Docket: 2019-1335(IT)G

BETWEEN:

FIDUCIE HISTORIA,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on October 17, 18, 19 and 20, 2022, at Montréal, Quebec, and written representations of December 2, 2022, February 3, 2023, and February 23, 2023

Before: The Honourable Justice Guy R. Smith

Appearances:

Counsel for the Appellant:	Paul Ryan Félix St-Vincent Gagné
Counsel for the Respondent:	Vlad Zolia Éliane Mandeville

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal from the reassessments made under the *Income Tax Act* for the 2013 and 2015 taxation years is allowed, with costs.

Signed at Ottawa, Ontario, this 24th day of May 2024.

"Guy R. Smith"

Smith J.

Translation certified true
on this 16th day of December 2025.

Melissa Paquette

Citation: 2024 TCC 76
Date: 20240524
Docket: 2019-1335(IT)G

BETWEEN:

FIDUCIE HISTORIA,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Smith J.

I. BACKGROUND

[1] Fiducie Historia (the "Trust" or "the Appellant") is a discretionary trust incorporated under the laws of the province of Quebec. For the 2013 and 2015 taxation years, it allocated $30,072,000 and $20,250,000, respectively, to one of its beneficiaries. It then deducted these amounts from its income for each taxation year under subsection 104(6) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("the ITA").

[2] The Minister of National Revenue (the "Minister") made reassessments on August 9, 2017, and August 30, 2017, to deny the corresponding deductions the Appellant had claimed for the 2013 and 2015 taxation years, respectively, on the ground that the allocations had not "[become] payable in the year to a beneficiary" as required by subsection 104(6) of the ITA.

[3] In short, the Minister argues that the allocations were contrary to the provisions of the trust deed and were [TRANSLATION] "invalid and absolutely null"

because they were contrary to article 1275 of the *Civil Code of Québec*, CQLR, c. CCQ-1991 (the "CCQ"), which is of public order.

[4] The Appellant argues that it was entitled to the deduction under subsection 104(6) of the ITA solely because the allocations were paid to its beneficiary, regardless of any violation of the trust deed, the CCQ, or other provincial and federal legislation.

[5] Alternatively, the Appellant contends that (i) it has always complied with the requirements of article 1275 of the CCQ and that even if the Minister takes the opposite view, the Minister does not have the required standing to invoke the nullity of the allocations, and that (ii) in the alternative, if the delegation of the powers of the trustees to some beneficiaries was contrary to the trust deed or article 1337 of the CCQ, the Minister does not have the required standing to raise nullity.

[6] For the reasons that follow, the appeal is allowed, with costs.

II. **ISSUES**

[7] The issue is whether the trustees' allocations of $30,072,000 and $20,250,000 for the 2013 and 2015 taxation years, respectively, were invalid and, therefore, whether the Minister's denial of the corresponding deductions the Appellant claimed for the 2013 and 2015 taxation years under subsection 104(6) of the ITA was justified.

[8] To resolve the dispute, the Court will analyze the following issues:

> **Issue 1**: Did the amounts "[become] payable" within the meaning of subsection 104(6) of the ITA solely because they were paid to the beneficiary, regardless of any violation of the trust deed, the CCQ, or other legislation?
>
> **Issue 2**: Did the Rémillard brothers become *de facto* trustees, in violation of article 1275 of the CCQ?
>
> **Issue 3**: If the Court were to find that there was a violation of article 1275 of the CCQ, which is of public order, would there be absolute or relative nullity?

III. **RELEVANT LEGISLATIVE PROVISIONS**

[9] The following provisions are relevant to this dispute:

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) ("ITA") (2013 version)

104(6) Deduction in computing income of trust – Subject to subsections (7) to (7.1), for the purposes of this Part, there may be deducted in computing the income of a trust for a taxation year

(a) …

(b) in any other case, such amount as the trust claims not exceeding the amount, if any, by which

> (i) such part (in this section referred to as the trust's "adjusted distributions amount" for the taxation year) of the amount that, but for … , would be its income for the year as became payable in the year to a beneficiary or was included under subsection 105(2) in computing the income of a beneficiary
>
> …

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) ("ITA") (2015 version)

104(6) Deduction in computing income of trust – Subject to subsections (7) to (7.1), for the purposes of this Part, there may be deducted in computing the income of a trust for a taxation year

(a) ...

(b) in any other case, the amount that the trust claims not exceeding the amount, if any, determined by the formula

$$A - B$$

> where:
>
> A
>
> is the part of its income (determined without reference to this subsection and subsection (12)) for the year that became payable in the year to, or that was included under subsection 105(2) in computing the income of, a beneficiary, and …

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) ("ITA") (2013 and 2015 version)

104(24) Amount payable – For the purposes of subsections (6), (7), (7.01), (13), (16) and (20), subparagraph 53(2)(h)(i.1) and subsections 94(5.2) and (8), an amount is deemed not to have become payable to a beneficiary in a taxation year unless it was paid in the year to the beneficiary or the beneficiary was entitled in the year to enforce payment of it.

[Emphasis added.]

…

Associated corporations

256 (1) For the purposes of this Act, one corporation is associated with another in a taxation year if, at any time in the year,

…

Acquiring control

256(7) For the purposes of this subsection, of section 55, subsections 66(11), 66.5(3), 66.7(10) and (11), 85(1.2), 88(1.1) and (1.2), 110.1(1.2) and 111(5.4) and paragraph 251.2(2)(a) and of subsection 5905(5.2) of the *Income Tax Regulations*,

(a) control of a particular corporation shall be deemed not to have been acquired solely because of:

…

- **(ii)** the redemption or cancellation at any particular time of, or a change at any particular time in the rights, privileges, restrictions or conditions attaching to, shares of the particular corporation or of a corporation controlling the particular corporation, where each person and each member of each group of persons that controls the particular corporation immediately after the particular time was related (otherwise than because of a right referred to in paragraph 251(5)(b)) to the corporation

  (A) immediately before the particular time, or

  (B) immediately before the death of a person, where the shares were held immediately before the particular time by an estate that acquired the shares because of the person's death, or

…

Civil Code of Québec, CQLR, c. CCQ-1991 ("CCQ")

1260. A trust results from an act whereby a person, the settlor, transfers property from his patrimony to another patrimony constituted by him which he appropriates to a particular purpose and which a trustee undertakes, by his acceptance, to hold and administer.

