Docket: 2019-1335(IT)G

BETWEEN:

FIDUCIE HISTORIA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Motion filed jointly on January 17, 2020, under section 58 of the *Tax Court of Canada Rules (General Procedure)* and reasons delivered orally by teleconference on February 19, 2021.

Before: The Honourable Justice Guy R. Smith

Parties:

Counsel for the appellant:	Guy Du Pont Élisabeth Robichaud Sammy Cheaib
Counsel for the respondent:	Susan Shaughnessy Michel Lamarre

ORDER

In accordance with the reasons delivered orally by teleconference on February 19, 2021, the motion filed jointly on January 17, 2020, under section 58 of the *Tax Court of Canada Rules (General Procedure)* is dismissed, without costs;

Nevertheless, the Court orders that the parties file a joint application to establish a timetable by March 19, 2021.

Signed at Ottawa, Canada, this 24th day of February 2021.

"Guy R. Smith"

Smith J.

Translation certified true
on this 18th day of August 2021.
François Brunet, Revisor

Citation: 2021 TCC 38
Date: 20210517
Docket: 2019-1335(IT)G

BETWEEN:

FIDUCIE HISTORIA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

TRANSCRIPT OF THE REASONS FOR ORDER
(Rendered orally on February 19, 2021, at Ottawa, Canada)

Smith J.

[1] I will now render my decision in this case.

[2] This concerns a motion filed jointly on January 17, 2020, seeking an order authorizing certain questions of law to be determined under Rule 58 of the TCC Procedural Rules (General Procedure) before the hearing is held.

[3] The motion was scheduled for October 1, 2020, but the parties asked that it be decided on the basis of the written submissions without appearance of the parties. Joint submissions were filed on September 25, 2020.

[4] Below I will summarize the "Proposed Questions" under Rule 58:

i) Did the agreement entered into on November 15, 2013, between the trustees of Fiducie Historia (the Trust) and the beneficiaries Julien Rémillard and Maxime Rémillard have the effect of delegating on the beneficiaries the powers of trustees duly appointed in accordance with the deed of trust?

ii) In the affirmative, are the allocations made by the Trust to Lucien Rémillard for the 2013 and 2015 taxation years null?

iii) In the affirmative, does this constitute relative or absolute nullity?

iv) If it constitutes relative nullity, would the Canada Revenue Agency have the necessary standing to raise it?

[5] The motion also seeks an order providing that the evidence shall consist of an agreed statement of facts and an order providing the methods of adducing the evidence should the parties be unable to arrive at an agreed statement of facts.

The relevant facts

[6] In my view, the following facts are essential for the purposes of this analysis and to understand the various transactions that took place on November 15, 2013.

[7] Lucien Rémillard was one of the three trustees of the Trust created under the laws of Quebec by notarial deed dated August 22, 2002. He ended his Canadian residency on November 15, 2013, to move to Barbados. That same day, he resigned as a trustee and was replaced by a third party in accordance with the terms and conditions of the Trust's deed of trust. Therefore, at that time, there were three trustees dealing with each other at arm's length.

[8] The Trust and Lucien Rémillard held shares in Maybach Corporation. On November 15, 2013, Maybach bought back Lucien Rémillard's shares, and the Trust subsequently became the sole shareholder.

[9] That same day, that is, November 15, 2013, an agreement was entered into between the trustees and two of the beneficiaries, brothers Julien Rémillard and Maxime Rémillard, the sons of Lucien Rémillard. Under that agreement, the trustees undertook [TRANSLATION] "to exercise their powers with respect to the Trust in accordance with the instructions given by the Rémillard brothers and not to make any decisions concerning the Trust without the prior consent of the Rémillard brothers." The trustees acknowledged that this undertaking did not release them from their obligations as trustees and was not a delegation of their powers as trustees, but that they were required to exercise those powers [TRANSLATION] "in accordance with their undertaking to the Rémillard brothers." The agreement also stipulated that [TRANSLATION] "if the trustees or some among them" were [TRANSLATION] "in disagreement with the instructions received . . . they must tender their resignations as trustees" and would be replaced in accordance with the terms and conditions of the Trust's deed of trust, as stipulated in paragraphs 2.1 and 2.2 of the agreement.

[10] By written resolutions dated December 4, 2013, and December 12, 2013, in response to a request signed by the Rémillard brothers, the trustees allocated to Lucien Rémillard income of $30,000,000 and dividend income of $72,000, for a total of $30,072,000.

[11] By written resolution dated October 29, 2015, in response to a request signed by the Rémillard brothers, the trustees allocated to Lucien Rémillard dividend income of $20,000,000, and by written resolution dated November 27, 2015, in response to a request signed by the Rémillard brothers, the trustees allocated to Lucien Rémillard dividend income of $250,000.

