Docket: 2024-1778(GST)G

BETWEEN:

CARVEST PROPERTIES LIMITED,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Motion by the Respondent heard on May 27, 2025, at Ottawa, Ontario

Before: The Honourable Justice Ryan P. Rabinovitch

Appearances:

Counsel for the Appellant:	David Douglas Robertson Scott Joly Eric Knopf
Counsel for the Respondent:	Jack Warren

AMENDED ORDER

1. The Respondent's motion for an order that a question be determined pursuant to section 58 of the *Tax Court of Canada Rules* (General Procedure) (the "**Rules**") is dismissed.
2. The parties shall have thirty days to make submissions regarding costs, failing which they will be awarded to the Appellant in the amounts provided for in Schedule II of the Rules.

This Amended Order is issued in substitution of the Order dated November 5, 2025.

Signed this 12th day of November 2025.

"Ryan Rabinovitch"

Rabinovitch J.

Citation: 2025 TCC 166
Date: November 5, 2025
Docket: 2024-1778(GST)G

BETWEEN:

CARVEST PROPERTIES LIMITED,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR ORDER

Rabinovitch J.

I. Introduction:

[1] The present motion is for an order that a question be decided by the Court pursuant to section 58 (**"Rule 58"**) of the *Tax Court of Canada Rules* (General Procedure) (the **"Rules"**). The question relates to a Notice of Appeal filed by the Appellant in respect of a series of reassessments issued for its reporting periods between August 1, 2016 and October 31, 2017. The reassessments concern a residential apartment building located at 315 Southdale in London, Ontario (**"315 Southdale"**), whose units were designed, constructed and rented out to tenants by the Appellant over the course of those periods.

[2] The above reassessments resulted mainly from the fact that the Appellant registered 315 Southdale as a condominium under the *Condominium Act*, despite its claim that it never intended to offer any of the units of the building for sale in the manner of a typical condominium developer. The Appellant ultimately took the position in its HST returns that despite this registration, 315 Southdale was a multiple unit residential complex, and as such, that it was required to self-assess HST on the fair market value (**"FMV"**) of the building as a whole at the time specified in subsection 191(3) of the *Excise Tax Act* (**"ETA"**). The Minister disagreed, reassessing the Appellant on the basis that 315 Southdale was a series of residential condominium units. As such, and according to the Minister, the Appellant was required to self-assess HST on the FMV of each of its individual units at the various times specified in subsection 191(1) of the ETA.

[3] According to the Appellant's Notice of Appeal, the following three issues must be decided in the present case:

1. The amount of its net tax for each reporting period in issue, which in turn depends on:

    a. Whether the Appellant was required to self-assess under subsection 191(3) or 191(1) of the ETA;

    b. What the FMV was of the building as a whole or each of its units, depending on the answer to question 1(a), at the relevant time;

2. The amount of the new residential rental property rebate in respect of its net tax that the Appellant was entitled to claim in each of the reporting periods in issue (i.e. whether it was a single rebate claim because subsection 191(3) applied or multiple rebate claims because subsection 191(1) applied); and

3. Whether the Minister correctly computed the interest owing by the Appellant in respect of the various amounts reassessed.

[4] The motion in the present case was filed by the Respondent. He seeks to have the Court order that the following question be determined under Rule 58:

> Whether s. 191(1) of the Excise Tax Act (ETA) is the applicable provision to determine tax on the self-supply of the at-issue residential complex located at 315 Southdale Road West, London Ontario?

[5] It is trite law that Rule 58 determinations proceed in two phases. First, the Court determines whether the question posed is appropriate for consideration under the provision. If the answer to that question is yes, a hearing is scheduled so that the question can be considered.

[6] The Respondent argues that it would save time and money for the Court to proceed to stage two in the present case. The main benefit would be to avoid the need for each party to prepare two valuation reports at trial (one valuing each unit, and one valuing the building as a whole, since they would not know whether the Court would conclude that subsection 191(3) or 191(1) is applicable). The Appellant

contests the motion on the basis that it is premature, given that the parties have not filed their lists of documents, undertaken examinations for discovery or responded to undertakings, and that Rule 58 is ill-suited to the determination of issues involving material facts that are in dispute. The main such fact is whether it ever intended to offer any of the units of 315 Southdale for sale.

[7] I have decided not to grant the Respondent's motion. I believe that it would be beneficial for the parties to conduct discovery before any Rule 58 proceeding. In addition, while I would not go so far as to say that Rule 58 can never be used to determine issues involving material facts in dispute between the parties, I do not believe that it should be so used where those facts are related to the remaining questions that will be decided at trial, which I find to be the case here.

[8] Before elaborating on my analysis, I shall address two preliminary evidentiary issues raised by the parties.