1261. The trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right.

…

1265. Acceptance of the trust divests the settlor of the property, charges the trustee with seeing to the appropriation of the property and the administration of the trust patrimony and is sufficient to establish the right of the beneficiary with certainty.

…

1275. The settlor or the beneficiary may be a trustee but he shall act jointly with a trustee who is neither the settlor nor a beneficiary.

1276. The settlor may appoint one or several trustees or provide the mode of their appointment or replacement.

1277. The court may, at the request of an interested person and after notice has been given to the persons it indicates, appoint a trustee where the settlor has failed to do so or where it is impossible to appoint or replace a trustee.

The court may appoint one or several other trustees where required by the conditions of the administration.

1278. A trustee has the control and the exclusive administration of the trust patrimony, and the titles relating to the property of which it is composed are drawn up in his name; he has the exercise of all the rights pertaining to the patrimony and may take any proper measure to secure its appropriation.

A trustee acts as the administrator of the property of others charged with full administration.

…

1287. The administration of a trust is subject to the supervision of the settlor or of his heirs, if he has died, and of the beneficiary, even a future beneficiary.

In addition, in cases provided for by law, the administration of a private or social trust is subject, according to its object and purpose, to the supervision of the persons or bodies designated by law.

…

1290. The settlor, the beneficiary or any other interested person may, notwithstanding any stipulation to the contrary, take action against the trustee to compel him to perform his obligations or to perform any act which is necessary in

the interest of the trust, to enjoin him to abstain from any action harmful to the trust or to have him removed.

He may also impugn any acts performed by the trustee in fraud of the trust patrimony or the rights of the beneficiary.

1291. The court may authorize the settlor, the beneficiary or any other interested person to take part in judicial proceedings in the place and stead of the trustee when, without sufficient reason, he refuses or neglects to do so or is prevented from doing so.

…

1337. An administrator may delegate his duties or be represented by a third person for specific acts; however, he may not delegate generally the conduct of the administration or the exercise of a discretionary power, except to his co-administrators.

He is accountable for the person selected by him if, among other things, he was not authorized to make the selection. If he was so authorized, he is accountable only for the care with which he selected the person and gave him instructions.

…

1416. Any contract which does not meet the necessary conditions of its formation may be annulled.

1417. A contract is absolutely null where the condition of formation sanctioned by its nullity is necessary for the protection of the general interest.

1418. The absolute nullity of a contract may be invoked by any person having a present and actual interest in doing so; it is invoked by the court of its own motion.

A contract that is absolutely null may not be confirmed.

1419. A contract is relatively null where the condition of formation sanctioned by its nullity is necessary for the protection of an individual interest, such as where the consent of the parties or of one of them is vitiated.

1420. The relative nullity of a contract may be invoked only by the person in whose interest it is established or by the other contracting party, provided he is acting in good faith and suffers serious injury therefrom; it may not be invoked by the court of its own motion.

A contract that is relatively null may be confirmed.

> **1421**. Unless the nature of the nullity is clearly indicated in the law, a contract which does not meet the necessary conditions of its formation is presumed to be relatively null.
>
> **1422**. A contract that is null is deemed never to have existed.
>
> In such a case, each party is bound to restore to the other the prestations he has received.
>
> …
>
> **1425**. The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.
>
> **1426**. In interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account.
>
> [Emphasis added.]

IV. **RELEVANT FACTS**

[10] The Trust was formed by notarial act dated August 22, 2002. It is a discretionary trust, and trustees have the right to add income to capital or to allocate income or capital among the beneficiaries.

[11] Lucien Rémillard ("LR") is a settlor of the Trust. He is a beneficiary with his sisters; his descendants, including his sons Maxime Rémillard and Julien Rémillard ("the Rémillard brothers"); and a company that is not a party to the dispute. He is also a trustee with two other individuals who are not beneficiaries of the Trust.

[12] The trust deed stipulates that there must be three trustees and provides a mechanism for replacing them in the event of resignation or incapacity. The following provisions of the trust deed are relevant:

> [TRANSLATION]
>
> 1.2 Trustee's powers and discretion
>
> Any determination that THE TRUSTEE is authorized to make and any power and discretion conferred on the TRUSTEES must be exercised by THE TRUSTEE in such a manner as THE TRUSTEE considers to be in the best interests of the BENEFICIARIES. Such determinations, powers, and discretion can in no case be subject to control or review by the BENEFICIARIES or the courts.

> …
>
> 2.4.1
>
> For clarification purposes, THE TRUSTEE has complete discretion to make distributions or allocations of capital or income from PROPERTY IN TRUST or TRUST income.

[13] Maybach Corporation ("Maybach") is a holding company with various assets in the Montréal region of Quebec, including real property held by its subsidiaries (collectively, the "Maybach Group"). Just prior to the beginning of the period in dispute, the Trust, LR, and the Rémillard brothers held Maybach's shares.

[14] RCI Environnement inc. ("RCI") was a waste treatment company incorporated in 1997 and controlled directly or indirectly by LR. Starting in 2010, RCI began taking steps to sell its assets; these steps ended on July 13, 2013. RCI then merged with Maybach on August 1, 2013.

[15] The merger had the effect of transferring RCI's capital dividend account to Maybach. On October 16, 2013, Maybach declared a capital dividend of $164,938,366 to the Trust. On the same day, the Trust allocated it to LR while he was still a trustee. This allocation is not the subject of this dispute.

[16] Following the sale of RCI's assets, LR withdrew from its operations and took steps to become a non-resident of Canada and settle in Barbados. The Respondent denies that he became a non-resident of Canada, but this matter is not before the Court.

[17] At the time of the redemption of the shares of LR and of the Rémillard brothers, the advisors of the Trust and of Maybach noted that the Maybach Group had unused capital losses and that the redemption of the shares of LR and of the Rémillard brothers would put the future deduction of these losses at risk because of the change of control in favour of unrelated persons acting as trustees.

