Docket: 2015-4697(IT)G

BETWEEN:

DAVID BROOKS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on November 19, 2018 at Vancouver, British Columbia

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant:	Craig C. Sturrock, Q.C.
Counsel for the Respondent:	Christa Akey

ORDER

WHEREAS the Respondent brought a motion for an Order:

1. under section 53 of the *Tax Court of Canada Rules (General Procedure)* (the "*Rules*"):

(a) striking paragraphs 5, 6, 7, 10, 12, 14 and 23 of the Notice of Appeal;

(b) striking the portions of paragraph 22 of the Notice of Appeal that specifically reference sections 7, 8 and 24 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"); and

(c) striking subparagraphs 18(a), 18(b), 18(c), 18(d) and 18(f) of the Notice of Appeal.

2. extending the time for the Respondent to file a Reply to the Amended Notice of Appeal to 60 days after the final disposition of this motion,

under paragraph 8(b), subsection 12(1) and paragraph 44(1)(b) of the *Rules*;

3. awarding costs to the Respondent in any event of the cause; and

4. providing such further and other relief as this Court deems just.

AND UPON reading the material filed and hearing submissions from counsel for the Appellant and counsel for the Respondent;

THIS COURT ORDERS THAT:

1. The Respondent's motion is granted in order to strike the following from the Notice of Appeal filed on October 19, 2015 and the Amended Notice of Appeal filed on November 16, 2018:

(a) paragraphs 5, 6, 7, 10, 12, 14 and 23;

(b) those portions of paragraph 22 that specifically reference sections 7, 8 and 24 of the *Charter*; and

(c) subparagraphs 18(a), 18(b), 18(c), 18(d) and 18(f).

2. The Respondent is directed to file and serve a Reply to the Appellant's pleadings that have not been struck within 60 days of the date of this Order.

3. Costs in favour of the Respondent are fixed in the amount of $1,000, payable forthwith.

Signed at Ottawa, Canada, this 28th day of February 2019.

"Diane Campbell"

Campbell J.

Citation: 2019 TCC 47
Date: 20190228
Docket: 2015-4697(IT)G

BETWEEN:

DAVID BROOKS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Campbell J.

Introduction:

[1] This motion was brought by the Respondent pursuant to section 53 of the *Tax Court of Canada Rules* (the "*Rules*") for an order to strike portions of the Notice of Appeal filed on October 19, 2015 and the Amended Notice of Appeal filed on November 16, 2018 and more particularly:

> 1. under section 53 of the Tax Court of Canada Rules (General Procedure) (the "*Rules*"):
>
> (a) striking paragraphs 5, 6, 7, 10, 12, 14 and 23 of the Notice of Appeal;
>
> (b) striking the portions of paragraph 22 of the Notice of Appeal that specifically reference sections 7, 8 and 24 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"); and
>
> (c) striking subparagraphs 18(a), 18(b), 18(c), 18(d) and 18(f) of the Notice of Appeal.
>
> 2. extending the time for the Respondent to file a Reply to the Amended Notice of Appeal to 60 days after the final disposition of this motion, under paragraph 8(b), subsection 12(1) and paragraph 44(1)(b) of the *Rules*;

> 3. awarding costs to the Respondent in any event of the cause; …
>
> (Notice of Motion, dated November 8, 2018)

The Respondent's Position

[2] The Respondent submits that it is plain and obvious that these paragraphs should be struck for several reasons. First, the Respondent contends that the Notice of Appeal pleads allegations, pertaining to the conduct of officials at Canada Revenue Agency ("CRA"), which are irrelevant to the correctness of a taxpayer's assessment. Second, the Notice of Appeal also contains allegations pertaining to violations of the Appellant's rights under sections 7 and 8 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") resulting from the exercise of civil audit powers used to gather records and information, which the Respondent argues disclose no reasonable cause of action and have no reasonable prospect of success. Third, the Appellant seeks to vacate the reassessments pursuant to section 24 of the *Charter* but there has been no violation of his rights under sections 7 or 8 of the *Charter*.

The Appellant's Position

[3] The Appellant's position is based almost entirely on the interpretation and application of the decision of the Supreme Court of Canada in *R. v. Conway*, 2010 SCC 22, [2010] 1 SCR 765. The Appellant submits that based on the *Conway* decision, this Court, being a court of competent jurisdiction, can consider *Charter*-based arguments where the Minister of National Revenue (the "Minister") has violated a taxpayer's rights under sections 7 and 8 of the *Charter* entitling that taxpayer to relief under section 24 of the *Charter*.

