Docket: 2014-4504(IT)G

BETWEEN:

COOPERS PARK REAL ESTATE DEVELOPMENT CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on May 10, 2022 at Toronto, Ontario

Before: The Honourable Justice John R. Owen

Appearances:

Counsel for the Appellant:	Martin Gentile Kristen Duerhammer Marta Porodko
Counsel for the Respondent:	Michael Taylor Alexander Wind

ORDER

WHEREAS the Appellant has brought a motion for an order:

(a) requiring the Respondent to provide answers to questions on examinations for discovery that were refused, or to which unresponsive answers were provided, within 30 days of the date of the order

(b) for costs of the motion; and

(c) for such further and other relief as counsel may advise and this Court may deem just.

AND UPON reviewing the affidavit evidence and the oral and written submissions of counsel for the Appellant and counsel for the Respondent;

IN ACCORDANCE with the attached Reasons for Order (the "Reasons"), it is ordered that:

1. the Respondent provide to the Appellant:

    i. the Sealed Documents (as defined in the Reasons), subject to the redaction of all information identifying third parties, and

    ii. the GAAR Committee Documents (as defined in the Reasons), subject to the redaction of all information identifying third parties and subject to any claim of solicitor-client privilege that the Respondent may wish to make;

2. if the Respondent wishes to claim solicitor-client privilege in respect of one or more of the documents identified in paragraph 1 of this Order, the Respondent shall submit the document or documents to the Court in a sealed envelope so that the Court may determine whether solicitor-client privilege applies; and

3. the costs of this motion shall follow the cause.

Signed at Ottawa, Canada, this 15th day of July 2022.

"J.R. Owen"

Owen J

Citation: 2022 TCC 82
Date: 20220715
Docket: 2014-4504(IT)G

BETWEEN:

COOPERS PARK REAL ESTATE
DEVELOPMENT CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Owen J

I. Background

A. The Reassessments Under Appeal

[1] The Minister of National Revenue (the "Minister") reassessed the 2007, 2008 and 2009 taxation years of the Appellant (the "Taxation Years") to apply the general anti-avoidance rule (the "GAAR") in section 245 of the *Income Tax Act* (the "ITA") to deny loss carryforwards, investment tax credit carryforwards and scientific research and experimental development pool deductions claimed by the Appellant for the Taxation Years. The denied amounts are described in paragraph 12 of the Amended Reply filed by the Minister as follows:

Taxation Year	Non-capital losses	SREDs	ITCs
December 31, 2007	$24,105,172	Nil	$219,679
December 31, 2008	$41,789,445	Nil	Nil
December 31, 2009	$389,429	$1,337,644	$262,979

B. The Motion

[2] The Appellant has brought a motion for an order:

(a) requiring the Respondent to provide answers to questions on examinations for discovery that were refused, or to which unresponsive answers were provided, within 30 days of the date of the order;

(b) for costs of the motion; and

(c) for such further and other relief as counsel may advise and this Court may deem just.

[3] The grounds for the motion are stated as follows:

(a) the Appellant conducted examinations for discovery of the Respondent on January 18, 19, and 20, 2021;

(b) the Respondent refused to answer proper questions [asked] during examinations for discovery, as set out in the attached Schedule;

(c) the questions are relevant to the issues as defined by the pleadings;

(d) answers to the questions will enable the Appellant to know the case that it has to meet;

(e) answers to the questions fairly lead to a train of inquiry that may either advance the Appellant's case or damage the Respondent's case;

(f) it would be fair and appropriate to grant the Appellant the requested relief in the circumstances;

(g) sections 65, 95, 107 and 110 of the *Tax Court of Canada Rules (General Procedure)* (the "Rules"); and

(h) such further and other grounds as counsel may advise and this Court may deem just.

[4] The Appellant's Amended Motion Record (the "AAMR") was served on the Respondent on April 28, 2022. The table of contents of the AAMR is as follows:

[5] Tab 1 of the AAMR contains the Appellant's Notice of Motion (the "NoM"). Schedule I of the NoM (the "Schedule") describes the Appellant's requests as follows:

#	Question No.	Motion Record Page	Lines	Question	Respondent's Basis for Refusal
1.	63	104–107	8–1	To provide the entire CRA audit file that is not in the paper file and that has not been produced yet.	Relevance and third-party information
2.	151	112–115	22–11	To describe the variant that is being referred to in Headquarters' GAAR Response.	Relevance
3.	171 Follow-up #5	120–122 72	18–8	To provide documents used by Dave Robbins to compare appellant's case from others.	Relevance
4.	171 Follow-up #6	120–122 72–73	18–8	To provide documents produced in meetings between Dave Robbins and Len Lubbers that reference a lead case.	Relevance
5.	171 Follow-up #7	120–122 73	18–8	To provide documents produced in meetings between Dave Robbins and Jim Randall that reference a lead case.	Relevance

#	Question No.	Motion Record Page	Lines	Question	Respondent's Basis for Refusal
6.	171 Follow-up #8	120–122 74–75	18–8	To provide information about CRA's typology of common methodologies.	Relevance
7.	171 Follow-up #11, 12	120–122 76–77	18–8	To provide documents produced during meetings where Tech Wreck files were discussed with diagrams on white board, both inside and outside of GAAR Committee meetings.	Relevance
8.	171 Follow-up #13	120–122 77–78	18–8	To provide documents produced during GAAR meetings.	Relevance

[6] I will refer to the refusals described in the Schedule as the "Disputed Refusals".

II. Analysis

A. The Rules

[7] The sections of the Rules relevant to the Appellant's motion include sections 95, 105 and 110 and subsections 4(1) and 107(1) and (3), which state:

> **4(1)** These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits.
>
> **95(1)** A person examined for discovery shall answer, to the best of that person's knowledge, information and belief, any proper question relevant to any matter in issue in the proceeding . . . and no question may be objected to on the ground that
>
> (a) the information sought is evidence or hearsay,
>
> (b) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness, or
>
> (c) the question constitutes cross-examination on the affidavit of documents of the party being examined.
>
> **95(2)** Prior to the examination for discovery, the person to be examined shall make all reasonable inquiries regarding the matters in issue from all of the party's officers, servants, agents and employees, past or present, either within or outside Canada and, if necessary, the person being examined for discovery may be required to become better informed and for that purpose the examination may be adjourned.

95(3) [Repealed SOR/2014-26, s. 10.]

95(4) A party may on an examination for discovery obtain disclosure of the names and addresses of persons who might reasonably be expected to have knowledge of transactions or occurrences in issue in the proceeding, unless the Court orders otherwise.

105(1) Unless the parties otherwise agree, or the Court otherwise directs, the person to be examined shall bring to the examination and produce for inspection,

(a) on an examination for discovery, all documents as required by subsection 85(3), and

(b) on all other examinations, such documents as may be required by subsection 105(3).