[18] To prevent this from possibly occurring, the advisors proposed entering into an agreement to enable the application of subparagraph 256(7)(a)(ii) of the ITA and to ensure that Maybach, after the redemption of the shares, would be indirectly controlled by a group of persons related to LR, namely, the Rémillard brothers.

[19] On November 15, 2013, an agreement was reached between the trustees and the Rémillard brothers ("the Agreement"). The Agreement stipulates the following:

> [TRANSLATION]

> **2.1 TRUSTEE UNDERTAKING**
>
> The Trustees hereby undertake to exercise their powers in respect of Fiducie Historia as directed by the Brothers and not to make any decisions in respect of Fiducie Historia without first obtaining the Rémillard Brothers' consent. The Trustees acknowledge that this undertaking does not relieve them of their obligations to Fiducie Historia and does not constitute a delegation of their powers as trustees. The Trustees will continue to exercise all their powers as trustees, but will have to do so in accordance with their undertaking to the Rémillard Brothers.
>
> **2.2 DISAGREEMENT**
>
> If some or all of the Trustees disagree with the Rémillard Brothers' directives, they will be required to resign as trustees of Fiducie Historia and will be replaced in accordance with the terms and conditions set out in Fiducie Historia's constituting act.
>
> **2.3 INDEMNIFICATION**
>
> The Rémillard Brothers will indemnify and hold the Trustees harmless against any liability, cost or expense for which the Trustees may become liable by acting as directed by the Rémillard Brothers.
>
> [Emphasis added.]

[20] On November 15, 2013, Maybach redeemed LR's voting shares and the Rémillard brothers' non-voting shares. The Trust thus became Maybach's sole shareholder. LR resigned as a trustee and was replaced by Julie Brosseau.

[21] By written resolutions dated December 4, 2013, and December 12, 2013, authorized by the Rémillard brothers, the Trust allocated to LR a dividend income of $30,000,000 and an income of $72,000, respectively, for a total of $30,072,000 for the 2013 taxation year. At the time of these allocations, the trustees were Jacques Plante, Antonino Porrello, and Julie Brosseau.

[22] By written resolutions dated October 29, 2015, and November 27, 2015, authorized by the Rémillard brothers, the Trust allocated to LR dividend income of $20,000,000 and $250,000, respectively, for a total of $20,250,000 for the 2015 taxation year. At the time of these allocations, the trustees were Jacques Plante, Antonino Porrello, and Tony Fionda.

[23] The allocations were paid on the same day directly to LR, subject to tax under Part XIII of the ITA, i.e., 15% of the amounts paid.

[24] The Trust deducted the amounts allocated and paid to LR (including Part XIII tax) from its income for each of the relevant taxation years under subsection 104(6) of the ITA.

[25] These dividend allocations of $30,072,000 and $20,250,000 and their deduction from the Trust's income for the 2013 and 2015 taxation years, respectively, are the subject of the assessments in dispute.

V. **TESTIMONY**

[26] Five witnesses testified on behalf of the Appellant: Charles Gagnon, Jacques Plante, Antonino Porrello, and Tony Fionda, all trustees of the Trust, and Maxime Rémillard, one of LR's sons and beneficiary of the Trust.

Charles Gagnon

[27] Mr. Gagnon is a lawyer and works for the BCF firm. He provided advice on the tax planning that led to the sale of the assets of RCI, Maybach, and their subsidiaries, as well as the reorganization of the company and the distribution of the sale proceeds. He also wrote the Agreement.

[28] He explained that the overall plan was to sell the assets related to the operations of RCI and Maybach; liquidate the other assets, including real estate in Montréal; and then distribute the proceeds of the sale of the businesses to LR.

[29] Shortly before LR left for Barbados, Mr. Gagnon learned that there were unused capital losses remaining in some entities of the Maybach Group, which were controlled by LR at the time. To avoid it not being possible to use these losses because of the change in control caused by LR's withdrawal as a trustee and the redemption of his voting shares by Maybach, he proposed the Agreement dated November 15, 2013.

[30] According to Mr. Gagnon, in addition to ensuring that the losses would be used, the Agreement makes it possible to achieve three objectives, the first of which is to allow the Rémillard family to maintain some control over the entire Maybach Group.

[31] Second, it enables the trustees to obtain the consent of the Rémillard brothers for distributions that would be paid mostly to their father, in order to protect the trustees from possible claims by the Rémillard brothers.

[32] Third, given the significant value of the amounts in question, the Agreement allows the Rémillard family to participate in the decision-making process with respect to the sale of Maybach Group assets and the Trust's distributions.

Jacques Plante

[33] Mr. Plante stated that in a sense, he has been LR's [TRANSLATION] "right-hand man" for several years and that he has held various positions in the group, including that of Maybach's president. He is considered the leader of the three trustees. He is responsible, in particular, for selecting a trustee to fill a vacancy and ensuring that the Trust is running smoothly.

[34] From what he understood from the tax and legal advisors, including Mr. Gagnon, Mr. Plante testified that the Agreement gives some control to the Rémillard family to enable the carry-forward of the Maybach Group's unused capital losses. However, he added that the trustees retain all their powers under the trust deed.

[35] According to him, the Agreement provides for two possibilities: either the Rémillard brothers issue a directive to the trustees or the trustees seek the consent of the Rémillard brothers before making a decision for the purposes of making a distribution. He considers that the Agreement provides some protection to the family because the Trust cannot make any allocations without some form of consent by the Rémillard brothers.

[36] Mr. Plante stated that the Rémillard brothers never participated in the management of the Trust and never disagreed with the decisions made by the trustees. He asserted that the decision to distribute the amounts to LR was made by the trustees, after consulting with the tax and legal advisors.

[37] Mr. Plante described the decision-making process prior to the allocation of an amount to a beneficiary as follows: (i) first, he consulted with the tax and legal advisors, including Mr. Gagnon; (ii) then, he contacted the other two trustees to discuss the decision to be made; and (iii) lastly, he contacted the Rémillard brothers to obtain their approval and send the letter of direction that they were asked to sign to give consent.

