Docket: 2006-3579(IT)G

BETWEEN:

HSBC BANK CANADA

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on April 8, 2010, at Vancouver, British Columbia.

By: The Honourable Justice Campbell J. Miller

Participants:

Counsel for the Appellant:	Edwin G. Kroft, Q.C., Deborah Toaze and Michael Feder
Counsel for the Respondent:	John Shipley and Justine Malone

ORDER

UPON motion by counsel on behalf of the Appellant to compel production of documents and answers to questions pursuant to sections 92 and 110 of the *Tax Court of Canada Rules (General Procedure)* (the "*Rules*"); and

UPON reading the Affidavits filed and hearing the oral submissions made by counsel for the Parties, and upon reading the written submissions filed by counsel for the Parties;

IT IS ORDERED THAT:

1. The Respondent is to produce the documents requested by the Appellant pursuant to Undertakings 9, 39, 67, 68, 69, 73, 83, 93, 98, 110, 112 and 116,

provided that if the Respondent is unable to locate any of the documents requested, she shall indicate, briefly, steps taken to attempt to locate such documents.

2. With respect to Undertakings 23 and 91, the Respondent is to produce all contracts including engagement letters between CRA and Dr. Duan with respect to the valuation of the guarantee fee as well as the findings, opinions and conclusions, if any, disclosed to those CRA officials who the Respondent knows communicated with Dr. Duan with respect to the guarantee fee.

3. With respect to Undertaking 54, the Respondent is to produce all relevant written and electronic communications (including e-mails, memos, draft memos, letters, draft letters, working papers, notes to file, including notes of meetings, reports and draft reports) of those CRA officials listed in Schedule "A" attached to this Order, and, specifically, without limiting the generality of the foregoing, to produce from such CRA officials the following:

   - Ron Simkover's analysis he prepared in recommending how to resolve the guarantee fee issue;

   - all information regarding the guarantee fee comparables accumulated in the course of the audit;

   - communications relating to CRA's decision to issue the proposal letter in June 2001 and its decision to use as a basis for the proposed reassessment, a guarantee fee of 8.33 basis points;

   - notes, minutes and draft minutes relating to the July 21, 2003 meeting of representatives of CRA and the Appellant;

   - notes, minutes or summaries of CRA's meetings with Dr. Duan on April 26 and 27, 1999.

4. Mr. Wou is to re-attend the examinations for discovery at the Respondent's expense and answer:

   a) questions identified as Undertakings 5, 40, 49, 51, 53, 82 and 109, and all proper questions arising from his answers;

b) all proper questions arising from the documents ordered by this Court to be produced in paragraphs 1, 2 and 3 of this Order, and all proper questions arising from Mr. Wou's answers;

c) all proper questions arising from documents provided by the Respondent to the Appellant between December 1, 2009 and April 8, 2010.

5. Costs to the Appellant in any event of the cause.

Signed at Ottawa, Canada, this 27th day of April, 2010.

"Campbell J. Miller"

C. Miller J.

Citation:2010TCC228
Date:20100427
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Appearances:

Counsel for the Appellant: Edwin G. Kroft, Q.C., Deborah Toaze and Michael Feder

Counsel for the Respondent: John Shipley and Justine Malone

REASONS FOR ORDER

Miller J.

[1] The Appellant brings a motion pursuant to sections 92 and 110 of the *Tax Court of Canada (General Procedure) Rules* (the "*Rules*") for an order directing the Respondent to produce certain documents and directing Mr. Wou, a representative of the Respondent, to re-attend examinations for discovery to answer certain questions: fifty-three requests in all.

[2] A brief background of this lawsuit will be helpful in setting the stage for addressing the Appellant's requests.

[3] During the relevant years (1996 – 2000) the Appellant paid a guarantee fee to a parent corporation residing in a foreign jurisdiction, to guarantee deposits, including deposits required by statute to be guaranteed with Canadian Deposit Insurance Corporation ("CDIC"). The Appellant deducted the guarantee fees as business expenses. The Minister assessed the relevant taxation years, according to the Reply "to give effect to a transfer pricing adjustment", reducing considerably, but not eliminating, the amount of guarantee fees claimed to be deductible by the Appellant in an aggregate amount of approximately $90 million. The Respondent set forth in paragraph 63 of her Reply the assumptions relied upon in determining the reassessment, including x) which reads:

> The amount paid as Guarantee Fees by the Appellant to HBAP and HHBV in the taxation years under appeal is unreasonable and exceeds amounts which would have been agreed to by parties dealing at arm's length.

