

[33] The parties do not dispute that when the normal reassessment period of a taxpayer ends on a holiday, section 26 of the *Interpretation Act* allows the Minister to reassess on the next day following that is not a holiday. In *Barrington Lane Developments Limited v. The Queen*, 2010 TCC 388 at para. 3, while the Tax Court did not opine on the point, the parties agreed that this would be the result.

[34] At the hearing, the appellant argued that when section 26 of the *Interpretation Act* applies to extend the time for the Minister to reassess, the “normal reassessment period” as defined in subsection 152(3.1) of the *ITA* is extended to the next day following that is not a holiday. If that were the case the analysis on the 1989 waiver would end here, as the waiver would be considered to have been filed prior to the end of the “normal reassessment period” (as extended). The appellant provided no elaboration or authority.

[35] I am not inclined to the appellant’s view, based on a plain reading of section 26 of the *Interpretation Act*. It provides that “the thing [i.e., the assessing or reassessing] may be done on the day next following that is not a holiday”. This does not seem to affect the “normal reassessment period” as defined in subsection 152(3.1) which prescribes a time period, without reference to an action (i.e., the doing of a thing). Given my conclusion below on the appellant’s main argument on the operation of section 26 of the *Interpretation Act*, I do not address this argument further.

[36] Turning to the appellant’s main statutory interpretation argument, I agree that the Tax Court mischaracterized the nature of a waiver in concluding that the benefit accrues solely to the Minister and only might “in theory” benefit a taxpayer: Reasons at paras. 150, 152 and 157.

[37] A waiver filed under subparagraph 152(4)(a)(ii) has been described as a “bargain” between the taxpayer and the Minister that provides benefits to both. The taxpayer foregoes the benefit of the normal reassessment period for the matter specified in the waiver and the Minister acquires the right to reassess after the normal assessment period, but only with respect to the

matter specified in the waiver: *Canada v. Honeywell Limited*, 2007 FCA 22 at para. 32; *Mitchell v. Canada (Attorney General)*, 2002 FCA 407 at para. 40 (*Mitchell*); *CAL Investments Ltd. v. Canada (T.D.)*, [1991] 1 F.C. 199 at 213-214, 44 D.T.C. 6556 (*CAL Investments*).

[38] The potential benefits to the taxpayer include additional time to consider the proposed adjustments and make submissions that may change the Minister's proposed assessing position, a delayed reassessment, and a reduction in the amount of a reassessment, due to a resolution of issues in the intervening period: *Bailey v. The Minister of National Revenue*, [1989] 2 C.T.C. 2177 at 2181-2182, 43 D.T.C. 416. While the filing of a waiver does not guarantee any outcome for the taxpayer, as the Minister may reassess based on the waiver at any time, it provides a taxpayer with the possibility of these outcomes which are not attainable without filing a waiver. Further, an assessment issued under subparagraph 152(4)(a)(ii) is limited to the issues described in the waiver, resulting in a narrowing of the dispute between the taxpayer and the Minister that may also benefit the taxpayer: *CAL Investments* at 213-214.

[39] The appellant submits that the Tax Court made several errors regarding the text, context and purpose of section 26 of the *Interpretation Act* and subparagraph 152(4)(a)(ii) of the *ITA*.

[40] Starting with the text of section 26 of the *Interpretation Act*, it requires the "doing of a thing" and a "time limited" for the doing of that thing which expires or falls on a holiday.

[41] The Tax Court concluded that section 26 of the *Interpretation Act* does not apply to a waiver because a taxpayer does not lose a "right" (such as a right to object or appeal from an

assessment) in choosing not to file a waiver: Reasons at paras. 152, 153, 155 and 156. I agree with the appellant that this was in error. First, a taxpayer choosing not to file a waiver does lose a right – the right to keep the reassessment period open (as confined by the waiver, and subject to the Minister’s ability to reassess at any time) and potentially reap the benefits described above. This Court in *Mitchell* referred to it as a “a privilege which a taxpayer has”: *Mitchell* at para. 40. Further, section 26 of the *Interpretation Act* does not require the loss of a right.

[42] Section 26 of the *Interpretation Act* applies to, in English, the “doing of a thing” and, in French, “tout acte ou formalité”. Both are phrases with wide scope. The *Canadian Oxford Dictionary* defines “thing” as, in part “an act, idea, utterance; an event”. Le dictionnaire *Le Petit Robert* defines “acte” as, in part “manifestation de volonté qui produit des effets de droit” and “formalité” as, in part “opération prescrite par la loi, la règle, et qui est liée à l’accomplissement de certain actes ... comme condition de leur validité”. There is nothing in the text to suggest a limitation on the type of thing (acte ou formalité) to which the provision applies or that there be the loss of a right. The text alone is sufficient to capture the filing of a waiver.