[4] Appellant counsel summarizes his position as follows:

> …The … entire argument … is based upon the principle that the Tax Court is a court of competent jurisdiction and can give full-on *Charter* relief. That's section 24(1). Not limited to an *O'Neill Motors* type of situation, but in any case where there's a *Charter* violation it can make remedies under 24(1) that is just and appropriate or appropriate and just in the circumstances.
>
> If that's not correct, then my friend is right, the impugned provisions in the Notice of Appeal would have to be struck. …
>
> (Transcript, line 21 on page 52 to line 4 on page 53)

[5] The Appellant contends that *Conway* expanded the jurisdiction of this Court to grant remedies, including vacating an assessment, under section 24 of the *Charter*:

> This Honourable Court and the Federal Court of Appeal have held that although the Tax Court has jurisdiction to rule on a *Charter* violation with respect to the question of admissibility of evidence and also has jurisdiction to rule on the constitutionality of an Act or a statutory provision it, nevertheless, does not have jurisdiction under *Charter* section 24(1) to provide as a remedy on a tax appeal an order vacating the assessment."
>
> (Appellant's Argument, paragraph 5).

Consequently, all of the caselaw from this Court and the Federal Court of Appeal, particularly since *Conway*, is wrong. The motion should be denied because the Respondent relies on jurisprudence that predates the Supreme Court of Canada decision in *Conway* and now "…should be totally discounted or ignored in light of … *Conway*" (Appellant's Argument, paragraph 49).

[6] Based on *Conway*, it is not plain and obvious that the Appellant's impugned pleadings, relying on the *Charter* and the remedies set forth in section 24, have no chance of success as the Respondent alleges. As a result, the Minister is no longer correct in arguing that conduct of its officials is irrelevant to the validity of an assessment. The Appellant asks that the assessment be vacated because of the conduct of CRA officials in their investigation of the Appellant and the violation of the Appellant's rights under section 7 and 8 of the *Charter*.

Analysis

[7] The Respondent submits that the issues in this appeal, for the taxation years 2004 to 2008, are straightforward:

1. whether the Appellant made any misrepresentations attributable to neglect, carelessness or wilful default in relation to those taxation years;

2. whether the Appellant failed to report business income; and

3. whether gross negligence penalties were properly assessed pursuant to subsection 163(2) of the *Income Tax Act* (the "*Act*").

[8] The Appellant's pleadings focus on the conduct of CRA officials and whether exercise of the Minister's civil audit powers, used to gather oral and documentary evidence, violated the Appellant's rights under sections 7 and 8 of the *Charter*. The Appellant submits that this evidence can be excluded and the assessment vacated pursuant to section 24 of the *Charter*.

[9] The Respondent argues that these matters fall outside the jurisdiction of this Court and have no chance of succeeding as they are frivolous, abusive and could cause delay in the conduct of the proceedings.

[10] The test for striking pleadings has been restated by the Supreme Court of Canada in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 RCS 45, at paragraph 17, page 66:

> [17] … A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.* [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate*; *Hunt*; *Attorney General of Canada v. Unuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

This Court has repeatedly adopted and applied the "plain and obvious" test to a Rule 53 motion.

[11] The decision in *Ronald Ereiser v The Queen*, 2013 FCA 20, at paragraph 16, sets out the standard of review to be used in dealing with a motion to strike:

> [16] The decision of a judge to grant or refuse a motion to strike is discretionary. This Court will defer to such a decision on appeal in the absence of an error of law, a misapprehension of the facts, a failure to give appropriate weight to all relevant factors, or an obvious injustice: see, for example, *Collins v. Canada*, 2011 FCA 140 at paragraph 12, *Domtar Inc. v. Canada*, 2009 FCA 218 at paragraph 24, *Apotex Inc. v. Canada (Governor in Council*), 2007 FCA 374 at paragraph 15, *Elders Grain Co. v. M.V. Ralph Misener (The*), 2005 FCA 139, [2005] 3 F.C.R. 367 at paragraph 13, *Mayne Pharma (Canada) Inc. v. Aventis Pharma Inc.*, 2005 FCA 50 at paragraph 9.