105(2) Where a person admits, on an examination, that he or she has possession or control of or power over any other document that relates to a matter in issue in the proceeding and that is not privileged, the person shall produce it for inspection by the examining party forthwith, if the person has the document at the examination, and if not, within ten days thereafter, unless the Court directs otherwise.

105(3) The notice to attend for examination or subpoena may require the person to be examined to bring to the examination and produce for inspection,

(a) all documents and things relevant to any matter in issue in the proceeding that are in that person's possession, control or power and that are not privileged, or

(b) such documents or things described in paragraph (a) as are specified in the notice or subpoena,

unless the Court directs otherwise.

107(1) Where a question is objected to, the objector shall state briefly the reason for the objection, and the question and the brief statement shall be recorded.

. . .

107(3) A ruling on the propriety of a question that is objected to and not answered may be obtained on motion to the Court.

> **110** Where a person fails to attend at the time and place fixed for an examination in the notice to attend or subpoena, or at the time and place agreed on by the parties, or refuses to take an oath or make an affirmation, to answer any proper question, to produce a document or thing that that person is required to produce or to comply with a direction under section 108, the Court may,
>
> (a) where an objection to a question is held to be improper, direct or permit the person being examined to reattend at that person's own expense and answer the question, in which case the person shall also answer any proper questions arising from the answer,
>
> (b) where the person is a party or, on an examination for discovery, a person examined on behalf of or in place of a party, dismiss the appeal or allow the appeal as the case may be,
>
> (c) strike out all or part of the person's evidence, including any affidavit made by the person, and
>
> (d) direct any party or any other person to pay personally and forthwith costs of the motion, any costs thrown away and the costs of any continuation of the examination.

B. Oral Examinations for Discovery in the Tax Court of Canada

[8] The Appellant's motion raises questions regarding the permissible scope of oral discovery under the Rules and the interaction of oral discovery with documentary discovery. In my recent decision in *Contractor v R*, 2021 TCC 46, I summarized the law relating to oral discovery as follows:

> [16] Subject to section 17.3 of the *Tax Court of Canada Act* (the "TCCA"), section 92 provides for examinations for discovery either by oral examination or, at the option of the examining party, by written questions. Whether the format is oral or written, an examination for discovery involves the asking and answering of questions. [Footnote: See, for example, subsections 95(1), 96(1) and 98(1) and sections 97 and 113 to 116.]
>
> [17] The purposes of oral discovery are recited by the Federal Court of Appeal in *R. v. Lehigh Cement Ltd.*: [Footnote: 2011 FCA 120 ("*Lehigh*").]

> (a) to enable the examining party to know the case he has to meet;
>
> (b) to procure admissions to enable one to dispense with formal proof;
>
> (c) to procure admissions which may destroy an opponent's case;
>
> (d) to facilitate settlement; pre-trial procedure and trial;
>
> (e) to eliminate or narrow issues; and
>
> (f) to avoid surprise at trial.

[18] These purposes are informative but do not directly address the permissible scope of oral discovery under the Rules, which is rooted in the words of subsection 95(1) viewed in the light of the principle of proportionality. [Footnote: *R v Cameco Corporation*, 2019 FCA 67 at paragraph 42.]

[19] To be permissible under subsection 95(1), a question must satisfy two conditions: the question must be proper and the question must be relevant to any matter in issue in the proceeding. To ensure a coherent application of these conditions elsewhere in the discovery Rules, where the term "proper question" is used [Footnote: See section 110 (preamble), subsections 96(1) and 116(2) and (4) and paragraphs 100(6)(d) and 110(a). In addition, paragraphs 108(1)(a) and 117(a) refer to "improper questions", which in this context can only mean questions that are not proper questions.] the term should be read as a reference to a question that is both proper and relevant. [Footnote: See, generally, *Charlebois v. Saint John (City)*, [2005] 3 S.C.R. 563, 2005 SCC 74 at paragraph 21.]

[20] In *Lehigh*, the Federal Court of Appeal described the scope of permissible discovery under the Rules as follows:

> The scope of permissible discovery depends upon the factual and procedural context of the case, informed by an appreciation of the applicable legal principles. [Footnote: At paragraph 24. Not surprisingly this general approach is very similar to the general approach to whether a question is proper.]

[21] The Court in *Lehigh* explains the Tax Court of Canada's ("Tax Court") discretion to disallow questions even though they meet the "relevant to" condition in subsection 95(1):

> Where relevance is established the Court retains discretion to disallow a question. The exercise of this discretion requires a weighing of the potential value of the answer against the risk that a party is abusing the discovery process. . . . The Court might disallow a relevant question where responding to it would place undue hardship on the answering party, where there are other means of obtaining the information sought, or where "the question forms part of a 'fishing expedition' of vague and far-reaching scope". [Footnote: At paragraph 35.]

. . .

[23] With respect to the "relevant to a matter in issue in the proceedings" requirement, in *Teelucksingh v. R.*, [Footnote: 2010 TCC 94 ("*Teelucksingh*").] the Tax Court states:

> Examination for discovery is an examination as to the information and belief of the other party as to facts that are relevant to the matters in issue, as defined by the pleadings. [Footnote: At paragraph 15(i).]

[24] When reviewing the pleadings for this purpose, the pleadings should be construed with fair latitude [Footnote: Gordon D. Cudmore, *Choate on Discovery*, 2nd ed. (Scarborough, Ont: Carswell, 1993)(loose-leaf updated 2018, release 6) at section 2.16, page 2-76.12.] and due regard should be had to the substantive law. [Footnote: Sidney N. Lederman, Alan W. Bryant and Michelle K. Fuerst, *Sopinka, Lederman & Bryant, The Law of Evidence in Canada*, 5th ed. (Markham, Ont.: LexisNexis, 2018) at paragraph 2.47.]

[25] The questions on oral examination for discovery must be relevant to the matters in issue between the party being examined [Footnote: Generally, a party will be examined when the party is an individual, and a nominee of the party will be examined when the party is not an individual. For exceptions, see subsections 93(5), (6) and (7).] and the party examining. The core issue between any appellant and the respondent in an income tax appeal under subsection 169(1) of the ITA is the correctness of the assessment or reassessment that is being appealed [Footnote: *Main Rehabilitation Co. v. R.*, 2004 FCA 403 at paragraphs 6 to 8 and *Johnson v. R.*, 2015 FCA 52 at paragraphs 3 to 6.] and therefore as a general proposition it is the facts directly or indirectly [Footnote: One example of a fact that is indirectly relevant is a fact that is relevant to credibility.] relevant to that core issue that may be explored in an oral examination for discovery.

