Docket: 2015-5560(IT)G

BETWEEN:

COUGAR HELICOPTERS INC.,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on November 24, 2016, at Vancouver, British Columbia
with supplementary written submissions received
by December 15, 2016.

Before: The Honourable Justice K. Lyons

Appearances:

Counsel for the Appellant:	Robert S. Anderson, Q.C. and Rebecca Cynader
Counsel for the Respondent:	Elizabeth McDonald and Geraldine Chen

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ORDER

UPON motion made by the applicant pursuant to section 58 of the *Tax Court of Canada Rules (General Procedure)*;

AND UPON hearing the evidence and submissions of the parties;

In accordance with the attached Reasons for Order, the motion is dismissed. Costs are awarded to the respondent in any event of the cause.

Signed at Toronto, Ontario, this 30th day of June 2017.

"K. Lyons"

Lyons J.

Citation: 2017 TCC 126
Date: 20170630
Docket: 2015-5560(IT)G

BETWEEN:

COUGAR HELICOPTERS INC.,

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REASONS FOR ORDER

Lyons J.

I. Introduction

[1] Cougar Helicopters Inc. ("Cougar") brought a motion under Rule 58 of the *Tax Court of Canada Rules (General Procedure)* (the "*Rules*") for a question of mixed law and fact (the "Question") to be determined before the hearing of its appeal.[1] The Question stated is:

> Whether the Reassessment is void *ab initio* because it was issued beyond the normal reassessment period and was not accompanied by any allegation that the Appellant made any misrepresentation or committed any fraud in filing its tax returns or in supplying in any other information under the *Act* for the Taxation Year. [2]

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1 SOR/90-688a.

2 At the hearing, Cougar abandoned the two questions in its Notice of Motion and restated the Question. The respondent made oral and written submissions which were followed by supplementary written submissions to address the restated Question. Cougar responded with supplementary written submissions.

[2] The Reassessment is the Notice of Reassessment dated July 29, 2015 ("Reassessment"), the *Act* is the *Income Tax Act* (the "*Act*") and the Taxation Year ended on December 31, 2011 ("2011").

[3] Cougar contends that if the Question is allowed to be determined, it will result in the disposition of its appeal or substantially shorten the hearing and result in substantial cost savings. The respondent disagrees and says a determination of the Question in the circumstances would be inappropriate, largely because of the contested material facts and credibility issues and would be prejudicial to the respondent.

II. Background

[4] Cougar, located in Newfoundland, is Canada's largest helicopter service provider to the offshore energy sector.[3] One of Cougar's main business activities involves flying workers to and from offshore locations such as oil rigs situated off of Newfoundland, Labrador and Nova Scotia. Another main activity involves search and rescue operations for the same sector in Newfoundland and Labrador. Cougar also performed work in Greenland and purportedly in British Columbia and the Gulf of Mexico.

[5] Cougar is a member of the VIH Aviation Group of Companies ("VIH Group"). Until 2012, Cougar was a wholly owned subsidiary of VIHAG Aviation Group Ltd. ("VIHAG") located in British Columbia.[4] In 2011, Cougar had leased eight helicopters from VIHAG; six of which operated in Newfoundland and Labrador and two of which operated in Nova Scotia.

[6] The Minister of National Revenue issued the Notice of Assessment, dated July 6, 2012, to Cougar for 2011. It was assessed nil tax under the *Act* and assessed for Nova Scotia tax on large corporations.

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3 Cougar was amalgamated under the *Canada Business Corporations Act*, RSC, 1985, c C-44.

4 Cougar Aviation Ltd. was a wholly owned subsidiary of VIHAG. VIHAG was a wholly owned subsidiary of Kenlor Investments Inc. Kenlor Investments Inc. was wholly owned by K. Norie.

[7] Affidavits in support of Cougar's motion set out the correspondence and the communications between Cougar and the Canada Revenue Agency ("CRA") as follows.

