Docket: 2014-385(IT)G

BETWEEN:

TERANET INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on November 23, 2015 at Toronto, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

Counsel for the Appellant:	John C. Yuan Paul Davis
Counsel for the Respondent:	Naomi Goldstein Jenny Mboutsiadis
Counsel for Deloitte Touche:	Neil Paris
Counsel for EY Canada:	Robert Trenker

ORDER

WHEREAS the Respondent has brought a motion for an Order seeking leave to conduct an examination for discovery of Brian Allard of Ernst & Young Orenda Corporate Finance Inc. pursuant to section 99 of the *Tax Court of Canada Rules (General Procedure)*;

AND WHEREAS the Appellant opposed the motion;

UPON hearing the representations of the parties and considering their written argument;

THIS COURT ORDERS that:

(1) The motion is granted;

(2) Ernst & Young Orenda Corporate Finance Inc. is to provide its files which pertain to Teranet Inc.'s conversion to an Income Trust through to the end of 2006;

(3) Brian Allard of Ernst & Young Orenda Corporate Finance Inc. is to attend and submit to an examination for discovery by the Respondent with respect the issues raised in this appeal;

(4) Ernst & Young Orenda Corporate Finance Inc. is to provide its files at least two weeks prior to the examination for discovery of Brian Allard;

(5) Ernst & Young Orenda Corporate Finance Inc. is entitled to its reasonable costs;

(6) The Respondent is entitled to its costs for this motion.

Signed at Ottawa, Canada, this 12th day of February 2016.

"V.A. Miller"

V.A. Miller J.

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Motion heard on November 23, 2015 at Toronto, Ontario

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Appearances:

Counsel for the Appellant:	John C. Yuan Paul Davis
Counsel for the Respondent:	Naomi Goldstein Jenny Mboutsiadis
Counsel for Deloitte Touche:	Neil Paris
Counsel for EY Canada:	Robert Trenker

ORDER

WHEREAS the Respondent has brought a motion for an Order seeking leave to conduct an examination for discovery of a knowledgeable person from Deloitte Touche pursuant to section 99 of the *Tax Court of Canada Rules (General Procedure)*;

AND WHEREAS the Appellant opposed the motion;

UPON hearing the representations of the parties and considering their written argument;

THIS COURT ORDERS that:

(1) The motion is granted;

(2) Deloitte Touche is to provide its files which pertain to Teranet Inc.'s conversion to an Income Fund through to the end of 2006;

(3) Deloitte Touche is to present a knowledgeable representative to attend and submit to an examination for discovery by the Respondent with respect the issues raised in this appeal;

(4) Deloitte Touche is to provide its files at least two weeks prior to the examination for discovery of its representative;

(5) Deloitte Touche is entitled to its reasonable costs;

(6) The Respondent is entitled to its costs for this motion.

Signed at Ottawa, Canada, this 12th day of February 2016.

"V.A. Miller"

V.A. Miller J.

Citation: 2016TCC42
Date: 201060212
Docket: 2014-385(IT)G

BETWEEN:

TERANET INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

V.A. Miller J.

[1] The Respondent has brought two motions pursuant to section 99 of the *Tax Court of Canada Rules (General Procedure)* (the "*Rules*") for Orders granting her leave to conduct examinations for discovery of third parties, namely Brian Allard from EY Canada, formerly Ernst & Young Orenda Inc. ("EY") (the "EY Motion") and a knowledgeable person from Deloitte Touche ("Deloitte") (the "Deloitte Motion"). These motions were brought after the close of the examinations for discovery and undertakings following discovery. The Appellant has opposed the motions.