[26] With respect to the degree of connection that is required by the phrase "relevant to any matter in issue in the proceeding", [Footnote: Subsection 95(1).] in *Lehigh* the Federal Court of Appeal states at paragraph 34:

> The jurisprudence establishes that a question is relevant when there is a reasonable likelihood that it might elicit information which may directly or indirectly enable the party seeking the answer to advance its case or to damage the case of its adversary, or which fairly might lead to a train of inquiry that may either advance the questioning party's case or damage the case of its adversary.

[27] Recently, in *Madison Pacific Properties Inc. v. R.*, [Footnote: 2019 FCA 19 ("*Madison*").] the Federal Court of Appeal confirmed the approach in *Lehigh*:

> In *Lehigh*, this Court held that the Tax Court had applied the correct legal test for disclosure in a case such as this, which defines relevance on discovery as requiring that the disputed question or production request give rise to a reasonable likelihood that it might lead to a train of inquiry that may advance a party's case or damage that of its opponent. . . . [Footnote: *Madison* at paragraph 23.]

[28] Discovery does not permit fishing expeditions. More precisely, questions that constitute a fishing expedition are not proper questions either because they are overly broad and/or an abuse of the discovery process or because they have no connection to the matters in issue in the proceeding, or both. [Footnote: See, for example, *Madison* at paragraph 19, where the request at issue in that case was referred to as a "vague, broad and ill-defined production request" that would be "difficult to satisfy".] The facts and circumstances will determine the appropriate determination. [Footnote: *Lehigh* at paragraph 24.]

[29] The matters in issue in a proceeding may include a law or policy. In *R. v. CHR Investment Corporation*, [Footnote: 2021 FCA 68 ("*CHR*").] the Federal Court of Appeal stated in paragraphs 25 and 31 that subsection 95(1) permitted questions to ascertain the opposing party's legal position and that the person being examined would be obliged to answer the questions. [Footnote: See, also, *Teelucksingh* at paragraph 15(ix).]

[30] In *Madison*, the Federal Court of Appeal observed that documents identifying a purported policy in the ITA were of limited relevance and were likely inadmissible at the hearing of the appeal because "the question

> of the policy in the ITA that the taxpayer is alleged to have avoided is ultimately a question of law". [Footnote: At paragraph 28.]
>
> [31] Based on *CHR* and *Madison*, examination for discovery may be used to ascertain the fact of a particular legal position that is relevant to any matter in issue in the proceeding, but any statement of that position in the examination has no bearing on the question of whether the legal position is in law correct or applicable.
>
> [32] In many cases, it will be reasonably clear whether a question meets or does not meet the conditions in subsection 95(1) (i.e., whether a question is a proper question). However, where there is doubt, consistent with the purposes of discovery recited in *Lehigh*, it is generally better to err on the side of allowing the question. The trial judge can then determine whether information (if any) elicited from the question is admissible at the hearing of the appeal.

[9] The Appellant relies in large part on the following statements made or adopted by the Tax Court judge in *HSBC Bank Canada v R*, 2010 TCC 228 ("*HSBC*"):

> [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* [Footnote: 2008 D.T.C. 4408]:
>
> . . .
>
> 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.*
>
> . . .
>
> . . .
>
> [15] Finally in the recent decision of *4145356 Canada Limited v. The Queen* [Footnote: 2009 TCC 480] 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;
>
> . . .

[10] As with all broad statements of principle addressing issues that can only be resolved based on the particular facts and circumstances, they cannot be applied literally to circumvent or sidestep the analysis of the facts and circumstances that must be undertaken to resolve those issues.

[11] In this regard, it is important to have regard to the context from which each statement of principle was taken. For example, in *Kossow v R*, 2008 TCC 422 ("*Kossow*"), the Tax Court judge cites *Amp of Canada, Ltd v R*, 1987 Carswell Nat 349 (FCTD) ("*Amp*"), for the principle that "[a] party is entitled to have full disclosure of all documents relied on by the Minister in making his assessment." (emphasis added).[1]

[12] In *Amp*, Justice Collier was addressing a transfer pricing case in which the Minister's representative on discovery had testified "that comparative analyses with competitors of the plaintiff had been made" and that "he had used the financial statements and tax returns of those three companies for the comparisons".[2] The documents which the Minister's representative admitted to relying upon in assessing the taxpayer were directly and materially relevant to the core factual issue raised by the taxpayer's transfer pricing appeal.

[13] In *4145356 Canada Limited v R*, 2009 TCC 480 ("*4145356*"), the Tax Court judge cited *Kossow* and *Concept Plastics Limited v R*, 2009 TCC 79 ("*Concept Plastics*") for the principle that "documents in the Canada Revenue Agency files **that led to the assessment** are relevant" (emphasis added) and for subsequent comments regarding *prima facie* relevance.

[14] In *Concept Plastics*, the Tax Court judge was asked for an order requiring full documentary discovery under section 82 of the Rules. In the context of considering that request, he posed a hypothetical:

> . . . . if CRA thought **something <u>involving the taxpayer</u> in the taxation year under appeal was worth recording** and decided that the obvious place to file it was in the taxpayer's file for the very year under dispute, **that document *prima facie* meets the relevance threshold applicable to pre-trial discoveries**.[3]

[Emphasis and double emphasis added.]

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[1] *Kossow*, paragraph 60 at point 6.
[2] *Amp* at paragraphs 9 and 10.
[3] *Concept Plastics*, paragraph 5.

[15] According to *Concept Plastics*, *prima facie* relevance requires two facts: there is something "involving the taxpayer in the taxation year under appeal" and that something is worth recording.

[16] There is nothing controversial about the conclusion that such a document is *prima facie* relevant for the purposes of discovery. The fact that the document was placed in the taxpayer's file was not the basis for the Tax Court judge's conclusion that such a document was *prima facie* relevant but an observation regarding why the document was placed in the file: the taxpayer's file was the obvious place to file a document recording something involving the taxpayer in the taxation year.

[17] It is also important to recognize that being *prima facie* relevant and being relevant are not the same. The term *prima facie* connotes something that may be correct but is subject to evidence to the contrary. If relevance is contested, to be subject to disclosure a document must be found to be relevant for the purposes of discovery based on the particular facts and circumstances.

[18] In *4145356*, the Tax Court judge's findings regarding a file that is *prima facie* relevant emphasize that the facts and circumstances are determinate:

> . . . The request for documents in a Canada Revenue Agency file, **a file that is *prima facie* relevant as it is the Government's file on this taxpayer**, is itself not a broad or vague request. If the file had just one document in it, one could hardly call the request broad. No, it is not the breadth of the answer but the breadth of the inquiry. **I do not find the request for documents in a specific taxpayer's file, <u>that lead to an assessment on one specific issue</u>, too broad.**[4]

[Emphasis and double emphasis added.]