[4] In paragraph 64 of the Reply, the Respondent states additional facts in support of the reassessment:

> 64. The Deputy Attorney General states the following additional facts in support of the reassessments under appeal:
>
> a) as HBAP and HHBV were contractually bound with the CDIC to guarantee all of the Appellant's deposit liabilities in the taxation years under appeal, a person dealing at arm's length with HBAP and HHBV would not have agreed, under similar circumstances, to pay any amount in respect of the guarantee of its deposit liabilities;
>
> b) the reasonable amount that would have been paid between persons dealing at arm's length in the circumstances is nil;
>
> c) it was unreasonable for the Appellant in the circumstances to pay or agree to pay any amount of guarantee fees;
>
> d) the Guarantee Fees paid by the Appellant in the taxation years under appeal were not incurred for the purpose of earning income from its business;
>
> e) in the alternative, a person dealing at arm's length with HBAP and HHBV would not have agreed, under similar circumstances, to pay any amount in respect of the guarantee of its deposits liabilities which were already covered by the CDIC deposit insurance;

f) the Guarantee Fees paid by the Appellant in the taxation years under appeal in respect of the guarantee of its deposit liabilities which were already covered by the CDIC deposit insurance were not incurred for the purpose of earning income from its business;

g) the Appellant would have been fully supported by HBAP and HHBV, even in the absence of the Deeds of Guarantee;

h) the guarantees provided by HBAP and HHBV were of nil value to the Appellant;

[5] The Respondent, in her Reply, identifies three issues (apart from penalties):

65. The issues are:

a) whether the payment of any amount of Guarantee Fees was made by the Appellant for the purpose of earning or producing income from its business in the taxation years under appeal pursuant to paragraph 18(1)(a) of the *Act*;

b) in the alternative, whether the payment of the Guarantee Fees in relation to the portion of its deposit liabilities which were already covered by the CDIC insurance was made for the purpose of earning or producing income from its business pursuant to paragraph 18(1)(1) of the *Act*.

The following two paragraphs really represent one issue but it is a matter of a different provision of the Income Tax Act ("*Act*") being in place in the different years, that requires the breaking down of this issue into two segments which the Respondent has identified as subparagraphs c) and d):

c) in the further alternative and in respect of the Appellant's August 31, 1996, October 31, 1996, October 31, 1997 and April 30, 1998 taxation years, whether the payment of guarantee fees in excess of $6,835494, $733,181, $23,572,390 and $8,112,862 respectively by the Appellant to HBAP and HHBV would have been considered reasonable in the circumstances, had the Appellant, HBAP and HHBV been dealing at arm's length within the meaning of subsection 69(2) of the *Act*;

d) in the further alternative and in respect of the Appellant's December 31, 1998, December 31, 1999, March 31, 2000 and December 31, 2000 taxation years, whether the terms and conditions made or imposed between the Appellant and HHBV differ from those that

> would have been made between person dealing at arm's length within the meaning of paragraph 247(2)(a) of the *Act* in a manner that these persons would have established the amounts of the Guarantee Fees to be no greater than $10,981,499, $13,580,813, $6,463,379 and $19,532,188 respectively; and

…

[6] While the Appellant appears to agree with the framing of the last issue, it framed the only other issue (apart from penalties) as follows:

> For all relevant taxation years, did the Appellant duly deduct the appropriate amount of the HBAP Guarantee Fee and/or the HHBV Guarantee Fee in computing its income in accordance with the provisions of Part I of the *Act*?

[7] The Appellant described the allegations in paragraph 64 of the Respondent's Reply as representing a new or fresh approach in the Appeal, upon which the Appellant is entitled to examine to fully determine the case it has to meet. The answers given by Mr. Wou on examination for discovery suggested to the Appellant that many Canada Revenue Agency ("CRA") officials were involved in this file, and, especially with respect to the fresh approach, Mr. Wou would not have been the decision maker. The Appellant contends the Respondent cannot satisfy its discovery obligations by producing only Mr. Wou's audit file. The Respondent has produced the audit file, which she clarified was more aptly described as the audit file rather than simply Mr. Wou's file.

[8] With respect to experts, the Appellant seeks draft reports of Dr. Duan, the expert engaged by CRA at the time of the reassessment, along with documents reflecting CRA comments on Dr. Duan's report, all notes and minutes of meetings between CRA and Dr. Duan and all contracts between CRA and Dr. Duan. The Respondent also brought a motion to compel answers and filed, in support of her motion, two affidavits of proposed experts, Mr. Kane and Mr. van Deventer. The Appellant now seeks production of the findings, opinions and conclusions of these proposed experts. I should note that the Appellant will be cross-examining Mr. Kane and Mr. van Deventer on their affidavits.