[8] Around November 26, 2013, the Minister commenced an audit of Cougar for 2011. That was followed by the field audit commencing on March 3, 2014. By letter dated March 3, 2015, the Minister sent an initial proposal letter to Cougar containing proposed adjustments.

[9] The final proposal letter, dated April 27, 2015, was sent by the auditor to Cougar containing proposed adjustments plus the Minister's intention to reassess 2011.[5]

[10] On July 29, 2015, the Minister issued the Reassessment for 2011 after the expiry of the normal reassessment period and disallowed the amount of $12,788,270 (the "Amount"), pursuant to paragraph 18(1)(*a*) of the *Act*, claimed by Cougar as a business expense.

[11] In August 2015, a Cougar representative made requests to the CRA auditor for all materials supporting the Reassessment. Cougar obtained the T20 Audit Report, the T2020 and "coding sheets and copy of diary regarding our conversations about the participation expense".[6] Cougar alleges the auditor informed it that all of his audit working papers were in the initial and final proposal letters and the coding sheets and diary and that he had no working papers relating to the participation fee except for those already provided in the initial and final proposal letters.[7]

[12] On September 24, 2015, Cougar filed an objection with the CRA to the Reassessment for 2011.

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5 See C. Hodgins Affidavit, Exhibit "C".

6 Affidavit of Darrell Eng sworn September 6, 2016 ("D. Eng Affidavit"), paragraphs 4, 5 and 7.

7 D. Eng Affidavit, paragraphs 5 to 9.

[13] During a telephone conversation on October 5, 2015, a CRA collections officer informed a Cougar representative that the auditor had created a subsection 152(4) "assessment after the normal (re)assessment period recommendation report" relating to the Reassessment for 2011 which alleges misrepresentation or fraud by Cougar (the "Report"). The Report had not been provided to Cougar by or until October 5, 2015.[8]

[14] The parties' pleadings, Amended Notice of Appeal, the Reply to the Amended Notice of Appeal ("Reply") and Answer (collectively, the "pleadings"), reveal the following issues. Cougar identifies the issues, each of which is melded with its respective position, in its Amended Notice of Appeal as follows:[9]

> The appellant's positions with respect to the issues are as follows:
>
> 1. The Reassessment is void *ab initio* because it was issued beyond the normal reassessment period and was not accompanied by an allegation that the appellant made any misrepresentation or committed any fraud in filing its tax returns or in supplying any other information under the *Act* for the Taxation Year;
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> 2. In the alternative, the Reassessment is statute-barred because it was issued beyond the normal reassessment period and the appellant did not make any misrepresentation attributable to neglect, carelessness or wilful default or commit any fraud in filing its tax returns or in supplying any other information under the *Act* for the Taxation Year;
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> 3. In the further alternative, paragraph 18(1)(a) does not apply to disallow the deduction of the Participation Fee.

[15] Cougar characterizes the Amount interchangeably as compensation for helicopter lease expenses or "Participation Fee" and claims it accrued the Amount in 2011 under an agreement it had with VIHAG. Cougar's Answer "denies that it paid, accrued or claimed any hourly flight time amounts to VIHAG", "denies that there was a "profit sharing charge" as alleged by the Respondent" and states "While the amount of the Participation Fee was not directly tied to the amount of

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8 D. Eng Affidavit, paragraphs 11 and 12.

9 Amended Notice of Appeal, paragraph 43.

the Appellant's revenue, the accrual of the Participation Fee was directly connected to the generation of revenue."[10]

[16] The respondent identifies the issues in her Reply as follows:[11]

> The issues are whether the appellant:
>
> a) made or incurred any claimed expenses, in excess of the amounts allowed by the Minister, for the purpose of gaining or producing income from a business or property;
>
> b) claimed an outlay or expense, in excess of the amounts allowed by the Minister, that was reasonable in the circumstances; and
>
> c) made a misrepresentation attributable to neglect, carelessness or wilful default in its 2011 income tax return that entitled to Minister to reassess beyond the normal reassessment period.