[12] The amounts thus allocated to Lucien Rémillard, that is, the sum of $30,072,000 for the 2013 taxation year and the sum of $20,250,000 for the 2015 taxation year, were deducted from the Trust's income in accordance with subsection 104(6) of the *Income Tax Act* (the ITA).

[13] On August 9, 2017, the Minister of National Revenue made reassessments, disallowing the deduction claimed by the Trust for the aforementioned amounts on the grounds that, under the agreement entered into on November 15, 2013, the trustees had undertaken: i) to exercise their powers with respect to the Trust in accordance with the instructions given by the Rémillard brothers; ii) not to make any decisions concerning the Trust without the prior consent of the Rémillard brothers; and iii) to resign as trustees in the event of disagreement with the instructions received from the Rémillard brothers, and that, in making such undertakings, the trustees had renounced their freedom to make the decisions inherent in the exercise of their discretion with respect to the Trust and had delegated those powers to the Rémillard brothers.

[14] According to the Minister, under the agreement entered into on November 15, 2013, the Rémillard brothers had in fact become both beneficiaries and trustees, without acting jointly with a trustee who is neither the settlor nor a beneficiary, contrary to article 1275 of the *Civil Code of Québec* (the CCQ), which provides for a public order prohibition to that effect.

[15] The Minister therefore argues that the allocations made by the trustees in the aforementioned amounts to Lucien Rémillard for the 2013 and 2015 taxation years [TRANSLATION] "are invalid and absolutely null" and therefore that the Trust was not entitled to deduct the amounts allocated pursuant to subsection 104(6) of the ITA.

[16] According to the appellant, the agreement entered into on November 15, 2013, [TRANSLATION] "never had the object or effect" and [TRANSLATION] "the parties' intention was never" to strip the trustees of their powers to administer the Trust and that, since the agreement was concluded, they have continued to exercise the powers and obligations that had been conferred on them by the deed of trust. The appellant also argues that the agreement was consistent with articles 1275, 1278, 1287, 1312 and 1314 of the CCQ, which enable the beneficiaries to exercise [TRANSLATION] "a certain oversight into the decision-making by the trustees" and enable the trustees to take any proper measure to secure the appropriation of the patrimony, including consulting with the beneficiaries.

[17] Lastly, the appellant argues that, even if the allocations in question were not in compliance with article 1275 of the CCQ, as the Minister argues, this would constitute relative, rather than absolute, nullity in accordance with article 1419 of the CCQ, and the Minister would not have the required standing to invoke the nullity of the allocations that were approved by the beneficiary.

Submissions of the parties

[18] I will now turn to the main arguments submitted by the parties in the context of the motion under Rule 58.

[19] In the notice of motion, which, it must be noted, was filed jointly, the parties state at paragraph 10 that a determination of the "Proposed Questions," a summary of which has been provided above, [TRANSLATION] "would dispose of all or part of the proceeding and would therefore substantially shorten the proceeding by outlining the issues and thus the evidence to be adduced by the parties."

[20] At paragraph 11 of the notice of motion, the parties state [TRANSLATION] "that the determination of the Proposed Questions constitutes the most efficient use of the resources of the Court and of the parties in the circumstances of this appeal."

[21] Paragraph 20 of the joint submissions states that [TRANSLATION] "rule 58 aims, among other objectives, to ensure the fair and expeditious resolution of disputes . . . and to assist the parties in finding solutions likely to settle the dispute without a trial, which thus increases access to justice, considering the underlying criteria of proportionality, efficiency and fairness."

[22] The parties state (paragraph 23) that [TRANSLATION] "Question (a) concerns the legal effect of an agreement concluded between the trustees and the Rémillard

brothers," that [TRANSLATION] "Questions (b) and (c) concern the scope and the effect of article 1275 of the CCQ on the allocations," and that [TRANSLATION] "Question (d) concerns the Agency's standing to raise the alleged nullity arising from article 1275 of the CCQ," all questions that were raised in the pleadings.

[23] The parties submit, citing *Ironside v. The Queen*, 2015 TCC 116, that the test for Rule 58 consists of deciding whether the determination of these questions "may" dispose of all or part of the proceeding and that the Court does not have to be "absolutely convinced" that this will be the case to refer the question to the second stage of the proceeding before the hearing.

[24] The parties also submit that, if a negative answer were given to Questions (a) and (b), that determination would decide the proceeding in the Trust's favour, but that if the determination were made in the respondent's favour, that would shorten the hearing by the time that would be devoted to arguing this question and would guide the parties in adducing their evidence, thus reducing the time required for testimony.

