Federal Court of Appeal | Cour d'appel fédérale

Date: 20260507

Docket: A-140-22

Citation: 2026 FCA 88

CORAM: **STRATAS J.A.**
LASKIN J.A.
ROUSSEL J.A.

BETWEEN:

THOMAS HUNT

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Vancouver, British Columbia, on October 3, 2023.

Judgment delivered at Ottawa, Ontario, on May 7, 2026.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: LASKIN J.A.
ROUSSEL J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

A. Introduction

[1] Parliament has enacted a tax-free savings account regime. This regime encourages taxpayers to invest in a flexible, registered, general-purpose account that allows them to earn tax-free investment income. However, like many other such schemes in the *Income Tax Act*, R.S.C.

1985 (5th Supp.), c. 1, there is a potential for misuse: taxpayers may use the scheme in a manner not intended by Parliament.

[2] For this reason, Parliament enacted strict limits on the use of a tax-free savings account and has imposed a liability on those who abuse the regime.

[3] Specifically, Parliament chose to impose liability under section 207.05 on those who abuse the scheme by realizing an advantage. Under section 207.01, generally speaking, an advantage is a benefit obtained from a transaction that is intended to artificially shift income into a tax-free savings account and other registered plans in order to exploit tax-free attributes. The liability is 100% of the advantage: section 207.05. However, the Minister can waive or cancel all or part of the 100% liability when it is just and equitable to do so: section 207.06.

[4] In this case, the Minister assessed the appellant for an advantage tax for five taxation years. The Minister initially did not reduce any portion of the taxpayer's liability. The appellant disagreed with the Minister's decision and brought a judicial review of it. The Minister reacted by reconsidering the matter and issued an assessment that cancelled a portion of the appellant's liability in the five taxation years.

[5] This did not satisfy the appellant. The appellant appealed the Minister's assessment to the Tax Court. As part of the appeal, the appellant challenged the constitutionality of the liability imposed by section 207.05. Ultimately, the challenge found its way to this Court. This Court dismissed the challenge because not all of the sections bearing on the constitutional issue were

challenged: *Hunt v. Canada*, 2020 FCA 118. So the appellant recast and relaunched its challenge in the Tax Court by including sections 207.01, 207.05 and 207.06 in it.

[6] The Tax Court dismissed the challenge: 2022 TCC 67, *per* Bocock J. The appellant now appeals to this Court. For the following reasons, I would dismiss the appeal.

B. What is the challenge?

[7] First, the appellant says that, separately or in combination, sections 207.05 and 207.06 of the Act do not impose a tax. In substance they impose a penalty for which a defence of due diligence is available.

[8] Second, the appellant says that under this statutory scheme, the Minister—not Parliament—determines the rate of the tax, which, in the end, can be anything from 0% to 100%. But the Minister is part of the executive branch of government. The appellant says that, as a constitutional matter, only our elected representatives in the House of Commons, not the executive branch of government, may impose a tax and determine the rate. This smacks of the classic "no taxation without representation" principle. As we shall see, this principle is enshrined in section 53 of the *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.), as am. by *Canada Act 1982*, 1982, c. 11 (U.K.).

C. Do sections 207.05 and 207.06 of the Act impose a penalty?

[9] This question depends on what these sections mean. We discover that by interpreting the sections using accepted principles.

[10] What are those principles? For a long time it has been accepted that courts must look at text, context and purpose. Specifically, the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983) at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 26. However, the precise manner in which those three elements should be assessed and analyzed has varied somewhat, causing uncertainty—something especially bad in such a fundamental, frequently recurring and important area.

[11] Today, however, we have a great deal of stability. A recent series of consistent Supreme Court cases deserves the credit. In the process of analyzing text, context and purpose, the text is "the anchor of the interpretive exercise": *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43 at para. 24, citing M. Mancini, "The Purpose Error in the Modern Approach to Statutory Interpretation" (2022), 59 *Alta. L. Rev.* 919, at p. 927; see also the excellent analysis in M. Mancini, "'Text as Anchor' in Statutory Interpretation", to be published in the Canadian Bar Review (online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6300919). Many Supreme

Court cases just before and just after *CISSS A* have faithfully followed this methodology and are admirably consistent: see, *e.g.*, *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144; *R. v. Rafilovich*, 2019 SCC 51, [2019] 3 S.C.R. 838; *MediaQMI Inc. v. Kamel*, 2021 SCC 23, [2021] 1 S.C.R. 899; *Piekut v. Canada (National Revenue)*, 2025 SCC 13; *R. v. Carignan*, 2025 SCC 43; *Kosicki v. Toronto (City)*, 2025 SCC 28; and many others.