Background

[2] The circumstances which gave rise to this appeal are as follows. The Appellant's primary business is the operation and maintenance of Ontario's electronic land registration system. As a result of two amalgamations, the Appellant became the successor to the corporation whose activities and tax liabilities are the subject of this appeal. On June 16, 2006, the Appellant and other corporate entities were part of a corporate reorganization which resulted in a corporate/income trust structure (the "2006 Reorganization"). As a consequence of this reorganization, the Appellant became liable for two unsecured demand promissory notes issued to Teranet Holdings Limited Partnership ("THLP"), a non-arm's length partnership in the Appellant's corporate structure. THLP owned all of the issued and outstanding shares of the Appellant.

[3] The principal amounts of the promissory notes were $1.215 billion and $10 million; both notes bore an interest rate of 9.75% per annum with interest payable monthly. The Appellant claimed interest deductions on these notes during the taxation years ending December 31, 2006, December 31, 2007, November 10, 2008 and February 28, 2009. The Minister of National Revenue (the "Minister") reassessed the Appellant in respect of these years and disallowed a portion of the interest expense which had been claimed on the basis that a reasonable interest rate would not be higher than 5.45% per annum.

[4] The questions to be answered on appeal are whether the interest rate was reasonable and whether the interest was incurred for the purpose of earning income.

Grounds Relied on by the Respondent

[5] In its request to examine Brian Allard, the Respondent has relied on the following grounds:

i. Brian Allard and EY have knowledge relevant to the issues on appeal, specifically, how the terms and conditions, including the interest rate of the $1.25 billion promissory note, were determined;

ii. The Appellant has refused or cannot provide this information and EY will not consent to providing this information without a court order;

iii. The Appellant has indicated that it intends to rely on the report prepared by Brian Allard and EY;

iv. It would be unfair to require the Respondent to proceed to trial without an opportunity to examine Brian Allard;

v. The examination will not unduly delay the hearing of the appeal; entail unreasonable expenses for other parties; or, result in unfairness to Brian Allard or EY.

[6] The grounds relied on by the Respondent in her request to examine a knowledgeable person from Deloitte are similar to those she relied on in her EY Motion. The additional grounds in the Deloitte Motion were that:

i. The Appellant has refused or cannot provide information about various steps involved in the restructuring and the flow of funds involved in the restructuring;

ii. Deloitte was retained by the Appellant at the time of the restructuring and it appears to have knowledge about the restructuring;

iii. The Respondent has requested the information from the Appellant and Deloitte, but to date, has not received the information;

iv. Deloitte has not consented to provide the information or to attend at a third party discovery.

Facts

[7] The Appellant's nominee for discovery was Gregory Pope who is the vice president and chief financial officer of the Appellant. At the time of his examination for discovery on June 8, 2015, he had been employed with the Appellant for five years, always in this position. He testified that he informed himself of the matters raised in the pleadings by reading a number of documents considered pertinent to this appeal. Although he was not employed by the Appellant at the time of the 2006 Reorganization, he did not speak to anyone who had been involved with the 2006 Reorganization. According to Mr. Pope, there is no one remaining at the Appellant who was involved in the restructuring.

[8] I have read the transcript of Mr. Pope's discovery evidence and it was readily apparent that he was not well informed. He could not answer the majority of the questions asked by counsel for the Respondent which resulted in 52 undertakings being given during his examination for discovery. It is my opinion that Mr. Pope did not prepare himself for the examination on discovery as is required by subsection 95(2) of the *Rules*.

[9] During the examination for discovery and in the response to undertakings, the Respondent was told that many of the Appellant's records were lost or destroyed or "may have been lost or deleted".

[10] According to the litigation timetable, undertakings given at the examinations for discovery were to be satisfied by August 31, 2015. The Appellant delivered its

answers to its undertakings on August 21, 2015 and with these answers it also gave the Respondent a USB containing 82 additional documents. Several of these documents were prepared by EY and Deloitte. It was only on receipt of these documents that the Respondent learned of Deloitte's involvement in the 2006 Reorganization.