II. Evidentiary Issues:

1. The Appellant's objection to the Respondent's affidavit:

[9] The Respondent included in its Motion Record an affidavit sworn by Paschalis Athanasiou, an employee of the Real Estate Appraisal Section (Southwest Ontario) of the Canada Revenue Agency (**"CRA"**). The affidavit contains (a) an explanation that the affiant was asked by another CRA official to obtain documents from the City of London (**"COL"**) concerning some of the Appellant's real estate developments, (b) a description of how the affiant went about obtaining those documents, (c) copies of the documents, and (d) a description of the affiant's conversations with a COL official about some of the documents. The documents consisted of a printout from an online database maintained by the COL showing when the Appellant's application for the registration of 315 Southdale under the *Condominium Act* was filed and copies of the notices sent by the COL to "concerned Departments and Agencies" regarding that application and another one previously filed by the Appellant in respect of its building situated at 1985 Richmond Street (**"1985 Richmond Street"**).

[10] The Appellant maintains that the Respondent's affidavit is irrelevant because it is sworn by a person unknown to the Appellant (i.e. not the auditor or valuator who were involved in its file) and relates to the second stage of the Rule 58 inquiry,

rather than the first (in other words, it goes to whether 315 Southdale is a multiple unit residential complex or series of residential condominium units, and not whether an order should be issued to decide that question). It further maintains that the document constitutes "triple hearsay", in the sense that it conveys conversations between CRA officials, conversations between the affiant and a COL official, and includes attachments that are themselves hearsay.

[11] I will begin by stating that I disagree with the Appellant that the affidavit is irrelevant. I do not see why it is problematic that the affiant is unknown to the Appellant. The affidavit states clearly that he is a CRA official in the department handling the Appellant's file. Furthermore, it was open to the Appellant to cross-examine the affiant in order to better understand his connection to its audit, but the Appellant chose not to do so. With respect to the first vs. second stage issue, I agree with the Appellant that this is not the appropriate time to make findings of fact needed to render a decision on the Rule 58 question itself.[1] That being said, I do not believe the Respondent filed the affidavit because he wanted me to draw factual conclusions relating to the merits of his Rule 58 question. Rather, he sought to demonstrate that the main facts relating to that question would be easy to establish (e.g. via a simple request to the COL), and so unlikely to be in dispute. Given that one of the reasons for my decision not to grant the Respondent's motion relates to the fact that there is a material fact in dispute, it is difficult for me to accept that this is not a relevant consideration.

[12] The above having been said, I have decided not to rule on whether or not the affidavit is admissible in the present case on the basis that it constitutes or includes hearsay evidence. I have reviewed the document, and am confident, given my reasons for rejecting the Respondent's motion, that it would have no impact on the outcome of this motion. It does not concern the discovery process or affect my conclusion that the parties have not reached any agreement regarding a material fact, namely, whether or not the Appellant intended to offer the units of 315 Southdale for sale. In such circumstances, and given both the likely relevance of the affidavit to the substantive issues in this appeal and the fact that the Appellant seems unprepared to concede that the documents attached to the affidavit are accurate or genuine, I prefer not to tie the hands of the judge who will decide those issues. As Bowman A.C.J. (as he then was) wrote in *Holm v. R.*, "the making of a pretrial ruling on the admissibility of evidence should not in general be done by a motions judge

[1] *Rio Tinto Alcan Inc. c. R.*, 2015 TCC 212 at para. 27.

where it is possible that it may affect or restrict the way in which the case is conducted before the trial judge."[2]

2. The Respondent's objection to the Appellant's affidavit:

[13] The Appellant's Motion Record included an affidavit sworn by Lili Patel, an employee of EY Law. Attached to her affidavit was a copy of two e-mails from the Respondent's counsel to the Appellant's counsel. The first e-mail was dated December 2, 2024 from the Respondent's counsel to the Appellant's counsel and began with the words "Without Prejudice". The e-mail explained the Respondent's position that the characterization of properties such as 315 Southdale had been decided by this Court[3] and the Federal Court of Appeal[4] in a case involving 1985 Richmond Street (the other of the Appellant's buildings referred to in the preceding section of these reasons). As such, the Respondent was considering filing a motion to strike the portions of the Appellant's Notice of Appeal dealing with the issue. He said that if the Appellant wished to amend its Notice of Appeal to remove this issue, his client would "be agreeable to that". The second was an e-mail dated December 5, 2024, from the Respondent's counsel to the Appellant's counsel. This e-mail did not begin with the words "Without Prejudice". It stated that the Respondent had decided not to file a motion to strike, and was now considering making a motion for a determination under Rule 58. It concluded by saying that the Respondent would be filing the motion unless the parties came to an agreement with respect to the subsection 191(1) issue.

[14] Counsel for the Respondent contended that the above e-mails were improperly attached to the Appellant's Motion Record because they contained the words "without prejudice" and were protected by settlement privilege.

