Dockets: 2012-1020(IT)G
2012-1921(IT)G
2012-4808(IT)G

BETWEEN:

RIO TINTO ALCAN INC.,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Motion to strike under section 65 of the *Tax Court of Canada Rules (General Procedure)* and disposed of without appearance by counsel, in accordance with section 69 of the *Tax Court of Canada Rules (General Procedure)*.

Before: The Honourable Justice Johanne D'Auray

Counsel for the Applicant:	Yves St-Cyr
Counsel for the Respondent:	Nathalie Labbé Susan Shaughnessy

ORDER

UPON motion by the respondent filed on July 14, 2015, under section 65 of the *Tax Court of Canada Rules (General Procedure)*;

UPON reading the respondent's Motion Record;

UPON considering the applicant's written representations regarding the respondent's Notice of Motion opposing the application;

The respondent's motion is dismissed, without costs, in accordance with the attached Reasons for Order.

Signed at Ottawa, Canada, this 26th day of August 2015.

"Johanne D'Auray"

D'Auray J.

Translation certified true
on this 22nd day of July 2016.

Erich Klein, Revisor

Citation: 2015 TCC 212
Date: 20150826
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BETWEEN:

RIO TINTO ALCAN INC.,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

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REASONS FOR ORDER

D'Auray J.

[1] The applicant, Rio Tinto Alcan Inc., filed a notice of motion on June 4, 2015, and an amended notice of motion on July 10, 2015, under section 58 of the *Tax Court of Canada Rules (General Procedure)* (the Rules).

[2] The applicant asks this Court to rule on the following questions:

A. Arbitrary assessments

(i) Did the *Income Tax Act* (ITA) authorize the delegate of the Minister of National Revenue (Minister) to issue for the period,[1] without first reviewing the facts pertaining to the applicant so as to determine its tax liability and without fixing the amount of tax payable on the basis of such determination, reassessments disallowing the expenses and the investment tax credit (ITC) claimed by the applicant in relation to scientific research and experimental

[1] The reassessments are for the taxation years ending December 31, 2006, October 31, 2007, and December 31, 2007.

development (SR&ED) in respect of the activities of Aluminerie Alouette Inc. (AAI)?

(ii) If not, are the reassessments invalid with respect to the disallowed expenses and ITC relating to the activities of AAI?

B. Assessments invalid in part

(i) Did the ITA authorize the Minister to issue outside the normal reassessment period (paragraph 152(3.1)(*a*) of the ITA), on April l9, 2013, and October 3, 2013, reassessments against the applicant for its taxation years ending December 31, 2006, and October 31, 2007, respectively, relating to items other than those expressly listed in subsections 152(4) and 152(4.01) of the ITA, including, more specifically, those set out in subparagraphs 152(4)(*a*)(ii), 152(4)(*b*)(iii), 152(4.01)(*a*)(ii) and 152(4.01)(*b*)(iii) of the ITA?

(ii) If not, are the said reassessments invalid with respect to the items assessed that are not listed in subsections 152(4) and 152(4.01) of the ITA and more specifically with respect to the expenditures and the ITC disallowed in their entirety in relation to the activities of AAI (for the taxation years ending December 31, 2006, and October 31, 2007), and with respect to the carry-forward of non-capital losses for the 2005 taxation year to the taxation year ending October 31, 2007?

[3] In support of its motion under section 58 of the Rules, the applicant attached the affidavit by Jocelin Paradis. Mr. Paradis's affidavit primarily describes the factual background of the questions to be disposed of by this Court, namely, the arbitrary assessments and the out-of-time reassessments issued by the Minister.

[4] Following the applicant's amended motion, the respondent filed with this Court a motion to strike paragraphs 4 to 8, 11, 12, 14 to 25, 28, 32 and 33 of Mr. Paradis's affidavit.

[5] The respondent asserts that she has moved to strike out these paragraphs of Mr. Paradis's affidavit because he is relying on documents prepared by representatives of the respondent to allege certain facts.