[11] On October 9, 2015, the Respondent delivered follow-up questions which arose out of the Appellant's answers to its undertakings. The Appellant delivered its answers to the follow-up questions on November 11, 2015, after the Respondent had filed the present motions. In its covering letter, counsel for the Appellant wrote that it had not answered the "vast majority of the Respondent's follow-up questions that purport to relate to the Deloitte document produced" pursuant to the undertaking as these questions should have been put to Mr. Pope at his examination.

[12] In a letter dated September 29, 2015, the Respondent requested that EY provide her with its files pertaining to the issues in this appeal and those files regarding the Appellant's conversion to an Income Trust and the names of individuals involved in providing services to the Appellant and its affiliates in 2006. On the same date, the Respondent requested that Deloitte provide her with its files pertaining to the work it carried out regarding Teranet's conversion to an Income Fund in 2006 and to advise which individuals were involved.

[13] On October 13, 2015, counsel for Deloitte replied that they were reviewing the Respondent's request. No further response was received from Deloitte but counsel for Deloitte appeared at the hearing of these motions.

[14] On October 23, 2015, counsel for EY advised that any information in their possession with respect to their client is confidential and they were unable to provide the information requested. Counsel for EY also appeared at the hearing of these motions.

Law

[15] The examination of a non-party is provided in section 99 of the *Rules*. This is an extraordinary remedy and all five criteria in subsection 99(2) of the *Rules* must be satisfied before the court will exercise its discretion to make an order

under section 99: *Teelucksingh v The Queen*, 2007 TCC 125 at paragraph 2. Section 99 provides:

> **99 (1)** The Court may grant leave, on such terms respecting costs and other matters as are just, to examine for discovery any person who there is reason to believe has information relevant to a material issue in the appeal, other than an expert engaged by or on behalf of a party in preparation for contemplated or pending litigation.
>
> **(2)** Leave under subsection (1) shall not be granted unless the Court is satisfied that,
>
> > **(a)** the moving party has been unable to obtain the information from other persons whom the moving party is entitled to examine for discovery, or from the person sought to be examined,
> >
> > **(b)** it would be unfair to require the moving party to proceed to hearing without having the opportunity of examining the person, and
> >
> > **(c)** the examination will not,
> >
> > > **(i)** unduly delay the commencement of the hearing of the proceeding,
> > >
> > > **(ii)** entail unreasonable expense for other parties, or
> > >
> > > **(iii)** result in unfairness to the person the moving party seeks to examine.
>
> **(3)** A party who examines a person orally under this section shall, if requested, serve any party who attended or was represented on the examination with the transcript free of charge, unless the Court directs otherwise.
>
> **(4)** The examining party is not entitled to recover the costs of the examination from another party unless the Court expressly directs otherwise.
>
> **(5)** The evidence of a person examined under this section may not be read into evidence at the hearing under subsection 100(1).

[16] The first question to address on a motion under subsection 99(1) of the *Rules* is relevance: *Sackman v The Queen*, 2008 FCA 177 at paragraph 17. It is necessary that the moving party demonstrate that the non-party has some information relevant to a material issue in the appeal. Where the non-party to be examined is not an individual, the inability to identify a specific and knowledgeable person

within the non-party (as in the present case of Deloitte) is not a bar to obtaining an Order under section 99. In this regard, Rip, CJ, as he then was, explained at paragraphs 32 and 33 of his decision in *Advantex Marketing International Inc v The Queen*, 2014 TCC 21:

> 32 Respondent's counsel submitted that Rule 99 refers to the examination for discovery of "any person" who there is reason to believe has information, not necessarily a "knowledgeable" person as is required by Rule 93. However, in my view, once a person is identified as a non-party being examined for discovery, that person must have some knowledge or obtain knowledge of the subject matter of the examination. If the person to be examined lacks knowledge about the subject matter of the examination, the examination probably will be useless.
>
> 33 The party examining a non-party to be examined, who is not an individual, should not be in any lesser position then when he or she examines an opposing party. Thus Rules 93(2) and 95(2) apply to a non-party as well as to a party: the non-party to be examined, other than an individual, is to select a knowledgeable current or former employee, officer or director to be examined on its behalf and prior to the examination that individual is to make all reasonable inquiries regarding the matters in issue in accordance with Rule 95(2).