[25] With regard to Question (c), the parties state that if it were decided that the alleged nullity was absolute, that would decide the proceeding in the respondent's favour, but that a decision to the contrary would shorten the hearing by the time that would be devoted to debating this question and would guide the parties in adducing their evidence, thus reducing the time required for testimony.

[26] Lastly, with regard to Question (d), a decision that the Agency does not have standing would decide the proceeding in the Trust's favour, but a decision to the contrary would shorten the hearing by the time that would be devoted to debating this question and would guide the parties in adducing their evidence, thus reducing the time required for testimony.

[27] The parties therefore conclude in their joint submissions (paragraph 29) that the answers to the Proposed Questions would dispose of all or part of the proceeding and, in the latter case, would outline the issues and thereby reduce the evidence to be adduced by the parties at the hearing and that, in either case, the answers to the Proposed Questions would be likely to result in time and cost savings for the parties and the conservation of legal resources.

[28] For these reasons, the parties argue that the determination of the Proposed Questions constitutes the most efficient use of the resources of the Court and of the parties in the circumstances of this appeal.

Two comments

[29] Before reviewing Rule 58, I will make two comments. Firstly, the parties jointly filed a notice of motion and written submissions. It is therefore relevant to review *Patel v. Canada*, 2020 FCA 27, a recent decision that also bore on a joint application, under subsection 172(2) of the ITA. The Federal Court of Appeal stated, "the fact that the parties are in agreement with respect to the manner in which their tax appeals should proceed, is a highly relevant, although not determinative, consideration in the exercise of the discretion to allow or not the parties' request" (my emphasis). Therefore, even though the parties in this proceeding jointly filed a notice of motion, the Court must nevertheless analyze everything in exercising its discretion to give a final determination as to whether the application should be allowed or dismissed.

[30] Secondly, although the parties did not cite Rule 4 of the TCC Rules, I am of the view that it must be considered, since it provides that "[t]hese rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits."

Rule 58

[31] What about Rule 58? Motions filed under this rule involve two steps. First, the Court must decide whether the question should be determined, based on what is provided in the rule. Second, if that is the case, the Court will hear the arguments and determine the question or questions.

[32] In my view, there are three essential components. First, there must be "a question of law, fact or mixed law and fact" that, second, is "raised in a pleading" and, third, the Court must be satisfied that the questions to be determined may "dispose of all or part of the proceeding or result in a substantially shorter hearing or a substantial saving of costs".

[33] Paragraph 58(1)(a) was amended and expanded in 2014 to provide that the rule applied to "a question of . . . fact or mixed law and fact" rather than just "a question of law". As Justice Campbell states at paragraph 26 of *McIntyre v. The Queen*, 2014 TCC 111, "[s]ince the amendment to this Rule, the existence of factual

disputes is no longer an absolute bar to granting an application but will remain relevant to a question of whether the determination will substantially shorten the hearing or save costs".

[34] Justice Campbell went on to conclude (paragraph 27) that "[d]espite this amendment, a Rule 58 determination should never be a substitute for a hearing and there should never be a dispute as to the material facts underpinning the question of law. As such, a Rule 58 determination should not be an easily accessible alternative to a hearing for contentious disputes".

[35] The 2014 amendment also broadened the scope of Rule 58 to questions as to the admissibility of any evidence. As Justice Owen states in *Paletta v. The Queen*, 2016 TCC 171, "[t]he inclusion of this requirement confirms the broad scope of current Rule 58, as it may now be used to address virtually any issue that could arise in a full hearing of the appeal." Justice Owen also states that "[s]ubsection 58(2) requires only that 'it appear' that the Rule 58 hearing 'may' lead to one or more of the specified outcomes. The word 'may' is used in two senses in subsection 58(2). The first sense is permissive and this is also the sense in which it is so used in subsection 58(1). The repetition of the permissive sense makes clear that the decision to grant an order is wholly in the discretion of the Court. In particular, even if t that a question may meet the requirements in subsections 58(1) and (2) by no means compels the Court to grant an order under Rule 58."

[36] In *Paletta*, the dispute concerned a question of a penalty for gross negligence and a statue-barred issue under the ITA. Justice Owen dismissed the application for an order under Rule 58 on the grounds that "[t]he Appellant's suggested approach to the evidence would not provide a fair and just adjudication of the statute-barred issue." That ruling was affirmed by the Federal Court of Appeal (2017 FCA 33), which concluded that "it was open to him to conclude that proceeding under Rule 58 would not be appropriate."