[17] The respondent asserts that the Minister was justified in reopening 2011 beyond the normal reassessment period because Cougar made a misrepresentation and it was attributable to neglect, careless or willful default. Intertwined with that issue is the characterization of the Amount by Cougar in claiming it as a business expense on its tax return even though it was devoid of any income producing purpose and was unconnected to Cougar's revenue from its charter service. She alleges the Amount is part of a tax planning arrangement to reduce Cougar's income to zero by profit sharing with VIHAG, its parent. The Amount was determined by how large it needed to be to accomplish zero net income because it wanted to ensure it paid no provincial income tax, on its income in Newfoundland and Nova Scotia, and shift the income to British Columbia where a lower tax rate would apply on that income in VIHAG's hands.

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10 Answer, paragraphs 11, 12 and 15. Cougar also describes the Participation Fee as monthly lease expenses and a deduction for a participation fee expense paid to VIHAG).

11 Reply, paragraph 25.

[18] Upon issuing the Reassessment pursuant to subparagraph 152(4)(*a*)(i) of the *Act*, there is no requirement, she says, that it be accompanied by an allegation of misrepresentation nor is the Minister required to give notice of such allegation prior to the issuance of the Reassessment.

[19] No examinations for discovery have been held.

[20] Cougar filed its "Notice of Motion (Rule 58)".

III. Analysis

[21] Rule 58[12] reads:

> Question of Law, Fact or Mixed Law and Fact
>
> **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.

12 SOR/2014-26, s. 6.

[22] In *Paletta v Canada*, 2016 TCC 171, 2016 DTC 1145 [*Paletta*], Justice Owen undertook a fresh consideration of the current Rule 58, effective February 7, 2014, because of the changes in text and structure from the former Rule 58 noting "current Rule 58 represents a consolidation of sections 58, 59, 60, 61 and 62 of the *Rules* under a single rule, which in some respects is similar to, but in other respects quite different from, the version of Rule 58 that it replaced".[13]

Rule 58 process and requirements

[23] Rule 58 sets out a two-stage process. At stage one, a motion's judge *may* set down a question for determination if the following requirements, in subsections 58(1) and (2) of the *Rules*, are met:

1. The question proposed must be a question of law, fact or mixed law and fact or be a question as to the admissibility of any evidence;[14]

2. The question must be raised in a pleading; and

3. It appears that the determination of the question before the hearing may dispose of all or part of the proceeding, result in a substantially shorter hearing, or result in a substantial saving of costs.

[24] The onus is on the applicant to establish that those requirements are met at stage one.[15]

[25] A decision to grant an order to allow for a determination of a question is discretionary as is clear from the repetitive, permissive and broad discretionary language in subsection 58(2) of the *Rules*.[16]

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13 *Paletta, supra* at paras 10 and 11. As indicated in *Paletta*, the Regulatory Impact Analysis Statement describes the 2014 amendments to Rule 58 as a regrouping of all matters under sections 53 (strike out a pleading) and 58 (determination of questions law, fact or mixed law or fact) resulting in the repeal of sections 59, 60, 61 and 62.

14 As part of the 2014 amendments, an alternative option was added to and expanded the scope of subsection 58(1) of the *Rules* so as to allow a proposed question as to the admissibility of evidence.

15 *Rio Tinto Alcan Inc. v Canada*, 2016 TCC 31, 2016 DTC 1033 at para 43.

16 *Suncor Energy Inc. v Canada*, 2015 TCC 210, [2015] TCJ No. 171 (QL) [*Suncor*]. Recently affirmed by the Federal Court of Appeal in *Paletta*, *supra* at paragraph 4.

[26] If the requirements are met, an order setting out terms *may* be granted to proceed to the stage two determination hearing where the Question is decided on its merits.

