Docket: 2018-3150(IT)G

BETWEEN:

HAVILLAND HOLDINGS LTD.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Application for Directions by the Respondent
Decided on Written Submissions

By: The Honourable Justice David E. Spiro

Participants:

Counsel for the Appellant:	Justin Kutyan Kristen Duerhammer Emily Zhong
Counsel for the Respondent:	Christa Akey Neva Beckie Lise Walsh Mihai Beschea

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ORDER

The Crown's application for directions that the transcripts of the oral evidence given at the hearing before Justice Hogan be placed before the Court at

the new trial and accepted as evidence given by witnesses under oath is dismissed without costs.

Signed this 29th day of August 2025.

"David E. Spiro"

Spiro J.

Citation: 2025 TCC 120
Date: 20250829
Docket: 2018-3150(IT)G

BETWEEN:

HAVILLAND HOLDINGS LTD.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR ORDER

[1] The late Justice Hogan conducted the trial of this appeal in the fall of 2024. His decision was under reserve when he died suddenly in January 2025. Following his untimely passing, Chief Justice St-Hilaire convened a conference call with both parties.

[2] Early in the conference call, the Chief Justice made it clear that if both parties wanted a new judge to review the record and decide the appeal on that basis, a new judge would be assigned to do exactly that. But if the parties did not agree to have a new judge decide the appeal based on the record before Justice Hogan, a new trial would be ordered.[1]

[3] Appellant's counsel made it clear that the Appellant wanted a new trial.[2] He described it as "a redo".[3] He called it a "fresh trial".[4]

[4] Upon hearing that, the Chief Justice stated that a new trial would be the way forward. She ended the call with the following statement:

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[1] Transcript of a conference call before Chief Justice St-Hilaire, April 2, 2025, at page 3, line 10.
[2] Transcript, page 4, line 16.
[3] Transcript, page 4, lines 24-25.
[4] Transcript, page 5, lines 7-8.

> … we all agree that we're moving forward with a new trial set for potentially eight days to be scheduled probably in Vancouver, keeping in mind that we want to get this back on schedule as quickly as possible.[5]

[5] I am the judge assigned to the new trial. During my first trial management conference with the parties, the Crown applied for directions from the Court.

The Crown's Application for Directions

[6] The Crown asked that the transcripts of the oral evidence given at the hearing before Justice Hogan in the fall of 2024 be placed before me at the new trial and accepted as evidence given by witnesses under oath.

[7] Counsel for the Appellant vociferously opposed the Crown's application. Here is how the Appellant set out its position in the first paragraph of its written submissions:

> A new trial with a new judge who has the benefit of hearing live witness testimony best preserves fairness for the parties, witnesses, and the Court.

The Underlying Appeal

[8] By way of background, the underlying appeal deals with the disallowance of partnership losses claimed by the Appellant, as limited partner, for its 2016 taxation year ($41,148,759) and its 2017 taxation year ($4,760,317).

[9] The Minister of National Revenue disallowed the losses on the basis that no business had been carried on in common with a view to profit. If there was no partnership, there were no partnership losses to be deducted in computing the Appellant's income.

[10] At the pleadings stage, the Crown invoked the General Anti-Avoidance Rule (the "GAAR") as an alternative basis on which the assessments would be defended at trial.

Exercise of Discretion by the New Trial Judge

[11] In *High-Crest Enterprises Limited v Canada*, 2017 FCA 88, the Federal Court of Appeal confirmed that our Chief Justice may re-assign the

[5] Transcript, page 11, lines 13-15.

hearing of an appeal to another judge if the judge originally assigned to hear the appeal has ceased to hold office.[6] That is exactly what happened on Justice Hogan's death.

[12] The new trial judge is entitled to decide the process to be followed to ensure that the parties have a fair trial. This may range from rendering judgment based on the earlier record to holding an entirely new trial.[7]

The Crown's Position

[13] The Crown contends that considerations of trial efficiency and trial fairness weigh in favour of using the transcript of the hearing before Justice Hogan to decide the Appellant's appeal.

[14] With respect to trial efficiency, the Crown argues that it will be unnecessary for either party to call the same witnesses again if the transcript of the hearing before Justice Hogan is used instead. The two weeks currently set aside for the trial could then be shortened considerably, representing a significant saving of scarce judicial resources.