[43] The context and purpose of section 26 of the *Interpretation Act* also support a generous reading of these already broad phrases. Section 26 is part of a group of provisions seeking to provide clarity on the computation of time in federal enactments: subsection 3(1) and sections 26-30 of the *Interpretation Act*. Section 26 is a remedial provision. It provides relief when the time limit for doing a thing expires on a holiday, allowing the thing to be done on the next day that is not a holiday. Section 12 of the *Interpretation Act* provides that:

<p>12 Every enactment is deemed remedial, and shall be given such fair,</p>	<p>12 Tout texte est censé apporter une solution de droit et s’interprète de la</p>
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large and liberal construction and interpretation as best ensures the attainment of its objects.

manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

[44] For these reasons, I am satisfied that the filing of a waiver is the “doing of a thing” for the purposes of section 26 of the *Interpretation Act*.

[45] The Tax Court also concluded that there is no “time limited” for filing a waiver because the deadline relates to its validity and does not preclude the taxpayer from doing anything: Reasons at paras. 153 and 156. I disagree.

[46] Subparagraph 152(4)(a)(ii) provides that the Minister may reassess after the end of the normal reassessment period if “the taxpayer has filed with the Minister a waiver in prescribed form within the normal reassessment period”. If a taxpayer wishes to obtain the potential benefits of filing a waiver, it must be filed before the end of the normal reassessment period. A waiver filed later is invalid: *984274 Alberta Inc. v. The Queen*, 2019 TCC 85 at paras. 43 and 49; rev’d on other grounds 2020 FCA 125.

[47] Perhaps the Tax Court’s conclusion stems from a focus on the benefits to the Minister of a waiver, and not on those to the taxpayer. In any case, I do not see how a statutory provision that provides that the doing of a thing will only be valid if done by a certain date does not impose a “time limited” for doing the thing. I do not view the time limited for filing a waiver as conceptually different for this purpose from the deadlines for filing a notice of objection or notice of appeal: subsection 165(1) and subsection 169(1) of the *ITA*, respectively. The Tax Court has applied section 26 of the *Interpretation Act* to extend the time for filing both: *Nach v.*

The Queen, [2000] 4 C.T.C. 2388 at paras. 8-10 regarding a notice of objection and *Leibovich v. The Queen*, 2016 TCC 6 at para. 6 regarding a notice of appeal.

[48] Subparagraph 152(4)(a)(ii) is found in subsection 152(4) which provides a list of situations in which the Minister may reassess after the expiry of the normal reassessment period. Given this context, there is undeniable logic in applying section 26 of the *Interpretation Act* to extend the time for filing a waiver in the same manner and with the same effect as it does to extend the Minister's time to reassess. When the normal reassessment period does not end on a holiday, the deadline to file a waiver is the same day as the last day that the Minister can reassess. It would be illogical for a mismatch in these deadlines to arise only because and only when the end of the normal reassessment period falls on a holiday.

[49] As already noted, the purpose of a waiver is to "permit the Minister to issue a favourable reassessment...or provide more time in which to resolve a matter in dispute before a reassessment is made": 1984 Department of Finance, Technical Notes, ss. 152(4.1) and 152(4). Applying section 26 of the *Interpretation Act* to extend the time for filing a waiver and thus allow the parties more time to achieve those objectives is consistent with the purpose of subparagraph 152(4)(a)(ii).

[50] For the foregoing reasons, I have determined that the Tax Court erred. Section 26 of the *Interpretation Act* applies to extend the deadline for filing a waiver pursuant to subparagraph 152(4)(a)(ii) of the *ITA*. Therefore, the 1989 waiver was timely filed, and the reassessment for the 1989 tax year was not statute-barred.

II. Conclusion

[51] I would allow the appeal with costs to the appellant and refer the matter back to the Minister for reconsideration and reassessment of the respondent on the basis that the underlying reassessment issued to the respondent's late spouse for the 1989 taxation year was not statute-barred, while the reassessment issued for the 1988 taxation year was statute-barred.

[52] As the respondent was assessed on the basis that the fair market value of the property was \$1,200,000 at the time it was transferred and the parties agree that the fair market value was \$950,000 (partial agreed statement of facts filed with the Tax Court, para. 2; appellant's letter to the Court dated January 20, 2025), the reconsideration and reassessment should also be on the basis that the fair market value of the property for the purposes of subparagraph 160(1)(e)(i) of the *ITA* was \$950,000.

“Monica Biringer”
J.A.

“I agree.
Donald J. Rennie J.A.”

“I agree.
Peter G. Pamel J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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