[15] I note as a preliminary matter that I have chosen to rule on the Respondent's objection, as, unlike the one made by the Appellant, it concerns documents which have an impact on the outcome of this motion. The above e-mails have been included in the Appellant's affidavit by way of context for another e-mail, dated May 27,

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[2] [2003] 2 C.T.C. 2041 at para. 21. Similar statements have been made by judges in other courts (see e.g. *Harrop (Litigation Guardian of) v. Harrop*, 2010 ONCA 390 at paras. 2-30, *Forbes v. Drouin*, 2011 ONSC 6006 at paras. 42-43, *Ivetic v. State Farm Mutual Automobile Insurance Co.*, [2016] O.J. No. 992 at paras. 10-12 and *Clarke v. Labelle*, [2013] O.J. No. 5274 at para. 32).

[3] *Carvest Properties Limited v. Canada*, 2021 TCC 21 ("***Carvest #1 - TCC***").

[4] *Carvest Properties Limited v. Canada*, 2022 FCA 124 ("***Carvest #1 - FCA***").

2025, which responds to them, and which outlines the fact that the Appellant considers a Rule 58 motion to be premature, given that the parties have not yet gone through the discovery process.[5] As such, the e-mails are part of the only evidence formally before this Court that this process is not yet underway. Given that this is one of my reasons for dismissing this motion, I cannot say that these documents would not have any impact on my decision. In addition, unlike the Respondent's affidavit, I am not concerned that the e-mails will be reconsidered during the subsequent proceedings in this file. In other words, my ruling is unlikely to tie the hands of the judge presiding in those proceedings.

[16] Turning to the objection itself, I note that the mere fact that a communication includes the words "without prejudice" is not sufficient to render it inadmissible. The Alberta Court of Appeal confirmed this view in *Bellatrix Exploration Ltd v. Penn West Petroleum Ltd*.[6] It wrote:

> The notation "without prejudice" is not conclusive in establishing privilege. If the contents of a communication are truly in furtherance of settlement, and therefore privileged, it makes no difference whether the communication is marked "without prejudice" or not. A communication that is not in substance privileged does not become so just because one party places "without prejudice" on it. Likewise, the absence of the words "without prejudice" means nothing if the communication is truly privileged […].[7]

[17] Similarly, in *Woodland v. R.*,[8] Campbell J. of this Court cited the following passage regarding settlement privilege from *The Law of Evidence in Canada*:

> §14.327 The communication must have been written for the purpose of attempting to effect a settlement. The privilege covers communications to initiate settlement discussions. If the circumstances reveal otherwise, then neither the presence of the words "without prejudice" nor the fact that a dispute existed will avail to confer a privilege [emphasis added].[9]

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[5] Given that neither party objected to the admission of this e-mail, I shall not address whether it is subject to privilege. Although the Courts have held that both parties to a communication protected by settlement privilege must agree for it to be waived (see e.g. *Canadian Flight Academy Ltd v. The Corporation of the City of Oshawa*, 2024 ONSC 2756 at para 11), they have also held that where one party seeks to rely on it and the other does not object, it can be assumed that a valid waiver has occurred (*Pedersen v. Lehn*, 1981 CanLII 441 at paras. 22-27).

[6] 2013 ABCA 10 ("***Bellatrix***").

[7] *Ibid*. at para. 25.

[8] 2009 TCC 434.

[9] *Ibid*. at para. 63.

[18] Accordingly, the real question here is whether the e-mail exchange referred to by the Respondent is protected by settlement privilege. The elements which must be present are as follows: (1) a litigious dispute must be in existence or in contemplation, (2) the communication in question must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed, and (3) the purpose of the communication must be to attempt to effect a settlement.[10] The first of these elements is clearly present, and I agree that the words "without prejudice" in the December 2, 2024 e-mail suggest that the second may be as well. It is the third element which is lacking.

[19] In *R. v. Sputek*,[11] Hogan J. wrote the following with respect to this element:

> With regard to the third condition, some decisions have held that the communication does not have to contain an actual offer of settlement in order to be covered by settlement privilege; others have suggested that a *bona fide* offer of settlement must be contained within the documents in order for the communication to receive protection.
>
> Sopinka suggests that the following compromise is the appropriate response:
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> ... [L]etters designed to open such negotiations, or letters or discussions which attempt to convince the opponent of the strengths of the other's position, but which also recognize weaknesses, in the hope that some settlement can be effected once each other's positions are on the table, should be subject to the privilege, whether or not they contain an actual offer of settlement.[12]

[20] A similar test was adopted by the Alberta Court of Appeal in the *Bellatrix* decision referred to above. The case concerned two parties which had engaged in a series of communications that unintentionally led to settlement negotiations. In finding that the initial exchanges between the parties were not privileged, it wrote:

> In conclusion, we generally agree with the Master's findings that the test to attract settlement privilege was met in this case. However, in our assessment, the correspondence dated May 27, 2009 and June 22, 2009 do not fall within the scope of the settlement privilege. <u>These communications are simply statements of Penn West's position and provide no hint of compromise, a critical hallmark to any settlement discussion. The letter of May 27, 2009 itself could be characterized as a "demand letter," which is not privileged</u>

[10] Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 6th ed. (Toronto: LexisNexis Canada, 2022) at para. 6.331.

[11] 2010 TCC 540.

[12] *Ibid*. at paras. 30 and 31.

> […]. [emphasis added].[13]

[21] The e-mails in issue here did not contain a *bona fide* offer of settlement. I find that they also were not intended to open negotiations and did not contain a hint of compromise. Rather, they were mere statements regarding the Respondent's position. It is true that in his e-mail of December 2, 2024, the Respondent's counsel suggests that his client will not file a motion to strike if the Appellant agrees to amend its Notice of Appeal to remove the references to subsection 191(3), and that he highlights a weakness in his position (i.e. that the case-law he is relying on concerned another building owned by the Appellant). It is also true that in his e-mail of December 5, 2024, he indicates that he will not file a motion to have a question decided under Rule 58 if the parties can agree regarding the application of the provision. Nevertheless, the e-mails essentially amount to demands that the Appellant capitulate and accept the Respondent's point of view. They do not suggest that discussions on the matter could lead to an alternate position. Accordingly, they are not protected by settlement privilege and are admissible.

III. Rule 58:

[22] The principles that are to be applied in determining whether a Rule 58 application should be granted are set out in subsections 58(1) and 58(2) of the Rules, which read as follows:

> 58. (1) On application by a party, the Court may grant an order that a question of law, fact or mixed law and fact raised in a pleading or a question as to the admissibility of any evidence be determined before the hearing.
>
> (2) On the application, the Court may grant an order if it appears that the determination of the question before the hearing may dispose of all or part of the proceeding or result in a substantially shorter hearing or a substantial saving of costs.

[23] Three requirements must therefore be met in order for a Rule 58 application to proceed to phase two: (1) the determination must concern a question of law, fact, or mixed law and fact or a question regarding the admissibility of evidence, (2) if the determination concerns a question of law, fact or mixed law and fact, it must be raised in a pleading, and (3) it must appear to the Court that the determination of the question may dispose of all or part of the proceeding or result in a substantially

[13] *Bellatrix, supra* note 6 at para. 35.

shorter hearing or a substantial saving of costs.

[24] The first two of these requirements present little difficulty in this case. The question posed by the Respondent is one of mixed law and fact: it requires the Court to determine whether subsection 191(1) or 191(3) apply to the facts in the present case. The question is also raised by both parties' pleadings. Paragraph 66(i) of the Notice of Appeal states that one of the issues for the Court's consideration is "was the Appellant required to self-assess HST pursuant to subsection 191(1) of the ETA in respect of 315 Southdale for any of the Periods at Issue." Similarly, paragraph 25(a) of the Reply states that such issues include "whether the Minister correctly applied ss. 191(1) of the Act to determine the tax on the Appellant's self supply of property that consisted of 169 residential condominium units."[14]

[25] I also see the attraction, at least at first blush, of finding that the condition that a Rule 58 determination might dispose of all or part of the proceeding or result in a substantially shorter hearing or a substantial saving of costs. As mentioned above, if the Court were to conclude that subsection 191(3) applied, there would be no need for testimony or expert reports regarding the FMV of 315 Southdale as a whole. Conversely, if the Court were to conclude that subsection 191(1) applied, there would be no need for testimony or expert reports regarding the FMV of each individual unit.

[26] This is not the end of the matter, however. It is clear from the use of the word "may" in both subsections 58(1) and 58(2), that the decision to order that a determination be made under Rule 58 is discretionary, and this Court has held on many occasions that this means that the Court may consider factors other than those specifically enumerated in subsections 58(1) and 58(2) of the Rules in arriving at its decision.[15] Among these factors are the two referred to at the outset of these reasons,

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[14] The Appellant pointed out in its submissions that the Court is really being asked to answer a series of questions in the present case: one question of law (how the definition of the term "residential condominium unit" in section 123 of the ETA should be interpreted), several questions of fact (what the facts relevant in applying the definition of "residential condominium unit" are), and one question of mixed law and fact (how the definition of the term "residential condominium unit" should be applied to those facts). I am in general agreement with this submission, but do not believe it changes the above analysis, as all of these questions are implied by the passages reproduced above from the Notice of Appeal and Reply.

[15] See e.g., *McIntyre v. R.*, 2014 TCC 111 ("***McIntyre***") at para. 25, *Suncor Energy Inc. v. R.*, 2015 TCC 210 ("***Suncor***") at para. 16*, Paletta v. R.*, 2016 TCC 171 ("***Paletta***") (*aff'd* by the Federal Court of Appeal at 2017 FCA 33) at para. 20, *Cougar Helicopters Inc. v. R.*, 2017 TCC 126 at para.

namely, whether the discovery process has been completed and whether the question the Court is being asked to decide involves a material fact that is in dispute between the parties.

[27] I shall begin with the discovery process.

[28] According to the Supreme Court of Canada, the benefits of discovery consist of avoiding "litigation by ambush", encouraging settlement once the facts are known, and narrowing issues where settlement proves unachievable.[16] Each of these benefits is relevant in the Rule 58 context. Where the relevant determination has a factual element, discovery ensures that there will be no trial by ambush as part of any phase two proceedings (i.e. each party will arrive at the hearing with a clear understanding of the strengths and weaknesses of their opponent's position, and thus, have had the opportunity to prepare accordingly). Discovery also increases the chances that there will be a settlement, that the issues that are the subject of the Rule 58 proceeding will be taken off the table or that phase two can proceed on the basis of an agreed statement of facts. Each of these results saves time and money for the parties and the Court. Finally, I would add that in cases where it seems clear that discovery will be necessary regardless of what the Court decides about the Rule 58 question, requiring that it occur prior to phase two does not impose any additional burden on the parties. It is simply a matter of sequencing.

[29] The Federal Court of Appeal has held that the Court may refuse to grant a request for a Rule 58 determination on the basis that it is premature.[17] In addition, there are several cases where this Court has cited the absence of any discovery as a reason for refusing to order that a question be determined under Rule 58.

[30] In *Spencer v. R.*,[18] for example, Bowman A.C.J. (as he then was), considered a request for judgment under section 170.1 of the Rules or alternatively, a Rule 58 determination, in the context of an appeal involving the appropriate income tax treatment of a payment made in exchange for an agreement not to compete. He

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46, *Lehigh Hanson Materials Limited v. R.*, 2017 TCC 205 ("***Lehigh***") at para. 47, *Rio Tinto Alcan Inc. c. R.*, 2016 TCC 31 at para. 55, *2078970 Ontario Inc. v. R.,* 2017 TCC 173 at para. 8 and *Jovic Developments Limited v. R.*, 2021 TCC 19 at para. 38.

[16] *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc*., 2008 SCC 8 at para. 24.

[17] *Canada v. Lux Operating Limited Partnership*, 2020 FCA 162.

[18] [2001] 4 C.T.C. 2640.

wrote:

> I do not think that this case is an appropriate one in which to render judgment under Rule 170.1, allowing the appeal on the basis of one proposition of law pulled from the replies. This is particularly so where, as here, no facts have been established and indeed no documents have been produced and no discoveries have been held. It is only under the most obvious circumstances that judgment under Rule 170.1 should be given. This is certainly not one of them [emphasis added].[19]

[31] While the above comments were made regarding section 170.1 of the Rules, Bowman A.C.J. wrote later on that "much the same reasoning" applied for the purposes of Rule 58.[20]

[32] Five years later, Bowman A.C.J. refused to grant a request to order a Rule 58 determination in *Kossow v. R.*[21] The question the appellant sought to have determined was whether or not he had made a valid gift for the purposes of section 118.1 of the *Income Tax Act*. One of the reasons given was that this question "was something upon which both parties should hold discoveries" and that to "try to determine the question in the abstract without a factual underpinning" would be "premature."[22]

[33] A more explicit reference to the need for discovery was then made by Bocock J. in the case of *McCartie v. R.*[23] The Rule 58 questions in that case all related to the implications of a finding made by a provincial court judge in prior tax evasion proceedings that the Crown had obtained some of its evidence in breach of the appellant's rights under the *Canadian Charter of Rights and Freedoms* (the **"*Charter*"**). Bocock J. noted that this was the second time that the appellant was requesting that a Rule 58 determination be made, and explained that he refused the first request in part because "no list of documents had been exchanged nor examinations for discovery had then yet occurred."[24]

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[19] *Ibid*. at para. 14.

[20] *Ibid*. at para. 16.

[21] 2006 TCC 151.

[22] *Ibid*. at para. 13.

[23] 2018 TCC 185 (*aff'd* by the *Federal Court of Appeal* at 2020 FCA 18) ("***McCartie***").

[24] *Ibid*. at para. 5.

[34] A final example is *Matthew Macisaac Consulting Inc. v. R.*,[25] a case which concerned a request for a Rule 58 determination on whether a "misrepresentation" for the purposes of subparagraph 152(4)(a)(i) necessarily meant a misrepresentation of fact, as opposed to mixed law and fact. Wong J. held that it would not be appropriate to decide the question without a proper factual context and noted that the discovery process was a key element of establishing this context. She wrote:

> In the present case, documents have not yet been exchanged nor have discoveries been conducted. Without these steps having been taken or at least in progress, I cannot agree with the Appellant's submission that the facts are largely not in dispute. While the mechanics of the transactions may not be in dispute, the factual circumstances have yet to be determined for the purposes of confirming or rebutting the Minister's assumptions [emphasis added].[26]