[19] It is apparent from the foregoing that the broad statements of principle put forward by the Appellant require consideration of the particular facts and circumstances to determine whether what is being requested is relevant for the purposes of discovery. This is reinforced by the fact that the Federal Court of Appeal has repeatedly held that discovery-related rulings raise questions of mixed fact and law, reviewable for palpable and overriding error.[5]

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[4] Paragraph 24.

[5] For example, *R v Lehigh Cement Ltd*, 2011 FCA 120 ("*Lehigh*") at paragraphs 24 and 25 and *Madison Pacific Properties Inc v R*, 2019 FCA 19 ("*Madison*") at paragraphs 22 to 25.

[20] It is therefore not a simple matter of saying that a document is in a file or that a document was looked at by the Canada Revenue Agency ("CRA") auditor. Notwithstanding the scope of relevance for the purposes of discovery, neither fact alone is necessarily sufficient to conclude that the document is relevant for purposes of discovery.

[21] The Appellant submits that it is not for the Minister to determine whether a document is relevant. I agree.

[22] In *Paletta v R*, 2017 TCC 233 ("*Paletta*"), the transactions in issue shared not only a general similarity with transactions carried on by other taxpayers but also a commonality of participants in the transactions:

> The CRA conducted audits of other taxpayers involved in transactions similar to the Trading Transactions, which also involved Tim and John Hodgins, UCAL, IFX and ODL. These audits were part of a project co-ordinated by officials located in CRA's Ottawa headquarters.[6]

[23] The Tax Court judge addressed questions and related documents that the appellant grouped into five categories. The first category of questions and related documents raised the relevance of a report prepared by RSD Solutions, which is referred to as the "RSD Report" in *Paletta*. With respect to the RSD Report, the Tax Court judge stated:

> Counsel for the Respondent's argument is similar to the argument he made with respect to other questions and documents: the Respondent should only be required to produce documents, or, in the case of the RSD Report, parts of a document that Ms. Andrews reviewed and considered relevant for establishing her assessing position. In other words, I should let Ms. Andrews be the gatekeeper with respect to the documents that should be provided to the Court. I do not accept this argument; it has no basis in law.
>
> It is for the Court, not Ms. Andrews, to decide whether a document is relevant. The Appellant is entitled to all documents that are relevant with respect to issues raised in the pleadings, both those that support the Respondent's case and those that damage her case. . . . [7]

[24] The Tax Court judge went on to find as follows:

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[6] *Paletta*, paragraph 36.
[7] *Paletta*, paragraphs 22 and 23.

> The Position Paper formed the technical basis for the Audit Report. Ms. Andrews attached portions of the RSD Report as an exhibit to the Position Paper. She acknowledged during discovery that she relied on the RSD Report when developing the concept of a normal trading instruction with respect to foreign currency trading.[8]

[25] The Tax Court judge concluded that the RSD Report was "clearly relevant".[9]

[26] The Appellant cites paragraph 48 of *Paletta* for the additional proposition that reliance on a particular document in developing an assessing position is not a deciding factor in determining whether the document is relevant. Again, I agree.

[27] The Tax Court judge made the cited statement in the context of the second category of questions and related documents, which addressed disclosure by the Minister of "various CRA working papers, position papers and proposal letters from other CRA tax services offices ("TSOs") that were reviewed and relied on by Ms. Andrews, the CRA auditor who audited the Appellant".[10]

[28] The Tax Court judge describes these documents and the appellant's and respondent's respective positions regarding disclosure as follows:

> This category covers the Appellant's requests for position papers prepared by CRA officials located in other CRA offices. The Appellant asserts that these CRA offices provided the position papers at issue to Ms. Andrews to assist her with her audit of the Appellant.
>
> The Respondent argues that she should not be required to produce the position papers because Ms. Andrews did not rely on the position papers in question.[11]

[29] The Tax Court judge concludes:

> Ms. Andrews was provided with each of the documents in this category in an attempt to ensure that the CRA assessed in a "consistent manner". The documents clearly relate to the issues raised in the Appellant's assessments.
>
> Further, Ms. Andrews, to varying degrees, reviewed each of the papers. The question of whether or not she relied on them when developing her

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[8] *Paletta*, paragraph 26.
[9] *Paletta*, paragraph 27. The Tax Court judge goes on to provide additional support for this conclusion.
[10] *Paletta*, paragraph 15b.
[11] *Paletta*, paragraphs 31 and 32.

> assessing position is not a deciding factor. The Appellant is entitled to information that supports the Respondent's position and to information that may damage her position.
>
> I wish to note that, contrary to what is argued by counsel for the Respondent, **it is clear from the record that Ms. Andrews relied upon the information contained in position papers** prepared by other CRA offices when assessing the Appellant.[12]

[Emphasis added.]

[30] The Tax Court judge recognizes that reliance implies that there is something in a document favourable to the respondent's case. However, as stated by the Tax Court judge, the appellant is entitled not just to information that supports the respondent's position, but also to information that may damage that position.[13] Accordingly, reliance is not a deciding factor as it addresses only one side of the discovery equation.

[31] The Tax Court judge found that the documents were provided to the CRA auditor to ensure a consistent assessing position and that the auditor did rely on the documents. On the basis of these findings, the documents were relevant for the purposes of discovery.

C. Is Oral Discovery different for a GAAR Appeal?

[32] The appeal by the Appellant challenges reassessments that apply the GAAR. This raises the question of whether the scope of discovery in a GAAR case differs from the scope of discovery in a non-GAAR case.

[33] As with many tax appeals, a GAAR appeal raises questions of fact, questions of law and questions of mixed law and fact.[14] The principal difference with a GAAR appeal is that the Minister is required to identify the "object, spirit or purpose of the provisions that are claimed to have been frustrated or defeated"[15] (the "policy"), which is the Minister's interpretation of the law. In non-GAAR appeals, the Minister

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[12] *Paletta*, paragraphs 47, 48 and 49.
[13] See *Owen Holdings Ltd v R*, [1997] FCJ No 995 (FC AD) at paragraph 22, *Smithkline Beecham Animal Health Inc v R*, 2002 FCA 229 at paragraphs 24 to 26, *Lehigh* at paragraph 34 and *Madison* at paragraph 23.
[14] *R v Canada Trustco Mortgage Company*, 2005 SCC 54 ("*Canada Trustco*"), paragraphs 19, 29, 44 and 46.
[15] *Canada Trustco*, paragraphs 64 and 65.

need only identify the statutory provisions relied upon in making the assessments under appeal and the Minister's legal position.[16]

[34] This means that in a GAAR appeal, consistent with the longstanding principle that a party to a tax appeal may ascertain through discovery the case that that party has to meet, the appellant is entitled to ascertain and explore the Minister's position regarding the policy that supports the application of the GAAR to the appellant.[17] This is so notwithstanding that the identification of a policy is a question of law.