[9] The Respondent believes some of the 53 requests have already been answered, some are patently irrelevant, some constitute a fishing expedition, some concern the manner in which facts are to be proven and those pertaining to Mr. Kane and Mr. van Deventer are simply premature.

[10] By letter dated April 1, 2010, counsel for the Respondent wrote to counsel for the Appellant as follows:

> We enclose copy of the appeal file as it relates to the examination of the objections filed in respect of the assessments under appeal. We maintain our position that the contents of the file are not relevant to the matters in this appeal.
>
> We have removed from the file documents which are protected by litigation and/or solicitor-client privilege and the confidentiality provisions of s.241 of the *Income Tax Act*. The file contains a few documents obtained from the CDIC for which we will seek the CDIC's position on their disclosure to afford the CDIC an opportunity to object before they are provided to the appellant.

[11] Also, by e-mail dated April 7, 2010, at 4:47 p.m., literally on the eve of the motion, counsel for the Respondent informed the Appellant as follows:

> We are writing to advise that the respondent has revised her position in respect of question 54 in the hopes this position will serve the interests of expediency of both parties. We will therefore undertake to make our best efforts to provide the appellant copies of the files, if they exist and can be obtained, of the persons named in question 54. If these "files" have already been provided to the appellant under previous undertakings, we will advise accordingly.
>
> It is our view that questions 7, 99, 59, 66, 92 and 40 are duplicative of question 54 and will therefore take the position that they need not be answered as we have agreed to answer question 54.

[12] Both these gestures by the Respondent are to be welcomed and, I would suggest, are made with a view to the greater objectives of efficiency, effectiveness and expediency. The timing however might have been better.

Law

[13] Both parties provided useful summaries of how this Court has in the past addressed the question of the scope of examinations for discovery. Justice Valerie Miller recently summarized some of the principles in the case of *Kossow v. R*[1]:

> 1. The principles for relevancy were stated by Chief Justice Bowman and are reproduced at paragraph 50:

[1] 2008 D.T.C. 4408.

a) Relevancy on discovery must be broadly and liberally construed and wide latitude should be given;

b) A motions judge should not second guess the discretion of counsel by examining minutely each question or asking counsel for the party being examined to justify each question or explain its relevancy;

c) The motions judge should not seek to impose his or her views of relevancy on the judge who hears the case by excluding questions that he or she may consider irrelevant but which, in the context of the evidence as a whole, the trial judge may consider relevant;

d) Patently irrelevant or abusive questions or questions designed to embarrass or harass the witness or delay the case should not be permitted.

2. The threshold test for relevancy on discovery is very low but it does not allow for a "fishing expedition": *Lubrizol Corp. v. Imperial Oil Ltd.*

3. It is proper to ask for the facts underlying an allegation as that is limited to fact-gathering. However, it is not proper to ask a witness the evidence that he had to support an allegation: *Sandia Mountain Holdings Inc. v. The Queen*.

4. It is not proper to ask a question which would require counsel to segregate documents and then identify those documents which relate to a particular issue. Such a question seeks the work product of counsel: *SmithKline Beecham Animal Health Inc. v. R.*

5. A party is not entitled to an expression of the opinion of counsel for the opposing party regarding the use to be made of documents: SmithKline Beecham Animal Health Inc. v. The Queen.

6. A party is entitled to have full disclosure of all documents relied on by the Minister in making his assessment: *Amp of Canada Ltd., v. R.*

7. Informant privilege prevents the disclosure of information which might identify an informer who has assisted in the enforcement of the law by furnishing assessing information on a confidential basis. The rule applies to civil proceedings as well as criminal proceedings: *Webster v.R.*

8. Under the *Rules* a party is not required to provide to the opposing party a list of witnesses. As a result a party is not required to provide a summary of the evidence of its witnesses or possible witnesses: *Loewen v. R.*

9. It is proper to ask questions to ascertain the opposing party's legal position: Six Nations of the Grand River Band v. Canada.

10. It is not proper to ask questions that go to the mental process of the Minister or his officials in raising the assessments: Webster v. The Queen.

[14] The following additional principles can be gleaned from some other recent Tax Court of Canada case authority:

1. The examining party is entitled to "any information, and production of any documents, that may fairly lead to a train of inquiry that may directly or indirectly advance his case, or damage that of the opposing party": Teelucksingh v. The Queen[2]

2. The court should preclude only questions that are "(1) clearly abusive; (2) clearly a delaying tactic; or (3) clearly irrelevant": John Fluevog Boots & Shoes Ltd. V. The Queen[3]

[15] Finally in the recent decision of *4145356 Canada Limited v. The Queen*[4] I concluded:

(a) Documents that lead to an assessment are relevant;

(b) Documents in CRA files on a taxpayer are *prima facie* relevant, and a request for those documents is itself not a broad or vague request;

(c) Files reviewed by a person to prepare for an examination for discovery are *prima facie* relevant; and

(d) The fact that a party has not agreed to full disclosure under section 82 of the Rules does not prevent a request for documents that may seem like a one-way full disclosure.