[6] According to the respondent, Mr. Paradis cannot, in support of his allegations in his affidavit, rely on excerpts from the examinations for discovery of

Ms. Martin, SR&ED Financial Reviewer at the Canada Revenue Agency (CRA), and Mr. Dufour, Research and Technology Advisor (RTA) for the CRA.

[7] The respondent argues as well that Mr. Paradis also cannot, in support of his allegations in his affidavit, rely on documents of CRA officials, such as Mr. Dufour's technical report, Ms. Martin's and other CRA officials' T20, T2020 and T661 reports, and various emails among CRA officials and between the representatives of the CRA and those of AAI.

[8] As for the examinations for discovery, the respondent argues that the applicant cannot use excerpts from the examinations for discovery of the CRA officials, as the applicant does not have personal knowledge of the facts alleged in those examinations. Furthermore, she argues that, under section 58 of the Rules, if the applicant can file in evidence the examinations for discovery of the respondent's representatives, the filing thereof should only take place at the second stage under section 58. In that regard, the respondent relies on the provisions of subsections 58(1) and 58(2) and paragraph 58(3)(*b*) of the Rules.

[9] As for the other documents, such as the technical report, the T20, T2020, and T661 reports, and the various emails among CRA officials and between the representatives of the CRA and those of AAI, the respondent argues that Mr. Paradis cannot adduce those documents in evidence in support of his allegations in his affidavit, because he is not the author of the documents. According to the respondent, Mr. Paradis' allegations of fact are hearsay.

[10] As for the applicant, it argues that Mr. Paradis, as its Vice-president, Taxation (Canada), [TRANSLATION] "is responsible for all tax matters for the applicant in Canada. Therefore, he has sufficient direct knowledge of all the evidence filed in support of Affidavit 58, including the content of the examinations for discovery."[2]

[11] Furthermore, with regard to the examinations for discovery of the respondent's representatives, the applicant argues that they were its examinations and that it was the applicant that examined for discovery Ms. Martin and Mr. Dufour; it can therefore use the examinations for discovery as evidence. The applicant also argues that sections 75 and 100 of the Rules allow examinations for discovery to be read into evidence on the hearing of a motion.

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[2] See page 2, paragraph 3 of the applicant's written representations.

[12] The applicant further argues that the documents relating to the examinations for discovery may also be used by Mr. Paradis to support the allegations of fact in his affidavit.

[13] As for the other documents in support of Mr. Paradis's allegations, the applicant argues that, although the documents could be hearsay, they are admissible under the traditional exceptions to hearsay and/or the exception to hearsay under the principled approach set out by the Supreme Court of Canada.[3] The traditional exceptions to hearsay upon which the applicant relies are [TRANSLATION] "possession of documents,"[4] [TRANSLATION] "statement made in the course of the performance of a duty" and [TRANSLATION] "admission of a party." The applicant also argues that the CRA reports are records made in the usual and ordinary course of business of the CRA and are therefore admissible under subsection 30(1) of the *Canada Evidence Act*.

[14] Thus, according to the applicant, Mr. Paradis's allegations that the respondent seeks to strike are admissible.

[15] During my teleconferences with the parties, there were discussions about whether the parties could file evidence at the first stage under section 58 of the Rules. In light of the amendment to section 58 in 2014, it was decided as a precaution that the respondent would also file evidence in support of her representations under section 58 and that I would review everything.

[16] I am of the view that a brief historical review of section 58 of the Rules is in order. In 1990, when this Court was created, section 58 was drafted as follows:

> DETERMINATION OF QUESTIONS OF LAW
>
> *Question of Law*
>
> 58. (1) A party may apply to the Court,
>
> > (*a*) for the determination, before hearing, of a question of law raised by a pleading in a proceeding where the determination of the question may dispose of all or part of the proceeding, substantially shorten the hearing or result in a substantial saving of costs, or

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[3] See: *R v Khan*, [1990] 2 SCR 531, *R v Starr*, [2000] 2 SCR 144, *R v Khelawon*, [2006] 2 SCR 787.