[12] Bowman, C.J., at paragraph 4 of his reasons in *Sentinel Hill Productions (1999) Corporation et al v. The Queen*, 2008 DTC 2544, set out the following principles to be applied in a Rule 53 motion:

> [4] …
>
> (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] 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) 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.
>
> (c) A motions judge should avoid usurping the power of the trial judge in making determinations of fact or relevancy. Such matters should be left to the judge who hears the evidence.
>
> …

[13] This Court has exclusive jurisdiction to determine the validity of tax assessments. However, its jurisdiction is limited by the statutory provisions set out in the *Act*. Specifically, section 171 of the *Act* sets out the parameters of this Court in dealing with a taxpayer's appeal under the *Act*. In this regard, the Court may dismiss an appeal or allow it and vacate an assessment or vary it or refer it back to the Minister for reconsideration and reassessment.

[14] There is a long line of jurisprudence both in this Court and the Federal Court of Appeal to support the Respondent's position that the conduct of the Minister and CRA officials is irrelevant in determining the validity and correctness of an assessment. The Federal Court of Appeal confirmed this principle in both *Main Rehabilitation Co. Ltd. v. The Queen*, 2004 FCA 403, and *Ereiser*. Sharlow J.A. in *Ereiser*, at paragraph 40, concluded that:

> [40] … The fact that a seizure of documents is unlawful may affect the admissibility of evidence obtained as a result of the seizure, but wrongful conduct unrelated to an evidentiary matter generally is not relevant to the admissibility of evidence. …

This Court has no jurisdiction to vacate an assessment on the basis of reprehensible conduct involved in the process leading up to that assessment. The Federal Court

of Appeal in *M.N.R. and C.R.A. v. J.P. Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, at paragraph 83, stated this principle succinctly:

> [83]… If an assessment is correct on the facts and the law, the taxpayer is liable for the tax.

[15] Recently, Webb J.A. in *Johnson v. The Queen*, 2015 FCA 52, [2015] FCJ No. 216, at para. 4, reiterated the approach that the Courts have taken:

> [4] … The motivation of the Minister in issuing such assessments or any collection action taken by the Minister in relation to such assessments is not relevant to this inquiry.

[16] Paragraphs 5, 6, 7, 10, 12, 14 and 18(d) reference various conduct of the CRA officials, including referral by the auditor to the enforcement division while continuing with the civil audit to obtain information, search warrants being issued, documents seized from various locations and the continuing involvement of the auditor with the Enforcement Division and the loss or destruction of the paper tax returns for three taxation years. While there may be alternate remedies for the wrongful conduct of CRA officials, such as an action in tort for damages or an administrative law remedy, Parliament chose not to expand this Court's jurisdiction in this manner.

[17] Applying the Supreme Court of Canada's test for striking pleadings, and the long line of cases employing that test, it is "plain and obvious" that the arguments contained in those paragraphs of the Appellant's pleadings that relate to CRA conduct would have no reasonable possibility of success at a hearing of the appeal and should be struck.

[18] Next are those paragraphs that the Respondent contends should be struck because they challenge the Minister's authority to gather evidence to be used in assessing a taxpayer's tax liability because they violate the Appellant's rights under sections 7 and 8 of the *Charter* and improperly seek relief pursuant to section 24 of the *Charter*. Again, there are a number of authorities, beginning with the Supreme Court of Canada decision in *The Queen v. Jarvis*, 2002 SCC 73, [2002] 3 RCS 757 and its companion case, *The Queen v. Ling*, 2002 SCC 74, [2002] 3 SCR 814, respecting the Minister's inspection and requirement powers as they relate to the Minister's ability to obtain and examine records and documents of a taxpayer in verifying the information reported in that taxpayer's return. When the predominant purpose of an audit becomes penal in nature, the Minister is prohibited at that point from using its statutory compulsion powers to collect

information to further the criminal investigation. However, according to the *Jarvis* test, the Minister may continue to conduct a parallel and simultaneous criminal investigation in addition to its audit investigation,

> …[s]o long as the predominant purpose of the parallel investigation actually is the determination of tax liability, the auditors may continue to resort to ss. 231.1(1) and 231.2(1). …
>
> (*Jarvis*, at paragraph 97)

[19] Since the decision in *Jarvis*, the Federal Court of Appeal has adopted this approach based on the distinction between a civil audit inquiry and a criminal investigation of an offence pursuant to section 239. At paragraph 7 of *Romanuk v. The Queen*, 2013 FCA 133, Webb, J.A., citing *Jarvis*, made the following observation:

> [7] In paragraph 103 of Jarvis, the Supreme Court also confirmed that "…it is clear that, although an investigation has been commenced, the audit powers may continue to be used, though the results of the audit cannot be used in pursuance of the investigation or prosecution". Since the audit powers may continue to be used, even though the results cannot be used in relation to an investigation or prosecution, the results can be used in relation to an administrative matter, such as a reassessment.