[38] On cross-examination, Mr. Plante explained that the letters signed by the Rémillard brothers were a [TRANSLATION] "form of consent" and that the template letter had been prepared by Mr. Gagnon and had been used for all allocations.

Tony Fionda and Antonino Porrello

[39] The other two trustees, Mr. Fionda and Mr. Porrello, provided similar testimony. They confirmed that Mr. Plante first consulted with the legal and tax advisors for the decision to be made and that he then contacted the Rémillard brothers to explain what had to be done and to obtain their consent. It was only afterward that the resolutions were signed to make the allocations. They also confirmed that the Rémillard brothers were not involved in the administration or management of the Trust.

[40] Mr. Fionda stated that he is a chartered accountant and has a master's degree in finance. He was working for National Bank Financial, in the mergers and acquisitions department, when he met LR in 2010 to discuss the sale of RCI and its subsidiaries. He confirmed that the overall plan was to liquidate the assets of RCI and Maybach and then pay the amounts [TRANSLATION] "to the family trust".

[41] Following LR's departure, there were still other assets in the Maybach Group, namely, real property located at 85 Saint-Paul Street, as well as Hotel Le St-James in Montréal. The sale of these assets resulted in the allocations at issue here.

Maxime Rémillard

[42] Maxime Rémillard explained that Mr. Plante presented the Agreement to him and that its main purpose was to preserve the capital losses of the Maybach Group.

[43] His understanding of the Agreement was that the trustees had to obtain his consent and that of his brother before making an allocation, but that he had never given directions to the trustees. He stated that he was not involved in the Trust's operations and that he had never had access to the accounting records, financial statements or income tax returns.

[44] He added that Mr. Plante contacted him to explain the decision made by the trustees before making an allocation, after which he agreed. He did not question the decision to allocate the income to LR because he knew that LR was responsible for this wealth.

[45] On cross-examination, he acknowledged that on January 5, 2015, the Trust received a capital dividend of $8,751,903 from Maybach and that this amount was allocated to him by the Trust on January 6, 2015. He stated that this amount was to be used to pay back money he owed LR. He noted that the decision-making process for this allocation was the same as for the allocations to LR.

[46] In response to a hypothetical question, he stated that if this had been about making an allocation to one of his aunts, for example, he would have [TRANSLATION] "asked questions". However, he specified that this situation never arose.

[47] Overall, the Court is of the view that the witnesses were credible. They testified directly and without hesitation or reluctance. Their testimony was corroborated and was not contradicted on cross-examination.

VI. **ANALYSIS OF ISSUES**

***ISSUE 1**: Did the amounts "[become] payable" solely because they were paid to the beneficiary, regardless of any violation of the trust deed, the CCQ, or other provincial or federal legislation?*

Appellant's position

[48] The Appellant states that the applicable rules are extremely simple and that the Trust has the option of retaining the income and paying the tax itself or distributing it to any of its beneficiaries, in which case the beneficiary pays the tax and the Trust can claim the deduction under subsection 104(6) of the ITA.

[49] The Appellant contends that subsection 104(24) of the ITA clarifies the meaning of the phrase "became payable" found in subsection 104(6) of the ITA. Since the allocations in question were paid to LR and indicated in the Trust's tax return (T3 form) under the heading "Amounts paid or payable to beneficiaries", the Appellant argues that it rebutted the presumption under subsection 104(24) of the ITA and that this is sufficient to be eligible for the deductions claimed.

[50] The Appellant reiterates the importance of the principles of predictability, certainty and fairness, as well as respect for the right to tax minimization recognized by the Supreme Court of Canada in *Canada v. Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49 (para. 1). It argues that where Parliament has specified precisely what conditions must be satisfied to achieve a particular result, a taxpayer should be able to rely on such provisions to achieve the prescribed result: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 (para. 11), and *Canada (Attorney General) v. Collins Family Trust*, 2022 SCC 26 (paras. 25 and 26).

[51] The Appellant maintains that the Respondent cannot consider the internal administration of Canadian entities to ensure that they comply fully with other provincial and federal legislation and the contractual agreements that govern them, as such an approach would be contrary to the recognized principles of tax law. It claims that it is entitled to the deductions claimed [TRANSLATION] "regardless of

whether they are lawful or unlawful, moral or immoral": *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298 (para. 118), *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804 (para. 56), and *Québec (Sous-ministre du Revenu) c. Parent*, 2008 QCCA 1476 (para. 47).

[52] The Appellant is relying in particular on *Cooper v. The Queen*, [1988] F.C.J. No. 931 (QL) (FCTD) ("*Cooper"*) (para. 61), in which a testamentary trust lent money to a beneficiary although the will prohibited distribution before the age of 25. The Minister challenged the legitimacy of the transaction, but the Court found that the alleged illegality of the transaction was not relevant to the determination of the tax liability and that the Minister had no interest in the proper administration of the trust, as this was a function of the provincial court system, specifically the superior courts.

Respondent's position

[53] The Respondent submits that the deduction under subsection 104(6) of the ITA is permitted only if, in addition to being paid or due, the amount "became payable", hence the Minister's interest in the case at hand. According to the Respondent, an amount that cannot be legally paid has not "[become] payable" within the meaning of subsection 104(6) of the ITA, even if it has been disbursed.

[54] In other words, an amount has "[become] payable" only if there is a legal obligation to pay the amount: *The King v. Dominion Engineering Co. Ltd*., [1944] S.C.R. 371 ("*Dominion Engineering*") (page 375), *Timagami Financial Services Ltd. v. The Queen*, [1981] 2 F.C. 777 (FCTD) ("*Timagami*") (page 779), and *Aceti v. M.N.R.*, [1992] T.C.J. No. 421 (QL).

[55] The Respondent points out that subsection 104(24) of the ITA does not make it possible to deem that an amount is payable because it sets out a presumption that "an amount is deemed not to have become payable to a beneficiary" but does not include a presumption that an amount is deemed to have become payable.