[35] In *Madison*, in upholding the decision of the Tax Court judge, the Federal Court of Appeal reproduced the discovery principles identified by the Tax Court judge and then described the Tax Court judge's approach to disclosure of a policy as follows:

> The Tax Court noted that these principles provide for broader disclosure in a GAAR appeal than might be appropriate in non-GAAR cases. Relying on the decisions of this Court in *Canada v. Lehigh Cement Limited*, 2011 FCA 120, 417 N.R. 342 (*Lehigh*) and *Canada v. Superior Plus Corp.*, 2015 FCA 241, 477 N.R. 385 (*Superior Plus*), the Tax Court stated that documents not specific to a taxpayer but relating to the policy of the ITA may be ordered to be disclosed in certain circumstances in a GAAR case. The Tax Court referred to the circumstances in *Lehigh* as an example of when such broader disclosure is warranted (Reasons, para. 29). The Tax Court also noted at paragraph 32 of its Reasons that, while draft documents prepared by the Minister or considered by officials in the context of a taxpayer's audit are not normally producible in a non-GAAR case, they should be disclosed in a GAAR appeal as they inform the Minister's mental process leading up to an assessment and reflect the Minister's understanding of the policy at issue. The Tax Court noted that such documents may lead to a train of inquiry that meets the lower threshold for disclosure in a GAAR case.[18]

[36] The Federal Court of Appeal did not find any legal error in the Tax Court judge's approach and therefore it is fair to conclude that unlike in non-GAAR appeals, draft documents prepared by the Minister or considered by officials in the context of a taxpayer's audit should be disclosed because they "inform the Minister's mental process leading up to an assessment and reflect the Minister's understanding of the policy at issue".

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[16] See paragraph 49(1)(g) of the Rules and *R v CHR Investment Corporation*, 2021 FCA 68 at paragraph 25, which cites *Cherevaty v R*, 2016 FCA 71 at paragraph 18, which in turn cites *HSBC* at paragraph 13, which in turn cites *Six Nations of the Grand River Band v Canada*, [2000] OJ No 1431.

[17] See, for example, *Lehigh*, paragraph 30.

[18] *Madison*, paragraph 12.

[37] Importantly, however, the policy relied upon by the Minister is a fact and it is this fact that the taxpayer is entitled to know and to explore. In *Superior Plus Corp v R*, 2015 TCC 132 ("*Superior Plus TCC*"), affirmed 2015 FCA 241 ("*Superior Plus*"), the Tax Court judge stated:

> In *Birchcliff*, the Tax Court concluded that it was imperative that the Crown's reply set out "**the fact [that] the Minister relied upon x or y policy underlying the legislative provisions at play**". The Court noted that this does not bind the Crown, but stated that that "ultimate aim" was to ensure that there were no surprises at trial. *Birchcliff* sets out the pleadings requirements in relation to policy in a GAAR case. It is well established that relevance at discovery is defined by the pleadings. It follows that a taxpayer should be entitled to proceed along a train of inquiry related to the policy that the Minister claims he considered and/or relied on in the making of a GAAR assessment.[19]

[Emphasis added.]

[38] In affirming the decision of the Tax Court judge, the Federal Court of Appeal stated:

> As was held by this Court in *Lehigh Cement Ltd. v. R.*, 2011 FCA 120 [*Lehigh*] in like circumstances, information pertaining to the policy of the Act, even where it is not taxpayer specific, can be relevant on discovery. We accept that an important consideration in that case was that the Crown had itself established the relevance of the documents sought by disclosing an internal policy memorandum on the subject (*Lehigh* at para. 41). However, relevance in the present case is no less established by the Tax Court judge's finding that the refused documents were either prepared in the context of the audit of Superior Plus or considered by officials who were involved in the audit (Reasons at para. 19). We can see no basis for distinguishing *Lehigh*. As always, the trial judge will be the ultimate arbiter of information garnered at the discovery stage.
>
> Nor can it be said that the disclosure of this information results in an unjustified intrusion into the CRA's deliberative process, thereby jeopardizing public servants' candour. . . . [20]

[39] The obligation on the Minister to disclose the fact of the policy relied upon by the Minister to apply the GAAR necessarily blurs the lines between fact (the statement of the policy) and legal analysis (the identification of the policy). In

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[19] *Superior Plus TCC*, paragraph 21.
[20] *Superior Plus*, paragraphs 8 and 9.

non-GAAR cases, the legal analysis of the Minister would not typically be subject to discovery. However, in GAAR cases, the legal analysis of the Minister in support of the policy relied upon is subject to discovery. Otherwise, the right to discovery of the policy would be limited to the right to discovery of the Minister's statement of the policy, which should already be found in the reply.

[40] Notwithstanding the broad right to discovery of the policy relied on by the Minister, this right does not extend to legal argument in support of the existence of the policy and its application to the taxpayer's transaction(s). In *Ahamed v R*, 2020 FCA 213, the Federal Court of Appeal stated:

> The Tax Court refused to order that the respondent provide information concerning factual assumptions surrounding the object, spirit and purpose and the policy behind the statutory provisions in issue. It based itself, in part, on the view that the appellant was seeking more than the respondent's legal position, but rather information concerning the respondent's legal argument (to which it is not entitled in discovery). The Tax Court was satisfied that the respondent's legal position was already clear.
>
> The appellant objects arguing that the information it seeks concerns the respondent's legal position and is relevant.
>
> In my view, the Tax Court did not err either in observing that factual assumptions are matters for pleading, not discovery, or in finding that the respondent has already communicated its legal position. The appellant has not convinced me that the Tax Court made a palpable and overriding error or erred on an extricable question of law in concluding that the respondent had already made its position clear and that ordering answers to the questions in issue would invite legal argument.
>
> Paragraph 27 of the Tax Court decision (as well as paragraph 18 thereof) cites an *obiter dicta* statement in *Madison Pacific Properties Inc. v. Canada*, 2019 FCA 19 (F.C.A.) at para. 28 (*MP Properties*) in support of the conclusion that the questions in issue lacked relevance because the statutory interpretation issue in dispute in the underlying appeal before the Tax Court is a question of law, not a question of fact:
>
> > [27] [...] The statutory interpretation of these sections is a question of law, and not a matter of fact and is for the Court to ultimately determine at trial as referenced in *MP Properties* by Gleason J. at paragraph 28 above referred to, the Appellant is entitled to know the Respondent's position on the law, but not its [sic] evidence it relies on nor its legal argument.[...]

