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2028604 Ontario Ltd. v. The King, 2026 TCC 187

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Docket: 2016-1496(GST)G

BETWEEN:

2028604 ONTARIO LTD.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Motion of the appellant, in writing, filed on September 18, 2026, and motion of the Crown, in writing, filed on October 8, 2026, at Ottawa, Ontario

Before: The Honourable Justice Perry Derksen

Participants:

For the Appellant:	Nicholas Cutaia
Counsel for the Respondent:	Stan W. McDonald

ORDER

In accordance with the attached Reasons for Order:

1. The appellant's motion is dismissed, with costs in the cause;

2. On or before November 6, 2026, the appellant shall file and serve, with proof of service, a notice signed by counsel giving the name, address for service and telephone number of its counsel;

3. If Mr. Cutaia continues to act as the appellant's counsel, he shall sign the above notice in his capacity as counsel and provide an effective address for service; and

4. The Crown's notice of motion is dismissed, without costs.

Signed this 28th day of October 2026.

"Perry Derksen"

Derksen J.

Citation: 2026 TCC 187
Date: 20261028
Docket: 2016-1496(GST)G

BETWEEN:

2028604 ONTARIO LTD.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR ORDER

Derksen J.

I. Introduction

[1] In 2016, the appellant appealed an assessment made under the *Excise Tax Act*, R.S.C., 1985 c. E-15 (ETA). The appeal has been plagued by delays. These reasons concern, in part, a motion by the appellant for leave to be represented by Mr. Cutaia in his capacity as an officer of the appellant.

[2] Mr. Cutaia is the appellant's shareholder and principal officer. He is also a lawyer licenced to practice law in Ontario.

[3] Mr. Cutaia has relied on his status as a lawyer to comply with s. 17.1 of the *Tax Court of Canada Act*, R.S.C., 1985 c. T-2 (TCC Act), which requires a corporation to be represented by a lawyer. In 2024, Parliament amended the TCC Act to add s. 17.1(1.1), which maintained the longstanding requirement that a

corporation in an appeal under the Court's general procedure be represented by a lawyer, but also provided the Court with the statutory authority to grant leave to a corporation, under special circumstances, to be represented by a director, officer, or employee (see S.C., 2024 c. 17, s. 321; and see rule 30 of the *Tax Court of Canada Rules (General Procedure)*).

[4] In response to the appellant's motion, the Crown filed a motion in writing seeking an order dismissing the appellant's motion, together with a supporting affidavit and written representations. But the Crown only needed to file written representations in opposition to the appellant's motion, together with any supporting affidavit. Accordingly, I issued a direction that the Crown's written representations and affidavit would be treated as such. And the Crown's motion will be dismissed on the basis that it was unnecessary.

[5] Turning to the appellant's motion, I have concluded that it must be dismissed for the reasons discussed below. These reasons end with some cautionary comments about the use of generative artificial intelligence for court filings.

II. Background

[6] Some additional context is needed.

[7] The hearing of the appeal was scheduled to commence on April 28, 2025. But on the eve of trial, the appellant filed a motion seeking an adjournment. Chief Justice St-Hilaire granted the request but ordered the appellant to pay costs of $2,000 (because the appellant had delayed the prompt resolution of the appeal and wasted the Court's resources) and set a deadline for payment, failing which the appeal would be dismissed (see orders dated May 7, 2025, and July 4, 2025).

[8] On August 8, 2025, the appellant filed a notice of appointment of counsel; going forward, the appellant would be represented by Mr. Cutaia plus Taxpayer Law Professional Corporation, and in particular by Igor Kastelyanets and Benjamin Isaak. Plus, a new joint application for hearing was filed on September 16, 2025. And so, the appeal seemed to be back on track, but this was short-lived.

[9] On November 28, 2025, the appellant filed a notice of change of counsel, electing to be solely represented by Mr. Cutaia and an address for service was provided for an address on Finch Avenue West, in North York. This prompted counsel for the Crown to inquire about whether Mr. Cutaia would be available on the dates proposed in the joint application and so the Crown requested a case management conference.

[10] The Registry made inquiries of Mr. Cutaia, who told a Registry Officer that the notice of change of counsel was filed in error. But no further steps were taken by the appellant. Eventually, the Court scheduled a status hearing to be held in person. The notice of status hearing was sent to the Finch Avenue address for service.