[16] So, there has been a great deal written by myself, my colleagues and former colleagues on this question of the scope of discovery. These comments are all helpful

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2 2010 TCC 94.

3 2009 TCC 345.

4 2009 TCC 480.

guides to ensure some consistency on how litigation in this Court is to proceed. Yet it is an art and not a science, and it would be counterproductive to dwell on each and every principle as though applying a formula. Rather, it must always be borne in mind what the Parties and the Court are trying to achieve with examinations for discovery; that is, a level of disclosure so that each side can proceed efficiently, effectively and expeditiously towards a fair hearing, knowing exactly the case each has to meet. Presumably that is why there is an attitude from the Courts of, as former Chief Justice Bowman put it, providing wide latitude. It is therefore with some frustration that I am faced with a motion referencing over 50 demands or questions. I would have thought the guidelines and attitude of the Court would have limited the extent of these motions. Counsel should be well aware that at one end of the spectrum fishing expeditions are discouraged and at the other end of the spectrum very little relevance need be shown to render a question answerable.

[17] With that background and brief review of the law, I will now address the questions and requests indicating a reference to the undertaking number assigned in the transcript of the examination of Mr. Wou or to the page number in his transcript.

1. (Page 182-183) Advise whether in allowing the deduction of a portion of the guarantee fee from the Appellant's income, CRA conceded that the guarantee fee was to gain or produce income.

   A review of the transcript of the examinations satisfies me that this question has already been answered.

2. (Page 353-354) Advise of the difference between paragraphs 64(b) and 64(c) of the Amended Reply.

   Subparagraphs 64(b) and 64(c) say what they say: no further answer is required.

3. (Page 612-613) Provide the analysis that Ron Simkover prepared in making his recommendation about how to resolve the guarantee fee issue.

   Given that Mr. Simkover's name is on the list of names in request (Undertaking) 54, which I will get to, and which the Respondent has now acceded to, this request is likely covered. The Appellant's counsel, however, wanted me to give a separate order for each request that may, in my view, be captured by request 54. I presume this goes to relevancy.

Request 54 is a request for relevant materials. The more specific request here for Mr. Simkover's analysis does not put the Respondent in the position of determining its relevance. I find it is relevant so it does make sense that I address this point specifically. I will do so though by ordering a response to request 54, and in that order identifying specific requests such as this, that I find are relevant and need to be provided by one or more of those people identified on the request 54 list. I see no need for an open-ended inquiry beyond this extensive list of names.

4. (Undertaking 5) Provide details of Ron Simkover's qualifications, both academic and practical, to evaluate the sufficiency of Dr. Duan's report.

Mr. Simkover was CRA's economist, who Mr. Wou relied upon in determining whether to accept Dr. Duan's expert report, the report on which the assessment was based. Though, normally, I would not consider a CRA officer's credentials to be of any possible relevance, I am satisfied, given Mr. Wou's explanation, that Mr. Simkover's qualifications are not patently irrelevant. The Respondent shall provide the information requested.

5. (Undertaking 7) Advise of and provide all relevant communications between CRA and CDIC.

The Respondent answered that any such communication would be in the audit file already provided. But on March 30, 2010, the Respondent wrote to Appellant's counsel stating:

> Subject to the right of CDIC to be heard, we are however prepared to provide the appellant with a copy of the balance of documents, even though in our judgment they are not relevant to the issues. We have been asked by the CDIC to treat these documents as confidential. We will therefore seek the CDIC's position on the disclosure of the documents to afford the CDIC an opportunity to object before they are provided to the appellant.

Given the Confidentiality Order that CDIC has had input into, there is no impediment to the Respondent now acceding to this request, as she has indicated she will.

6. (Undertaking 8) Provide all information that CRA obtained from CDIC pursuant to the Requirement.

Given the Respondent's letter of March 30, 2010, referenced above, this request has been answered.

7. (Undertaking 9) Provide the contents of the appeals file in its entirety.

   As mentioned, the Respondent provided the appeals file by letter dated April 1, 2010. The Respondent has withheld parts of the file, specifically those protected by section 241(1) of the *Act*. Given the confidentiality order and the breadth of section 241(3) of the *Act*, I conclude that no material is to be withheld from the appeals file on the basis of the application of section 241(1) of the *Act*.