[27] The Question will require the courts consideration of subparagraph 152(4)(*a*)(i) of the *Act* which permits a late reassessment if a taxpayer makes a "misrepresentation that is attributable to neglect, carelessness or willful default" in filing a return or supply of information under the *Act*.[17] The Minister has the authority to reassess (or assess or make an additional assessment) after the expiry of the normal reassessment period of the taxation year in such circumstances. In re-opening a taxation year on that basis, the onus is on the Minister to show misrepresentation occurred and it was attributable to neglect, carelessness or willful default.

Cougar's application

[28] I now turn to Cougar's application which is at stage one.

Subsection 58(1)

[29] As framed, the Question asks whether and to what extent the Minister has an obligation to make an allegation of misrepresentation or fraud when issuing an out-of-time reassessment, a question of law, and whether the Minister made any allegation of misrepresentation or fraud at the time of (or prior) to the time of issuing the Reassessment, a question of fact.[18] Clearly, the Question meets one of the alternative requirements in subsection 58(1) of the *Rules* that it is a question of mixed law and fact and that it is raised in Cougar's Amended Notice of Appeal.[19]

Subsection 58(2)

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17 *Boucher v Canada*, 2004 FCA 46, 2004 DTC 6084 (FCA).

18 If the Question proceeds to a determination, Cougar's position is that in reopening a statute barred year, an allegation of misrepresentation or fraud must accompany the Reassessment at the time of issuance or the taxpayer must be given notice prior to its issuance in order that a reassessment is valid. The respondent's disagrees; even if notice is required, Cougar received it expressly or implicitly.

19 Conceded by the Respondent, Transcript at page 62, lines 16-21.

[30] Cougar claims that the requirements in subsection 58(2) are "overwhelmingly met" because if the Question is answered in the affirmative the Reassessment is void *ab initio*, (invalid), and will dispose of the entire appeal rendering a trial unnecessary. Alternatively, if the Reassessment is determined to be valid, issue 1 in its pleading will be resolved leaving the remaining issues identified in the pleadings to be dealt with at trial.

[31] The Question, Cougar submits, is a discrete "silo" issue that goes to the validity - versus the correctness - of the Reassessment for 2011. The validity versus correctness distinction is expressed as follows:

> The facts that gave rise to the Reassessment and the basis for reopening the statute-barred year will be of key relevance to the issue of whether the Appellant made a misrepresentation attributable to neglect, carelessness or wilful default. However, they are not relevant to the question of the whether the Minister made any *allegation* of misrepresentation or fraud within the meaning of subsection 152(4) at or prior to the time of issuing the reassessment.

[32] Cougar contends whether the Minister made any allegation of misrepresentation or fraud at the time of or prior to issuing the Reassessment (validity) engages facts and law that differ from and are irrelevant to the remaining issues in the appeal (correctness). The former is legally and factually determinable by considering subparagraph 152(4)(*a*)(i) of the *Act*, the jurisprudence, and the actions of the Minister and her representatives. Cougar estimates that the issues raised in the motion should take only a day to argue and the balance of the trial may take more than a week resulting not only in a substantially shorter hearing but substantial costs savings.

[33] The respondent counters that the basis for reopening 2011 and raising the Reassessment is inextricably linked with Cougar's characterization of the Amount in the context of Cougar's filing position necessitating a consideration of all the circumstances and should not be bifurcated. Further, there are material foundational contested facts, some of which will invoke credibility findings and it would be inappropriate and prejudicial to the respondent to allow the Question to proceed to a determination.

[34] If allowed to proceed, says the respondent, it would not result in substantial savings of time at the hearing of the appeal or costs if the Question proceeded to

stage two and was unsuccessful as there would be a duplication of evidence relating to issue involving the Amount. Thus, the same evidence about Cougar's pursuit of profit-sharing arrangement under the guise of inter-corporate lease payments would be relevant to whether those were for the purpose of earning income. An affirmative answer to the Question would have far-reaching jurisprudential implications impacting future taxpayers.