[11] I held the status hearing on May 12, 2026, but no one appeared for the appellant. (Mr. Cutaia had by then a history of sending correspondence to the Court without including an address for service, and no updated address of service was filed.) In the circumstances, I ordered the appellant to pay costs of $1,000 on or before June 12, 2026, failing which the appeal would be dismissed (see order dated May 12, 2026). My order also directed Mr. Cutaia to file and serve a notice confirming his current address.

[12] On July 2, 2026, I issued a further order requiring the appellant to file and serve a notice confirming the name and current address for service of its counsel of record and proof a payment of the costs. My order also set the appeal down for hearing commencing on March 9, 2027, provided the appellant complied with the other terms. In the background, I was appointed as the case management Judge.

[13] On July 3, 2026, Mr. Cutaia filed a notice confirming the address for the appellant was at a suite located at 10 Four Seasons Place, Etobicoke, Ontario. That address was ineffective. Mr. Cutaia later confirmed the address was for an accountant that he was consulting. Mr. Cutaia provided that address because he considered this matter to be unrelated to his law practice and, as such, he did not wish to use his business address. This created new problems: the Court's orders and the Registry's communications, generally sent by registered mail, were consistently returned as undelivered.

[14] On September 11, 2026, I held a case management conference. During the teleconference, I asked Mr. Cutaia whether he intended to be a witness at the hearing of the appeal. Mr. Cutaia confirmed that he would testify. And so, I next asked

counsel whether they had considered the principle that a lawyer cannot appear as both an advocate and a witness.

[15] Since neither Mr. Cutaia nor Mr. McDonald had considered that matter, I issued an order dated September 11, 2026, requiring the appellant to file a notice on or before September 18, 2026, confirming the name and address for service of its counsel of record. The order also gave the appellant until September 18, 2026, to file a motion for leave to be represented by a director, officer, or employee. As well, if Mr. Cutaia intended to continue to act as counsel, I set a deadline for the Crown to provide a position on whether Mr. Cutaia cannot act as counsel for the appellant considering that he intends to testify at the hearing of the appeal. I also set a further deadline for the appellant to provide responding submissions.

[16] On September 17, 2026, Mr. Cutaia filed a document indicating that the appellant's address is located at a PO Box in Waterdown. The document was unsigned, and Mr. Cutaia made no reference to being counsel for the appellant. So, it is now self-evident that Mr. Cutaia does not want this appeal to be associated with his law practice.

[17] On September 18, 2026, the appellant filed this motion under s. 17.1(1.1) of the TCC Act for leave to be represented by Mr. Cutaia in his capacity as an officer of the corporation. The appellant's notice of motion—although unsigned— seems to be made by Mr. Cutaia in his capacity as president of the appellant. The appellant also requested that the motion be disposed of upon consideration of written representations.

III. **Section 17.1 of the TCC Act**

[18] As mentioned, in an appeal under the Court's general procedure, a corporation must be represented by a lawyer unless the Court, under special circumstances, grants leave to the party to be represented by a director, officer or employee: see ss. 17.1(1.1) and (2) of the TCC Act.

[19] A corporation must be represented by counsel because a corporation cannot appear in person; it can only appear through an agent: *Canada v. BCS Group Business Services Inc.*, 2020 FCA 205 at para. 13. Moreover, a corporate director or sole shareholder is legally distinct from the corporation and is, therefore, a third party to it: *BCS Group* at para. 14.

[20] In *Stinson School Inc. v. The King*, 2026 TCC 128, Sorensen J. explained that while a corporation is a legal person, its legal personality is separate from its shareholders:

> [14] A corporation is a legal fiction, summoned into existence to encourage the carrying on of business that might not otherwise be carried on if owners were exposed to personal liability. While a corporation is a legal person, its legal personality is separate from its shareholders. Corporate legal personhood neither merges with shareholders nor, for that matter, officers, directors, managers or employees. A corporation cannot appear in court "in person" on its own behalf and must be represented. Statutory authority is required to allow a non-lawyer to represent an appellant that is not an individual in this Court. [Footnotes omitted]

[21] The factors to consider when evaluating whether special circumstances exist that warrant granting leave under s. 17.1(1.1) include whether:

a. there is a financial impediment to retaining counsel;

b. the proposed representative is reasonably capable of acting *qua* representative; and

c. the proposed representative is capable of preparing the appellant for trial (see *684761 BC Ltd. v. The King*, 2025 TCC 45 at para. 13; and *Stinson* at para. 16).