[56] Ultimately, the Respondent submits that the allocations in issue are contrary to the trust deed and article 1275 of the CCQ and are absolutely null. As they have not legally "[become] payable", they cannot be deducted under subsection 104(6) of the ITA.

Analysis

[57] Subsection 104(6) of the ITA enables a trust to deduct such part of its "income … as became payable in the year to a beneficiary", or "the part … that became payable in the year to … a beneficiary" according to the version of the ITA in effect in 2015.

[58] Subsection 104(24) of the ITA states that the amount paid "is deemed not to have become payable to a beneficiary in a taxation year unless" (i) the amount was paid in the year or (ii) the beneficiary was entitled in the year to enforce payment of it (*Herbert Family Trust #1 v. The Queen*, 2001 TCC 476, para. 6).

[59] More recently, in *Robillard (Estate) v. The Queen*, 2022 TCC 13, Hogan J. explained the following:

> [60] The appellant, in its Notice of Appeal, claims a deduction pursuant to subsection 104(6). According to this provision, once a part of the estate's income "became payable," meaning that it was paid to the beneficiary or that the beneficiary had the right to demand payment, the estate is entitled to a deduction. There is no doubt here that before it was paid, the sum was payable.

[60] However, these decisions do not rule on the legality of the allocation.

[61] Clearly, while the decisions cited by the Respondent do not involve subsections 104(6) or 104(24) of the ITA, they converge on a common point: an obligation to pay must exist for an amount to have "[become] payable".

[62] In *Dominion Engineering*, *supra*, the Court explained that the phrase "[become] payable" also contemplates "an obligation to pay arising from the legal effectiveness of the contract" (page 375), and in *Timagami*, *supra*, the Court confirmed that there must be "an obligation to pay" (page 779).

[63] However, the Respondent contends that the Agreement is contrary to article 1275 of the CCQ, [TRANSLATION] "which is of public order", and that the allocations made in violation of this provision are absolutely null for the purposes of subsection 104(6) of the ITA. Article 1422 of the CCQ states that a "contract that is null is deemed never to have existed" and that each "party is bound to restore to the other the prestations he has received."

[64] In *Felix & Norton International inc. c. Procureur général du Canada*, 2009 QCCS 919 ("*Felix*"), shareholders sought to obtain [TRANSLATION] "a declaratory judgment as to the nullity of a resolution adopted by the board of directors" (para. 1). The Superior Court allowed the motion, stating as follows:

> [TRANSLATION]
>
> [40] In fact, what we are talking about here is not the application of civil rules to a tax dispute, but the application of civil law to a juridical act with a view to declaring the act null. It is only by its effect that the annulment of the act has consequences for the ministère du Revenu: if there is no longer a juridical act, the tax consequences of the act no longer exist.
>
> [Emphasis added.]

[65] Similarly, in *Durocher v. The Queen*, 2016 FCA 299 ("*Durocher*"), the issue was the nullity of a call option. The Federal Court of Appeal stated as follows:

> [21] The TCC judge accepted from the onset that it is the Superior Court that has the jurisdiction to declare null and void the call option (Reasons, para. 45). Nevertheless, the Tax Court of Canada (TCC), in exercising its jurisdiction to rule on an appeal from an assessment, "must consider the *bona fides* of contracts, including the validity of a contract and any of its provisions" (Reasons, para. 46). The TCC judge therefore proceeded on the basis that he could entertain the argument based the alleged nullity of the option.
>
> …
>
> [40] The Crown is challenging the TCC's jurisdiction to declare null and void the call option. In pronouncing on the assessment, the TCC judge held that he could entertain the argument based on the nullity of the call option, the validity of which was relied upon by the Minister in issuing the assessment, even though no competent tribunal had ruled on the matter.
>
> [41] It is not necessary to resolve this issue … . As the TCC judge explains at paragraphs 45 and 46 of his reasons, he would have been required to pronounce on the nullity of the option for the sole purpose of determining the validity of the assessments under appeal.
>
> [42] Thus, the role of the TCC, when addressing an argument based on nullity in an appeal under the ITA, cannot be assimilated to that of the Superior Court, which has the jurisdiction to "declare" null and void a contract …
>
> [Emphasis added.]

[66] In applying *Durocher*, the Court must conclude that it is not within the jurisdiction of this Court to "declare" that the Agreement or the resolutions are null. On the other hand, it may declare a clause or the entire Agreement null in order to be able to determine the validity of the assessments under appeal.

[67] Ultimately, the Court dismisses the Appellant's submission that the amounts "became payable" and can therefore be deducted under subsection 104(6) of the ITA solely because they were paid to the beneficiary, regardless of a possible violation of the trust deed, the CCQ, or other federal or provincial legislation.

<u>ISSUE 2</u>: Did the Rémillard brothers become de facto trustees, in violation of article 1275 of the CCQ?

Appellant's position

[68] The Appellant argues that there was no violation of article 1275 of the CCQ, as the three trustees continued to comply with the trust deed notwithstanding the Agreement.

[69] Although clause 2.1 of the Agreement obliges the trustees to exercise their decision-making powers in respect of the Trust [TRANSLATION] "as directed" by the Rémillard brothers by [TRANSLATION] "first obtaining" their consent, it also states that [TRANSLATION] "this undertaking" does not release the trustees [TRANSLATION] "from their obligations to the trust" and [TRANSLATION] "does not constitute a delegation of their trust powers."

[70] Thus, while the trustees had, at first glance, the contractual obligation to obtain the Rémillard brothers' approval before making a decision in respect of the Trust, this does not mean that they abdicated their full powers as trustees. In fact, the decisions were made on the initiative of the trustees, with the consent of the Rémillard brothers, who were not otherwise involved in the management of the Trust. The evidence shows that the trustees continued to manage and administer the Trust in accordance with their mandatory legal obligations under the CCQ.

[71] The Appellant contends that the Rémillard brothers did not actually become trustees and that the concept of [TRANSLATION] "*de facto* trustee" is not recognized in Quebec civil law.

[72] According to the Appellant, clause 2.1 of the Agreement simply confers a supervision right on the Rémillard brothers, which is explicitly permitted by article 1287 of the CCQ.