[35] Several similarities exist, in my view, in the present motion and the motion brought in *Paletta* (albeit a different question). Both involve a statute-barred issue and a vigorous debate between the parties over the circumstances surrounding income tax filing positions. In denying the Rule 58 motion and having referred to the Federal Court of Appeal in *Nesbitt v The Queen*[20] as to whether a misrepresentation has occurred, Justice Owen states:

> 30 In light of this statement, it is apparent that, for the Court to find a misrepresentation, the Respondent must establish that there were one or more incorrect statements in the Appellant's returns for the Taxation Year. As the correctness of the returns is the crux of the reassessment issue … it seems to me that it would be difficult to address this question without a full hearing that addresses all of the issues raised in the pleadings.

[36] Justice Owen found that the question was not a discrete issue and "cannot be resolved without an appreciation of all of the circumstances surrounding the filing positions taken by the Appellant in his returns for the Taxation Year. Those circumstances have not been agreed upon by the parties and, in fact, are at the heart of the highly contested reassessment issue."[21]

[37] The comments in *Paletta* are equally applicable in the present motion I disagree with Cougar that the Question involves a silo issue which can be separated from the other issues in the appeal. The pleadings in Cougar's situation disclose a factually complex appeal flowing from commercial transactions with the pivotal concern being Cougar's characterization of the Amount (payment to its parent, VIHAG, that was claimed as a business expense) plus the debate between

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20 *Paletta, supra* at paras 29 and 30 referring to *Nesbitt v Canada*, 96 DTC 6588 (FCA).

21 *Paletta, supra* at para 32. Mr. Paletta had conceded that his tax filings contained a misrepresentation (for the purpose of narrowing the Rule 58 process) so that the motions judge at the determination hearing need only consider whether the misrepresentation was attributable to neglect, care or willful default.

the parties as to the circumstances surrounding Cougar's 2011 income tax filing position.[22]

[38] The facts surrounding the reopening of 2011 and raising the Reassessment under subparagraph 152(4)(*a*)(i) of the *Act*, involving allegations of misrepresentation as it relates to the Amount and Cougar's filing position, are germane to the correctness of the return which is the crux of the Reassessment issue. Tied to that, is the Question involving the alleged Ministerial obligation to communicate the allegations of misrepresentation (by notice) to Cougar when reopening 2011. These are intertwined issues and cannot be dealt with in isolation given the highly contested material and multiple facts surrounding the characterization issue involving the Amount that led to the income tax filing that are connected to the communications between Cougar and the CRA also involving material disputed facts foundational to the Question.

[39] One example of the latter is whether Cougar was unaware of the Minister's position regarding the Reassessment before it was issued. A motions judge would be asked to assess whether Cougar had notice that the Minister intended to allege misrepresentation or fraud or whether in the circumstances there was an implied allegation of misrepresentation or fraud made to Cougar.[23] Cougar's claim that there is one disputed fact that relates solely to the communication between Cougar and the Minister appears to be an oversimplification of the issues in a complex appeal.[24]

[40] Cougar argues that the principles identified in by the Supreme Court of Canada in *Hryniak v Mauldin* are apposite in assessing the candidacy of a question

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22 Paragraph 1 of Cougar's initial written submissions refers to extensive document production and discoveries.

23 Respondent's Supplementary Written Submissions at page 5, para 3 highlights the auditor's diaries and other documents that contains the Minister's position and her communications regarding her position and what transpired between the parties and if the Minister gave notice to Cougar.

24 Cougar's written Reply submissions. Cougar previously suggested that the Question involves no disputed evidence and either no or limited disputed facts unrelated to the facts the trial judge will have to determine at the hearing of the appeal.

for a Rule 58 determination.[25] The general principles derived from that decision are that summary judgment rules are to be interpreted broadly favoring proportionality and expediency; a summary judgment is to be granted where the record enables a motions judge to reach a fair and just determination on the merits.[26] The Court further instructs that the summary judgment process is only appropriate where a motions judge can make necessary findings of fact and apply the law.[27]

[41] The Federal Court of Appeal in *Southwind v Canada*, 2015 FCA 57, cautioned that "care must be taken not to import the pronouncements in *Hryniak* uncritically, thereby improperly amending" the substantive content of other rules before the courts.