[22] In *White Star Copper Mines Limited v. The Queen*, 2007 TCC 669, the Court identified a similar four-part test, and in particular whether:

a. the corporation can pay for a lawyer;

b. the proposed representative will be required to appear as an advocate and as a witness;

c. the complexity of the legal issues to be determined (and therefore whether it appears that the representative will be able to handle the legal issues); and

d. the action can proceed in an expeditious manner.

[23] The onus is on the appellant as the moving party to establish how each of the criteria have been met: *Stinson* at para. 19.

IV. **Analysis & Findings**

A. **Financial Constraint**

[24] Evidence of financial constraint is required and bald assertions are insufficient: *Stinson* at para. 20; and see *White Star Copper Mines* at para. 10. Establishing that a corporation cannot afford counsel should be demonstrated by submitting complete and clear financial information, including financial statements if available (see generally *El Mocambo Rocks Inc. v. Society of Composers, Authors and Music Publishers of Canada (SOCAN)*, 2012 FCA 98 at para. 4).

[25] Mr. Cutaia provided an affidavit in support of the motion, but it says nothing about the appellant's financial capacity. Instead, the appellant argues that the cost of retaining legal counsel would be disproportionate to the amount at issue. That might be so, but no evidence was provided respecting the cost of a two-day trial.

[26] In the end, I am not satisfied based on Mr. Cutaia's affidavit that the appellant is unable to afford separate counsel so that Mr. Cutaia can freely testify at the hearing of this appeal. On this basis alone, I would dismiss the appellant's motion.

[27] Although it is not necessary to consider the other factors (see generally *Wang v. Louis Vuitton Malletier S.A.*, 2019 FCA 199 at para. 6), I have other concerns, which I turn to next.

B. **Other Concerns**

[28] The appellant emphasizes that Mr. Cutaia's actions and decisions are at the heart of the dispute. But nowhere does the appellant grapple with the difficulty that Mr. Cutaia has advised that he intends to appear as both an advocate and a witness.

[29] In *Pluri Vox Media Corp. v. Canada*, 2012 FCA 18, Stratas J.A. considered rule 82 of the *Federal Courts Rules*, which is intended to prevent, as much as reasonably and practically possible, the invidious circumstances that can arise when lawyers act as both witnesses and advocates in the same matter (at para. 3). In that

context, Stratas J.A. referred to the Law Society of Upper Canada's Rules of Professional Conduct (*Pluri Vox Media Corp.* at para. 5).

[30] The relevant rule is now in s. 5.2-1 of the *Rules of Professional Conduct* of the Law Society of Ontario, which reads as follows:

> 5.2-1 A lawyer who appears as advocate shall not testify or submit their own affidavit evidence before the tribunal unless
>
> (a) permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal, or
>
> (b) the matter is purely formal or uncontroverted.
>
> Commentary
>
> [1] A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination, or challenge. The lawyer should not in effect appear as an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect to receive special treatment because of professional status.

[31] As Stratas J.A. noted in *Pluri Vox Media Corp.*, an unacceptable conflict can ensue when a lawyer enters the fray by testifying on factual matters since the lawyer runs the risk of his or her testimony being disbelieved, with the effect of undercutting the lawyer's believability and trustworthiness as an advocate for the client's cause. The lawyer also seems less of an officer of the court and more as a partisan with a stake in the outcome: *Pluri Vox Media Corp.* at para. 7.

[32] It is far from clear to me that Mr. Cutaia—as a lawyer licenced to practice law in Ontario—can shed his status as a barrister and solicitor, and importantly his status as an officer of the Court under s. 17.1(2) of the TCC Act, if he were granted leave to represent the appellant under s. 17.1(1.1). In light of my earlier finding, it is unnecessary for me to resolve the question. Such a situation seems fraught with problems here. I acknowledge that the situation is entirely different than one where a self-represented appellant is an individual who also happens to be a lawyer.

[33] If Mr. Cutaia seeks to continue to act as counsel for the appellant on the basis that he is a lawyer, and if he were to seek to give evidence at the hearing of the appeal, presently scheduled to commence on March 9, 2027, he should not be surprised if counsel for the Crown or the trial judge refers to the *Rules of Professional Conduct* and the principle that a member of the bar ought not appear as a witness and as counsel in the same proceeding (see also *Sherman v. The Queen*, [2000] 2 CTC 2670 at para. 6). The implications, however, are best left to the trial judge.