[37] In *Sentinel Hill Productions IV Corporation v. Canada*, 2014 FCA 161, the question proposed under Rule 58 was based on an unproven hypothesis that the limited partnerships did not exist during the relevant periods and that the existence of those limited partnerships at all was a contentious issue. The TCC had refused to grant the application under Rule 58, and the Federal Court of Appeal affirmed that decision, noting that "[i]t would be an academic exercise to answer the proposed question before the issue of the existence of the partnership is settled" (paragraph 6).

[38] In my view, *Canada v. Lux Operating Limited Partnership*, 2020 FCA 162, a more recent case, is to the same effect. In that case, the question proposed under Rule 58 had been accepted at the preliminary stage, and the motion had been heard by a different TCC judge, who had to consider the question regarding the determination of a deduction by a limited partnership under subsection 152(1.4) of the ITA. The Federal Court of Appeal noted that the question of fact, namely whether or not a limited partnership existed, had never been addressed and that the Court was unable to give a definitive "yes" or "no" answer to the question. It therefore held that the question was premature and stated the following at paragraphs 23 and 24:

> **23.** The validity of the partnerships has clearly been put in issue by the Crown in the pleadings that were filed with the Tax Court. Therefore, the preliminary issue that the Tax Court will need to address in those appeals is whether the purported partnerships were valid partnerships . . . .
>
> **24.** . . . Therefore, if there were no partnerships in 2006 then there could be no valid determinations in respect of the partnerships under subsection 152(1.4) of the Act.

[39] The Federal Court of Appeal stated the following at paragraphs 39 and 40:

> **39.** This is similar to the situation in *Antle et al. v. The Queen*, 2009 TCC 465, where the trust was assessed but the existence of the trust was being challenged. The trust was able to file an appeal to the Tax Court and, even though its appeal to the Tax Court was quashed, the trust was also able to file an appeal to this Court (2010 FCA 280). In each case, the first issue that was decided was whether the trust existed.
>
> **40.** Similarly in this case, the first issue that should be decided by the Tax Court (or any subsequent court) would be the existence of the partnerships. If the court concludes that the partnerships existed in 2006, then the court could address the issue of the amount of the loss of each partnership for each fiscal year for the purposes of the Act.

[40] Consequently, the Federal Court of Appeal concluded as follows at paragraphs 46 and 47:

> **46.** The answer to the question as posed by the parties is neither a definitive yes or no. It is not a question that should have been posed under Rule 58, as it is premature. The key question that needs to be answered before the validity of the determinations made under subsection 152(1.4) of the Act can be addressed is whether the partnerships existed. This is the question that the parties should be pursuing before the Tax Court. Once the validity of the partnerships has been finally decided, then either the determinations are invalid (if the partnerships did not exist) or the determinations were validly issued (if the partnerships were valid partnerships) and

> the correctness of the determinations that the losses were nil can be reviewed by the court.
>
> **47.** I would therefore allow the appeals without costs and set aside the Order given by the Tax Court. Rendering the Order that the Tax Court should have given, the response to the question is that the question is premature and cannot be definitively answered at this time.

[41] Thus, it seems clear to me in that decision that the proceeding under Rule 58 was unsuccessful. The appeal was not substantially shortened, and there were no significant cost savings for the parties.

[42] I will continue my review of the case law by stating that in *3488063 Canada Inc. v. Canada*, 2016 D.T.C. 5099, the Federal Court of Appeal confirmed that if the central question in issue concerns material questions of fact, it "is best left to the Judge who will hear all of the evidence." Similarly, in *HSBC Bank Canada v. The Queen*, 2011 TCC 37, Justice C. Miller stated that, according to the case law, in a proceeding under Rule 58, the facts underlying the questions of law should not be in dispute.

[43] The principle that a motion under Rule 58 is inappropriate when material facts are in dispute, meaning facts concerning a substantive issue, was followed in *Aitchison Professional Corporation v. The Queen*, 2016 TCC 281; *Cougar Helicopters Inc. v. The Queen*, 2017 TCC 126 and *Lehigh Hanson Materials Limited v. The Queen*, 2017 TCC 205.

[44] And lastly, in an other recent case, *McCartie v. Canada*, 2020 FCA 18, the trial judge had dismissed an application under Rule 58, and that decision had been appealed against. The Federal Court of Appeal agreed with the TCC, stating the following at paragraph 22:

> **22.** Furthermore, as the Tax Court judge rightfully pointed out, given the circumstances of the present case, he declined to order under Rule 58 the determination of the Questions because "[t]he Rule 58 Questions 1, 2, and 3, however answered, would require testimony before the motion judge which would most likely need be repeated before a trial judge. The prospects of two judges, after considerable testimony, opining on the credibility and weight of the same witnesses in the same appeals is neither fair, nor consistent to the parties nor the interests of justice." (reasons, para. 45).