[42] Cougar asks that if the Question proceeds to stage two, that the evidence be tendered by affidavit and that it be restricted to the affidavit Cougar adduced. Admittedly, subsection 58(3) of the *Rules* enables a motion's judge to address evidentiary matters, and may give directions, relating to the stage-two determination hearing. However, a Rule 58 process should not be used as a substitute for a full hearing merely because evidentiary issues can be addressed in an order.[28] Nor would a determination be appropriate where the motions judge would need to hear a volume of evidence comparable to what a trial judge would hear.

[43] Cougar's approach seeks to circumscribe the manner in which the respondent may introduce evidence. In my view, that would not be conducive with the principle enunciated in *Hryniak* for a fair and just determination on the merits especially when the respondent has the onus relating to subparagraph 152(4)(*a*)(i) of the *Act*.

[44] As noted by Chief Justice Rossiter in *Suncor*, "although Rule 58 contemplates questions of fact and of mixed law and fact, the determination of

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25 *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 [*Hryniak*]. The decision considered the summary judgment rules in Ontario's *Rules of Civil Procedure*.

26 That approach is consistent with subsection 4(1) of the *Rules* which provides that the Rules "shall be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits" and Rule 58.

27 *Hryniak, supra* at paras 10, 49 and 66.

28 *Paletta, supra* at para 34.

such questions is very much like a a trial, except that an actual trial has the benefits of a fair hearing with evidentiary protections".[29] In my opinion, it would be challenging in such a complex appeal with contested material facts and credibility issues that are pivotal to the Question without hearing the matter in a trial setting to gain a full appreciation of all the circumstances to address the issues raised in the pleadings as to the filing position and the communications between Cougar and the CRA to properly address the Question, that center on allegations of misrepresentation pursuant to subparagraph 152(4)(*a*)(i) of the *Act*.

[45] I am unconvinced in the context of the Question and what the motions judge will be required to assess in Cougar's circumstance involving the application of subparagraph 152(4)(*a*)(i), that the requirements in subsection 58(2) of the *Rules* may be met and would result in a substantial savings of time or costs.

Other factors

[46] Even if the requirements in subsections 58(1) and (2) of the *Rules* are met, the motion's judge is not compelled to order a determination and can consider other factors, with all the circumstances of the case, to decide whether the proposed question is appropriate for a Rule 58 determination.[30]

Vagueness

[47] *Suncor* affirms that vague questions are not appropriate for determination under Rule 58.[31]

[48] Cougar submits that the Question is not vague and provides flexibility to the motion's judge to determine the specific requirements that form part of the Minister's obligation to allege misrepresentation or fraud either prior to or at the time of issuing the Reassessment.

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29 *Suncor, supra* at para 26.

30 *McIntrye v Canada*, 2014 TCC 111, 2014 DTC 1116 at para 25 and *Delso Restoration Ltd. v Canada*, 2011 TCC 435, 2011 DTC 1315.

31 *Suncor, supra* at para 31.

[49] One difficulty with the Question, is the meaning to be ascribed to the phrase "was not accompanied by any allegation" which poses several questions and lacks clarity. This is illustrated by several examples provided by the respondent in her written submissions as to queries that might flow from the use of that phrase.[32] Additionally, the Question may entreat further queries into whether a taxpayer must subjectively understand the Minister's position at the time they are reassessed.

[50] Cougar responds that if the motion's judge finds that the answers to the respondent`s queries are necessary, it is within the purview of the motion's judge to determine the answers to those questions but suggests such queries are unlikely to arise.[33] Yet, it admits that the motion's judge must decide whether and to what extent the Minister has an obligation to make an allegation of misrepresentation or fraud when issuing an out-of-time reassessment.[34] The injection of "to what extent" makes clear that Cougar's expectation of a determination to make reference to what constitutes sufficient notice of the Minister's allegations of misrepresentation.