[12] The majority reasons in a recent Supreme Court case, *R. v. Wilson*, 2025 SCC 32, seem at odds with this line of cases. The majority did not refer to the principle that the text is the anchor, seemed to de-emphasize the role of the text in the interpretation exercise, arguably found unexpressed legislative intention under the guise of purpose interpretation, and did not attempt to reconcile its reasoning with the earlier cases. This is regrettable: *R. v. Sullivan*, 2022 SCC 19, [2022] 1 S.C.R. 460 (horizontal *stare decisis*); *Canada v. Boloh 1(A)*, 2023 FCA 120, [2023] 2 F.C.R. 915 at para. 24 (the need for doctrinal stability, especially on fundamental points of law like this). *Wilson* must be taken as an outlier and, thus, cannot be taken to have modified or repealed the long string of recent legislative interpretation cases that came just before it, cited above: and, on this, see also M. Mancini, *Sunday Evening Administrative Review*, Issue No. 198 (November 2025) (online: https://sear.substack.com/p/issue-198-november-2025) and M. Mancini, *Sunday Evening Administrative Review*, "Administrative Law Wrapped, 2025" (December 14, 2025) (online: https://sear.substack.com/p/administrative-law-wrapped-2025). Perhaps confirming that the long string of case law on this point continues is *Carignan*, a case postdating *Wilson*.

[13] While the text is the anchor of the exercise, the context of the words in the legislation can shed light on the meaning of the text and sometimes can resolve ambiguities in the text. And the same is true for the legislative purpose. A court must consider the context and purpose of the provision "no matter how plain the disposition may seem upon initial reading": *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at para. 47; *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 48; *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252, [2018] 4 F.C.R. 174 at para. 43. But where the language is clear and unambiguous and unaffected by considerations of context and purpose, it must be given its effect and the element of purpose "cannot be used to create an unexpressed exception to clear language" which was arguably the case in *Wilson*: see, e.g., *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715 at para. 23. And policy considerations "cannot be permitted to distort the actual words of the statute, read harmoniously with the scheme of the statute, its object, and the intention of the legislature, so as to make the provision say something it does not": *TELUS Communications*, above at para. 79.

[14] Courts must also consider both official language versions of legislation: *Piekut*, above; *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269. In this case, there is no substantive difference between the English and French versions of sections 207.01, 207.05 and 207.06 of the Act.

[15] The Tax Court followed this methodology and found that sections 207.05 and 207.06 of the Act do not impose a penalty (at paras. 30-65). The Tax Court was correct.

[16] The provisions state clearly and unambiguously that they impose or are dealing with a "tax". The words used in subsection 207.05(1) are "a tax is payable" / "un impôt est à payer". See also subsection 207.05(2) ("amount of tax payable" / "l'impôt à payer") both in the text and the margin note, subsections 207.06(1)-207.06(2) ("liable to pay a tax" / "l'impôt dont un particulier serait redevable" in the text and "tax payable" / "l'impôt à payer" in the margin notes).

[17] The word "penalty" is not present. When a penalty is intended, the Act consistently uses the expression "is liable to a penalty" / "est passible d'une pénalité" or "penalty is paid" / "la pénalté…est payée".

[18] As for context, the words "a tax is payable", "liable to pay a tax" and other similar variants using the word "tax" are used consistently in the Act whenever a tax liability, as opposed to a penalty, is being imposed. And the use of a 100% tax is not unique to section 207.05. The Act uses a 100% rate where the Act provides special tax treatment or there is concern with avoidance and abuse.

