Federal Court  Cour fédérale

Date: 20240315

Docket: T-121-24

Citation: 2024 FC 425

Ottawa, Ontario, March 15, 2024

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Applicant

and

ASB HOLDINGS LIMITED
CEB HOLDINGS LIMITED
NSB HOLDINGS LIMITED
SDH HOLDINGS LIMITED
SDS HOLDINGS LIMITED

Respondents

ORDER

[1] The underlying proceeding is an application brought by the Applicant pursuant to section 231.7 of the *Income Tax Act*, RSC 1985, c 1, for a compliance order requiring the Respondents to provide certain specified documents to the Applicant for the 2019 and 2020 taxation years.

[2] In the underlying application, the Applicant asserts that:

A. Abraham Bleeman [Abraham] and his spouse, Eva Bleeman [Eva], have five children: Aaron Bleeman [Aaron], Eli Bleeman [Eli], Nathan Bleeman [Nathan], Deena Smursz [Deena], and Shifra Hofstedter [Shifra] [collectively, the Siblings].

B. The Respondents, ASB Holdings Limited [ASB], NSB Holdings Limited [NSB], CEB Holdings Limited [CEB], SDS Holdings Limited [SDS] and SDH Holdings Limited [SDH], are corporations incorporated under the laws of Ontario. Aaron is a shareholder and director of ASB, Nathan is a shareholder and director of NSB, Eli is a shareholder and director of CEB, Deena is a shareholder and director of SDS and Shifra is a shareholder and director of SDH.

C. The Bleeman Family Trust was established on November 30, 1998 [1998 Trust]. Abraham is the settlor of the 1998 Trust, as well as one of its trustees along with Eva, Aaron and Nathan. The Siblings are the beneficiaries of the 1998 Trust. The 1998 Trust's 21st anniversary occurred on November 30, 2019.

D. Asden Holdings Inc. [AHI] and Bleeman Holdings Limited [BHL] are corporations incorporated under the laws of Ontario. The 1998 Trust, the Respondents, 1206139 Ontario Limited, Abraham and the Siblings, are or were shareholders of BHL. The Respondents, Abraham and the Siblings are or were shareholders of AHI.

E. The Aaron Bleeman 2019 Family Trust, The Nathan Bleeman 2019 Family Trust, The Eli Bleeman 2019 Family Trust, The Deena Smursz 2019 Family Trust, and The Shifra

Hofstedter 2019 Family Trust were all established on July 31, 2019 [collectively, the 2019 Trusts]. Abraham is the settlor of the 2019 Trusts. The Siblings are trustees of each of their respective 2019 Trusts as well as beneficiaries.

F. The Respondents, Abraham, Eva, the Siblings, the 1998 Trust, the 2019 Trusts, AHI and BHL, are collectively referred to by the Applicant as the "Bleeman Group."

G. During the 2019 and 2020 taxation years, the Bleeman Group engaged in estate freeze transactions under sections 51, 85 and/or 86 of the *Income Tax Act*. These transactions included the Siblings transferring their shares in AHI and BHL to the respective Respondents on January 1, 2019, in exchange for shares of the Respondents. As a result of the transactions, the Respondents and the 2019 Trusts held all the preference and common shares of the Respondents.

H. The Siblings each filed section 85 elections forms with the Canada Revenue Agency [CRA] claiming that the fair market value [FMV] of the 1,000 issued and outstanding BHL common shares was $1,097,973,630.

I. The CRA is engaged in audits of the Bleeman Group for the 2019 and 2020 taxation years, which commenced on or about March 22, 2022 [Audits].

J. The purpose of the Audits is to verify whether members of the Bleeman Group complied with their duties and obligations under the *Income Tax Act* and properly reported their worldwide income for the 2019 and 2020 taxation years. This includes verifying the

FMV of the AHI and BHL shares as at January 1, 2019, and whether the transactions comply with sections 51, 85 and/or 86 of the *Income Tax Act*.

[3] The documents for which a compliance order are sought in the underlying application are the following:

A. The valuation report for the purchase of the shares in AHI and BHL that occurred on January 1, 2019, or, if there is not such a valuation report, the documents evidencing the FMV of the transferred property [Request 1].

B. Any tax planning memo and related documents (i.e. closing agenda for the transaction) [Request 2].

C. The presentation of the transaction to the Respondents [Request 3].

[4] Notwithstanding that the underlying proceeding is intended to be summary in nature, the parties have been engaged in numerous interlocutory disputes related to the affidavit evidence and the conduct of the cross-examinations, which have already resulted in one adjournment of the hearing of the application. In his Order dated February 8, 2024, Justice McHaffie found that a review of the transcripts from the cross-examination of one of the Applicant's affiants, Francois Cloutier, on February 2 and 5, 2024 revealed that:

A. A considerable waste of time was spent on multiple entirely inappropriate questions regarding Mr. Cloutier's choice to be cross-examined in French, including inappropriate insinuations that the choice was made for tactical advantage and that he should choose to

be examined in English for the convenience of counsel, which questions went well beyond reasonable confirmation that Mr. Cloutier understood the evidence in his affidavit and in the documents and conversations to which he referred;

B. A considerable waste of time was spent on the repetition of questions to which objections had already been made, including questions with respect to whether Mr. Cloutier has authority under section 231.2 of the *Income Tax Act*, questions regarding Mr. Cloutier's understanding of the law of hearsay evidence, questions regarding correspondence in August and September 2023 that Mr. Cloutier testified he could not recall having seen at the time and questions regarding the underlying transactions;

C. Some waste of time resulted from counsel's repeated indications that he intended to ask the Court to draw adverse inferences from objections to questions; and

D. The Respondents' submission that significant delays were occasioned by the Minister's counsel running interference and making improper objections to relevant and proper questions was largely unfounded.