[51] In arguing for the Question's appropriateness for a Rule 58 determination, Cougar's choice of language highlights the ambiguity inherent in the Question. Initially, Cougar asks the motion's judge to decide, in essence:

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[32]
1. What does "accompanied by" mean? Does it mean that the notifications of the grounds must be contemporaneous with the notice or must it pre-date it?
2. By what method (i.e. in writing only) would a notice of reassessment be "accompanied by any allegation of misrepresentation"?
3. What degree of specificity would be required?
    i. Would a simple reference to ss. 152(4)(a)(i) of the Act on the face of the notice suffice?
    ii. Must the notice of reassessment itself set out the facts relied upon, or would it suffice if some other document or communication did so?
    iii. Must the notice, document or communication from the Minister set out all – or merely some – of the facts relied on in support of the allegation?

[33] Applicant's Reply Submissions at para 11.

[34] Applicant's Reply Submissions at para 31.

> Whether a notice of Reassessment must be accompanied by any allegation of misrepresentation or fraud?[35]

[52] Cougar then indicates that the motion's judge will be required to determine the contemporaneous nature of such allegations as to:

> Whether the notice of reassessment … is void without some accompanying or prior allegation of misrepresentation or fraud?[36]

[53] Then, Cougar states that the motion's judge must draw the necessary conclusions from the relevant case law to decide what constitutes constructive notice:

> What is the legal requirement of notice?[37]

[54] I agree with the respondent that "notice" is a broad term and comes in many forms. Phrasing the Question such that "notice" of allegations of fraud would be required becomes unclear.

[55] Further, the Question would require the motions judge to dissect the phrases "accompanied by any allegation" or "accompanying allegation". Neither are anchored in subparagraph 152(4)(*a*)(i). The provision does not explicitly stipulate that the taxpayer must be warned of the Minister's position nor set out a procedure to be used by the Minister to allege misrepresentation or fraud when issuing an out-of-time reassessment. If the Question is not properly framed, a determination may lack corresponding legal consequences such that the usefulness of the Question's determination would be compromised if the answer is not linked to the relevant provisions as in *Barejo*.[38]

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35 Applicant's Reply Submissions at para 1.

36 Applicant's Reply Submissions at para 7(a).

37 Applicant's Reply Submissions at para 9.

38 *Barejo Holdings ULC v Canada*, 2016 FCA 304, 2016 DTC 5139 (FCA) [*Barejo*]. Leave to appeal to the Supreme Court denied. The parties had jointly framed a broad question concerning the meaning of the word "debt" without referencing the provision in the *Act*. It proceeded to a stage-two hearing and a general opinion was received. At the Federal Court of Appeal, they sought to add a provision of the *Act* to no avail.

[56] Notably, an affirmative answer to the Question would add a requirement to the *Act* without Parliament's input obliging the Minister to notify a taxpayer at the time of or prior to issuing the Reassessment of the allegations of misrepresentation or fraud in order to validly reassess a taxpayer beyond the normal assessment period.

[57] Based on the foregoing, I find the Question to be vague in nature and suffers from ambiguity. It is not appropriate in my opinion for a Rule 58 determination.

Merit of the Question

[58] Another argument advanced by Cougar was that the Court should exercise its' discretion to allow the determination because the Question has merit and is not precluded from success by existing jurisprudence.

[59] In *Paletta*, the Court affirmed that the prospect of success factor remains relevant at stage-one of a Rule 58 analysis as one of several factors in the analysis in the exercise of the Court's discretion.