[17] In accordance with paragraph 99(2)(a) of the *Rules*, the moving party must satisfy the Court that it has been unable to obtain the information from the persons it is entitled to examine or from the person sought to be examined. The "or" in this paragraph is written conjunctively as both of these requirements must be satisfied: *Barker v The Queen*, 2012 TCC 64 at paragraph 13.

[18] The moving party must also demonstrate that (i) it would be unfair to require her to proceed to trial without having the opportunity to examine the non-party; (ii) the examination will not unduly delay the commencement of the hearing; or (iii) entail unreasonable expense for other parties; or (iv) result in unfairness to the non-party.

Analysis

A. Relevance

(1) EY

[19] The Respondent is seeking to examine Mr. Allard of EY on how the terms and conditions, including the interest rate, of the $1.215 billion and $10 million promissory notes were determined. As the issues in this appeal are the reasonability of the interest rate and the purpose of the promissory notes, if Mr. Allard has any information on these matters, that information would be relevant.

[20] The Appellant has argued that Mr. Allard and EY have no information which is relevant to the issues on appeal. Counsel for the Appellant stated that the Appellant established the interest rate and only sought EY's opinion on the reasonability of the interest rate. As such it will be relying on the EY Report only to demonstrate its due diligence. In support of its position, the Appellant highlighted its engagement letter with EY, dated January 11, 2006. The scope of procedures to be performed as set out in the letter, read:

> In order to prepare the Deliverable, we will perform limited review procedures to obtain an understanding of the proposed transactions to be described in the Prospectus (the "Transaction"). We will perform these limited procedures in order to determine whether we believe that it is not unreasonable to conclude that the proposed interest rate on the intercompany loan is likely not higher than the interest rate that an arms length lender might reasonable agree to in the circumstances.[1]

[21] According to counsel for the Appellant, this demonstrated that EY did not advise on the terms and conditions of the promissory notes or suggest different terms and conditions or suggest different interest rates. Counsel for the Appellant stated that EY was simply "given interest rates and they assessed those rates for reasonableness".[2]

[22] The Respondent stated that the documents provided by the Appellant demonstrate that Mr. Allard and EY were involved in determining the interest rate of the promissory notes. Counsel for the Respondent referred to the following documents: (i) the EY Letter regarding the intercompany loan review "THLP Note";[3] (ii) the EY Work Schedule Breakdown regarding the THLP Note;[4] (iii) the EY Memo Regarding the THLP Note;[5] (iv) the EY Presentation regarding the valuation of identifiable assets of Teranet;[6] (v) the email from Mr. Allard to M. Galloro, regarding the Teranet Income Trust Tax Model;[7] and (vi) various letters from EY to Teranet regarding the Intercompany Loan Review "THLP Note"[8].

[23] In the circumstances of this case, the Appellant may have ultimately chosen the interest rate for the promissory notes but based on the evidence and arguments presented at the motion, it does not necessarily follow that EY has no information relevant to the issues in this appeal. At the examination for discovery, Mr. Pope was asked when the principal amount of the $1.215 billion promissory note was determined. He replied:

> I don't know an exact date. It would obviously be before June 16, 2006. I seem to recall that there were other documents contemplating other amounts prior to that, but by a few weeks, not months, so presumably not long before the June 16 date on the note itself.[9]

[24] The EY engagement letter is dated January 11, 2006 – five months prior to the date of the promissory note. Counsel for the Appellant stated that the Appellant gave EY interest rates and EY was to assess those rates for reasonability. This was five months prior to the 2006 Reorganization. I have inferred from counsel's statement that the principal amount of the promissory note was known some time prior to June 16, 2016.

[25] It is plain that Mr. Allard and EY have information concerning the decision to choose the 9.75% interest rate. In addition to the above, the EY Work Schedule Breakdown regarding the THLP Note illustrates that EY employees spent 109 hours on the Appellant's mandate, of which Brian Allard spent 59.5 hours.

[26] The Respondent has established that Mr. Allard and EY have information concerning how the terms and conditions, including the interest rate, of the $1.215 billion and $10 million promissory notes were determined.

(2) Deloitte

[27] The Appellant did not contest that Deloitte has information which is relevant to the issues in this appeal.

[28] Counsel for the Respondent stated that: (i) Deloitte prepared documents regarding the conversion of Teranet Inc. to Teranet Income Fund;[10] (ii) Deloitte prepared a Tax Steps Memo and Tax Model; *pro forma* financial statements for Teranet's management; and, comfort letters;[11] and (iii) Deloitte made a presentation to the management of Teranet on November 15, 2005 with respect to

the "Teranet Income Fund IPO Proposal"[12] . This was seven months prior to the 2006 Reorganization.

[29] It is my opinion that the Respondent has established that Deloitte has information relevant to the issues in this appeal.

(a) Unable to Obtain Responses from the Appellant

(i) The Appellant

[30] The Appellant had an obligation under subsection 93(2) of the Rules to choose a knowledgeable current or former officer. It chose Mr. Pope, a current officer, as its nominee for discovery. Mr. Pope was not employed with the Appellant during the 2006 Reorganization and as the Appellant's nominee he had the responsibility under subsection 95(2) to acquire the knowledge necessary for the discovery. As I stated earlier, it was apparent from reading the transcript of the examination for discovery that Mr. Pope did not inform himself beyond reading certain documents in the possession of the Appellant. He testified at the discovery that he neither spoke to any of the Appellant's former employees who were involved in the 2006 Reorganization nor did he review any emails.

[31] Mr. Pope could only answer a few questions and those that he could answer necessitated prompting with documents. He could not answer questions with respect to the structure of the Appellant prior to the 2006 Reorganization. He did not know the Appellant's financial obligations prior to the restructuring. He could not answer questions concerning who was involved with the restructuring or who was involved in establishing the terms and conditions of the promissory notes. Towards the end of the examination, counsel for the Appellant began to answer the majority of the questions put to Mr. Pope. Mr. Pope's inability to answer questions led to the Appellant giving 52 undertakings.

[32] The following exchanges were typical of the discovery. Mr. Pope was asked:

> Q. The promissory note ultimately uses an interest rate of 9.75 percent. Was the choice of that interest rate of 9.75 percent based exclusively on the recommendation of Ernst & Young at R00036?
>
> A. I would be unable to answer that.

…

Q. If you could turn back to the promissory note at exhibit R00100, when was the principal amount of the $1.215-billion determined?

A. I don't know the exact date. It would obviously be before June 16, 2006

…

Q. Who were the people involved in determining the principal amount of the note?

A. I don't know.

…

Q. Who were the people from Teranet involved in determining the interest rate?

A. I would expect it to be the chief financial officer at the time, but I don't know.[13]

At the examination for discovery of Mr. Pope, the Respondent asked how funds were flowed:

Q. […] How did money flow from Teranet Holdings Limited Partnership to the Teranet Operating Trust?

A. I don't know.

Q. Could you undertake to advise?

Mr. Finkelstein: Yes.[14]

The answer to the undertaking provided by the Appellant was:

From a review of Teranet's consolidated financial statements, it appears that Teranet Holdings Limited Partnership issued distributions to the holder of its partnership units, Teranet Operating Trust.[15]

Another example of the typical exchange between the Respondent and Mr. Pope is as follows:

> Q. […] the note between Teranet Operating Trust and the Holder. How was the interest rate of four percent determined?
>
> A. I don't know.
>
> Q. Would you undertake to advise?
>
> Mr. Finkelstein: We'll use our best efforts to do that.[16]

The Appellant, in undertakings, answered:

> Teranet is not aware and cannot locate documents to explain how the 4% rate was determined.[17]

The following is a typical example of the full exchange between the parties, examination for discovery, undertakings, and follow-up questions:

> Q. Were the principals of those three entities and the other 15 percent the persons who were involved in the restructuring and determining the terms of the promissory note?
>
> A. No.
>
> Q. Who was?
>
> A. It would be – I don't know.[18]

Counsel for the Respondent asked for an undertaking to identify the individuals in charge of making the decisions about the restructuring and the interest rate, and to identify any documents or emails surrounding the restructuring. In response, counsel for the Appellant stated:

> Mr. Finkelstein: Just unpacking you request, Teranet Inc. will identify the people and tell you their positions, that was the first group. In terms of searching for documents, as you can appreciate, OMERS owns Teranet now and so we're not going to go outside and start looking for documents, but Teranet will look internally to see whether it has documents from those people that relate to the issue.[19]

The Appellant's answer to the undertaking was:

> From Ternate's review of the documents, it appears that Teranet's CFO at the time of the transaction, Brian Kyle, was among those responsible for "spearheading" the transaction.[20]

The Respondent asked a follow-up question:

> The question was not limited to a review of the documents, nor to identifying a single individual. The questions seek information as to all individuals involved in the decision making process regarding the restructuring and making the note. Respond.[21]

The Appellant replied:

> Teranet made best efforts to respond to UT 4. Brian Kyle was the only individual Teranet was able to identify who appeared to be making material decisions in respect of the restructuring in the documents. As no individuals with decision-making authority remain at Teranet who were also at the company in June 2006, the only way for Teranet to respond to this undertaking was from a review of the relevant documents.[22]

[33] As can be seen from the above exchanges, Mr. Pope was not knowledgeable about the issues in this appeal and the Appellant was not willing to inform itself by asking former employees so that it could answer the Respondent's questions. At the discovery, the Appellant also refused to give its consent if the Respondent asked EY to produce its file. Further, in answers to undertakings, the Appellant stated that many of the records of the Appellant may have been destroyed or lost. It is not surprising that the Respondent has asked to discover the third parties to obtain the information it seeks. When a party chooses not to respond to proper questions put to it or not to inform itself, section 99 of the *Rules* provides an extraordinary remedy so that the purpose of discoveries is not defeated.

(ii) EY

[34] It is the Appellant's position that the EY Report and the Appellant's interaction with EY are irrelevant from the perspective of determining a reasonable rate. Counsel for the Appellant stated:

> Ultimately what's going to matter is what the company actually did. What were the terms of the debt? What was the interest rate? What would an arm's length party charge for this type of debt? […] [H]ow the company got to that point is

> actually irrelevant. And E&Y's analysis, to the extent that we are relying on it, it speaks for itself.[23]

[35] The Respondent may have the EY Report but it was clear from the examination of Mr. Pope that he could not speak to the role that EY or the EY Report played in determining the interest rate for the promissory notes.

(iii) Deloitte

[36] The Respondent has requested to discover a knowledgeable person with Deloitte with respect to (i) the purpose of each step in the series of transactions specified in the draft Term Sheet, including the purpose of the intercompany promissory notes: (ii) the flow of funds in the transactions; and (iii) how the principal and interest rates of the intercompany promissory notes were determined.

[37] During the examination of Mr. Pope, the Respondent was unaware of Deloitte's involvement in the 2006 Reorganization of the Appellant. The Respondent received documents created by Deloitte when the Appellant produced them in answer to undertakings. In follow-up questions, the Respondent asked the Appellant questions with respect to each of the areas listed in paragraph 36 above.

[38] The record showed that the Appellant answered the Respondent's questions with respect to the purpose of the series of transactions but it did not answer the questions about the purpose of each step in the series of transactions.