> In my view, the statements in *MP Properties* and by the Tax Court should not be taken as an indication that a party is not entitled during discovery to obtain, and ask questions about, relevant documents simply because they concern a question of law. Rather, I understand these statements to mean that a party may not use discovery to question an opposing party as to which of the documents on the record will be relied on for which legal arguments. Such questions essentially seek the opponent's legal argument rather than its legal position.[21]

[41] Accordingly, questions exploring the Respondent's legal position are permissible but questions that seek the Respondent's legal arguments are not. Legal argument in support of a question of law[22] is reserved for argument before the Tax Court judge and the appellate courts and is not a proper subject of discovery even in a GAAR appeal.

[42] In addition, while the Appellant is entitled to disclosure of the policy relied upon by the Minister to apply the GAAR to know the case that the Appellant must meet, this disclosure is likely not admissible at trial because the existence or non-existence of the policy is a question of law:

> I also note that, in any event, the documents in issue are of limited relevance and likely inadmissible at trial as, under the GAAR analysis, the question of the policy in the ITA that the taxpayer is alleged to have avoided is ultimately a question of law. . . . [23]

D. Obtaining Documents through Oral Discovery

[43] The documents required to be produced at an examination for discovery are specified by paragraph 105(1)(a) and subsection 85(3) of the Rules.[24] Subsection 85(3) refers to the examined party's list of documents under either section 81 or section 82 of the Rules, as applicable, and to documents previously produced for inspection.

[44] The parties to this motion agreed to the discovery of documents under section 81 of the Rules, which is described by the Federal Court of Appeal in *3488063 Canada Inc v R*, 2016 FCA 233 ("*3488063*"):

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[21] Paragraphs 39 to 43.
[22] The identification of a policy in the ITA is a question of law that must be determined by the court: *Canada Trustco*, paragraph 44. The role of the court is further explained in *Copthorne Holdings Ltd v R*, 2011 SCC 63 ("*Copthorne*") at paragraphs 66, 69 and 70.
[23] *Madison*, paragraph 28.
[24] *Buhler Versatile Inc v R*, 2016 FCA 68 ("*Buhler Versatile*") at paragraphs 7 to 11.

> Rule 81 differs from Rule 82. Under Rule 81 a party is only obligated to "file and serve on every other party a list of the documents of which the party has knowledge at that time that might be used in evidence, (a) to establish or to assist in establishing any allegation of fact in any pleading filed by that party, or (b) to rebut or to assist in rebutting any allegation of fact in any pleading filed by any other party". Therefore, under Rule 81, a party is only obligated to provide a list of those documents that such party would be proposing to use either to establish its case or to attack the case of the other side. There is no obligation under Rule 81 to provide a list of all relevant documents that may have been in a party's possession or control.[25]

[45] Subsection 105(2) of the Rules allows a party to obtain production of a document that is not otherwise required to be produced at the examination by paragraph 105(1)(a) and subsection 85(3) of the Rules.[26] Subsection 105(2) of the Rules states:

> Where a person admits, on an examination, that he or she has possession or control of or power over any other document that relates to a matter in issue in the proceeding and that is not privileged, the person shall produce it for inspection by the examining party forthwith, if the person has the document at the examination, and if not, within ten days thereafter, unless the Court directs otherwise.

[46] Subsection 105(2) of the Rules imposes three conditions on a party's right to obtain production of a document. First, a person must admit on an examination that he or she has possession or control of or power over the document. Second, the document must relate to a matter in issue in the proceeding.[27] Third, the document must not be privileged. A party cannot avoid the application of subsection 105(2) to a document in the possession of the party by refusing to answer a question.[28]

[47] The imposition of the conditions in subsection 105(2) is both fair to parties that have agreed to discovery under section 81 of the Rules and consistent with the proportionality principle. Neither party raised the issue of whether the conditions of

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[25] Paragraph 43. See, also, *Shell Canada Ltd v R*, 1997 CarswellNat 68 and *General Electric Capital Canada Inc v R*, 2008 TCC 256 at paragraph 27.

[26] *Buhler Versatile Inc v R*, 2014 TCC 364 ("*Buhler Versatile TCC*") at paragraphs 19 and 20, affirmed 2016 FCA 68 without comment on subsection 105(2). With respect, I do not agree with the *obiter dicta* suggestion in paragraph 23 of *4145356* that subsection 105(3) of the Rules is the operative rule and permits one-way full discovery. Paragraph 105(1)(b) of the Rules expressly states that subsection 105(3) of the Rules applies to examinations other than examinations for discovery.

[27] The phrases "relates to" and "relevant to" encompass similar meanings: *Lehigh* at paragraph 32.

[28] *Buhler Versatile TCC*, paragraph 21.

subsection 105(2) of the Rules have been met in this case and therefore I will not address that issue.

E. The Disputed Refusals

[48] With the above principles in mind, I will address the discovery questions (63, 151 and 171) listed in the Schedule.

[49] Item 1 of the Schedule addresses six documents requested by the Appellant. The Appellant and the Respondent agreed that the Respondent would provide to the Court in a sealed envelope the six documents (the "Sealed Documents") on the understanding that the Court would determine whether the Respondent is required to disclose the Sealed Documents to the Appellant.

[50] Two of the Sealed Documents are proposals to two unrelated taxpayers that set out the CRA's understanding of the facts and the CRA's legal analysis of those facts. One of the Sealed Documents is a memorandum to the GAAR Committee regarding the transactions undertaken by a third unrelated taxpayer. The two proposals and the memorandum are similar in structure and set out the CRA's understanding of the facts (including evidence in support of certain facts) and the CRA's legal analysis of those facts.

[51] Two of the Sealed Documents describe transactions undertaken by a fourth unrelated taxpayer with no analysis of those transactions. One of the Sealed Documents is a four-slide presentation of which two slides describe transactions undertaken by a fifth unrelated taxpayer and two slides describe the decision in *Copthorne*.

[52] The Appellant is entitled to know the case that it must meet in its appeal and "information pertaining to the policy of the Act, even where it is not taxpayer specific, can be relevant on discovery".[29]

[53] However, in applying this general principle, it is important to keep in mind that the factual circumstances of unrelated taxpayers and the analysis that the CRA applied to those factual circumstances are not relevant to the Appellant's tax consequences, which turn on the Appellant's factual circumstances and the analysis

[29] *Superior Plus* at paragraph 8.

applicable to those circumstances. In *Sinclair v R*, 2003 FCA 348, the Federal Court of Appeal stated:

> . . . The issue before the Tax Court in this case is whether Ms. Sinclair is entitled to an exemption under section 87. This must be decided on the basis of the interpretation of the section and its application to her situation: that others are given the benefit of the exemption is simply not relevant to Ms. Sinclair's appeal. . . . [30]

[54] Consequently, the fact that there may be similarity between the Appellant's transactions and the transactions undertaken by another taxpayer and/or the fact that the CRA may have analysed these other transactions do not alone make information about those other transactions relevant for the purposes of discovery.