[20] Even where the Minister may be contemplating a criminal investigation prior to issuing requirements for information in the course of its audit process, the Minister can still use that information obtained pursuant to the requirements to reassess a taxpayer (*Romanuk*, paragraph 10). Ultimately, if information and documentation is obtained and used in an investigation and prosecution under section 239 of the *Act*, then it is that particular criminal court, and not the Tax Court, which will be the proper forum for determining the predominant purpose of the exercise of the Minister's powers.

[21] In *Piersanti v. The Queen*, 2014 FCA 243, even where the requirements were issued by an investigator, not an auditor, as part of the criminal investigation, the Federal Court of Appeal concluded that the taxpayer's rights under the *Charter* had not been breached even where the Minister used information gathered in the course of a criminal investigation to reassess the tax liability. Even where information, obtained in the course of a criminal investigation, is used to reassess a taxpayer's tax liability, there is no violation of the rights of that taxpayer under sections 8 and 9 of the *Charter*. The question of whether the Minister could properly use information to prosecute the taxpayer for criminal offences will be

irrelevant to the civil audit process (*Piersanti*, paragraph 9). Where evidence obtained through the audit process is used in the prosecution of an offence under section 239 of the *Act*, then the particular court that is presiding over that offence will be tasked with determining the predominant purpose of the Minister's powers in gathering the information or documents (*Romanuk*, paragraph 8).

[22] In *Bauer v. The Queen*, 2018 FCA 62, at paragraph 13, the Federal Court of Appeal held that even though a criminal investigation had commenced that could lead to charges under section 239 of the *Act*, "…this did not preclude the CRA from using requirements to obtain information or documents that could be used only in relation to the reassessments". The Federal Court of Appeal went on, at paragraph 14, to state the following respecting the admissibility in this Court of evidence acquired pursuant to requirements:

> [14] While using requirements under section 231.2 of the ITA to obtain information or documents after an investigation has commenced may result in that information or those documents not being admissible in a proceeding related to the prosecution of offences under section 239 of the ITA, it does not preclude that information or documents from being admissible in a Tax Court of Canada proceeding where the issue is the validity of an assessment issued under the ITA. It is the use of the information or documents that is relevant, not who at CRA issued the requirement for information or documents.

[23] According to the reasons in *Bauer*, taxpayers, appealing an assessment that is based on documents received following the issuance of a requirement under section 231.2 of the *Act*, should be in no better position than other taxpayers simply because they were also under criminal investigation pursuant to section 239 of the *Act* (*Bauer*, paragraph 16).

[24] The fact scenarios in *Piersanti*, *Romanuk* and *Bauer* are almost identical to the facts presented in the Appellant's pleadings in the motion before me. Based on the conclusions in the decisions of *Piersanti*, *Romanuk* and *Bauer*, those paragraphs in the Appellant's pleadings that challenge the admissibility of evidence obtained during the audit process should be struck, as it is plain and obvious that the facts pleaded disclose no *Charter* violations under section 7 or 8 and, consequently, no remedy under section 24. The Appellant's pleadings place into issue the actions and conduct of CRA officials and the *Charter* challenges, respecting the information obtained during the course of an investigation and subsequently used to raise an assessment. There are no facts that would allow me to distinguish this case from those decisions in *Piersanti*, *Romanuk* and *Bauer*.

The Appellant's *Conway* Argument

[25] Appellant counsel submits that this Court, in *Bauer*, was presented with the same argument and submissions respecting the Supreme Court of Canada decision in *Conway* as in the present motion but that this Court did not address it. In my opinion, the *Conway* decision does not extend the jurisdiction of this Court in the manner suggested by the Appellant, nor does it change the existing jurisprudence of this Court or of the Federal Court of Appeal.

[26] Prior to 2010, several cases culminating in *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 SCR 5, concluded that specialized tribunals have the authority to decide *Charter* issues and award *Charter* remedies related to their statutory mandate. The Supreme Court of Canada, in *Conway*, was asked again in 2010 to consider the same issue of whether tribunals, in hearing allegations of *Charter* violations, can render *Charter* remedies. The Court consolidated its prior decisions and formulated a two-part test to determine if a tribunal has jurisdiction to decide questions of law and if the legislation intended to exclude the *Charter* from its jurisdiction. The Court merged the existing law and took a more expansive approach in concluding that administrative tribunals should hear and determine "stand alone" *Charter* issues, thereby avoiding bifurcated claims where *Charter* issues would have to be heard by a superior court rather than the tribunal. *Conway* now obligates tribunals to deal with *Charter* issues and by extension, this Court, as it is a specialized court.