8. (Undertaking 17 and 18) Advise of and provide all information regarding guarantee fee comparables accumulated in the course of the audit.

   The Respondent, through Mr. Wou, contacted the CRA's current banking specialist, Mr. Bertolas, who advised he had no such information, and if there was any it would be in the audit file. Mr. Bertolas was not CRA's banking specialist at the time. The Appellant suggests that Mr. Mitchell and Mr. Thompson are more likely to have had such information. Their names are on the undertaking 54 request, so I will specifically include reference to guarantee comparables in my request 54 ruling.

9. (Undertaking 19) Advise of agreements between CRA and CDIC or OSFI concerning appropriate guarantee fees to be charged by banks to their subsidiaries.

   In reading the transcript referred to by the Appellant on this point, I fail to see an undertaking. Indeed, it appears Mr. Kroft was to get back to Mr. Shipley rather than vice versa. I believe this is subsumed in any event in how I intend to frame the order on request 54.

10. (Undertaking 22) Provide the names of any experts that the Respondent has retained.

    This has already been answered by the Respondent.

11. (Undertaking 23) Provide the findings, opinions and conclusions of any expert retained at any time in relation to the deposit guarantee fee.

This one is a little tricky as it goes to the interpretation of what I would describe as a difficult *Rule* – *Rule* 95(3). *Rule* 95(3) reads:

…

95(3) A party may on an examination for discovery obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that relate to a matter in issue in the proceeding including the expert's name and address, but the party being examined need not disclose the information or the name and address of the expert where,

(*a*) the findings, opinions and conclusions of the expert relating to any matter in issue in the appeal were made or formed in preparation for contemplated or pending litigation and for no other purpose, and

(*b*) the party being examined undertakes not to call the expert as a witness at the hearing.

A little background is in order. The Respondent filed a motion March 25, 2010, to compel answers from the Appellant. That matter has been adjourned. In support of the Respondent's motion, the Respondent filed affidavits of Mr. Kane and Mr. van Deventer, whom, it is clear, the Respondent has retained as experts. It is also clear from a review of their affidavits they hold certain opinions, and they require certain financial information from the Appellant to apply those opinions to the facts of this matter to reach conclusions.

The Appellant argues it is unfair for the Respondent to rely on these experts to get information from the Appellant while refusing the Appellant any discovery of these experts' work. However, practically, the Appellant has been afforded the opportunity to cross-examine these individuals on their affidavits. What possible better discovery could the Appellant have?

The Appellant does go on to raise some case law from Ontario that suggests "findings, opinions and conclusions" are not limited to final reports, but would include a preliminary report and data obtained by the

expert; indeed, the test in Ontario appears to be - "if the finding is expressed in a sufficiently coherent manner that it can be used by counsel, then it is a "finding" that ought to be disclosed. The same applies to "opinions" and "conclusions".[5]

The Appellant does acknowledge that there is some authority (*Hosh (Litigation guardian of) v. Black*[6] suggesting counsel's decision whether to undertake not to call an expert as a witness may be deferred for a short time following discovery.

The Respondent looks at this issue more in terms of timing. At what point must a party disclose experts' findings, conclusions and opinions? The Respondent's view is that while examinations are still ongoing, and before the expert has reached any findings with respect to the case at hand, it is premature to have to make a *Rule* 95(3) election, whether or not to call the expert, and consequently premature to be obliged to disclose "findings, opinions and conclusions", if any. I agree with the Respondent.

The Respondent must provide more than just an expert's final report: that is absolutely clear. But, to insist that from the moment a party retains an expert to consider a matter, the party is obliged to immediately disclose the expert's name and his or her expert opinions makes more of *Rule* 95(3) than is reasonable. A party retains an expert for the very reason that the expert holds opinions. But it is not until the expert has an opportunity to make findings in the matter at issue, and then apply his opinion to those findings to be able to reach conclusions that *Rule* 95(3) should rear its head. I am not suggesting the conclusion must be final: the law does not support such a position. Preliminary and informal findings and conclusions are discoverable. My point is there must be findings, opinions and conclusions in the context of the particular litigation. The expert will bring opinions to the table but in a vacuum; without findings and ultimately conclusions on the matter at issue, it is premature to insist on disclosure. Given the stage of examinations for discovery in this matter, combined with my preceding

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5 *Cheaney v. Peel Memorial Hospital* (1990), 73 O.R. (2d) 794 (S.C.).