Analysis and conclusion

[45] In this case, the parties state in their joint submissions that questions (a) to (d) are questions [TRANSLATION] "of law and/or questions of mixed law and fact." However, in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, the Supreme Court of Canada addressed this issue by stating (paragraph 35) that "questions of law are questions about what the correct legal test is", while "questions of fact are questions about what actually took place between the parties" and, lastly, "questions of mixed law and fact are questions about whether the facts satisfy the legal tests."

[46] On that basis, I conclude that questions (c) and (d) are questions of law, while question (a) is a mixed question of law and fact because it concerns the legal effect and nature of the agreement entered into on November 15, 2013, between the trustees and the Rémillard brothers.

[47] The respondent submits that the agreement was contrary to article 1275 of the CCQ, which is of public order, but the appellant raises questions of fact at paragraph 22 of the notice of appeal, stating that [TRANSLATION] "the agreement never had the object or effect of stripping the trustees' powers to administer the Trust" and at paragraph 38 that [TRANSLATION] "the intention of the parties to the agreement was never to make a general delegation of the trustees' powers to the Rémillard brothers . . . as demonstrated by the conduct of the parties following the agreement."

[48] In my view, it would be practically impossible to answer the question regarding the purpose or object or the intention of the parties to the agreement without hearing the testimony of the trustees or of the Rémillard brothers, or at least some of them. If the motions judge were to hear the testimony of those witnesses, it is highly likely that they would be called to testify again before the trial judge, which raises the possibility that two judges would be opining on the credibility of the same witnesses, which would be contrary to the principles set out by the FCA in *3488063 Canada Inc.* and *McCartie*, cited above. The parties acknowledge this possibility at paragraphs 26 to 28 of the joint submissions, which state that, depending on the answers to Questions (a), (b), (c) or (d), this [TRANSLATION] "would guide the parties in adducing their evidence, thus reducing the time required for testimony." It must be noted that it would be the same testimony during the trial even if it were shortened.

[49] In my view, the purpose and object and the intention of the signatories to the agreement entered into on November 15, 2013, are all essential questions of fact underlying the questions of law. As Justice Webb notes in *Lux Investor*, unless the

Court considers this question and arrives at a definitive conclusion, the other questions are to some extent premature. Or, to reiterate the FCA's ruling in *Sentinel Hill*, unless this question is definitively answered, it would be academic to address questions (c) and (d).

[50] Moreover, as Justice Campbell states in *McIntyre*, cited above, the proceeding set out in Rule 58 should not serve as an alternative to a trial on the facts and, in my opinion, that is what the parties are trying to do here. Indeed, it seems clear to me that the Proposed Questions summarize the entire dispute, which is not the object of Rule 58.

[51] To conclude, I am not satisfied that the proposed proceeding is appropriate or that it would have the effect of substantially shortening the appeal or result in significant cost savings. While the amounts at issue are large, the facts are relatively simple. In my view, the parties could substantially shorten the appeal and reduce the costs by completing the examinations through written questions, which would enable the parties to prepare and file a partial agreement on the facts before the hearing. The testimony of the trustees and of the Rémillard brothers, or some of them, on the question regarding the purpose, object and intent of the agreement should be brief, followed by oral or written submissions on the questions of law.

[52] The motion is dismissed, but the Court orders the parties to file a joint application to establish a timetable no later than March 19, 2021.

[53] The whole without costs.

Signed at Ottawa, Canada, this 17th day of May 2021.

"Guy R. Smith"

Smith J.

Translation certified true
on this 18th day of August 2021.
François Brunet, Revisor

CITATION:	2021 TCC 38
COURT FILE NO.:	2019-1335(IT)G
STYLE OF CAUSE:	FIDUCIE HISTORIA AND THE QUEEN
PLACE OF HEARING:	Ottawa, Canada
DATE OF HEARING:	February 19, 2021
REASONS FOR ORDER BY:	The Honourable Justice Guy R. Smith
DATE OF ORDER:	May 17, 2021

APPEARANCS:

Counsel for the appellant:	Guy Du Pont Élisabeth Robichaud Sammy Cheaib
Counsel for the respondent:	Susan Shaughnessy Michel Lamarre

COUNSEL OF RECORD:

For the appellant:

Name:	Guy Du Pont Élisabeth Robichaud Sammy Cheaib
Firm:	Davies Ward Phillips & Vineberg L.L.P.
For the respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada