Docket: 2025-651(IT)G

BETWEEN:

ZELKOVA DESIGN LTD,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Motion heard on April 2, 2026 at Vancouver, British Columbia

Before: The Honourable Justice John A. Sorensen

Appearances:

Counsel for the Appellant:	Sam McDonald Josh Schmidt
Counsel for the Respondent:	Crystal Choi

JUDGMENT

The Appellant's motion to strike subparagraphs 9(i), (j) and (p) and 10(o) of the reply is granted pursuant to Rule 53(1)(a), without leave to amend. Costs will be in accordance with the Tariff.

Signed this 14th day of April, 2026.

"J.A. Sorensen"

Sorensen J.

Citation: 2026 TCC 66
Date: 20260414
Docket: 2025-651(IT)G

BETWEEN:

ZELKOVA DESIGN LTD,

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REASONS FOR JUDGMENT

Sorensen J.

I. Overview and Summary Conclusion

[1] The Appellant[1] moved to strike four subparagraphs of the reply on the bases that they may prejudice or delay the fair hearing of the appeal and/or are scandalous, frivolous, or vexatious. The impugned subparagraphs refer to previous tax audits, charges and a conviction, none of which directly relate to the Appellant or the years in dispute. They may prejudice the fair hearing of the appeal, pursuant to Rule 53(1)(a), and are struck without leave to amend. There was no need to consider Rule 53(1)(b).

II. Factual Background

[2] This appeal concerns reassessments of the Appellant's 2016, 2017, 2019, 2020 and 2021 taxation years. Deductions taken in the 2019 and 2020 taxation years were denied. Penalties were assessed. The 2019 taxation year was reassessed after the expiration of the normal reassessment period. The years other than 2019 and 2020 were reassessed for the resulting denial of loss carry-forwards and carry-backs.

[3] The Appellant's motion was supported by the affidavit of Christine Giroux, sworn December 4, 2025 ("**Giroux Affidavit**"). The Giroux Affidavit asserted that

[1] As is my usual practice, for ease of reference I describe the taxpayer as the Appellant and the Crown as the Respondent, rather than referring to the Appellant as a "moving party".

the Appellant and SGR Design Ltd. ("**SGR**") operate in the residential property development space. The Giroux Affidavit stated that during 2019 and 2020, Mrs. Giroux managed the Appellant, Sylvain Giroux was the sole director, and their son was the shareholder. Mr. Giroux was also the director of SGR.

[4] Numerous deductions were denied. The largest were in 2019, for management fees to SGR and a bad debt in connection with a related but defunct company (Lyons & Noble Developments Ltd. or "**Lyons**").[2]

[5] The Appellant described the following reply subparagraphs as the Impugned Assumptions, although subparagraph 10(o) is not an assumption, but an additional fact supporting a limitation period argument:

> 9(i) Christine and Sylvain were charged with tax evasion in 2014;
>
> 9(j) Christine pleaded guilty to two counts of tax evasion;
>
> …
>
> 9(p) Lyon had previously been audited twice to deny personal expenses and to assess shareholder benefits.
>
> …
>
> 10(o) as a result of one of the audits of Lyon, Christine was charged with tax evasion.

[6] According to the Giroux Affidavit, the above-noted impugned subparagraphs relate to a 2007 and 2008 audit of Lyons.

[7] Mrs. Giroux pled guilty to two counts of tax evasion, relating to unreported income for the 2006 through 2008 taxation years, and a small amount of unremitted GST/HST.[3] According to the Giroux Affidavit, the fees to defend the charges were more than double the tax in issue. They could not afford the ongoing cost, and it did not seem economically worthwhile to continue. She pled guilty to two charges. Six others were dropped and the charges against Mr. Giroux were stayed, all as part of the plea deal.

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[2] Mr. and Mrs. Giroux were both directors and equal shareholders of Lyons, and they both worked on its business. The timing of the loan(s) is not clear from the record.
[3] *R v Giroux*, 2014 BCPC 156.

III. Positions of the Parties

[8] The Appellant argued that the impugned subparagraphs colour the evidence and invite propensity reasoning, as though by association the Appellant is more likely to have improperly deducted expenses, although there seems to be no connection between the prior issues and the Appellant's dispute. According to the Appellant, the allegations give rise to both moral prejudice and reasoning prejudice, casting the Appellant in an unfavourable light and encouraging the trial judge to give disproportionate weight to prior issues in the course of resolving the appeal.

[9] The Respondent argued that the impugned subparagraphs were assumptions made in assessing the Appellant, and that they are material to the issues, including penalties. The Respondent further submitted that they had to be pled because of the Minister of National Revenue's (the "**Minister**") responsibility to fully disclose the facts relied on when assessing. According to the Respondent, the Appellant misunderstands the role of assumptions, and that any concerns should be dealt with at trial – since a trial judge may be better positioned to determine whether the assumptions are material and relevant.

IV. Analysis

1. General Principles

[10] Striking a portion of a pleading is a discretionary decision,[4] and the "plain and obvious" standard applies. A motion judge should avoid usurping the trial judge regarding determinations of fact and relevance.[5] However, pleading irrelevant facts may prejudice the fair hearing of an appeal. Irrelevance must be apparent at first glance,[6] and a motion judge should not reach a conclusion regarding relevance unless it is plain and obvious that a fact could never be relevant.[7] Information concerning years not under appeal may be irrelevant.[8] Irrelevant assertions that "unnecessarily colour the debate" and "prejudice or delay the fairness of the appeal" must be struck.[9]

[4] *Canada v Preston*, 2023 FCA 178, at paragraph 12.
[5] *Sentinel Hill Productions (1999) Corp. v R*, 2007 TCC 742, at paragraph 4.
[6] *Heron v R*, 2017 TCC 71 (**"*Heron*"**) (aff'd 2017 FCA 229), at paragraph 12.
[7] *Cote Estate v The King*, 2023 TCC 66 (**"*Cote Estate*"**), at paragraph 5.
[8] *Ibid*, at paragraph 41.
[9] *Basal v the King*, 2022 TCC 154, at paragraph 49. See also *Canadian Imperial Bank of Commerce v R*, 2013 FCA 122, at paragraph 103; and *Mudge v The Queen*, 2020 TCC 77, at paragraph 20.

[11] Apropos relevance, the Supreme Court of Canada stated as follows in *R v White*:[10]

> In order for evidence to satisfy the standard of relevance, it must have "some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would be in the absence of that evidence" [citations omitted].

[12] Regarding propensity reasoning, in *Handy*[11] the Supreme Court of Canada affirmed that the danger it poses is well known, and courts have consistently rejected it because, while past similar conduct can potentially be relevant, it also draws undue attention and may unfairly influence the trier of fact. In other words, the risk of harm tends to outweigh the probative value of similar fact evidence, so it should generally not form part of the case to be met.

[13] There is a narrow exception to the rule: similar fact evidence may be admissible if it is so compelling that its probative value outweighs the potential for prejudice. This exception requires that the similarity between the prior and current matters be marked, and it must be an affront to common sense to assume that the similarity occurred by chance. The evidence must be sufficiently strong as to overcome "reasoning prejudice" (the problem of giving it too much weight) and "moral prejudice" (the problem of judging the individual as a bad person). The policy basis for the exception is that sometimes historic evidence is both similar and specific to the current matter in a way that suggests that the similarity is not a coincidence, but a pattern. The more closely aligned the historic facts are with a current case, the stronger the inference becomes that there is a pattern rather than coincidence.[12]

[14] The Appellant relied on *Simard*,[13] a case in which Rip J stated as follows regarding mere allegations:

> In short, the persons referred to in paragraph 76 of the reply were charged with offences under the *Criminal Code* but not convicted of any charges. In the event the charges against the principals of XXX and ABC proceed to trial and the persons are found not guilty, the allegations in paragraph 76 would not be true. And the fact

[10] *R v White*, 2011 SCC 13, at paragraph 36.
[11] *R v Handy*, 2002 SCC 56, at paragraphs 35 to 37.
[12] *Ibid*, at paragraphs 41 to 48.
[13] *Simard v The Queen*, 2015 TCC 2 (*"**Simard**"*), at paragraph 5.

> the allegations were made, as far as I can determine, could only serve to colour or taint the evidence to the respondent's favour.
>
> [emphasis added]

[15] The Respondent disputed the relevance of *Simard*, insofar as that case concerned "additional facts" rather than assumptions, which must be pled to ensure full disclosure of the assessing bases.

[16] The Appellant also relied on *Harris* for the proposition that the Crown should not be permitted to rely on past criminal matters that were resolved with a plea bargain:

> At the commencement of the hearing, counsel for the Respondent submitted that Ms. Harris was estopped from pleading that she did not "knowingly fail" to report income of $85,029 in that she had pleaded guilty in earlier criminal proceedings to a charge of tax evasion in respect of that amount … The guilty plea was the result of a joint submission with the Crown proceeding on only one of the six counts in the information against Ms. Harris and Ms. Harris pleading guilty after her lawyer estimated that defending the charges against her would cost as much as the fine likely to be levied. ... In all of the circumstances and especially where the guilty plea was the result of a joint submission to the criminal Court (as opposed to a finding of guilt on the merits), the Crown ought not to be allowed to use to Ms. Harris' detriment in subsequent civil proceedings the fact of her having lived up to her part of their plea bargain.
>
> [emphasis added]

[17] The Respondent relied on *Heron*, describing it as a failed motion to strike similar assumptions. Those assumptions related to smuggling charges in an unreported income case including gross negligence penalties. The Respondent pointed out that the Court called the assumptions a complete and truthful disclosure of facts that the Minister relied on in assessing the taxpayer, and that they were relevant to the penalty assessment.

2. Applying the Principles to the Case at Bar

[18] Paragraph 9 of the reply set out the Minister's assumptions in assessing tax against the Appellant. Paragraph 10 incorporated the preceding assumptions together with additional information to support a misrepresentation argument for 2019. Paragraph 11 incorporated same, referring to penalties.

[19] Is the information in subparagraphs 9(i), (j) and (p) relevant to the assessment of tax against the Appellant in the 2016, 2017, 2019, 2020 and 2021 taxation years (defined in the reply as the Relevant Years)? Are those allegations together with subparagraph 10(o) relevant to a limitation period argument or to penalties? It is difficult to imagine how any of this could be the case, in the absence of any connection between the civil audit of Lyon, the stayed charges against Mr. Giroux, the plea bargain of Mrs. Giroux (all of which concern 2006 through 2008), and the determination of liability of the Appellant in later years. Further, even if there was some connectivity between the historic events and the Appellant, the significance that may be ascribed to those events is limited – charges not leading to a successful prosecution (Mr. Giroux), or a guilty plea under a negotiated resolution (Mrs. Giroux), are not facts entitled to significant weight as compared to a criminal matter determined on its merits.

[20] The Appellant's case is unlike *Heron*. In *Heron*, the taxpayer was a police officer living in the Niagara Region, and his unreported taxable income came from reselling food items (the "**products**") to restaurants in Southern Ontario. The products were smuggled into Canada. He was charged with smuggling, breach of trust, and four offenses under the *Customs Act*, all in connection with smuggling the products that gave rise to the unreported income. He was tried and convicted. It is unsurprising that assumptions concerning his misconduct were assumed and pled, since the criminal acts had a direct link to the tax non-compliance and penalty assessments. *Heron* is distinguishable from the Appellant's case.

[21] The facts articulated in the impugned subparagraphs in the Appellant's case do not make it any more likely that the disputed assessments are correct, and do not inform the case the Appellant has to meet. Thus, they are irrelevant to the assessment of tax. This conclusion is obvious at first glance without requiring any probing inquiry. I appreciated Crown counsel's candor on this point – that the Giroux's past issues and the Lyons audit are not actually facts that fulfill a tax determination purpose for the Appellant in the years under appeal. Appropriate concessions are a hallmark of competent advocacy and integrity.

[22] I would go further: each deduction denial was the subject of detailed Ministerial assumptions which, if not demolished, are sufficient to support the assessments, even if the impugned subparagraphs were struck. Similarly, the grounds for the limitation period argument and penalties as pled would, if proved, be sufficient support for the Minister's position, even if the impugned subparagraphs were struck.

[23] Turning to whether the impugned subparagraphs constitute similar fact evidence inviting propensity reasoning, in my view they do risk colouring the evidence in the case, as they suggest a tendency to mislead the revenue authorities and/or they intimate bad character. This risk is acute where the allegations are that the Appellant made a misrepresentation when it filed its T2, and that it was grossly negligent. Consequently, the usual analysis of whether the probative value outweighs the prejudicial effect is easy: the impugned subparagraphs risk significant prejudice without substantial probative value.

[24] The Respondent argued that the content of the penalty recommendation report included multiple references to the Giroux's past dealings with the Canada Revenue Agency, including audits, charges and convictions. This was said to be relevant to the Appellant's knowledge of its tax obligations. However, in its notice of appeal, the Appellant did not put in issue the fiscal astuteness of Mr. or Mrs. Giroux. If either of them appear as witnesses at the eventual trial and assert their lack of knowledge of tax or accounting, or that they blindly relied on advice, it may be open to the Respondent to cross-examine them on past non-compliance, subject to the supervision of the trial judge.

[25] Tying the discussion back to Rule 53, the impugned subparagraphs may prejudice the fair hearing of the appeal. It is unnecessary to consider whether the impugned subparagraphs are scandalous, frivolous or vexatious.

[26] Finally, concerning whether to allow the Respondent to amend the reply, I do not see any point. Variations on the same themes would not survive a future motion. Judicial economy and fairness to the Appellant dictate that the tussle over the impugned subparagraphs be disposed of with finality.

V. Conclusion

[27] The requested relief is granted, and the impugned subparagraphs are struck without leave to amend. Costs will be in accordance with the Tariff.

[28] I was grateful for the thoughtful advocacy of counsel for both parties.

Signed this 14th day of April 2026.

"J.A. Sorensen"

Sorensen J.

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COURT FILE NO.:	2025-651(IT)G
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APPEARANCES:

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