Respondent's position

[73] The Respondent submits that article 1275 of the CCQ has been violated because the Agreement made it so that there is no longer an independent trustee and

that as of November 15, 2013, the Rémillard brothers became the *de facto* sole trustees.

[74] The Respondent adds that the three trustees are bound by the Agreement, which stipulates in clause 2.1 that they must obtain the Rémillard brothers' consent before making any decision in respect of the Trust. If some or all of the trustees disagree with an instruction received from the Rémillard brothers, clause 2.2 stipulates that they must resign and be replaced by another trustee [TRANSLATION] "in accordance with the terms and conditions set out in the trust's constituting act."

[75] The Respondent states that after the sale of Maybach's assets, a [TRANSLATION] "comprehensive plan" was put in place for the distribution of the proceeds of the sale of the assets to LR and that everything was [TRANSLATION] "determined in advance", an [TRANSLATION] "essential consideration" being [TRANSLATION] "to minimize tax costs". According to the Respondent, there were very few [TRANSLATION] "formal interactions" between the three trustees, and the role of the tax advisors and professionals was essential to the implementation of this [TRANSLATION] "comprehensive plan". The Respondent concludes that the Agreement was generally respected because [TRANSLATION] "the Appellant's decisions were made according to the comprehensive plan under the *de facto* control of the Rémillard brothers".

[76] The Respondent submits that each trustee in place at the time of the allocations was [TRANSLATION] "a loyal witness", [TRANSLATION] "a person close to the Rémillard family and its interests", or, in Mr. Rémillard's case, a witness [translation] "economically accountable to the family's interests". The Respondent submits that it is [TRANSLATION] "not credible" to think that the trustees would decide to make an allocation and only subsequently obtain the Rémillard brothers' consent, as this would be contrary to the Agreement; also, in fact, each letter of direction begins with [TRANSLATION] "We ask you", and the trustees comply with this direction.

[77] The Respondent adds that the Appellant's position [TRANSLATION] "is confusing" because it [TRANSLATION] "varies according to its interests". The Appellant submits that the Rémillard brothers [TRANSLATION] "have only oversight over the trustees" in this dispute, but when it comes [TRANSLATION] "to safeguarding the capital losses of the group's companies", it states that the brothers [TRANSLATION] "control" the Trust and therefore the Maybach Corporation, of which the Trust is the sole shareholder.

[78] Ultimately, the Respondent submits that the Agreement cannot be construed as conferring a mere supervision right, as the Appellant claims.

Analysis

[79] Before concluding that clauses 2.1 and 2.2 or the entire Agreement is invalid, the Court "[must seek] the common intention of the parties rather than [adhere] to the literal meaning of the words", as set out in article 1425 of the CCQ. The Court must also consider "the interpretation which has already been given to it by the parties or which it may have received", as provided in article 1426 of the CCQ.

[80] However, the testimony of the three trustees leaves little doubt that there were consultations with the consultants prior to the allocations in question and that it was only after the trustees' decision that the Rémillard brothers' approval was obtained in all cases.

[81] The Court also accepts Maxime Rémillard's testimony that he was not involved in the management of the Trust. He did not attend the meetings, nor did he have access to the accounting records, financial statements or tax returns.

[82] In analyzing this issue, it is also important to note that a resolution was signed by the three trustees for each of the allocations in issue paid to LR. Under article 1337 of the CCQ, trustees may not "delegate generally" their powers, and in practice, the trustees continued to exercise all their powers as trustees in a manner consistent with the CCQ, notwithstanding the Agreement.

[83] Although it is possible that clauses 2.1 and 2.2 of the Agreement are contrary to the trust deed and article 1275 of the CCQ, as the Respondent contends, the Court concludes, on the balance of the evidence submitted, that the Rémillard brothers did not in fact act as trustees or "*de facto* trustees".

[84] The testimony of Mr. Gagnon and Mr. Plante leaves little doubt that the primary purpose of the Agreement was to preserve the accumulated capital losses and avoid the consequences of a change in control following the redemption of the Maybach shares held by LR and thus satisfy subparagraph 256(7)(a)(ii) of the ITA.

[85] Since the Trust was "controlled" by three independent trustees validly appointed under the trust deed, the purpose of the Agreement was to ensure that the Rémillard brothers were part of the "group of persons that controls" and that "was

related to the corporation" immediately after the redemption of LR's Maybach shares.

[86] Clearly, the Minister accepted the intended effect of the Agreement in terms of the "group of persons that controls" under the ITA because Maybach was able to use the accumulated losses prior to the redemption of LR's shares. However, the Agreement did not make the Rémillard brothers trustees within the meaning of the CCQ, let alone the [TRANSLATION] "sole trustees" as the Respondent claims.

[87] With all due respect, the concept of control under the relevant provision of the ITA should not be confused with the duties of a trustee under the provisions of the CCQ. If the Court is to decide whether the Rémillard brothers were trustees, this must be done in light of the provisions of the CCQ.

[88] The Court is of the view that the Appellant has successfully demolished the Minister's factual assumptions, namely, that the Rémillard brothers became [TRANSLATION] "both beneficiaries and de facto trustees of the trust" or that [TRANSLATION] "the trustees renounced their freedom to make the decisions inherent in the exercise of their discretion" in favour of the Rémillard brothers: *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336 (paras. 92–95), and *House v. Canada*, 2011 FCA 234, [2011] 4 F.C.R. F-3 (paras. 30 and 31).

[89] The Court therefore concludes, on the balance of the evidence heard, that the Rémillard brothers did not become *de facto* trustees and that, in fact, there was no violation of article 1275 of the CCQ.

***ISSUE 3*: If the Court were to find that there was a violation of article 1275 of the CCQ, which is of public order, would there be absolute or relative nullity?**

[90] The Court has already concluded that notwithstanding the Agreement, there was in fact no violation of article 1275 of the CCQ, as the Rémillard brothers did not actually become trustees and the three independent trustees continued to exercise their powers as trustees.

[91] However, even if the Court were to find that the Agreement is contrary to the trust deed and the requirements of article 1275 of the CCQ, which is of public order, it must still be determined whether there is absolute or relative nullity.