[35] Applying the above principles here, I find that the Respondent's motion is premature having regard to the fact that the parties have not yet engaged in discovery. As alluded to above, there is a meaningful risk that stage two proceedings would involve a debate regarding whether or not the Appellant had any intention to offer the units of 315 Southdale for sale. Discovery will permit the parties to properly prepare for this. Counsel for the Respondent made it clear at the hearing that he did not think that the Appellant's intention to sell (or lack thereof) was relevant. On this basis, I expect that he would maintain that there would not in fact be any debate along the lines described above, and that any discovery relating to the debate would be a waste of time. I disagree. It is inconceivable to me that a judge in a phase two proceeding would refuse to at least hear out an argument made by the Appellant regarding the relevance of its lack of any intention to sell. Accordingly, the Respondent has, at the minimum, an interest in exploring whether he can develop an alternative position in this regard. For the same reason, the Appellant has an interest in knowing what evidence, if any, the Respondent may have to challenge its assertion. Even if this were not the case, discovery would increase the chances of a settlement being reached or an agreed statement of facts being submitted to the Court. Lastly, and as mentioned above, requiring that the parties engage in the discovery process does not impose any burden on them that they would not in any event have had to bear.

[36] This brings me to the second of the other factors considered by the Courts in

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[25] 2020 TCC 44.

[26] *Ibid*. at paras. 26-28.

deciding whether or not to grant a phase one request, which is whether the Rule 58 determination involves a material fact which is in dispute between the parties.

[37] It should be noted in this regard that Rule 58 originally did not permit the Court to decide questions of fact, and only permitted the parties to adduce evidence by consent or with leave of the Court. This has changed. Since 2004, Rule 58 has very clearly contemplated determinations on questions of fact and questions of mixed law and fact, and since 2014, it has eased the restrictions on hearing evidence.[27] In addition, the Supreme Court of Canada recently encouraged Courts to make greater use of alternative means for adjudicating and resolving legal disputes such as Rule 58 in the case of *Hryniak v. Mauldin*.[28] Nevertheless, the judgments rendered since the occurrence of these developments have continued to be reluctant to make Rule 58 determinations which rely on material facts that are in dispute between the parties. This is particularly so when there is a link between the Rule 58 question and the remaining issues that will have to be determined at trial.

[38] There are several reasons for this hesitancy. First, where there is a connection between the Rule 58 and trial issues, the Court will often benefit from hearing all of the evidence before making a determination on any of them. In other words, evidence on one of the issues will usually inform the Court's thinking on the others. Second, in cases involving interrelated issues, there is a risk that the judge hearing the Rule 58 determination will not be the same as the one who presides at trial. The Rule 58 proceedings therefore create a risk that one judge will tie the hands of the other, that they will reach conflicting decisions on a given factual point or that there will be repetition, undermining the objective of Rule 58 more generally.[29] Third, where the same witness will be required to testify in the course of phase two proceedings and at trial, it is often better to have the benefit of all of that witness' testimony before coming to a decision regarding his or her credibility. Fourth, there is a feeling that

[27] Before 2014, the provision only permitted evidence to be heard "with leave of the Court or on consent of the parties." Now, subsection 58(3) simply indicates that an order that phase two proceedings be conducted should "give directions relating to the determination of the question, including directions as to the evidence to be given — orally or otherwise".

[28] 2014 SCC 7 ("***Hryniak***").

[29] It should be noted in this regard that the Supreme Court indicated in *Hryniak* that a Court should decline to make use of the fact finding powers in the context of summary judgment proceedings under the *Ontario Rules of Civil Procedure*, where they "run the risk of duplicative proceedings or inconsistent findings of fact" as in such circumstances, the Court wrote that "the use of the powers may not be in the interest of justice (*Hryniak*, *supra* note 28 at para. 60)."

important factual determinations are better suited to a trial, which provides all of the evidentiary and procedural protections set out in the Rules and common law. Some of the sting associated with this criterion is removed by the fact that many of these protections can be applied by analogy as part of a Rule 58 proceeding through the exercise of the Court's implied jurisdiction to control its process. The more this is done though, the more a Rule 58 proceeding resembles a trial, which, like the risk of repetition, makes it less likely that the goal of reducing the amount of time and money expended by the Court and the parties will be achieved.

[39] Examples of the above-mentioned reluctance include *Kossow*. As previously mentioned, the question the appellant in that case sought to have determined was whether or not he had made a valid gift for the purposes of section 118.1. It was one of three issues in the appeal, the other two being whether the transactions entered into were a sham and whether they had triggered the application of the general anti-avoidance rule. Bowman A.C.J. wrote that the issues were too interlinked to be analyzed separately:

> I do not think the first basis of assessment should be severed from the rest of the case and dealt with separately. I say this for several reasons.
>
> (a) Whether the making of the donation entailed a corresponding benefit to the appellant involves a substantial factual issue that can best be dealt with by the trial judge in the context of the overall hearing.
>
> (b) It is inappropriate for me, as a motions judge, to set the matter down for determination before one judge and have that judge's determination tie the hands of the judge who hears the other issues (sham and GAAR). The factual and legal issues in the first question are inextricably bound up with those in the second and third bases. One judge should be free to deal with all issues at one sitting […] [emphasis added].[30]