[60] In *Sentinel Hill,* the Federal Court of Appeal upheld Justice Woods' (as she then was) dismissal of a Rule 58 motion. The Court found that the question was predicated on an unproven assumption and inappropriate for a determination because the proposed question's ability to dispose of all or part of the proceedings, shorten the hearing, or save costs, would be undermined if it was so lacking in merit that it accomplished none of these.[39] Cougar's Question is based on an unproven assumption that the notice of intention to rely on subparagraph 152(4)(*a*)(i) of the *Act* was not given. Consequently, the Question is inappropriate for a determination.

[61] Cougar says for out-of-time reassessments to be valid, these must be accompanied by the Minister's allegation of fraud or misrepresentation. It relies on the legal principle enunciated by the Federal Court of Appeal in *Canadian*

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39 *Sentinel Hill Productions IV Corp v Canada*, 2013 TCC 267, 2013 DTC 1217 (aff'd 2014 FCA 161) [*Sentinel Hill*].See also *Suncor supra* at para 28.

Marconi[40] and followed in *Blackburn Radio*. That is, it is unnecessary to object to an out-of-time reassessment, unless the Minister has alleged fraud or misrepresentation.[41] In *Blackburn Radio*, Woods J. (as she then was) states that "*Canadian Marconi* is strong authority that an out-of-time reassessment is void absent an allegation of fraud or misrepresentation. Cougar construes that to suggest for such Reassessment to be valid, it must be accompanied by the Minister's allegations of fraud or misrepresentation at the time of issuance or prior to so as to put the taxpayer on notice.

[62] The Court in *Canadian Marconi* found that the Minister had no power to reassess Canadian Marconi's tax returns for the 1977 to 1981 taxation years:

> Absent a waiver as provided by subparagraph 152(4)(a)(ii), an allegation of misrepresentation or fraud is implicit in an out-of-time reassessment.
>
> Where the Minister alleges, expressly or implicitly, misrepresentation or fraud, there is nothing offensive in putting a taxpayer on notice that he must object to an out-of-time reassessment. It is, with respect, quite otherwise absent an allegation of fraud or misrepresentation. An obvious policy consideration nourishes the distinction in treatment.[42]

[63] Even if Cougar's circumstances show that it did not receive notice, *Canadian Marconi* appears to suggest that when the Minister issues a statute-barred reassessment, she implicitly alleges misrepresentation or fraud.

[64] In assessing merit as a factor, I find that the Question has no reasonable chance of success because the Question is based on an unproven assumption, it is flawed and misrepresentation appears to be implicit upon the issuance of a reassessment.

[65] Based on the foregoing, I conclude that the Question would not dispose of the proceeding, substantially shorten the hearing or result in a substantial cost

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40 *Canadian Marconi Co. v Canada (C.A.),* [1992] 1 FC 655 (FCA), 85 DLR (4th) 670. Leave to appeal to the SCC refused [1992] SCCA No 9, 90 DLR (4th) vii [*Canadian Marconi*].

41 *Blackburn Radio Inc. v Canada,* 2012 TCC 255, 2012 DTC 1213 at para 62 [*Blackburn Radio*] affirming *Canadian Marconi, supra*.

42 *Canadian Marconi, supra* at paras 9 and 10.

savings. The Question is not appropriate for a determination hearing under the more abbreviated Rule 58 process. Rather, the circumstances warrant a full trial with the opportunity to tender and test evidence thereby affording evidentiary protections to obtain a fair and just decision. The motion is dismissed.

[66] Costs are awarded to the respondent in any event of the cause.

Signed at Toronto, Ontario, this 30th day of June 2017.

"K. Lyons"

Lyons J.

CITATION:	2017 TCC 126
COURT FILE NO.:	2015-5560(IT)G
STYLE OF CAUSE:	COUGAR HELICOPTERS INC. and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	November 24, 2016
REASONS FOR ORDER BY:	The Honourable Justice K. Lyons
DATE OF ORDER:	June 30, 2017

APPEARANCES:

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Counsel for the Respondent:	Elizabeth McDonald and Geraldine Chen

COUNSEL OF RECORD:

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