[5] The parties advised the Judicial Administrator that they were available for the hearing of this application on March 22, 2024. Having been assigned to hear this full-day application, I convened a case management conference on March 7, 2024, to address the timetable for the delivery of the Respondents' responding application record. During that case management conference, the Respondents raised, for the first time with the Court, their need to bring a refusals motion arising from the cross-examinations of both of the Applicants' affiants (Mr. Cloutier and Ian Charpentier). I set a timetable for the delivery of motion materials (in chart form) to enable the

refusals motion to be heard on an expedited basis, and cautioned the parties against seeking the Court's adjudication of unnecessary questions, refusing to answer relevant questions and failing to take advantage of answering questions under reserve of objection under Rule 95(2) of the *Federal Courts Rules*, SOR/98-106.

[6] As the Court does not yet have the benefit of the Respondents' complete responding motion record, but rather only their responding affidavit from Michael Belz, I confirmed with the Respondents during the case management conference that their opposition to the underlying application was based on their position that documents related to Requests 1 and 3 did not exist and that documents related to Request 2 were protected by solicitor-client privilege. Given the Respondents' positions on the requests, I queried why the types of questions that the parties raised as examples of the refusals at issue warranted a motion as, on their face, they did not appear in any way relevant to the Respondents' basis for objection. I cautioned the parties to consider this in deciding whether and how to proceed with the motion.

[7] On the motion presently before the Court, the Respondents seek:

A. An order requiring that Mr. Cloutier provide responsive answers to certain questions improperly refused and produce documents improperly refused during the cross-examination on his affidavit held on February 2, 5, and 23, 2024, as set out in the Refusals Chart attached to the Notice of Motion, within five days of the making of the Court's order;

B. An order requiring that Mr. Charpentier provide responsive answers to certain questions improperly refused and produce documents improperly refused during his cross-examination on his affidavit held on March 5, 2024, as set out in the Refusals Chart attached to the Notice of Motion, within five days of the making of the Court's order;

C. An order awarding the Respondents enhanced costs of this motion; and

D. Such other relief as counsel may advise and this Honourable Court may consider appropriate.

[8] The Applicant has opposed the motion in its entirety.

I. Analysis

A. *Applicable Legal Principles*

[9] The scope of permissible cross-examination on an affidavit in a proceeding before this Court was addressed in detail by Associate Judge Duchesne, in his Order dated January 9, 2024, in *Moosomin First Nation et al v Canada* (Federal Court File No.T-1848-11). I can do no better than repeat his detailed summary of the applicable jurisprudence:

> [18] The *Rules* are silent on the scope of cross-examination. The proper scope of a cross-examination on a motion or an application has given rise to a volume of jurisprudence that was neatly summarized by Mr. Justice McHaffie in *Farmobile, LLC v. Farmers Edge Inc.*, 2021 FC 1427 (CanLII) at paras 31 to 34 as follows:
>
> > [31] I therefore understand the principles applicable to cross-examination on an affidavit filed in support of an application or motion in the Federal Court to be that a question on cross-examination must be a fair and *bona fide* question relevant to: (a) the issues on the application or motion; (b) the matters raised by the

deponent in the affidavit, even if those matters are not relevant to the application or motion; or (c) the credibility and reliability of the deponent's evidence.

[32] The first of these categories confirms that an affiant may be asked questions about matters relevant to the issues in the motion, even if those matters are not addressed in the affidavit. This is often expressed in the principle that cross-examination is not restricted to the "four corners" of the affidavit: *Ottawa Athletic Club* at para 132 citing *Almrei (Re)*, 2009 FC 3 at para 71. As a corollary to the principle that an affiant cannot avoid fair questions on matters raised in their affidavit, they also cannot avoid fair questions on relevant matters about which they have knowledge simply by leaving those matters out of their affidavit.

[33] I note that whether the second category above is formulated as being "matters raised by the deponent in the affidavit, *even if those matters are not relevant to the issues*" (the formulation of *Rothmans*, referred to with approval in *CBS*), or the narrower "matters raised by the deponent in the affidavit, *if those matters are relevant to the issues*" (effectively the formulation of *Merck (1997)*, referred to with approval in *Fink*), the result in this case does not change, as I find the CMJ did not err in finding Farmobile's questions about the first set of redactions irrelevant even on the more expansive formulation.