[19] One indication that section 207.05 imposes a tax is seen by the fact that paragraph 207.06(2)(b) permits the Minister to waive or cancel all or part of the liability for tax imposed under section 207.05 in the event of double taxation. If section 207.05 levied a penalty, there would be no concern with relieving against double taxation, as penalties generally apply in addition to tax otherwise imposed.

[20] Section 207.05 is not unlike other provisions that are aimed at anti-avoidance and, thus, does not smack of a penalty: see subsection 56(2) which provides for an income inclusion of amounts diverted to a third party; see also section 103 which provides for an inclusion of partnership income allocated to a different partner. These provisions are not aimed at punishing fault but rather are aimed at preventing abuse.

[21] The charge in section 207.05 also meets the definition of a tax: *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357 at 363. It is enforceable by law, imposed under the authority of Parliament, levied by a public body and intended for a public purpose.

[22] As mentioned above, if these provisions are characterized as imposing a penalty, the taxpayer will be able to raise a due diligence defence. But when Parliament intends a due diligence defence under the Act it says so: subsection 227.1(3) of the Act (director's liability). It has not said so here.

[23] And on purpose, there is nothing in these sections that suggests a liability is being imposed in order to redress some sort of moral opprobrium normally associated with a penalty. Rather, in these sections, Parliament aims to take away the advantage gained through misuse of the tax-free savings account regime. It does not aim to do more, such as levying an amount over and above the advantage gained in order to create the sort of deterrence normally associated with penalties. Here, Parliament is not levying a disproportionate liability upon the taxpayer to punish socially unacceptable conduct.

[24] Parliament has enacted very strict requirements and limits concerning tax-free savings accounts and has needed to protect the integrity of the regime. It has done so by enacting a highly intricate and detailed scheme. Re-characterizing the regime as imposing a penalty would bring into operation a defence of due diligence that would undermine that intricate and detailed scheme.

[25] The Tax Court correctly characterized this regime as follows (at para. 59):

> The [tax-free savings account] regime is a benefit-conferring structure introduced to encourage personal savings by taxpayers by exempting tax from the income otherwise earned on savings. As such, there is a risk of taxpayers abusing the regime to avoid taxes on investments outside the [tax-free savings account] rules set by Parliament. The [tax-free savings account] Charge addresses those abuses. It taxes benefits from transactions that artificially shift taxable income from other unqualified transactions into the [tax-free savings account] regime.

The Tax Court also correctly noted that the 100% tax rate is proportional to the generous treatment offered under the tax-free savings account regime and, for that reason, cannot be characterized as a penalty.

[26] Rather than interpreting the relevant provisions in accordance with their text, context and purpose, the appellant urged upon us a “pith and substance” or “dominant characteristic” approach. This may well be part of the proper approach for determining the constitutional validity of statutory provisions in some contexts, but it is not the proper approach for determining the meaning of a legislative provision.

[27] In this regard, the appellant's reliance on *620 Connaught Ltd. v. Canada (Attorney General),* 2008 SCC 7, [2008] 1 S.C.R. 131, is misplaced. That case used the language of "dominant characteristics" because it dealt with the constitutional division of powers between Parliament and the executive, not because the dominant characteristic approach applies to determine whether a charge is a tax or a penalty.

[28] The appellant also submits that the relevant provisions are aimed at deterring certain conduct and further larger public purposes and thus, smack of a penalty. However, it has been well-established for decades that taxation provisions can go beyond the purpose of raising public revenue and can extend to further economic and social policies or protect the integrity of a taxing regime: *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536 at pages 573-575. I agree with the Tax Court's finding (at para. 58) that "[a] charge labelled as a tax may have characteristics so clearly coercive and disproportionate that one concludes it is a penalty; however, this case does not meet that standard".

[29] The appellant also cites foreign law in support of his position. The foreign law is not relevant in this case. The statutory context and the interpretative principles in other jurisdictions often are different. Foreign law might assist only when the laws are the same or very similar, a point usually proven by expert evidence, something we do not have here. The Tax Court was correct (at paras. 47-48) in rejecting foreign law.

[30] Therefore, sections 207.05 and 207.06 of the Act do not impose a penalty, either separately or in combination.