[27] The Federal Court of Appeal in *Martin v. Canada (Attorney General)*, 2013 FCA 15, [2014] 3 FCR 117, at paragraphs 94 and 95, discussed the effect of the Supreme Court decision in *Conway* on the current state of the law:

> [94] In *Conway*, the Supreme Court merged the subsection 24(1) and the section 52 inquiries into a single line of inquiry that considers the same foundational concepts in a unified approach. Under the framework developed in *Conway*, the relevant question remains whether a tribunal has the statutory authority to consider questions of law.
>
> [95] As such, it does not serve as a true departure point from the earlier jurisprudence on questions of constitutional interpretation. It is more helpful in considering whether tribunals have authority to grant remedies under subsection 24(1). If anything, it seems to adopt reasoning very similar to that of *Martin*, thus collapsing any residual distinction in the different types of constitutional inquiry.

[28] It is my view that the Appellant's proposed interpretation of *Conway* and its applicability to this Court cannot be correct within the context of the relevant statutory provisions and existing jurisprudence. The jurisdiction of this Court is qualified by the powers set out in its overriding statutory legislation. It cannot deal, for example, with discretionary fairness relief or with provincial tax disputes. In addition, the legislative intent was also to withhold the power to grant to taxpayers relief such as damages. This Court's power is limited by statute to a determination of how much tax, if any, is payable. Both Appellant and Respondent counsel agreed that this Court is a court of competent jurisdiction with the power to decide questions of law relating to *Charter* issues, including whether a provision is valid or not. However, the available remedies to this Court are designated in subsection 171(1) of the *Act* and are specifically limited to those. Contrary to what the Appellant suggests, this Court's remedial powers are restricted by the legislation. This Court does have the authority to address *Charter* issues that are connected to issues that are properly before it. *Conway* focussed primarily on specialized tribunals but although its reasons can be logically extended to this Court, its applicability is limited by the statutory provisions that govern this Court. *Conway* cannot override that legislative intent.

[29] The Appellant cited the decision in *O'Neil Motors Ltd. v. The Queen*, 96 DTC 1486, as an example of this Court's jurisdiction under section 24 to grant *Charter* remedies. In that case, Bowman J. (as he was then) concluded that an exclusion of evidence alone would be insufficient and he went on to vacate the taxpayer's reassessment. The Federal Court of Appeal upheld this decision on the basis that this Court had jurisdiction to award the remedy it did in those particular circumstances (see [1998] 4 FC 180). However, *O'Neill* can be distinguished from the present motion in that the documents in *O'Neill* had been seized under an invalidly issued search warrant. Records were seized pursuant to a provision in the *Act* that was subsequently found to be unconstitutional. The facts before me are in line, not with *O'Neill*, but with the fact scenarios in *Piersanti*, *Romanuk* and *Bauer*. Consequently, even though this Court has the power to grant remedies under section 24 of the *Charter* in accordance with its governing statutory scheme, it is plain and obvious that I cannot grant a remedy in these circumstances because the Appellant's rights have not been violated under sections 7 and 8.

[30] To conclude, the Respondent's motion is granted in order to strike the following: paragraphs 5, 6, 7, 10, 12, 14 and 23; portions of paragraph 22 that specifically reference sections 7, 8 and 24 of the *Charter*; and subparagraphs 18(a), 18(b), 18(c), 18(d) and 18(f).

[31] The Respondent is directed to file and serve a Reply to the Appellant's pleadings that have not been struck within 60 days of the date of this Order.

[32] Costs in favour of the Respondent are fixed in the amount of $1,000, payable forthwith.

Signed at Ottawa, Canada, this 28th day of February 2019.

"Diane Campbell"

Campbell J.

CITATION:	2019 TCC 47
COURT FILE NO.:	2015-4697(IT)G
STYLE OF CAUSE:	DAVID BROOKS and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	November 19, 2018
REASONS FOR ORDER BY:	The Honourable Justice Diane Campbell
DATE OF ORDER:	February 28, 2019

APPEARANCES:

Counsel for the Appellant:	Craig C. Sturrock, Q.C.
Counsel for the Respondent:	Christa Akey

COUNSEL OF RECORD:

For the Appellant:

Name:	Craig C. Sturrock, Q.C.
Firm:	Thorsteinssons LLP Vancouver, British Columbia

For the Respondent: Nathalie G. Drouin
Deputy Attorney General of Canada
Ottawa, Canada