[39] Counsel for the Respondent also asked follow-up questions concerning the flow of funds in the transactions. Counsel for the Appellant stated that this was not a proper follow-up question and the Respondent cannot now ask Deloitte about the flow of funds because these questions should have been posed to Mr. Pope at the examination for discovery. In support of his position, counsel stated that Nicholas Correia, the auditor with the Canada Revenue Agency ("CRA"), prepared a document entitled "Teranet Income Fund, Flow of Funds Flowchart" which illustrated the steps in the transaction, who gets what and the cash flows. Counsel argued that Mr. Pope should have been asked questions about the CRA document and because he was not, the Respondent should not be allowed to ask Deloitte this question.

[40] I disagree. An audit does not necessarily contemplate litigation and what a lawyer may require in the litigation process is not necessarily what an auditor was looking for during an audit: *Advantex Marketing International Inc* (*supra*) at paragraph 34.

[41] It is my view that the Deloitte documents directed counsel for the Respondent to a different line of inquiry beyond the diagram produced by the CRA auditor. The CRA diagram merely illustrated the steps in the 2006 Reorganization. Whereas, the Deloitte document indicated that Deloitte considered how to structure the 2006 Reorganization to minimize the tax risk. Deloitte reviewed or considered "structuring the acquisition of Teranet shares/flow of funds to maximize the deductions in Teranet Amalco II to limit any corporate income taxes during the modelling period (2006 to 2017)".[24] This document also showed that Deloitte addressed or considered other issues including the "reasonability of interest rates used in alternative structures" and "interest deductibility".[25] One of the reasons the Income Trust structure was recommended was because the "interest rates used in the model to create desired outcome" appeared plausible.[26]

[42] As the examining party, the Respondent is entitled to have any information and production of any documents which may lead to a train of inquiry that may directly or indirectly advance her case or damage that of the opposing party: *Teelucksingh v The Queen*, 2010 TCC 94 at paragraph 15.

[43] Instead of asking the Appellant to describe the structure of the 2006 Reorganization, counsel for the Respondent has asked the Appellant why the 2006 Reorganization was structured the way it was. This was a proper follow-up question. It resulted from the newly produced Deloitte documents and these documents quite rightly required an explanation: *Blais v Toronto Area Transit Operating Authority*, 2011 ONSC 1880 at paragraphs 61 to 63.

[44] In this case, the Appellant has not answered the follow-up questions with respect to the Deloitte documents nor has it demonstrated that it is capable of answering the questions.

[45] The Appellant also argued that the Respondent should not be permitted to examine Deloitte because there was no evidence that Deloitte had any information concerning how the principal and interest rate of the promissory notes were determined. However, at the examination for discovery, the Appellant's nominee

could not say who was involved in setting the interest rate other than Brian Kyle, nor could he explain what went into determining the interest rate. It appeared from the Deloitte documents and Deloitte's involvement that Deloitte may have knowledge of who was involved in setting the rate and what considerations went into setting the rate.

[46] The Respondent requested the information from both EY and Deloitte and her request was refused.

[47] It is my view that the Respondent has satisfied both conditions in paragraph 99(2)(a) of the *Rules*; that is, she was unable to obtain the information from the Appellant, EY or Deloitte.

(b) Unfairness to the Respondent to Proceed to Trial Without Examining the Third Party

[48] The Appellant argued that there is no unfairness to the Respondent if she is not allowed to examine third parties because the CRA is very familiar with income fund structures. Counsel also stated that the Respondent should not be permitted to discover someone from EY because EY's involvement with respect to the interest rate and its interaction with the Appellant are irrelevant from a valuation perspective.[27]

[49] The Respondent stated at the hearing of the motion, that should she be required to proceed to trial without having the opportunity to examine either EY or Deloitte, she would not be aware of the documents in their possession. As the Appellant has advised that few documents remain in its possession, proceeding to trial, without examining the non-parties, would likely result in a request for an adjournment to review the documents of EY and Deloitte.