D. Do the provisions violate section 53 of the *Constitution Act, 1867*?

[31] In many law schools these days, the Charter of Rights is the focus of instruction, almost as if the rest of the Constitution is silent on the subject of fundamental rights, freedoms and democratic protection. Of course, this is not true.

[32] Section 53 of the *Constitution Act, 1867* enshrines one of the most fundamental democratic principles in our Constitution, a bulwark against tyranny and oppression: no taxation without representation. See *Re Eurig Estate*, [1998] 2 S.C.R. 565 at para. 30; *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134 at para. 19; *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 S.C.R. 470 at paras. 70-71. To put it another way, the obligation to pay taxes, ultimately punishable in some cases through the criminal law, can only be imposed by those we elect or, as we shall see, through their delegates who are adequately constrained by laws passed by those we elect.

[33] Section 53 provides that any bill "appropriating…[r]evenue" or "imposing any [t]ax or [i]mpost" must originate in the House of Commons, the body of those we elect. While section 53 expressly applies to the federal House of Commons, it also applies to provincial Legislatures under section 90 of the *Constitution Act, 1867*.

[34] Section 53 did not spring out of the blue in 1867. Rather, section 53 reflects many experiences over many centuries, such as Runnymede (1215), Ghent (1539), Boston (1773) and Shanghai (1853). In each, the populace reacted against unelected authorities trying to impose

taxes upon the citizenry. In our democracy, the obligation to pay taxes to government—if not fulfilled, one subject to charge, conviction and incarceration—can only be imposed by those we elect.

[35] E. A. Driedger, in "Money Bills and the Senate" (1968), 3 Ottawa L. Rev. 25 once put it this way (at p. 41):

> Through the centuries, the principle was maintained that taxation required representation and consent. The only body in Canada that meets this test is the Commons. The elected representatives of the people sit in the Commons, and not in the Senate, and, consistently with history and tradition, they may well insist that they alone have the right to decide to the last cent what money is to be granted and what taxes are to be imposed.

[36] In these more complex times, our elected representatives have found it necessary to delegate some aspects of taxation to subordinate officials. For example, in this case, it is the Minister who determines under section 207.06 whether the 100% tax should be waived all or in part.

[37] As explained in *Ontario English Catholic Teachers' Assn.* at para. 74, such a delegation can comply with section 53:

> [I]f the legislature expressly and clearly authorizes the imposition of a tax by a delegated body or individual, then the requirements of the principle of "no taxation without representation" will be met. In such a situation, the delegated authority is not being used to impose a completely new tax, but only to impose a tax that has been approved by the legislature. The democratic principle is thereby preserved in two ways. First, the legislation expressly delegating the imposition of a tax must be approved by the legislature. Second, the government enacting the delegating legislation remains ultimately accountable to the electorate at the next general election.

[38] As well, the delegated power must be limited to setting the "details and mechanism" of the tax: *Confédération des syndicats nationaux v. Canada (Attorney General)*, 2008 SCC 68, [2008] 3 S.C.R. 511 at para. 92.

[39] The appellant says that section 207.05 establishes a tax base equal to the tax-free savings account advantage received (see section 207.01) while section 207.06 delegates the authority to set the tax rate to the Minister. The appellant says that this is a delegation of rate-setting to the Minister, and in effect makes the Minister, and not Parliament, the practical architect of the tax including its rate and, thus, is contrary to section 53 of the *Constitution Act, 1867*.

[40] The respondent says that the tax-free savings account charge under section 207.05 establishes all the necessary features of a tax—a charging provision in subsection 207.05(1) and the rate payable in subsection 207.05(2). When section 207.05 is read with the definition of "advantage" in subsection 207.01(1), the rate of tax is 100% of the fair market value of the advantage. So, the respondent says, Parliament has set the tax, its rate and on whom it can be levied. All that section 207.06 does is provide the Minister with the power to grant relief where (under subsection 207.06(2)) it is "just and equitable" having regard to all the circumstances. The tax is set by Parliament in section 207.05 and all that section 207.06 does is relieve against the tax or waive the tax in certain circumstances, similar to other taxpayer fairness provisions, like section 220(3.1) of the Act, which permits the Minister to waive or cancel interest or penalties.