C. **Another Concern — generative AI**

[34] When I read the appellant's written representations, I was concerned about how they were prepared.

[35] The appellant cited *Masa Sushi Japanese Restaurant v. The Queen*, 2017 TCC 234 (Graham J.) as the leading authority under s. 17.1(1.1) of the TCC Act. More specifically, the appellant cited *Masa Sushi* at paragraphs 14, 16, and 18. But the reasons of Graham J. at paragraphs 14, 16, and 18 do not support the propositions that were asserted by the appellant. Moreover, the decision predated the amendment adding s. 17.1(1.1) to the TCC Act. Graham J. held that under s. 17.1 of the TCC Act, as it then read, the only option available to a corporation in an appeal under the Court's general procedure was to be represented by counsel; it was a precursor to the Federal Court of Appeal's decision in *BCS Group*.

[36] In a subsequent decision, reported as *Masa Sushi Japanese Restaurant Inc. v. The Queen*, 2018 TCC 98, Boyle J. considered, in the alternative, the factors for granting leave to be represented by non-counsel. Boyle J.'s decision at 2018 TCC 98 contains just seven paragraphs, numbered 1 to 7. And so, the appellant could not have mistakenly referred to the wrong reported decision in citing paragraphs 14, 16, and 18 of *Masa Sushi*.

[37] The appellant also cited "Robson Enterprises" but included no citation information.

[38] In the circumstances, I wondered whether the appellant's written representations may have been prepared using generative artificial intelligence (AI). With that in mind, I issued a direction that referred to the appellant's citation of *Masa*

Sushi at 2017 TCC 239 and also to "Robson Enterprises" for which no citation was provided. My direction required the appellant to advise whether generative AI was used in the preparation of the appellant's written representations.

[39] By letter dated October 21, 2026, Mr. Cutaia confirmed, on behalf of the appellant, that generative AI was "used in part of the preparation process of its written representations." The appellant apologized and also provided amended written representations, which deleted the paragraph referring to "Robson Enterprises" and the reference to *Masa Sushi* at paragraph 18. But the appellant continues to cite *Masa Sushi* at paragraphs 14 and 16.

[40] Recently, Lafreniиre J. acknowledged that AI tools promise efficiency, but warned that "their indiscriminate use in drafting legal arguments constitutes a pernicious threat to the integrity of the judicial process": *Ahmed v. The Minister of Citizenship and Immigration*, 2026 FC 1202 at para. 19.

[41] I have no hesitation in concluding here that Mr. Cutaia did not review the cases cited by the appellant in the original written representations. Moreover, when given the opportunity—another chance—to reconsider the references to *Masa Sushi* (reported at 2017 TCC 239) at paragraphs 14 and 16, nothing was done.

[42] This Court cannot condone accidental or deliberate reliance on inaccurate, false, or misleading citations that arise from the use of generative AI. The situation here will serve as a cautionary reminder that parties to proceedings in this Court cannot hand over responsibility for the content of their writing to generative AI.

V. **Conclusion**

[43] The appellant's motion is dismissed, with costs in the cause. My order will also direct that on or before November 6, 2026, the appellant shall file and serve, with proof of service, a notice signed by counsel and giving the name, address for service and telephone number of its counsel. If Mr. Cutaia continues to act as the appellant's counsel, he shall sign the notice in his capacity as counsel and provide an effective address for service.

Signed this 28th day of October 2026.

"Perry Derksen"

Derksen J.

CITATION:	2026 TCC 187
COURT FILE NO.:	2016-1496(GST)G
STYLE OF CAUSE:	2028604 ONTARIO LTD. v. HIS MAJESTY THE KING
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	Motion in writing of the appellant filed on September 18, 2026 Motion in writing of the Crown filed on October 8, 2026
REASONS FOR ORDER BY:	The Honourable Justice Perry Derksen
DATE OF ORDER:	October 28, 2026

APPEARANCES:

For the Appellant:	Nicholas Cutaia
Counsel for the Respondent:	Stan W. McDonald

COUNSEL OF RECORD:

For the Appellant:

Name:	n/a
Firm:	n/a
For the Respondent:	Marie-Josée Hogue Deputy Attorney General of Canada Ottawa, Canada