6 [2003] O.J. No. 2374 (S.C.J.).

views of the approach to take to *Rule* 95(3), I conclude that disclosure at this point is premature.

Having reached that conclusion, I am not prepared to order the Respondent to answer Undertaking 23 as it pertains to Mr. Kane and Mr. van Deventer. Frankly, this is somewhat academic as the Appellant has an opportunity to cross-examine them in any event as the Respondent chose to disclose their involvement by providing the Affidavits in support of her motion.

With respect to Dr. Duan, the Respondent has answered that all findings and conclusions of Dr. Duan are contained in the audit file. The Appellant argues that because others at CRA, and not just Mr Wou, communicated with Dr. Duan, there may be preliminary or informal findings and conclusions in others' files. I agree. The Respondent should seek from those CRA officials, who the Respondent knows communicated with Dr. Duan with respect to the valuation of the guarantee fee, any of Dr. Duan's findings, opinions and conclusions provided to such officials.

12. (Undertaking 27) Advise of Dr. Duan's engagements with the federal government prior to this engagement by CRA.

    I see no relevance to Dr. Duan's former engagements, if any, with CRA to matters at issue in this appeal.

13. (Undertaking 35) Advise whether Dr. Duan received any assistance from CRA officials, whether during or after the audit. (My reading is that this request really goes to assistance after the audit.)

    I am confused by this request. The Appellant seeks advice whether Dr. Duan received any assistance from CRA officials after the audit; in effect, after his report. Assistance with respect to what? Information regarding communications between Dr. Duan and CRA officials will be picked up by request 54 and I see no need to make any further order regarding this request.

14. (Undertaking 39) Provide Exhibit "C" (summarizing fees collected to foreign subsidiaries) as referred to in the January 19, 1995 memo from Doug Mitchell to Ron Simkover.

The Respondent suggests this has already been answered. The Exhibit "C" referred to was attached to a memo from Mr. Mitchell to Mr. Simkover, and, in that memo, it was specifically stated that this exhibit should not be attached to any particular file. Given that, the order with respect to request 54 may not be sufficient, so I am prepared to order a response on this matter. If Exhibit "C" cannot be located, the Respondent shall indicate what steps were taken to search for Mr. Simkover's and Mr. Mitchell's papers.

15. (Undertaking 40) Advise if the information that Doug Mitchell communicated to Ron Simkover after his review and examination of permanent files in the North York district office are related to Schedule II banks.

    The Respondent states that she cannot locate these people. It is not enough to be unable to contact these gentlemen – what happened to their records? Presumably they did not take records with them. The Respondent must answer the request or assure the Appellant steps have been taken to search for Mr. Simkover's and Mr. Mitchell's papers.

16. (Undertaking 49) Provide particulars for the basis of the allegation that the fees paid by the Appellant were exorbitant.

    The Respondent responded, "fees were exorbitant because they far exceeded a reasonable amount, if any or an amount, if any, which would have been agreed to between persons dealing at arm's length".

    This is one of those fine line questions between seeking evidence and questions aimed at getting the witness to divulge relevant facts in connection with an allegation. I find this more the latter than the former. To respond that something is exorbitant because it is not reasonable is hardly responsive. The Appellant is entitled to a more detailed response setting out the facts the Respondent has relied upon in making the "exorbitant" allegation.

17. (Undertaking 51) Advise why the fees were exorbitant by reference to paragraphs 63(v), (x) and (y) of the Amended Reply.

    See my answer to the preceding question.

18. (Undertaking 52) Provide the information and documents relied on in support of the assumptions in paragraph 63 of the Amended Reply.

    This should be covered by the Respondent's response to request 54.

19. (Undertaking 53) Provide the information and documents relied on in support of paragraph 64 of the Amended Reply.

    The statement of facts in paragraph 64 of the Respondent's Amended Reply indicate the Respondent is travelling down a different track from that arising as a result of assumptions in paragraph 63 of the Reply. It is appropriate for the Appellant to seek facts underlying those allegations.

20. (Undertaking 54) Provide all relevant written and electronic communications (including e-mails, memos, draft memos, letters, draft letters, working papers, notes to file, drafts of notes to file, reports and draft reports) of CRA officials who participated in the reassessment.

    The parties go on to list approximately 44 names, whom I will specifically mention in my order.

    As indicated, the list of individuals named is extensive. Also, the Respondent has agreed to this request, but given some specific areas I want to raise arising from other requests, I will draft my order to answer this request accordingly.

21. (Undertaking 57) Provide CRA's audit files and correspondence files with respect to the audit of the guarantee fee for the Relevant Taxation Years.

    The request for the audit file has been answered; any other correspondence outside the audit file should be covered by the order I intend to give regarding request 54.