[4] The applicant submits that the possession of documents exception to hearsay also applies to examinations for discovery. See page 8, paragraph 25, applicant's written representations.

> (*b*) to strike out a pleading because it discloses no reasonable grounds for appeal or for opposing the appeal,
>
> and the Court may grant judgment accordingly.
>
> (2) No evidence is admissible on an application,
>
> (*a*) under paragraph (1)(*a*), except with leave of the Court or on consent of the parties, or
>
> (*b*) under paragraph (1)(*b*).
>
> (3) The respondent may apply to the Court to have an appeal dismissed on the ground that,
>
> (*a*) the Court has no jurisdiction over the subject matter of an appeal,
>
> (*b*) a condition precedent to instituting a valid appeal has not been met, or
>
> (*c*) the appellant is without legal capacity to commence or continue the proceeding,
>
> and the Court may grant judgment accordingly.

[17] It can be seen that, at that time, only questions of law could be the subject of an application under section 58 of the Rules. The rule was that no evidence could be filed in support of an application under section 58, except with leave of the Court or on consent of the parties.

[18] In 2004, section 58 of the Rules was amended so that a question of law, a question of fact or a question of mixed law and fact could be the subject of an application under section 58. Section 58 then read as follows:

> QUESTION OF LAW, FACT OR MIXED LAW AND FACT
>
> 58. (1) A party may apply to the Court,
>
> (*a*) for the determination, before hearing, of a question of law, a question of fact or a question of mixed law and fact raised by a pleading in a proceeding where the determination of the question may dispose of all or part of the proceeding, substantially shorten the hearing or result in a substantial saving of costs, or
>
> (*b*) to strike out a pleading because it discloses no reasonable grounds for appeal or for opposing the appeal,

and the Court may grant judgment accordingly.

(2) No evidence is admissible on an application,

(*a*) under paragraph (1)(*a*), except with leave of the Court or on consent of the parties, or

(*b*) under paragraph (1)(*b*).

(3) The respondent may apply to the Court to have an appeal dismissed on the ground that,

(*a*) the Court has no jurisdiction over the subject matter of an appeal,

(*b*) a condition precedent to instituting a valid appeal has not been met, or

(*c*) the appellant is without legal capacity to commence or continue the proceeding,

and the Court may grant judgment accordingly.

[19] In 2014, section 58 of the Rules was again amended. The purpose of the 2014 amendments was to spell out the process under section 58, that is, the two-stage process.[5]

[20] At stage one, the Court must determine whether the proposed question is suitable for determination under section 58. If it is determined to be such, the Court proceeds to the second stage, that is, the hearing of the question.[6]

[21] It is this version of section 58 that applies in this case. So, as of 2014, section 58 reads as follows:

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5 Under the 2014 version of section 58 of the Rules, unlike under the 2004 version, the respondent cannot use section 58 to apply to the Court to have an appeal dismissed if the Court does not have jurisdiction, if a condition precedent to instituting a valid appeal has not been met, or if the appellant is without legal capacity to commence or continue the proceeding. Moreover, under the 2014 version, a party can no longer apply to the Court to have a pleading struck out. The 2014 version of section 58 has only one object: the determination of a question of law, of fact or of mixed law and fact.

6 The majority of the judges of the Court, even prior to the amendment of section 58 in 2014, applied a two-stage process. See *McIntyre v The Queen*, 2014 TCC 111, and *HSBC Bank of Canada v The Queen*, 2011 TCC 37.

> 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.
>
> (3) An order that is granted under subsection (1) shall
>
> (*a*) state the question to be determined before the hearing;
>
> (*b*) give directions relating to the determination of the question, including directions as to the evidence to be given — orally or otherwise — and as to the service and filing of documents;
>
> (*c*) fix time limits for the service and filing of a factum consisting of a concise statement of facts and law;
>
> (*d*) fix the time and place for the hearing of the question; and
>
> (*e*) give any other direction that the Court considers appropriate.
>
> [Emphasis added.]