[34] With respect to the third category, Farmers Edge argues that questions going to credibility must also meet the requirement of being formally and legally relevant as set out in *Merck (1997)*. I disagree. In *Merck (1997)*, Justice Hugessen expressly left aside questions aimed at attacking the witness' credibility, which he described as being "in a class by themselves": *Merck (1997)* at para 8. In *Almrei*, Justice Mosley noted that cross-examination was permitted if it was "relevant, fair and directed to an issue in the proceeding or to the credibility of the applicant" [emphasis added]: *Almrei* at para 71; *Ottawa Athletic Club* at para 132. A question may therefore be relevant and proper if it fairly goes to the credibility of the witness's evidence and thus to the Court's ability to rely on that evidence in deciding the motion.

[19] Justice McHaffie also explained in *Farmobile* at paras 23 to 30, that the Federal Court of Appeal confirmed in *Canada (Attorney General) v Fink*, 2017 FCA 87 ("*Fink*"), at para 7, a decision that followed a differently constituted bench of the Federal Court of Appeal in *CBS Canada Holdings Co. v. Canada*, 2017 FCA 65 (CanLII) ("*CBS*"), that the proper governing authority with respect to the scope of cross-examination on an affidavit is the Federal Court's decision in *Merck Frosst Canada Inc v Canada (Minister of Health),* 1997 CarswellNat 2661, [1997] FCJ No 1847 (TD), aff'd [1999] FCJ No 1536 (CA) ("*Merck*") and that neither *CBS* nor *Fink* detract from the general principle that an affiant may be cross-examined on the subject matter of their affidavit.

[20] Although some may argue that the authority to cross-examine on an affidavit is largely unconstrained and that cross-examination on the content of an affidavit is proper even if the subject matter of the affidavit is irrelevant and immaterial to the underlying motion, a close review of *CBS*, *Fink*, and *Farmobile* confirms that this is not the case.

[21] In *CBS*, the Federal Court of Appeal wrote at para 29 that, "The scope of cross-examination on an affidavit has been the subject of a number of decisions in which the relevant principles are set out: see *Ontario v. Rothmans Inc*., 2011 ONSC 2504 at para. 143, [2011] O.J. No. 1896 (QL) and *Ottawa Athletic Club Inc. (Ottawa Athletic Club) v. Athletic Club Group Inc*., 2014 FC 672 at paras. 130-33, [2014] F.C.J. No. 743 (QL) [Ottawa Athletic Club]".

[22] Justice Perell of the Ontario Superior Court of Justice wrote in *Ontario v. Rothmans Inc*., 2011 ONSC 2504 at para. 143 ("*Rothmans"*) that one of the principles of cross-examination is that if a matter is raised in, or put in issue by the deponent in his or her affidavit, the opposite party is entitled to cross-examine on the matter even if it is irrelevant and immaterial to the motion before the court.

[23] Justice Russell took a different view of the issue in *Ottawa Athletic Club Inc. (Ottawa Athletic Club) v Athletic Club Group Inc*., 2014 FC 672 at paras 130-33 (*Ottawa Athletic Club*) where his Honour held at para 133 after citing and relying upon *Merck* that, "However the proper scope of cross-examination on an affidavit is defined, the affiant is required to answer fair and legally relevant questions that come within that scope (Merck (1996), above)". The reference to Merck 1996 is to the apparent consensus that an affiant who swears to certain matters should not be protected from fair cross-examination on the very information he volunteers in his affidavit and should submit to cross-examination not only on

matters set forth in his affidavit, but also to those collateral questions which arise from his answers as discussed in *Merck Frosst Canada Inc v Canada (Minister of National Health and Welfare)*, [1996] FCJ No 1038 at para 9, 69 CPR (3d) 49, quoting *Wyeth Ayerst Canada Inc v Canada (Minister of National Health and Welfare)* (1995), 60 CPR (3d) 225 (FCTD).

[24] By citing both the *Rothmans* and *Ottawa Athletic Club* decisions as references to principles, one may be tempted to consider that the Federal Court of Appeal in *CBS* adopted the broad endorsement of permitting cross-examination on matters raised in an affidavit even though those matters are irrelevant to the underlying motion as set out in *Rothmans*. That would be incorrect.

[25] After citing *Rothmans* in *CBS* the Federal Court of Appeal applied *Ottawa Athletic Club* and held at para 32 that if the subject matter of the affidavit was not in issue in that proceeding, then the question did not need to be answered. *CBS* applied the requirement that questions must be legally relevant to the issues. The primacy of legal relevance as was then applied in *CBS* was reasserted in *Fink*, where *Merck* was confirmed as being the governing authority on determining relevance in the specific context of cross-examination on affidavits.

[26] Justice McHaffie's decision in *Farmobile* is also consistent with *Merck, Ottawa Athletic Club, CBS* and *Fink* in that he held at para 30 that parties will not be permitted to "waste their own and the Court's time and effort (to say nothing of money) in interminable questioning on matters that can have no conceivable impact on the outcome", citing *Merck.*

[27] As the foregoing shows, the analysis to be carried out a motion to compel answers on a cross-examination on an affidavit begins with the determination of the issues on the underlying motion and whether the questions asked are fair and *bona fide* questions that are relevant to the issues on the motion. The scope of cross-examination will necessary vary depending on the nature of the motion (*Ontario v. Rothmans Inc*., 2011 ONSC 2504 (CanLII), at para 148, approved of by the Federal Court of Appeal in *CBS* at para 29).

[28] As has been stated in *Merck*, reiterated *Ottawa Athletic*, confirmed by the Federal Court of Appeal in *Fink* and further explained in *Farmobile*, among others, the relevance of a question is to be determined through the two pronged analysis set out in *Merck*. At paragraphs 6 to 8 of *Merck* Justice Hugessen set out the applicable two pronged analytical approach to relevance as follows:

> For present purposes, I think it is useful to look at relevance as being of two sorts: formal relevance and legal relevance.
>
> Formal relevance is determined by reference to the issues of fact which separate the parties. In an action those issues are defined by the pleadings, but in an application for judicial review, where there are no pleadings (the notice of motion itself being required to set out only the legal as opposed to the factual grounds for seeking review), the issues are defined by the affidavits which are filed by the parties. Thus, cross-examination of the deponents of an affidavit is limited to those facts sworn to by the deponent and the deponent of any other affidavits filed in the proceeding.
>
> Over and above formal relevance, however, questions on cross-examination must also meet the requirement of legal relevance. Even when a fact has been sworn to in the proceeding, it does not have legal relevance unless its existence or non-existence can assist in determining whether or not the remedy sought can be granted. (I leave aside questions aimed at attacking the witness's personal credibility which are in a class by themselves). Thus, to take a simple example, where a deponent sets out his or her name and address, as many do, it would be a very rare case where questions on those matters would have legal relevance, that is to say, have any possible bearing on the outcome of the litigation. (the emphasis is mine)

[Emphasis added.]

[10] As such, contrary to the Respondents' assertion, questions relevant to the matters raised by the deponent in the affidavit, but that are not relevant to the application or motion, are not proper questions. In that regard, I would note that the *Farmobile* decision relied upon by the Respondents was not, in fact, affirmed by the Federal Court of Appeal [see *Farmobile, LLC v Farmers Edge Inc*, 2021 FC 1427].

[11] Rather, as confirmed by the Federal Court of Appeal in its decisions cited by Associate Judge Duchesne, questions on a cross-examination are proper if they are fair and *bona fide* questions relevant to: (a) the issues on the motion, with relevance requiring both formal and legal relevance; or (b) the credibility and reliability of the deponent's evidence and thus the Court's ability to rely on that evidence in deciding the motion.

[12] In relation to questions going to credibility and reliability, as noted by Justice McHaffie in *Farmobile*:

> [35] Of course, a question cannot be justified simply by asserting that it goes to credibility. There are limits on questions going to credibility as well. They cannot, for example, be questions designed simply to impeach the character of the deponent: *Rothmans* at para 143. Questions going to credibility are also subject to the general rule against "fishing expeditions": *Castlemore Marketing Inc v Intercontinental Trade and Finance Corp*, [1996] FCJ No 201 at para 1; *Sawridge Band v Canada*, 2005 FC 865 at paras 4, 9.

[13] On the underlying application, the Applicant seeks an order pursuant to section 231.7 of the *Income Tax Act* compelling compliance with the demands served pursuant to section 231.1 of the *Income Tax Act*. To grant the requested compliance order, the Court must be satisfied that: (i) the person against whom the order is sought was required under section 231.1 of the *Income Tax Act* to provide the disputed items; (ii) although the person was required to provide the disputed items sought by the Minister, they did not do so within a reasonable period of time; and (iii) the disputed items are not protected from disclosure by solicitor-client privilege as defined within the *Income Tax Act* [see *Minister of National Revenue v Lee*, 2016 FCA 53 at para 6; *Canada (Minister of National Revenue) v Miller*, 2021 FC 851 at para 16, aff'd 2022 FCA 183].

[14] As such, the formal and legal relevance of the questions asked on cross-examination in this case will be determined based on: (i) the facts sworn by the deponent and the deponent of any other affidavit filed in the proceeding; and (ii) whether the existence or non-existence of the facts sought to be adduced through the refused question can assist the Court in determining (in its application of the aforementioned test) whether or not the requested compliance order should be issued.

[15] Before turning to the refusals at issue, it is also important to consider the limitations on a party's ability to seek production of documents on a cross-examination. Rule 91(1)(c) of the *Federal Courts Rules* provides that a party who intends to conduct a cross-examination may serve a Direction to Attend on the person to be examined, which Direction to Attend may direct the person to be examined to produce for inspection at the examination "all documents and other material in that person's possession, power or control that are relevant to the application or motion". As stated by Associate Judge Tabib in *Autodata Ltd v Autodata Solutions Co*, 2004 FC 1361 at paragraph 19:

> …Parties cannot expect, nor demand, that the summary process mandated for applications will permit them to test every detail of every statement made in affidavits or in cross-examinations against any and all documents that may be in the opposing party's possession. If a party is not required to "accept" a witness' bald assertion in cross-examination, it is however limited in its endeavours to test that assertion to the questions it may put to the witness and the witness' answers in the course of the cross-examination. To the extent documents exist that can buttress or contradict the witness' assertion, production may only be enforced if they have been listed, or sufficiently identified, in a direction to attend duly served pursuant to Rule 91(2)(c) (see *Bruno v. Canada (Attorney General)*, [2003] F.C.J. 1604)…
>
> [Emphasis added.]

[16] A demand for production of a document from a person being examined must be made in advance of the hearing. There is no mechanism for the Court to order disclosure of documents based on requests that are made at the cross-examination, except where the examining party has laid a foundation for a claim that the documents should have been produced in response to a Direction to Attend [see *Ottawa Athletic Club Inc (Ottawa Athletic Club) v Athletic Club Group Inc*, 2014 FC 672 at para 140].

B. ***Determination of the Refusals at Issue***

[17] The Respondents assert that each of the refusals at issue are relevant to the question of whether this Court should exercise its discretion to grant the Applicant's request for a compliance order. In particular, the Respondents assert that the questions below are relevant because they relate to: (i) whether the Respondents provided responses to the requirements for information issued on November 4 and December 5, 2022 [Demands], whether CRA received the responses and what actions, if any, the CRA undertook if it received the responses; and/or (ii) whether the Court ought to issue a compliance order in light of the fact that the CRA has been informed that the required information and documents do not exist or are protected from disclosure by solicitor-client privilege.

[18] However, there does not appear to be a live dispute as to whether the Respondents provided responses to Requests 1, 2 and 3. It is the evidence of both the Applicant and the Respondents that no responsive documents were provided. As such, the Court will not be required to consider whether the CRA received responses and what actions it took thereafter. Moreover, the Court will

not need to examine any responses provided by the Respondents to any other requests made by the Applicant in order to determine the underlying application.

[19] Moreover, whether or not the Respondents advised the CRA that certain documents do not exist, or that certain documents are protected from solicitor-client privilege, is not the focus of the Court's inquiry. The issue to be determined by the Court on the underlying application is whether the Court is satisfied that the Respondents have demonstrated to the Court that documents responsive to Requests 1 and 2 do not exist and that documents responsive to Request 3 are protected by solicitor-client privilege.

(1) Cross-examination of Mr. Cloutier

[20] There are essentially twelve refusals at issue arising from Mr. Cloutier's cross-examination.

[21] Question 29 asks Mr. Cloutier to confirm that he is not authorized to issue a written notice to any person requiring them to provide any information or any document under subsection 231.2(1) of the *Income Tax Act*. Mr. Cloutier's evidence is that the demands at issue were issued under subsection 231.1(1), not subsection 231.2(1), the demands themselves refer to subsection 231.1(1) and the Notice of Application is similarly framed. Whether or not Mr. Cloutier is authorized to issue a notice under a different provision of the *Income Tax Act* is not relevant to the issues to be determined by the Court. If the Respondents intend to assert at the application that subsection 231.1(1) does not empower the CRA to issue a written notice requiring a person to produce information or documents, they do not require an answer to this question to do so.

[22] Questions 283-284 and 296-298 seek production of the query control sheet in relation to the Audits, or alternatively, to detail "precisely the information found in that query control sheet". The Respondents assert that the query control sheet is relevant as it records the Respondents' responses to the Demands. As noted above, if and when the Respondents informed the CRA that the documents at issue do not exist or are protected by solicitor-client privilege is not of assistance to the Court in determining whether to issue the compliance order. The live issue is whether the Respondents have demonstrated to the Court that the documents do not, in fact, exist or are protected by solicitor-client privilege. As such, I am not satisfied that these questions are relevant.

[23] Moreover, the query control sheet was not referred to in Mr. Cloutier's affidavit and the Direction to Attend served on Mr. Cloutier in relation to his cross-examination did not list or sufficiently identify the query control sheet. As stated above, there is no mechanism for the Court to order disclosure of the query control sheet based on a request that was made at his cross-examination and it cannot be credibly suggested that the Respondents have laid a foundation for a claim that the document should have been produced in response to the Direction to Attend. In that regard, I note that there was no precision in the drafting of the Direction to Attend — it simply mirrored the language of Rule 91(2)(c). As such, the production request is improper.

[24] Questions 299-301 and 361-363 again seek production of the query control sheet and the specific entries from the query control sheet relevant to the audit. I find that these questions are irrelevant and improper for the same reasons as questions 283-284 and 296-298. I would also note that in relation to these questions, the Respondents asserted that the Applicant had "failed to justify why she refused to allow the questions to be answered under Rule 95(2) – which would have

avoided the necessity of this motion". To be clear, the Applicant has no obligation to justify why the Applicant is not prepared to answer the question under reserve of objection and given that this refusal is devoid of merit, it was the Respondents, not the Applicant, that should have avoided the need for a motion on this refusal.

[25] Questions 330-334 relate to an objection by the Applicant to the marking of a letter dated August 30, 2023, from Aaron Tallon (a lawyer with the Department of Justice) to Davies Ward Phillips & Vineberg LLP (counsel for the Respondents) [Tallon Letter], as an exhibit during Mr. Cloutier's cross-examination. Mr. Cloutier's evidence is that he was aware that the Department of Justice had started compliance procedures against the Respondents (Q325), that he was kept aware of whether the documents were obtained during those procedures (Q329) and that he was "in the loop" throughout the compliance application proceedings (Q331). However, when the Tallon Letter was put to him on cross-examination and it was noted that it was appended as Exhibit A to Mr. Belz's affidavit, Mr. Cloutier stated that he did not recognize the letter, it was not addressed to him and he did not recall seeing the letter until he saw it in Mr. Belz's affidavit (Q309-310, 315).

[26] Mr. Cloutier is providing evidence in this proceeding as a fact witness. Unlike in an examination for discovery, Mr. Cloutier is not a representative of the CRA with a duty to inform himself in advance of his cross-examination. As such, contrary to the submissions of the Respondents, Mr. Cloutier is not "deemed to have been privy to the DOJ's demand letter dated August 30, 2023". Given Mr. Cloutier's lack of knowledge of this document, I see nothing

improper regarding the Applicant's objection to it being marked as an exhibit. In any event, the Tallon Letter is already before the Court as an exhibit to Mr. Belz's affidavit.

[27] Questions 459 and 461 ask whether "as a matter of fact" the Bleeman Group did not engage in any transactions under sections 51 or 86 of the *Income Tax Act*. Mr. Cloutier's affidavit states at paragraph 11 that it is the CRA's understanding, based on information provided by the Bleeman Group during the Audits as well as their tax reporting, that the Bleeman Group had engaged in transactions under sections 51 or 86 of the *Income Tax Act*. Whether or not the Bleeman Group engaged in such transactions is entirely irrelevant to the issues before the Court for determination in the underlying application. Moreover, these are not fair and *bona fide* questions, as Mr. Cloutier is clearly in no position to answer whether "as a matter of fact" such transactions occurred given that he did not participate in the transactions and the only information available to him, as stated in his affidavit, is information provided by the Bleeman Group.

[28] Questions 467, 487-489 and 494 relate to whether CRA policy requires formal valuation reports to be prepared for the purpose of a section 85 election. The Respondents assert that the fact that the Demands require the Respondents to produce a valuation report that does not exist and is not required under the CRA's own policy is relevant to the Respondents' defence. I reject this assertion, as the questions are not relevant to the issues before the Court. I acknowledge that Request 1 seeks a valuation report. However, the Court will not be making a determination on the underlying application as to whether a formal valuation report must be prepared for the purpose of a section 85 election or, put differently, whether the Respondent has to demonstrate that it needs the document it has requested. In that regard, the Respondents have pointed the Court to no

authority to support the assertion that such a determination must be made on a section 237.1 application. Moreover, the existence of any such policy is entirely irrelevant to the determination to be made by the Court as to whether the specific valuation report requested of the Respondents actually exists.

[29] Questions 568-574 were asked at the continuation of Mr. Cloutier's cross-examination after the parties' appearance before Justice McHaffie. In advance of the continuation of the cross-examination, the Respondents served Mr. Cloutier with a second Direction to Attend listing a number of documents — namely: (a) current copies of the CRA's query control sheets in relation to documents received from the Respondents pursuant to the Demands; (b) reports from the workload development section pertaining to information and records provided by the Respondents and the Bleeman Group; (c) unredacted copies of the T2020 Memo to File in connection with the Respondents and the Bleeman Group; (d) copies of handwritten, typed, scanned or recorded notes of any kind in connection with discussions on November 4, 2022, January 16, 2023, March 15, 2023, March 28, 2023, April 25, 2023 and May 3, 2023, between Mr. Cloutier and Mr. Belz; and (e) a letter from Peter Grater addressed to Mr. Cloutier and Mr. Charpentier dated February 16, 2024, a copy of which was attached, for some reason, to the Direction to Attend. Questions 568-574 seek production of the documents listed in the second Direction to Attend, which the Applicant refused to produce at the continuation of the cross-examination. The Respondents assert that the Court should order production on the basis that the Applicant is offside the second Direction to Attend.

[30] As stated above, the first Direction to Attend did not list with specificity any documents, including the ones now at issue. Notwithstanding, the Applicant nonetheless produced at Mr. Cloutier's first appearance those documents that were referenced in his affidavit, including the section 85 election forms, the reassessments, the business valuation report, the proposal letter and a redacted T2020 Memo to File which contained the notes taken by Mr. Cloutier during his conversations with the Respondents' representatives. It is not open to the Respondents to remedy the defects in their first Direction to Attend by improperly serving a second Direction to Attend in relation to the continuation of the same cross-examination. The issuance of the second Direction to Attend was an abuse of process. While the Respondents criticize the Applicant for not bringing a motion under Rule 94(2) for an order relieving Mr. Cloutier from the requirement to produce the documents listed in the second Direction to Attend, I will not fault the Applicant for failing to do so, as the second Direction to Attend was clearly abusive on its face.

[31] Moreover, the Respondents have not even attempted to explain, in relation to these questions, the relevance of any of the requested documents sought from the Applicant in the second Direction to Attend. For the reasons already given above, I fail to see how any of these documents would, in any event, be relevant to the issues to be determined on the underlying application.

[32] Questions 599-600 ask whether Mr. Cloutier "refutes" the representations made by Mr. Grater in his letter dated February 16, 2024, and whether Mr. Cloutier is in possession of any facts or documents to refute the representations made by Mr. Grater or the facts as attested to in Mr. Belz's affidavit. The questions asked by the Respondents are akin to those asked in an examination for discovery, where a party seeks all facts that a discovery representative is aware of, that are

relevant to a particular portion of the party's pleading. This not an examination for discovery. Mr. Cloutier is a fact witness who may be asked questions on cross-examination about facts that are relevant to the issues raised on the application or that are relevant to his credibility. As a fact witness, it is not Mr. Cloutier's role to "refute" the evidence of other affiants. As such, I am not satisfied that these questions are fair and *bona fide*. Moreover, evidence as to whether the documents actually exist — as opposed to representations made in a letter to the CRA as to whether they exist — is what is relevant to the Court's determination to be made on the underlying application.

[33] Questions 602-605 ask Mr. Cloutier, in light of the representations made by Mr. Grater in his letter: "what is it that you're asking a judge of the Federal Court to order in this case"? "[A]re you asking a Federal Court judge to order these Respondents to produce a valuation report that does not exist"? "[A]re you asking a judge of the Federal Court to produce the memo dated July 6, 2017 prepared by Dentons Canada LLP, which is a law firm, and which is stated to be protected from disclosure by solicitor-client privilege"? "[A]re you asking the Respondents to produce a presentation of a transaction that was never made to the Respondents"? These questions are entirely inappropriate. Mr. Cloutier is a fact witness, not a representative of the Applicant. Mr. Cloutier is not "asking" this Court for any relief.

[34] Questions 644-645 ask Mr. Cloutier whether having received information in writing that the valuation report does not exist impacts his belief as to whether or not the valuation report exists. Mr. Cloutier's beliefs are entirely irrelevant to the issues to be determined on the underlying application.

[35] Questions 716-728 ask Mr. Cloutier to confirm that the CRA has missed the normal limitation period for reassessing the Respondents' 2019 and 2020 tax years and to confirm that the CRA is now statute barred from reassessing the Respondents' 2019 and 2020 tax years. These questions are entirely irrelevant to the issue to be determined on the underlying application and, in any event, they improperly seek an opinion from this fact witness.

[36] Questions 731-741 ask Mr. Cloutier whether he was aware that the compliance application would suspend the normal assessment period under subsection 152(4) of the *Income Tax Act*, and whether the Minister was motivated to bring this compliance application in an effort to trigger the operation of section 231.8 of the *Income Tax Act* and thereby suspend the computation of the period of time within which a reassessment may be made against the Respondents. Again, these questions are irrelevant to the issues to be determined on the underlying application. In that regard, the Respondents have not even attempted to explain how the Minister's motivation in commencing this application is relevant to the issues before the Court.

[37] Accordingly, I find that each of the aforementioned questions need not be answered and the objections are upheld.

(2) Cross-examination of Mr. Charpentier

[38] There are essentially ten refusals at issue arising from Mr. Charpentier's cross-examinations.

[39] Question 77 asks Mr. Charpentier whether the letter from Mr. Grater dated February 16, 2024, is a representation that falls within his responsibility to review representations provided by the Bleeman Group and its authorized representatives. The Respondents assert that this question is proper as it "seeks to establish whether specific representations made by the Respondents and/or their authorized representatives in response to the Demands were reviewed/considered by the CRA's audit team". However, Mr. Charpentier had already testified that he received and reviewed the letter in its entirety. As such, this question is duplicative. Moreover, as stated above, the issue to be determined by the Court is not whether the Respondents made representations to the CRA that certain documents do not exist or are protected by solicitor-client privilege, but rather whether the Respondents have established before this Court that such documents do not, in fact, exist and are protected from disclosure as being privileged. An answer to this question will therefore not be of assistance to this Court.

[40] Question 90 raises the same issues as question 77 and need not be answered for the same reasons.

[41] Question 94 asks Mr. Charpentier whether he reviewed the letter from Mr. Grater dated February 16, 2024. This question was already asked and answered by Mr. Charpentier at Q73, where he confirmed that he reviewed the entirety of the letter on February 22, 2024, and it was not answered under reserve of objection.

[42] Question 102 asks Mr. Charpentier what he did after he received the letter from Mr. Grater, dated February 16, 2024. The Respondents assert that the question is relevant to whether the CRA

considered or gave effect to the responses provided by the Respondents and whether the CRA is satisfied with the representations made in the letter. However, Mr. Charpentier's evidence is that he reviewed the letter and, as such, the CRA considered it. What further steps the CRA took after receipt of the letter, which was delivered after the cross-examinations had begun and from a non-affiant, is not relevant to the issues to be determined on the underlying application. The fact that the Applicant is persisting with the application after the delivery of the letter is a clear indication that the CRA was not satisfied with the representations made in the letter. However, the issue of whether the Respondents actually complied with the Demands (as opposed to whether the CRA was satisfied that they had not complied with the Demands) will be for the Court to determine.

[43] Question 104 similarly asks Mr. Charpentier what he did after receiving the letter from Mr. Grater dated February 16, 2024. This question need not be answered for the same reasons given in relation to question 102.