22. (Undertaking 59) Provide the files found in CRA headquarters in Ottawa that pertain to the matters in issue in this Appeal, including files created during the audit of the guarantee fee for the relevant Taxation Years and during the appeals process.

This I find is covered by the order with respect to request 54.

23. (Undertaking 60) Provide Mr. Wou's complete working paper file pertaining to the audit of the guarantee fee for the Relevant Taxation Years, including any documents relating to the audit of the guarantee fee for years prior to the Relevant Taxation Years.

    I am satisfied this matter has been dealt with.

24. (Undertaking 61) Provide Mr. Wou's referral to CRA headquarters' chief economist along with all information and documents forwarded to the chief economist in conjunction with the referral and any written response received by Mr. Wou or any other person to the referral.

    Any written response by "any other person" is covered by the order with respect to request 54.

25. (Undertaking 63) Provide all notes, files, e-mail, memoranda, position papers, working papers and other correspondence of Doug Mitchell and other CRA banking specialists, dealing with the guarantee fee or matters related to the termination of the guarantee fee.

    This, I find, is covered by the order with respect to request 54. Any broadening of that order beyond the names already identified as having in some way touched on the matter is casting the net too broadly.

26. (Undertaking 64) Provide all written and electronic notes (including summaries and minutes) of meetings in which the guarantee fee was discussed in respect of the Relevant Taxation Years.

    The Appellant has been provided with the audit file, appeals file and now is getting an order with respect to request 54 with a view to picking up any information from a large number of CRA officials. This request need not be specifically ordered, though I am prepared to add to the request 54 order reference to "notes of meetings".

27. (Undertaking 66) Provide all written and electronic working papers, correspondence, notes, e-mails, analyses, research and meeting minutes of the members of the transfer pricing review committee as these

materials relate to the consideration of the guarantee fee and the imposition of transfer pricing penalties.

I believe the names of members of the transfer pricing review committee are on the request 54 list of names, and this request is therefore covered.

28. (Undertaking 67) Provide all information regarding guarantees provided by Canadian banks to their foreign subsidiaries that was reviewed by Mr. Wou in the course of the audit.

    The Respondent objects to this request citing the confidentiality provisions of section 241(1) of the *Act*. Given the exception provided in section 241(3) of the *Act* and the existence of a Confidentiality Order, this objection has been met, and this request is to be answered.

29. (Undertaking 68) Provide any information or documents which Ron Simkover obtained from third parties regarding guarantee fee comparables.

    See my answer to question 15 of my list.

30. (Undertaking 69) Provide any information or documents which Robert Thompson obtained from third parties regarding guarantee fee comparables.

    As Mr. Thompson is still employed at CRA this request should be answered.

31. (Undertaking 70) Provide all summaries of the audit history of the guarantee fee.

    This, I find, is covered by the order with respect to request 54.

32. (Undertaking 71) Provide all communications relating to CRA's decision to issue the proposal letter in June 2001 and its decision to use as a basis for the proposed reassessment a guarantee fee of 8.33 basis points.

Similar to my answer to question 26 (Undertaking 64) this will form part of my request 54 order by specifying therein "communications relating to CRA's decision to issue the proposal letter in June 2001 and its decision to use as a basis for the proposed reassessment a guarantee fee of 8.33 basis points".

33. (Undertaking 72) Provide all notes, including minutes and draft minutes, of the December 13, 1999 meeting between representatives of CRA and CDIC.

    Given the Respondent's comments in its March 30, 2010 correspondence and the breadth of the request 54 order, and the Confidentiality Order now in place, no separate order is necessary with respect to this request.

34. (Undertaking 73) Provide the differential premium binder that CRA obtained from CDIC as a result of the December 13, 1999 meeting.

    Given the Confidentiality Order now in place this request should be answered.

35. (Undertaking 75) Provide all notes, including minutes and draft minutes, relating to the July 21, 2003 meeting between representatives of CRA and the Appellant.

    This should be specifically mentioned in the request 54 order.

36. (Undertaking 82) Advise whether Ron Simkover contacted OSFI for information regarding the matters in issue in this Appeal.

    See my answer with respect to question 15 of my list.

37. (Undertaking 83) Provide all correspondence, and records and notes of communications, between Ron Simkover and OSFI.

    See my answer with respect to question 15 of my list.

38. (Undertaking 91) Provide all contracts, including engagement letters, between CRA and Dr. Duan with respect to the valuation of the guarantee fee.

