

# Taxpayer Reliance on Wording of Waiver

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[Gramiak v Canada, 2015 FCA 40](#)

**[For a paper discussing judicial approaches to interpreting waivers of limitations periods see [HERE](#)]**

This was an appeal from the TCC dismissing the Appellant's motion to strike portions of the Crown's Reply to the Notice of Appeal and granting the Respondent's leave to amend the reply.

A number of factual and legal issues were raised. Among them, the Appellant argued that language of the waiver is air-tight such that no transaction other than the one specifically mentioned and no provisions other than those specifically referred to can be part of the Crown's reply. The Appellant also argued that subsection 152(9) cannot be relied on as the legal and factual basis of the alternate argument are different from that which underlies the reassessment.

The FCA held that the taxpayer cannot, on a motion to strike, rely on limitations introduced in the waiver based on asserted facts which the taxpayer now denies or claims to be otherwise. The matter is best left for trial.

### ANALYSIS

Subsection 152(9) permits the Minister to support an assessment using an alternative argument in circumstances where the taxpayer is not prejudiced by a late argument from an evidentiary perspective, and where the alternative argument would result in a reassessment being made outside the normal reassessment period: *Walsh v. Canada*, [2007 FCA 222](#). Where the alternative argument by the Minister rests on a legal and factual basis that is different than underlying the original reassessment, outside of the normal reassessment period, the effect would be to do away with the limitation period.

The FCA accepted that a broad view of the factual basis is appropriate where supported by language in communications between the auditor and taxpayer (or taxpayer's representative) (para 38). However, the FCA also states that the "determination of the factual basis for the reassessment is best left to be determined at trial based on the fullness of the evidence" (para 39).

The FCA noted that the TCC relied on a non-textual objective interpretation of the waiver to allow for a broader application. The FCA agreed that "allowing the appellant to escape taxation on the basis of a waiver, crafted so as to include the transaction which he maintained had taken place but exclude the transaction which he later revealed after the limitation period had expired, would give rise to an absurd result" (para 41).

In this case, the CRA was induced to maintain its initial assessment position at a time where the normal reassessment period had not yet expired due to factual assertions made by the appellant's authorized representative as well as those contained in the Notices of Objection (in which all relevant facts must be set out - subsection 165(1)). The appellant sought to modify the wording of the waiver to limit its application, such that the court ought to be hesitant to allow a motion to strike allowing the taxpayer to benefit from facts that are different than that originally asserted. The FCA stated:

[47] To the extent that the appellant actively induced the Minister to remain on the wrong path and waited until the reassessment period had passed to reveal the true transaction after having ensured that the waiver had been made air-tight, he may well be precluded from resiling from his initial position and/or relying on the waiver. In this respect, the appellant's state of mind when these representations were made is obviously crucial. Yet, the extensive affidavits sworn by the appellant and his authorized representative in support of the Motion to Strike are both silent as to when they became aware that the debentures were not acquired (Appeal Book, Vol. 1 at pp. 74 to 77 and 113 to 118). In my view, only the trial judge after having considered the evidence on point will be in position to pronounce on the behaviour of the appellant and its impact on the position which he takes on appeal.

- **Sas Ansari, JD LL M PhD (exp)**

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