[55] In *Superior Plus TCC*, the Tax Court judge found that "the motion record shows that the Refused Documents were either prepared directly in the context of the audit of the Appellant or were considered by CRA officials who were charged with the audit of the Appellant or who were consulted regarding the application of the GAAR".[31] The Federal Court of Appeal expressly refers to this finding[32] in upholding the decision of the Tax Court.

[56] The decisions in *Superior Plus* suggest that for third party information to be relevant for the purposes of discovery, there must be evidence that that third party information was at least considered by the CRA officials who were charged with the audit and assessment of the Appellant or by the CRA officials who were consulted regarding the application of the GAAR to the Appellant.

[57] Absent an indication of relevance such as found by the Tax Court judge in *Superior Plus*, seeking information about the transactions of an unrelated taxpayer and/or the CRA's analysis of such transactions is a "fishing expedition", which is generally understood to mean an indiscriminate request for production in the hope of uncovering useful information.[33]

[58] The Sealed Documents were in the audit file of the Appellant, albeit in electronic form. The Respondent's counsel states in a letter to the Appellant's counsel that "Mr. Simms advises that beyond reading those documents, he did not make any use of these documents in the audit of the appellant and they did not inform

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[30] Paragraph 7. See, also, *R v Oxford Properties Group Inc*, 2018 FCA 30 at paragraph 95.
[31] *Superior Plus TCC*, paragraph 19.
[32] *Superior Plus*, paragraph 8.
[33] *George William Harris v R and MNR*, 2001 DTC 5322 (FCTD) at 5328, paragraph 45.

the basis of the assessment in any manner".[34] The Respondent submits that the contents of the Sealed Documents are third party information and are not relevant.

[59] Mr. Simms[35] admits that he read the Sealed Documents and states that the Sealed Documents were in the Appellant's audit file. I infer from these two facts that Mr. Simms did consider the Sealed Documents but he did not rely on the documents in auditing the Appellant.

[60] As previously stated, reliance is not the test for relevance. As was the case in *Superior Plus*, consideration of the documents in the context of the audit of the Appellant is sufficient to make them relevant for the purposes of discovery. Moreover, although I have read the Sealed Documents and believe that they are of marginal relevance even for purposes of discovery, the worth of these documents is best left to counsel for the Appellant to decide.

[61] I will therefore order the Respondent to provide the Sealed Documents to the Appellant, subject to the redaction of all information identifying the third parties.

[62] The question identified in item 2 of the Schedule (question 151) asks that Mr. Robbins describe the variant that is being referred to in a memorandum regarding the Appellant from Mr. Robbins to Mr. Simms dated July 24, 2013 (the "Robbins Memo").[36] The Robbins Memo states on the first page, immediately under the heading "The Issue":

> As you have noted in your referral **the issue in <u>this case</u> is whether <u>a series of transactions, comprising one variant</u>** of what is referred to as a Tech Wreck, constitutes abusive loss trading.
>
> [Emphasis and double emphasis added.]

[63] The reference to a "variant" is clearly a reference to the Appellant's version of a so-called Tech Wreck series of transactions. I fail to see how the Respondent disclosing to the Appellant the very transactions undertaken by the Appellant assists the Appellant or hurts the Respondent.

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[34] Exhibit "C" to the Affidavit of Kristina Ilogon at tab 4 of the AAMR.

[35] Mr. Simms is the CRA employee who conducted the audit of the Appellant and is the individual who was examined on behalf of the Respondent.

[36] The Robbins Memo is found at tab 5, pages 156 and 157 of the AAMR. At the time, Mr. Robbins was with the Aggressive Tax Planning, GAAR, Inter-provincial Tax Avoidance & Technical Support group at CRA Headquarters.

[64] If the Appellant is requesting details of how the Appellant's transactions differ from other variants, without facts and circumstances that suggest otherwise, I fail to see how knowledge of the existence or nature of other variants can assist the Appellant or hurt the Respondent. The issue under appeal is the application of the GAAR to the Appellant's transactions, not the application of the GAAR to a variant of those transactions.

[65] I therefore find that question 151, described in item 2 of the Schedule, is not relevant and that the Respondent is not required to answer the question.

[66] Items 3 to 8 of the Schedule result from follow-up request numbers 5 to 8 and 11 to 13, which in turn arise from a single question (question 171) in the examination for discovery of Mr. Simms. The follow-up requests and the Respondent's responses to those requests are set out in a letter from counsel for the Respondent to counsel for the Appellant dated December 10, 2021.[37]

[67] Item 3 of the Schedule describes follow-up request number 5 to provide documents used by Mr. Robbins to compare the Appellant's situation to others. The documents that have not been disclosed are six documents in unrelated taxpayer files.

[68] Mr. Robbins did not keep a file and provided a single response to the questions directed to him through Mr. Simms:

> My memory of this particular case is very limited. I can only respond in the most general terms and cannot comment on the technical questions in the latter questions as I don't recall specific facts.
>
> At the time ATP received this file there were many Tech Wreck files in inventory. There were two other officers (maybe 3 including Patrice Mallet) besides me working these files. We discussed these files among ourselves on a daily basis (we were physically located next to each other) for mutual assistance, bouncing comparable org charts with each other, and interpretation comparisons. Therefore each file was not done in a vacuum. Each of us had a general knowledge of all the Tech Wrecks. Several times a week we met with Len Lubbers who was my manager at the time and had taken the lead on these files. Jim Randall was the manager for one of the other officers involved in the Tech Wrecks and we had

[37] Exhibit "E" to the Affidavit of Kristina Ilogon at tab 4 of the AAMR.

> frequent discussions with him as well. He provided the second opinion type of advice.
>
> It was not an easy process to arrange for the GAAR committee to hear a case. There is quite a logistical challenge to find a time when the most appropriate experts from Finance, Justice, Appeals etc. are all available to discuss a given file. As there were so many Tech Wrecks in inventory at the same time and if one was presented the first question would be how does it compare to other files, the only the [*sic*] logical approach was to break out the files into the five (or whatever the number was) of common methodologies used to get around the change of control rules and present the cases in that manner. However this did not take away from the fact that each file was looked at based on the facts of each specific case and the facts of each case were discussed in debates with diagrams on whiteboards on a regular basis. My recollection was that I was in attendance at the GAAR meeting when these files were discussed.[38]

[69] Mr. Robbins states that "each file was looked at based on the facts of each specific case and the facts of each case were discussed in debates with diagrams on whiteboards on a regular basis". Mr. Robbins has given no indication that the documents requested in item 3 of the Schedule were considered or reviewed in relation to the audit of the Appellant or the decision to apply the GAAR to the Appellant.

[70] The Robbins Memo is a summary of what the Minister says are the Appellant's facts and circumstances and the Minister's GAAR analysis of those facts and circumstances. The policy relied upon by the Minister is clearly stated in the Robbins Memo.