[92] The Appellant submits that article 1275 of the CCQ is intended for "the protection of an individual interest". Therefore, clauses 2.1 and 2.2 of the Agreement, which allegedly violate this provision, are relatively null. Under

article 1420 of the CCQ, relative nullity may be raised only by the beneficiary, or by the settlor provided this person is acting in good faith and has suffered injury. The Court cannot invoke it on its own motion.

[93] The Respondent submits that it is rather absolute nullity that applies because the purpose of article 1275 of the CCQ is to ensure "the protection of the general interest." Since absolute nullity can be raised by any interested person, the Minister had the required standing in this case.

Analysis

[94] The relevant provisions on nullity are articles 1417, 1418, 1419, and 1420 of the CCQ. First, it should be noted that article 1417 of the CCQ provides that "[a] contract is absolutely null where the condition of formation sanctioned by its nullity is necessary for the protection of the general interest." Article 1419 of the CCQ states that "[a] contract is relatively null where the condition of formation sanctioned by its nullity is necessary for the protection of an individual interest".

[95] The type of contract nullity therefore depends on "the condition of formation" sanctioned, and in particular whether it is intended to ensure "the protection of the general interest" or "the protection of an individual interest". The commentaries of the Minister of Justice on article 1417 of the CCQ (*Commentaires du ministre de la Justice sur l'article 1417 C.c.Q.*, 1993) distinguish between [TRANSLATION] "directive economic public order" and "protective economic public order":

> [TRANSLATION]
>
> This article defines absolute nullity, which contrasts with relative nullity, on the basis of the criterion that characterizes it in the current law: the general interest tied to compliance with the condition of formation that the nullity is intended to sanction.
>
> …
>
> There are several kinds of public order: political public order (dedicated to defending essential institutions of society: the state, family, morality) and economic public order (dedicated to directly regulating the exchange of wealth and services), the latter of which is divided into directive economic public order (to ensure the implementation of a directed economic policy) and protective economic public order (to ensure the protection of individual interests).
>
> [Emphasis added.]

[96] The Court must therefore consider whether article 1275 of the CCQ is intended to ensure [TRANSLATION] "the implementation of a directed economic policy" or the protection of [TRANSLATION] "individual interests".

[97] According to the Minister of Justice's commentaries (*Commentaires du ministre de la Justice sur l'article 1275 C.c.Q.*, 1993), article 1275 is intended [TRANSLATION] "to ensure objective administration" of the trust and to avoid [TRANSLATION] "a purely artificial division of the patrimony" that [TRANSLATION] "would provide an easy way to avoid payment of certain obligations." These commentaries also add the following:

> [TRANSLATION]
>
> …
>
> The article does not accept the possibility that the settlor or beneficiary could act as sole trustee, because although in many cases a settlor or beneficiary may designate a trustee who is accommodating of their own needs, enabling them to act would favour a purely artificial division of the patrimony and would provide an easy way to avoid payment of certain obligations.
>
> Article 1275 enables the settlor to participate in the operation of the trust that the settlor first launched, and the beneficiary to exercise some oversight over the decision-making that affects the beneficiary, while ensuring some degree of objectivity in trust management.
>
> [Emphasis added.]

[98] In *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862 (paras. 12–14), the Supreme Court of Canada notes that the Minister of Justice's commentaries "can sometimes be helpful in determining the legislature's intention", but they "are not binding on the courts, and their weight can vary, *inter alia* in light of other factors that may assist in interpreting the *Civil Code*'s provisions."

[99] In *Godoy Enriquez v. M.N.R.*, 2019 TCC 114, Tardif J. considered the issue of directive economic public order, which gives rise to absolute nullity. He cites the following passage from the Court of Appeal of Québec's decision in *Fortin c. Chrétien*, 1998 CanLII 12628, [1998] J.Q. 4010 (QL), aff'd 2001 SCC 45, [2001] 2 S.C.R. 500:

> [53] The decision *Fortin v. Chrétien*, 1998 CanLII 12628 (QCCA) (aff'g. 2001 SCC 45), contains the following more detailed remarks on directive public order:

> [TRANSLATION]
>
> Generally associated with political and moral public order is legislation regarding the administration of justice, the laws regarding the organization of the State, administrative and fiscal laws, laws regarding the organization of professional bodies, penal statutes, labour laws and charters of fundamental rights and freedoms. The parties cannot circumvent or contract out of it, and a contract purporting to do so is absolutely null. Thus, if an individual is illegally practising the profession of architect, physician or lawyer, not only is the violator subject to penal sanctions, but the contract based on a violation of the law is deemed null and invalid.
>
> Within directive economic public order, the jurisprudence and doctrine include the texts and decisions that seek to impart upon the behaviours of individuals a given public, social or economic direction. These are therefore, above all, rules established in the interest of society as a whole and its sound government and that relate more, though not exclusively, to the collective interest.
>
> [54] Therefore, directive public order aims to protect [TRANSLATION] "all the institutions that form the basis of the rules of the game in society".

[Emphasis in the original.]

[100] In *Financière Transcapitale inc. c. Fiducie succession Jean-Marc Allaire*, 2012 QCCS 5733 (paras. 42 and 43) ("*Financière Transcapitale*"), the Superior Court of Québec concludes that three trustees, all beneficiaries of a trust, could not act alone because of article 1275 of the CCQ, which is [TRANSLATION] "a provision of public order". As a result, the guarantees given by the trust were [TRANSLATION] "absolutely null" and [TRANSLATION] "were not subject to ratification".

[101] Curiously, the Court did not consider the distinction between directive economic public order and protective economic public order before finding that absolute nullity rather than relative nullity applied.

[102] In *Syndic de Banville*, 2021 QCCS 5176 ("*Syndic de Banville*"), the trustee asked the court to determine that the trust deed, which did not meet the requirements of article 1275 of the CCQ, was irregular. The Court stated the following in *obiter* (paras. 80–85):

[TRANSLATION]

[80] Since there are no defects in the trust deed or the gift deed that could affect their existence, they are valid, as is the 2011 deed of hypothec.