[40] A similar line of reasoning was adopted in *HSBC Bank Canada v. R.*,[31] a case regarding a series of guarantee fees payable by the appellant to its parent corporation. The Crown's position was that the fees were prohibited from being deducted by paragraph 18(1)(a), and that they were too high for transfer pricing purposes. Alternatively, the Crown argued that the portion of the fees paid in respect of deposits guaranteed by the Canadian Deposit Insurance Corporation (**"CDIC"**) were prevented from being deducted under paragraph 18(1)(a). The appellant sought to

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[30] *Kossow*, *supra* note 21 at para. 13.
[31] 2011 TCC 37 ("***HSBC***").

have a series of questions decided under Rule 58, including some regarding the scope of the contracts entered into in connection with the guarantees and one consisting of whether the Crown's alternative argument regarding the CDIC-insured deposits should be accepted. Miller J. refused to apply Rule 58 to any of the questions, stating:

> Case law has […] established that on a Determination there should be no dispute as to the facts underpinning the questions of law to be answered. The Appellant placed considerable emphasis on the changes in 2004 to Rule 58 which extended Determinations on questions of law to Determinations of fact or mixed fact and law as well, suggesting the Rule now specifically contemplates that a Determination of questions of law may first require a Determination of facts. That sounds very much to me like a trial.
>
> […]
>
> The Respondent argues that the major fact, over which there is dispute, underpinning the overriding issue is whether any amount paid by the Appellant to its parents as a guarantee fee was incurred for the purpose of producing income. The Respondent has alleged as additional facts in its Reply that there is no such purpose and acknowledges it is for the Respondent to prove this. Any Determination cannot be complete without facing that dispute head-on. The Appellant invites the Respondent to call evidence at the Determination. Notwithstanding the new wording of Rule 58, I do not agree that calling such evidence at a Determination of the 12 questions of law before me is in order. The CDIC issue as framed in the Reply is a question of fact: was there the necessary purpose to incur the fee to produce income. Interestingly, the Appellant has framed its question for Determination as a question of law - is the fee to the parents deductible vis-à-vis the deposit liabilities insured by CDIC. The answer to the legal question can only be determined by answering the factual question, and that notwithstanding the new wording of Rule 58, is a finding so fundamental to the overall appeal that only a full-blown trial with all the benefits of trial rules and procedures is the appropriate place for such an adjudication [emphasis added].[32]

[41] Another, more recent decision on point is *Paletta*. The appellant in that case

[32] *Ibid*. at paras. 11 and 13. Similar statements are made in *Aitchison Professional Corp. v. R.*, 2016 TCC 281 at paras. 18 and 19, *McIntyre*, *supra* note 15 at paras. 26 and 27, *Suncor*, *supra* note 15 at paras. 25 and 26 and *Lehigh*, *supra* note 15 at para. 44. As indicated at the outset of my reasons, I do not agree with the categorical nature of the statements made in these cases. I find them to be inconsistent with the legislative intention underlying the changes made to Rule 58 in 2004 and 2014, as well as the guidance offered by the Supreme Court of Canada in *Hryniak*. In my view, the existence of material facts in dispute is an important factor to consider in determining whether Rule 58 should be applied, but a blanket prohibition is only warranted in cases where there is a meaningful link between those facts and the remaining issues which will have to be resolved at trial.

had engaged in a series of straddle trades. There were a variety of issues raised by his appeal, including the factual question of whether or not the appellant had made any misrepresentation attributable to neglect, carelessness or wilful default for the purposes of subsection 152(4). Owen J. refused the appellant's request to consider this question as part of a Rule 58 proceeding, stating that it could not "be readily separated"[33] from the remaining issues that would have to be addressed at trial. He then added that:

> "To assess whether the Appellant acted as a wise and prudent person in the complex circumstances of this case, it is in my view necessary for the Court to understand all of the circumstances in which the relevant actions of the Appellant took place. This requires a full-blown trial in which the Court has the opportunity to see and assess all of the witnesses presented by the parties and all of the evidence tendered through those witnesses. Such a hearing will also provide the parties with a full opportunity to tender their evidence through examination in chief, cross-examination, discovery read-ins, etc. in a forum that provides the safeguards of the rules of evidence and the rules and procedures of the Court. This opportunity is clearly in the interests of justice in a case where the facts are complex and highly contentious and each of the parties bears an onus with respect to those facts [emphasis added].34

[42] As indicated above, there is in my view, a material fact which remains in dispute (or at least, unagreed to) between the parties. Paragraph 19 of the Notice of Appeal states that "neither 315 Southdale nor any apartment unit in the building was constructed or ever intended to be offered for sale as a condominium unit to individual owners for their own use," and that paragraph 2 of the Reply indicates that the Respondent has no knowledge of this allegation of fact and "puts the Appellant to proof" thereof. I asked whether the Respondent's position during the hearing of the motion had changed in this regard, and he confirmed that it had not. He further clarified that the Respondent did not deny that there was no intention to sell the units, but simply had no knowledge of whether or not this was the case.