[15] With respect to trial fairness, the Crown argues that the Appellant would have an unfair advantage at a new trial. The Appellant's witnesses now know exactly what questions will be asked of them by Crown counsel and Appellant's counsel now knows exactly what arguments the Crown will make at the conclusion of the new trial. An entirely new trial will deprive the Crown of the element of surprise.

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[6] *SPE Valeur Assurable Inc. v The King*, 2023 TCC 79 at para 40, citing *High-Crest* at paras 17-40.
[7] *SPE Valeur* at para 41.

Analysis

[16] As the Federal Court of Appeal noted at paragraph 13 of its reasons in *Yacyshyn v Canada*, 1999 CanLII 7552 (FCA) "the days of trial by ambush or surprise are fortunately gone". Indeed, many rules in the *Tax Court of Canada Rules (General Procedure)* (the "Rules") are intended to reduce the element of surprise at trial, including the rules regarding discovery of documents (Rules 78 to 91) and examination for discovery (Rules 92 to 100).

[17] Paragraph 126.1(2)(a) of the Rules contemplates that a trial judge at a trial management conference may obtain from the parties the names and contact information of the witnesses that each party intends to call and the substance of their testimony (known as a "will say statement"). The transcript of the hearing before Justice Hogan is, in effect, a long and detailed "will say statement".

[18] If there is no longer any mystery about the evidence that each witness would give at the new trial, the parties should be able to file a comprehensive written agreement setting out all, or almost all, of the material facts. Indeed, an exhaustive Statement of Agreed Facts would go a long way toward meeting the Crown's legitimate concern that the new trial be conducted as efficiently as possible and that scarce judicial resources are not expended unnecessarily.

[19] But, to the extent that facts do remain in issue, I would prefer to hear from witnesses who appear before me. As the British Columbia Court of Appeal has recently noted, trial judges have an "overwhelming advantage" when making credibility assessments as the trial judge is able to directly observe the witnesses as they give evidence in real time.[8] The Supreme Court of Canada recognized this advantage in the tax context in *Schwartz v Canada*, 1996 CanLII 217 (SCC):

> [32] It has long been settled that appellate courts must treat a trial judge's findings of fact with great deference. The rule is principally based on the assumption that the trier of fact is in a privileged position to assess the credibility of witnesses' testimony at trial.

[8] *Wang v Li*, 2025 BCCA 256 at para 42. See also *Coastridge Enterprises Ltd. v Canada*, 2022 FCA 78 at para 11 and *Jefferson v Canada*, 2022 FCA 81 at paras 30-32.

[20] More recently, in *R. v Kruk*, 2024 SCC 7, the Court held that:

> [83] Trial judges have expertise in assessing and weighing the facts, and their decisions reflect a familiarity that only comes with having sat through the entire case. The reasons for the deference accorded to a trial judge's factual and credibility findings include: (1) limiting the cost, number, and length of appeals; (2) promoting the autonomy and integrity of trial proceedings; and (3) recognizing the expertise and advantageous position of the trial judge (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 12-18). In light of the practical difficulty of explaining the constellation of impressions that inform them, it is well-established that "particular deference" should be accorded to credibility findings (*G.F.*, at para. 81). Appellate courts are comparatively ill-suited to credibility and reliability assessment, being restricted to reviewing written transcripts of testimony and often focussing narrowly, even telescopically, on particular issues as opposed to seeing the case and the evidence as a whole (*Housen*, at para. 14, citing R. D. Gibbens, "Appellate Review of Findings of Fact" (1991-92), 13 *Advocates' Q.* 445, at p. 446).

Conclusion

[21] I am satisfied that a new trial will be fair even in the absence of the direction sought by the Crown. For example, to the extent that evidence given by a witness on a material point at the new trial is inconsistent with the evidence given by that witness at the earlier hearing, counsel will be able to impeach the credibility of that witness by confronting them with their prior inconsistent statement.

[22] The Crown's application for directions is dismissed, without costs. Before concluding, I would like to express my gratitude to all counsel for their helpful written submissions.

Signed this 29th day of August 2025.

"David E. Spiro"

Spiro J.

CITATION:	2025 TCC 120
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PLACE OF HEARING:	N/A
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REASONS FOR ORDER BY:	The Honourable Justice David E. Spiro
DATE OF ORDER:	August 29, 2025

PARTICIPANTS:

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