[22] As can be seen in the text of section 58 of the Rules, the first subsection of section 58 deals only with the first stage, namely, deciding whether the question to be determined is one that may be dealt with under section 58.

[23] In that regard, the Court must take into account the criteria set out in subsection 58(2) of the Rules to decide whether the question is an appropriate one for determination under section 58. Those criteria are whether the hearing pursuant to section 58 may dispose of all or part of the proceeding or result in a substantially shorter hearing or a substantial saving of costs.

[24] Subsection 58(3) of the Rules indicates that, in an order granted under subsection 58(1), the Court shall give directions relating to the determination of the question, including directions as to the evidence to be given—orally or otherwise—and as to the service and filing of documents.

[25] Subsection 58(3) of the Rules and paragraph 58(3)(*b*) state that evidentiary matters are to be disposed of in the order, which suggests that evidentiary matters will be determined only if the Court decides to hear the question under section 58.

[26] As drafted, section 58 does not prevent a party from filing evidence at stage one of the process under section 58.

[27] It should be noted that, at stage one of the section 58 process under the Rules, the Court is not required to dispose of the substantive issues, namely, whether the assessments are arbitrary and whether the reassessments were issued out of time, but must decide whether section 58 is applicable to the questions to be determined and whether it will dispose of all or part of the proceeding or result in a substantially shorter hearing or a substantial saving of costs. Thus, at stage one under section 58, the scope of the allegations in an affidavit should be limited to the facts relating to that first stage.

[28] At stage one under section 58, the facts alleged by Mr. Paradis in his affidavit can only serve to establish that there are questions of fact and law to be determined and that these questions are appropriate for determination under section 58.

[29] In the decision of the Supreme Court of Canada in *R v Khelawon*, [2006] 2 SCR 787, Charron J. states in Part 5.2.1 of her reasons that "[t]he purpose for which the out-of-court statement is tendered matters in defining what constitutes hearsay because it is only when the evidence is tendered to prove the truth of its contents that the need to test its reliability arises".

[30] At stage one under section 58 of the Rules, the Court will not determine whether the assessments are arbitrary or whether the Minister issued the reassessments out of time. Therefore, in accordance with subsections 58(1) and 58(2) of the Rules, Mr. Paradis's affidavit cannot have any purpose other than to show that there are questions of law and fact are appropriate for determination under section 58.

[31] Thus, pursuant to *Khelawon*, Mr. Paradis's allegations are not hearsay because the allegations of fact merely establish that questions of law and fact do exist for the purpose of determining a question under section 58. At stage one under section 58, the documents in support of Mr. Paradis's allegations of fact cannot prove the truth of their contents as these documents pertain to the questions to be determined. If the motion under section 58 were allowed, directions as to the

evidence to be given would then be issued by the Court under paragraph 58(3)(*b*), and at stage two under section 58, the documents could be entered in evidence, if admissible.

[32] The same reasoning applies to the affidavits and related evidence filed by the respondent.

[33] Consequently, Mr. Paradis's allegations will not be struck, as they serve only to establish that there are questions of law and fact appropriate for determination under section 58. The respondent's motion is dismissed.

[34] I have decided not to award costs considering the recent amendment to section 58 of the Rules.

Signed at Ottawa, Canada, this 26th day of August 2015.

"Johanne D'Auray"

D'Auray J.

Translation certified true
on this 22nd day of July 2016.

Erich Klein, Revisor

CITATION:	2015 TCC 212
COURT FILE NO.:	2012-1020(IT)G 2012-1921(IT)G 2012-4808(IT)G
STYLE OF CAUSE:	RIO TINTO ALCAN INC v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	
DATE OF HEARING:	
REASONS FOR ORDER BY:	The Honourable Justice Johanne D'Auray
DATE OF ORDER:	August 26, 2015

APPEARANCES:

Counsel for the applicant:	Yves St-Cyr
Counsel for the respondent:	Nathalie Labbé Susan Shaughnessy

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