[50] It is my view that, to the extent that the Respondent needs information from the third parties to litigate this case, it should have access to that information before trial: *Sackman* (*supra*) at paragraph 19.

(c) Unduly Delay the Hearing; Unreasonable Costs to the Other Parties; and Unfairness to the Third Parties

[51] The Respondent stated that if the Motions are granted, the trial will not be unduly delayed. The Respondent indicated that she would be able to proceed to trial in late May or early June as requested by the Appellant. The examinations for discovery of the third parties would be limited to one day for each party.

[52] At the motion, counsel for EY and counsel for Deloitte requested that they be reimbursed for costs in the event that the motion is granted. The Respondent indicated that she was prepared to cover reasonable costs to EY and Deloitte.

[53] Neither of the third parties nor the Appellant indicated that the examinations for discovery of EY and Deloitte would cause unfairness.

Conclusion

[54] For these reasons, I allow the Respondent's motions. I will issue an order granting the Respondent leave to examine a third party from EY, namely Brian Allard and a knowledgeable nominee from Deloitte as a third party so that the Respondent can obtain answers to its questions. Both EY and Deloitte will produce documents in its control which are relevant to the issues in this appeal. These documents are to be given to the Respondent prior to the examination for discovery.

[55] Costs for these motions are awarded to the Respondent.

Signed at Ottawa, Canada, this 12th day of February 2016.

"V.A. Miller"

V.A. Miller J.

[1] Appellant's Motion Record, Tab 1, Exhibit J at page 175
[2] Transcript of proceedings, pages 56-57
[3] Respondent's EY Motion Record, Tab 2, Exhibit E
[4] Respondent's EY Motion Record, Tab 2, Exhibit F
[5] Respondent's EY Motion Record, Tab 2, Exhibit B

[6] Respondent's EY Motion Record, Tab 2, Exhibit D
[7] Respondent's EY Motion Record, Tab 2, Exhibit D
[8] Respondent's EY Motion Record, Tab 2, Exhibit D
[9] Respondent's EY Motion Record, Tab 3, Transcript of the Examination for Discovery of Gregory Pope at page 50

[10] Respondent's Deloitte Motion Record, Tab 2, Exhibit C
[11] Respondent's Deloitte Motion Record, Tab 2, Exhibit D
[12] Respondent's Deloitte Motion Record, Tab 2, Exhibit E
[13] Respondent's EY Motion Record, Tab 3, Transcript of the Examination for Discovery at pages 50-51
[14] Respondent's EY Motion Record, Tab 3, Transcript of the Examination for Discovery at page 55
[15] Respondent's EY Motion Record, Tab 2, Exhibit C at page 10
[16] Respondent's EY Motion Record, Tab 3, Transcript of the Examination for Discovery at page 54
[17] Respondent's EY Motion Record, Exhibit 2, Tab C, page 10, UT44
[18] Respondent's EY Motion Record, Tab 3, Transcript of the Examination for Discovery at page 11
[19] Respondent's EY Motion Record, Tab 3, Transcript of the Examination for Discovery at page 12
[20] Respondent's EY Motion Record, Exhibit 2, Tab C, "Examination for : Undertakings and Refusals Chart at page 1, UT 4
[21] Supplementary Affidavit of Justine Wilde, Exhibit A, Examination for Discovery of Gregory Pope: Follow-up Questions and Answers at page 4, UT4
[22] Supplementary Affidavit of Justine Wilde, Exhibit A, "Examination for Discovery of Gregory Pope: Follow-up Questions and Answers" at page 4, UT 4
[23] Transcript of proceedings, page 51
[24] Respondent's Deloitte Motion Record, Tab 2, Exhibit E, page 5
[25] Ibid, page 14
[26] Ibid at page 15
[27] Transcript of Proceedings, page 51

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REASONS FOR ORDER BY:	The Honourable Justice Valerie Miller
DATE OF ORDER:	February 12, 2016

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