[81] However, even if a defect had affected the trust deed or the gift deed, this would not necessarily have resulted in their absolute nullity.

[82] In this regard, article 1275 of the CCQ, although of public order, is primarily intended to protect the private interests of the beneficiaries and the settlor, as noted by author Julien Busque:

> … Article 1275 of the CCQ is mainly intended to protect the interests of the beneficiaries and the settlor, enabling, among other things, compliance with the intentions of the settlor as set out in the deed, and even the protection of the trust patrimony itself.

[83] This is a protective (not directive) public order. The sanction of nullity can thus be invoked only by the parties to the deed and not by the trustee. The Court agrees in this respect with the doctrine cited.

[84] It should be remembered that article 1420 of the CCQ provides as follows:

> **1420.** ***Beneficiary of the nullity*** The relative nullity of a contract may be invoked only by the person in whose interest it is established or by the other contracting party, provided he is acting in good faith and suffers serious injury therefrom; it may not be invoked by the court of its own motion.
>
> ***Confirmation*** A contract that is relatively null may be confirmed.

[85] Thus, even if the trustee had had reason to raise the alleged defects, the absolute nullity of the deeds would not have been the sanction.

[Emphasis added.]

[103] In quoting author Julien Busque's statement that article 1275 of the CCQ aims to [TRANSLATION] "protect the private interests of the beneficiaries and the settlor", the Superior Court concluded that article 1275 is [TRANSLATION] "a protective (not directive) public order." Therefore, a contract entered in violation of this provision is sanctioned by relative nullity, which "may be invoked only by the person in whose interest it is established", as provided for in article 1420 of the CCQ.

[104] The commentaries of the Minister of Justice (*supra*) raise the risk [TRANSLATION] "of a purely artificial division of the patrimony". This may have been what motivated the Court in *Financière Transcapitale* to determine that the

sanction for a violation of article 1275 of the CCQ is absolute nullity, because in that case, the three trustees were also all beneficiaries. However, in this proceeding, there were three independent trustees who validly signed the resolutions to make the allocations in issue to beneficiary LR; despite the Agreement, the Rémillard brothers did not in fact usurp the powers of the trustees.

[105] The Court agrees with the Superior Court's analysis in *Syndic de Banville* and the supporting doctrine cited. Moreover, if there is any doubt as to the "nature of the nullity", article 1421 of the CCQ provides that "a contract which does not meet the necessary conditions of its formation is presumed to be relatively null."

[106] It should also be reiterated that article 1287 of the CCQ provides that the "trust is subject to the supervision of the settlor or of his heirs", here, the Rémillard brothers. Article 1290 of the CCQ grants the settlor, the beneficiary or "any other interested person" (emphasis added) the right to take action against the trustee to compel them to perform their obligations. These provisions support the argument that article 1275 of the CCQ is intended for "the protection of an individual interest" rather than the protection of the general interest.

[107] The same is true of article 1337 of the CCQ, which provides that a trustee may not delegate a discretionary power, "except to his co-administrators". The Court is of the view that this article again targets "the protection of an individual interest".

[108] However, the Appellant's alternative argument is that if the delegation of trustee powers to the Rémillard brothers is contrary to article 1337 of the CCQ, it is still relative nullity that would apply and the Minister would still not have the required standing to invoke it.

[109] However, the Court has already found that, notwithstanding the Agreement, the independent trustees never actually delegated their discretionary powers to the Rémillard brothers. They would merely obtain their consent as to their decision to proceed with the allocations in question.

[110] The issue of the independence or impartiality of the trustees in place remains. The Minister contends that each trustee is [TRANSLATION] "a person close to the Rémillard family and its interests" and suggests that none have the necessary independence. However, article 1275 of the CCQ requires only that there be at least one trustee "who is neither the settlor nor a beneficiary." This provision does not set out requirements for trustee qualifications.

[111] In *Brassard c. Brassard*, 2009 QCCA 898 (para. 110), the Court of Appeal of Québec states that the choice of a trustee [TRANSLATION] "is rightfully made by only one person: the settlor. Only the settlor's trust in the trustee matters." In addition, the Minister of Justice's commentaries on article 1275 indicate that the settlor may "designate a trustee who is accommodating of their own needs." The Court must therefore reject the Respondent's arguments in this regard.

[112] In light of the foregoing, the Court must therefore conclude that if article 1275 has been violated as alleged by the Respondent, it is relative nullity that applies, and the Minister did not have the required standing to invoke it.

VII. **CONCLUSION**

[113] In conclusion, the Court is of the view that the Rémillard brothers never became *de facto* trustees and that the three trustees never delegated their discretionary powers, so the resolutions are valid. There was no violation of article 1275 of the CCQ.

[114] The allocations therefore "became payable" and were validly paid to beneficiary LR, with the result that the Appellant was entitled to the deduction under subsection 104(6) of the ITA for each of the years in dispute.

[115] For these reasons, the appeal is allowed, with costs.

Signed at Ottawa, Ontario, this 24th day of May 2024.

"Guy R. Smith"

Smith J.

Translation certified true
on this 16th day of December 2025.

Melissa Paquette

CITATION:	2024 TCC 76
COURT FILE NO.:	2019-1335(IT)G
STYLE OF CAUSE:	FIDUCIE HISTORIA AND HIS MAJESTY THE KING
PLACE OF HEARING:	Montréal, Quebec
DATES OF HEARING:	December 17, 18, 19, and 20, 2022
REASONS FOR JUDGMENT BY:	The Honourable Justice Guy R. Smith
DATE OF JUDGMENT:	May 24, 2024

APPEARANCES:

Counsel for the Appellant:	Paul Ryan Félix St-Vincent Gagné
Counsel for the Respondent:	Vlad Zolia Éliane Mandeville

SOLICITORS OF RECORD:

For the Appellant:

Names:	Paul Ryan Félix St-Vincent Gagné
Firm:	Ravinsky Ryan Lemoine, L.L.P.
For the Respondent:	Shalene Curtis-Micallef Deputy Attorney General of Canada Ottawa, Ontario