[44] Question 105 asks Mr. Charpentier whether he recorded anywhere the responses received in the letter from Mr. Grater dated February 16, 2024. Mr. Charpentier already testified that he reviewed the letter. Whether he recorded the content of the letter anywhere is not relevant to the issues to be determined in the application.

[45] Question 106 asks whether the query control sheet only contains the documents received on behalf of the taxpayers or whether it also contains responses received in connection with the CRA's requests. This question is irrelevant to the issues to be determined on the underlying application.

[46] Question 162 seeks production of the query control sheet in connection with the Respondents. The query control sheet was not listed in the Direction to Attend served on Mr. Charpentier and accordingly, its production will not be compelled for the same reasons that production was not compelled in the context of Mr. Cloutier's cross-examination. Moreover, the Respondents' suggestion that counsel conducting the cross-examination had no knowledge of what a query control sheet was prior to Mr. Charpentier's answer in response to question 157 is entirely disingenuous. Mr. Charpentier's Direction to Attend was dated February 23, 2024, long after the existence of the query control sheet was made known to counsel for the Respondents in the context of Mr. Cloutier's cross-examination on February 2 and 5, 2024. In that regard, I note that Mr. Sood appeared as counsel for the Respondents on all of the cross-examinations.

[47] Question 163 asks whether Mr. Charpentier has made any changes to the query control sheet since January 23, 2024. Again, for the same reasons as noted above, the Respondents have not established that entries in the query control sheet are relevant to the issues to be determined on the underlying application.

[48] Question 164 asks whether Mr. Charpentier has received any representations in connection with the Bleeman Group after he swore his affidavit on January 23, 2024. Mr. Charpentier had already testified that he received the letter from Mr. Grater dated February 16, 2024, and as such, this question has already been answered. Moreover, Mr. Charpentier had already testified that he had no corrections to make to his affidavit, which included his statement that he had reviewed all information and documentation provided by the Respondents to the CRA "to date" and that "to date" the Respondents have not provided the outstanding material in response to Requests 1

through 3. As already stated multiple times, the issue to be determined on the underlying application is not whether the Respondents represented to the CRA that responsive documents do not exist or are privileged, but rather whether the Respondents have satisfied the Court that such documents do not exist or are privileged.

[49] Accordingly, I find that each of the aforementioned questions need not be answered and the objections are upheld.

II. Conclusion

[50] The Respondents' motion shall be dismissed in its entirety. Accordingly, the deadline for service and filing of the Respondents' responding application record will not be modified.

III. Costs

[51] Pursuant to Rule 401 of the *Federal Courts Rules*, the Court may award costs of a motion in an amount fixed by the Court and where the Court is satisfied that the motion should not have been brought, the costs of the motion shall be payable forthwith.

[52] The Applicant has requested their costs of the motion, fixed in the amount of $1,000 per question, for a total of $22,000. Despite having the opportunity to respond to the Applicant's request for costs, the Respondents made no cost submissions in their reply.

[53] The Applicant was entirely successful in resisting the motion and I see no reason to depart from the general principle that the successful party should receive their costs of the motion. The sole remaining issue is the quantum of costs.

[54] During the case management conference on March 7, 2024, I canvassed the issues to be raised on the motion with a view to determining whether a resolution could be reached so as to avoid the time and expense of a motion. Based on the submissions of the parties, I cautioned the Respondents against bringing the within motion as it did not appear, based on the information then available to me, that the refusals had merit. Having now seen the entirety of the transcripts of the cross-examinations and the Respondents' rationale for moving on the refusals, my initial impression was accurate. I also cautioned the parties that if I found that the position taken by a party on the motion was unreasonable and wasteful of the parties' and the Court's resources and time, that I would consider making a heightened award of costs on a per question basis in the range of $100 to $1,000 per question.

[55] As noted above, the Applicant seeks $1,000 per question and the Respondents, in their Notice of Motion, also sought "enhanced costs". I am satisfied that, in all of the circumstances, a heightened cost award of $1,000 per refusal is warranted as: (a) the motion was devoid of merit; (b) the Respondents persisted with the motion notwithstanding the concerns that I expressed during the case management conference, as well as the concerns expressed by Justice McHaffie against pursuing certain lines of questioning, such as in relation to section 231.2 of the *Income Tax Act*; (c) the Respondents put minimal effort into their moving record, relying on boilerplate rationales with limited explanation as to how those rationales applied to the questions at issue; (d) the conduct

of the cross-examination of Mr. Cloutier was abusive (as noted above) and demonstrated a lack of civility; (e) the cost award is consistent with the principle of proportionality given that the underlying share transactions have an apparent value of approximately $1 billion; and (f) such an award is consistent with one of the accepted functions of awards of costs — namely, deterrence of improper conduct.

[56] Accordingly, the Respondents shall pay to the Applicant costs of this motion in the amount of $22,000 payable forthwith and in any event of the cause.

THIS COURT ORDERS that:

1. The Respondents' motion is dismissed in its entirety.

2. The Respondents shall pay to the Applicant their costs of the motion fixed in the amount of $22,000 and payable forthwith and in any event of the cause.

"Mandy Aylen"
Judge