[43] I also note that the material fact in dispute here is related to the FMV of the

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[33] *Paletta*, *supra* note 15 at para. 40.

[34] *Ibid.* at para. 41. This passage was cited with approval by Bocock J. in *McCartie*, *supra* note 23. One of the reasons he gave for refusing the appellant's Rule 58 request was that one of the questions to be determined concerned what evidence the Minister relied upon in reassessing the appellant (and more particularly, whether it included evidence obtained in breach of his *Charter* rights), which was a factual matter in dispute. He also noted that witnesses who would have to testify during phase two would likely have to go on to testify a second time at trial, and that it would be better for a single judge to assess their credibility.

building or units, as the case may be, which is one of the matters that the Court would have to consider at trial. I find it difficult to conclude that the Appellant's intention bears no relationship with that FMV in light of the earlier Carvest appeal regarding 1985 Richmond Street. Before this Court, for example, the Appellant argued that "[i]t is the intended and actual use of the residential complex that defines the market into which it is sold."35 St-Hilaire J. (as she then was), appeared to agree with this statement as a matter of principle, even though she ultimately concluded that the FMV of the units in question had to be determined based on the market for condos that were not rented out because there did not appear to be any market for condos that were. Similarly, before the Federal Court of Appeal, the Appellant criticized St-Hilaire's reasons (albeit unsuccessfully) on the basis that they "treated the units as condominiums, rather than as what they were — leased apartments that were registered as condominiums."[36] This error, "led the Tax Court to conclude it was bound to use the direct comparison method to determine the fair market value of the units […]."[37] While I express no views regarding the relevance of intention in assessing FMV at this stage, I am satisfied that there is a meaningful chance it will be raised by the parties no matter what decision is reached regarding the proper characterization of 315 Southdale.

[44] The Respondent proposed that any evidence in a stage two proceeding be presented by way of affidavit. Presumably, the relevant affidavit would be sworn by one of the Appellant's principals, who, in the absence of any agreement between the parties regarding the Appellant's intention, would be cross-examined by the Respondent. At trial, by contrast, I would expect the witnesses to consist mainly of valuation experts. Their conclusions regarding the Appellant's intention (e.g. regarding whether the design of the units is consistent with an intention to rent them out or sell[38]) could be of assistance to a judge considering the Rule 58 question and the testimony of the relevant affiant could be of assistance to a judge considering the FMV question.

[45] Moreover, while it is possible that the relevant affiant/witness would not be

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[35] *Carvest #1 - TCC*, *supra* note 3 at para. 88.

[36] *Carvest #1 - FCA, supra* note 4 at para. 17.

[37] *Ibid*.

[38] The Appellant noted during the hearing that units that will be rented tend to be identical, whereas units intended for sale are often customized, for example. He also pointed out that while units that will be rented out typically use two pipe HVAC systems, units intended for sale often use four pipe systems.

required to testify a second time during the trial (i.e. meaning that there would not be any issues with assessing his or her credibility without having heard all of the evidence he or she has to give), I do believe that *viva voce* evidence would give any Rule 58 proceeding the feeling of a trial.

[46] On a final note, I reject the Respondent's argument that the Appellant's intention to sell is not a material fact because it is not relevant. In my view, materiality means arguable materiality, rather than actual materiality. For me to decide at this stage that intention is not relevant in determining whether subsection 191(1) or 191(3) applies would be to pre-judge the question which would be considered as part of a stage two proceeding. The Federal Court of Appeal has sensibly cautioned judges of this Court not to do this. In *632738 Alberta Ltd. v. Canada*,[39] Woods J.A. wrote:

> At the outset, I would observe that many of the Tax Court's findings, above, decide issues that ultimately will have to be decided by the judge tasked with determining the scope of the waiver. This should be avoided at a stage 1 proceeding if at all possible. In this case, the Tax Court could have accomplished its task at stage 1 by determining whether issues are arguable, rather than deciding them. The result is unfortunate.[40]

IV. CONCLUSION:

[47] The Respondent's motion is dismissed. The parties shall have thirty days to make submissions regarding costs, failing which they will be awarded to the Appellant in the amounts provided for in Schedule II of the Rules.

Signed this 5th day of November 2025.

"Ryan Rabinovitch"

Rabinovitch J.

[39] 2021 FCA 43.

[40] *Ibid*. at para. 21.

CITATION:	2025 TCC 166
COURT FILE NO.:	2024-1778(GST)G
STYLE OF CAUSE:	CARVEST PROPERTIES LIMITED AND HIS MAJESTY THE KING
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	May 27, 2025
REASONS FOR ORDER BY:	The Honourable Justice Ryan P. Rabinovitch
DATE OF ORDER:	November 5, 2025
DATE OF AMENDED ORDER:	November 12, 2025

APPEARANCES:

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