[71] The fact that the CRA had a collaborative process to address the volume of so-called Tech Wreck files does not alone make the files of unrelated taxpayers relevant to the Appellant's appeal for the purposes of discovery. The fact that knowledge and experience are gained from reviewing similar transactions is not in and of itself sufficient to make materials in respect of those other transactions relevant.

[72] I therefore find that the documents described in item 3 of the Schedule are not relevant for the purposes of discovery and that the Respondent is not required to provide those documents to the Appellant.

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[38] Exhibit "A" to the Affidavit of Kristina Ilogon, response to undertaking 4 at pages 48 and 49.

[73] Items 4 and 5 of the Schedule are requests for documents produced at meetings between Mr. Robbins and two others[39] that reference a lead case for the category of cases in which the Appellant was placed.

[74] The fact that the CRA considered a lead case for a category of transactions that were similar to the Appellant's transactions is not alone sufficient to establish relevance for the purposes of discovery. There is nothing in the AAMR that suggests that discussions that CRA employees may have had about a lead case were considered in relation to the audit of the Appellant or the decision to apply the GAAR to the Appellant.

[75] I therefore find that the documents requested in items 4 and 5 of the Schedule are not relevant for the purposes of discovery and that the Respondent is not required to provide those documents to the Appellant.

[76] Item 6 of the Schedule is a request to provide information about how the CRA categorized the variants of transactions into five groups. The Appellant is in effect seeking information about the audit process adopted by the CRA. The audit process, including the categorization by the CRA of variants of transactions undertaken by a multitude of taxpayers, is not relevant to the audit of the Appellant or the decision to apply the GAAR to the Appellant.

[77] I therefore find that the Respondent is not required to provide to the Appellant the requested information.

[78] Item 7 of the Schedule is a request to provide documents produced during meetings where Tech Wreck files were discussed with diagrams on a whiteboard. This request stems from Mr. Robbin's statement reproduced above in discussing item 3 of the Schedule.

[79] The Respondent provided the following responses to this request:

> To the extent that the appellant seeks details of discussions and debates regarding other taxpayers, the respondent objects to those inquiries as not relevant. . . . With respect to whether the appellant's file was specifically discussed at meetings, debates, etc., CRA HQ advised Mr. Simms that notes, records, documents, etc. relating to the meetings and debates referred to by Mr. Robbins were not kept. As such, it cannot be said with certainty if or when the appellant's file was discussed, or who specifically

[39] Len Lubbers and Jim Randall.

> of Mr. Robbins, Mr. Lubbers, Mr. Randall, Mr. Mallet, Mr. Percival, or Ms. Scott attended those meetings.
>
> . . .
>
> To the extent that the appellant seeks details of discussions and debates regarding other taxpayers, the respondent objects to those inquiries as not relevant. . . . With respect to whether the appellant's file was specifically discussed or debated at GAAR Committee meetings, the appellant's file was not considered by the GAAR Committee (as mentioned in the auditor's position paper, which is Respondent's Document no. 19).[40]

[80] I am at a loss to understand why these responses are not a complete answer to follow-up requests 11 and 12. Mr. Robbins stated in his response reproduced above that it was individual cases that were discussed in debates with diagrams on whiteboards.

[81] For reasons already stated, even if documents were reviewed in discussions regarding the cases of unrelated taxpayers, such documents are not relevant to the Appellant's appeal for the purposes of discovery unless there is evidence to suggest that the documents were reviewed or considered in relation to the audit of the Appellant or the decision to apply the GAAR to the Appellant.

[82] More to the point, however, even if the Appellant's transactions were discussed at one or more of the meetings described by Mr. Robbins—a fact that has not been established—according to the Respondent, there are no notes, records, documents, etc, from the meetings. It is therefore unclear what the Appellant expects the Respondent to produce.

[83] I therefore find that the Respondent is not required to provide to the Appellant the documents requested in item 7 of the Schedule.

[84] Item 8 of the Schedule requests documents produced during GAAR Committee meetings. The Robbins Memo states on page 2 under the heading "A Similar Case":

> We have in the past few months considered a similar case where the parties entered into a plan of arrangement which resulted in the transfer of the Lossco business into a Newco and the transfer of Newco to the former shareholders of Lossco. . . . The GAAR committee recommended the application of GAAR as a principal position. Given the similarities in that

[40] Exhibit "E" to the Affidavit of Kristina Ilogon at tab 4 of the AAMR, responses to follow-up 11 and 12.

> case to the current case and the lack of representations we have not taken your case to the GAAR Committee.

[85] I will refer to this excerpt as the "Similar Case Excerpt". The Similar Case Excerpt indicates that the CRA relied on the GAAR Committee's analysis of the similar case in deciding to assess the Appellant under the GAAR. The approach adopted by the CRA negated the need for a GAAR Committee assessment of the Appellant's transactions. If the GAAR Committee had considered the Appellant's case, there is no doubt that the Appellant would be entitled to discovery of all non-privileged documents considered by the GAAR Committee in deciding to assess the Appellant under the GAAR.

[86] In my view, the Appellant is equally entitled to all non-privileged documents considered by the GAAR Committee in deciding to assess under the GAAR the unrelated taxpayer described in the Similar Case Excerpt because that decision directly resulted in the subsequent decision to assess the Appellant under the GAAR. Consequently, the documents considered by the GAAR Committee in making the first decision are in effect the basis for the CRA's subsequent decision to assess the Appellant under the GAAR even though those documents do not address the Appellant's transactions.

[87] I therefore find that the documents requested by the Appellant in item 8 of the Schedule that were considered in the meeting or meetings of the GAAR Committee described in the Similar Case Excerpt (the "GAAR Committee Documents") are relevant for the purposes of discovery. I will order the Respondent to provide the GAAR Committee Documents to the Appellant, subject to the redaction of all information identifying third parties and subject to any claim of solicitor-client privilege that the Respondent may wish to make. In the latter case, each such document shall be provided to the Court to determine if solicitor-client privilege applies.

F. Conclusion

[88] The motion is allowed. The Respondent is ordered to provide to the Appellant (i) the Sealed Documents, subject to the redaction of all information identifying third parties, and (ii) the GAAR Committee Documents, subject to the redaction of all information identifying third parties and subject to any claim of solicitor-client privilege that the Respondent may wish to make. If solicitor-client privilege is claimed in respect of one or more documents, the Respondent shall submit the

document or documents to the Court in a sealed envelope so that the Court can determine whether solicitor-client privilege applies.

[89] The costs of this motion shall follow the cause.

Signed at Ottawa, Canada, this 15th day of July 2022.

"J.R. Owen"

Owen J.

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COURT FILE NO.:	2014-4504(IT)G
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APPEARANCES:

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