This request is to be limited to those CRA officials in addition to Mr. Wou who the Respondent knows communicated with Dr. Duan with respect to the guarantee fee, as this type of material in connection with an expert is relevant, as it goes to establish the parameters within which the expert was retained.

39. (Undertaking 92) Provide all relevant correspondence, including e-mails, amongst officials at CRA headquarters in Ottawa who dealt with the assessment, reassessment or appeals of the guarantee fee issue.

    This, I find, is covered by the order with respect to request 54.

40. (Undertaking 93) Provide the letter sent by Tom Markota or Robert Thompson to the Appellant regarding advance pricing agreements in respect of the 1994 to 1995 period.

    Granted, the letter pre-dates the taxation years in question, but it goes to the CRA's knowledge of the Appellants approach on this issue, and could have some bearing on the Appellant's future conduct. All to say, I can see some possible relevance. The request should be answered.

41. (Undertaking 98) Provide the referral issued to Ron Simkover in respect of the audit of the 1994 and 1995 taxation years and any advice provided by Rom Simkover in respect of that referral.

    Again, I can see some possible relevance, certainly in connection with the penalty issue: this request should be answered.

42. (Undertaking 99) Provide communications from Doug Mitchell to Wayne Wou, Ron Simkover, Robert Thompson, Phil Fortier, Mark Turnbull, Slav Kanjer or Tom Markota regarding guarantee fee comparables.

    This, I find, is covered by the order with respect to request 54.

43. (Undertaking 100) Provide all correspondence between CRA and the Inland Revenue of the United Kingdom regarding the guarantee fee.

    The Respondent has indicated it will respond.

44. (Undertaking 101) Provide all correspondence between CRA and treaty partners regarding guarantee fee comparables.

    The Respondent has indicated it will respond.

45. (Undertaking 105) Provide all relevant communications, including e-mails and notes of telephone conversations, between Mr. Wou and CRA officials at CRA headquarters in Ottawa.

    This, I find, is covered by the order with respect to request 54.

46. (Undertaking 108) Advise of and provide all notes, minutes or summaries of CRA's meeting with Dr. Duan on April 26 and 27, 1999.

    This specific request is to be added to the wording of the request 54 order, limited to the persons named.

47. (Undertaking 109) Advise whether Ron Simkover prepared any documents in which he recommended how to resolve the guarantee fee issue (as Paul Wong suggested he had).

    See my answer with respect to question 15 of my list. This is the same undertaking identified at item 3.

48. (Undertaking 110) Provide the binder of information that Mr. Wou sent to Ron Simkover on or about June 26, 2000 for delivery to Dr. Duan, as well as any other packages sent to Dr. Duan.

    If there were any other packages sent to Dr. Duan, in connection with his expert opinion in this matter, they should be provided.

49. (Undertaking 112) Provide any notes, minutes, memos, e-mails or other correspondence relating to the May 26, 2000 meeting with Doug Mitchell, and provide any materials distributed at the meeting which relate to the matters at issue in this Appeal.

The Respondent's answer is only partially responsive, and as there is no further objection from the Respondent other than "no notes were taken", the Respondent must respond to the balance of this question.

50. (Undertaking 114) Provide any correspondence between Bruno Westerlund and Larry Dankoff in response to the request for information regarding guarantee fee payments by Schedule B banks to foreign parents contained in Bruno Westerlund's June 2, 1989 memo.

    The Appellant suggests the guarantee fee comparables are inherently relevant to issues in this appeal. But there is a limit. This is a question asked by one CRA officer to another in 1989 with respect to 1986 and 1987 fees. The years in question start in 1998. This does not go to the issue of penalties but simply the question of comparable guarantee fees, and I conclude that 11 or 12 year old information arising from this memo is too dated to be relevant.

51. (Undertaking 116) Provide a resume for Govindaray Nayak which includes his academic qualification and work experience.

    Same answer as I gave to item 4 in Mr. Simkover's qualifications, albeit with some reservation.

52. (Undertaking 117) Provide all draft reports prepared by Dr. Duan for CRA.

    I am satisfied this has been answered as of March 12, 2010.

53. (Undertaking 118) Provide all comments by CRA personnel on all draft reports prepared by Dr. Duan.

    This is to be limited to those people identified in request 54, and therefore added to the wording of the order I intend to give with respect to request 54.

[18] Costs of this motion to the Appellant in any event of the cause.

Signed at Ottawa, Canada, this 27th day of April 2010.

"Campbell J. Miller"

C. Miller J.

CITATION:	2010 TCC 228
COURT FILE NO.:	2006-3579(IT)G
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DATE OF HEARING:	April 8, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice Campbell J. Miller
DATE OF JUDGMENT:	April 27, 2010

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