[41] In examining this problem in *Hunt v. Canada*, 2020 FCA 118, this Court held that a key question is whether the Minister's discretion "is so undefined…that the Minister…is really

setting the tax rate or imposing the tax": at para. 10. This Court put the question another way in *Hunt* (at paras. 10 and 15): is the Minister's discretion "effectively a standardless sweep"? If so, "any measures adopted by the Canada Revenue Agency to guide the improperly wide discretion Parliament has given the Minister, such as policies, practices or interpretation bulletins, would be irrelevant".

[42] The respondent's view is correct. Properly construed, section 207.06 does not give the Minister a discretion so untrammelled that it can be considered a "standardless sweep". It would be strange to construe the section as doing that; the Court must strive to avoid that sort of interpretation of section 207.06. After all,

> ...there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute.

(*Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 140.)

[43] In fact, properly interpreted, sections 207.01, 207.05 and 207.06 are nothing close to a standardless sweep, nor do they bestow an unguided discretion to set a tax rate or impose a tax. The text, context and purpose of subsection 207.06(2) shows that the grant of a waiver under that section is not up to the whim or idle say-so of the Minister.

[44] First, the criterion of "just and equitable" in section 207.06 must be interpreted in light of the purposes of the tax-free savings account regime and its aim to prevent misuse and abuse of

the regime. It is best characterized not as a tax-imposition provision but rather as an anti-abuse provision, similar to so many under the Act.

[45] As well, subsection 207.06(2) sets out three circumstances for the Minister to consider while assessing whether relief is "just and equitable" in the circumstances:

- whether the tax arose as a consequence of reasonable error;
- the extent to which the transaction or series of transactions also gave rise to another tax; and
- the extent to which payments have been made from the person's registered plan.

[46] The broad phrase, "just and equitable", takes its colour from these three circumstances, guided by the need to curb abuse of the tax-free savings account regime bearing in mind the purposes of that regime.

[47] Finally, it must be recalled that the Minister's decision is subject to judicial review and an assessment of its substantive reasonableness, procedural fairness, and adequacy of reasons. It is not the sort of wide-open policy decision of the sort unamenable to review: see, e.g., *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643. It is a reviewable decision subject to legal constraints set by Parliament in section 207.06, not a purely policy-based guess by the Minister

about what a number should be: *Alexion Pharmaceuticals Inc. v. Canada (A.G.)*, 2021 FCA 157, [2022] 1 F.C.R. 153 at paras. 26 and 40.

[48] Parliament could have drafted subsection 207.06(2) in a different way. Rather than using "just and equitable" and three illustrations of it, it could have tried to implement complex, tangible and unwieldy rules and exceptions to try to prohibit transactions that frustrate the purposes of the tax-free savings account regime.

[49] But that way is fraught with peril. Skilled and tricky tax planners—through cunningly drafted documents and truly ingenious structures—can navigate around those shoals. Then Parliament must amend the legislation to block that navigation and preserve the integrity of the regime, which leads to further navigation around the shoals, which leads to more amendments and more navigating, and perhaps still more after that. Along the way, unless Parliament uses the heavy hand of retrospective or retroactive legislation, some get benefits inconsistent with the intended purposes of the tax-free savings account regime.

[50] Parliament chose not to get into that game. Instead, it went a different, more practical way. It granted the Minister discretion to provide relief on a case-by-case basis, considering the specific circumstances of the individual, the particular transactions and circumstances, and the purposes of the tax-free savings account regime.

[51] That is not a standardless sweep for the Minister. The Minister does not have *carte blanche* to decide how much tax should be paid. Instead, it is a legitimate exercise in prudent

law-making by Parliament to keep the integrity of an important regime established for important public purposes.

E. Disposition

[52] For the foregoing reasons, I would dismiss the appeal with costs.

"David Stratas"
J.A.

"I agree.
J.B. Laskin J.A."

"I agree.
Sylvie E. Roussel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

STYLE OF CAUSE:	THOMAS HUNT v. HIS MAJESTY THE KING
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	OCTOBER 3, 2023
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	LASKIN J.A. ROUSSEL J.A.
DATED:	MAY 7, 2026

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