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BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on July 15 and 16, 2015 at Toronto, Ontario

Before: The Honourable Eugene P. Rossiter, Chief Justice

Appearances:

Counsel for the Appellant:	Joseph Steiner Al Meghji Caroline D'Elia
Counsel for the Respondent:	Michael Ezri Eric Noble Craig Maw

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Introduction

[1] This is a motion by the Respondent to:

- Compel answers to discovery questions that were refused or, in the Respondent's view, not fully answered or not answered at all;

- Adjudicate various claims of privilege made by the Appellant (hereinafter referred to as "CIBC") over questions and requests for documents from the Respondent; and

- Adjudicate issues with respect to CIBC's list of documents.

Background: the underlying appeals

[2] The appeals relate to CIBC's attempt to deduct about $3 billion in settlement payments, interest on the payments and related legal expenses (the "Settlement Amounts") from its business income in its 2005 and 2006 taxation years. The Settlement Amounts relate to litigation arising from certain CIBC transactions with Enron Corp. ("Enron"). After Enron filed for Chapter 11 Bankruptcy protection, CIBC and others were sued for allegedly improperly participating in transactions with Enron involving the sales of assets to special purpose entities. The plaintiffs in the litigation alleged that CIBC knew the sales were improperly represented on Enron's financial statements. The two Enron-related litigations in issue are known as the Newby Litigation and the MegaClaim Litigation.

[3] During its 2005 taxation year ended October 31, 2005, CIBC reached a settlement in the Newby and MegaClaim Litigations for approximately U.S. $2.6 billion, or about CDN $2.9 billion. CIBC also owed interest on the Newby settlement payments totalling about $48 million and incurred related legal expenses of about $56 million.

[4] CIBC then deducted almost all of the Settlement Amounts from its business income in its 2005 tax year. In its 2006 tax year, it then deducted from its business income the remaining available Settlement Amounts (which at this point only consisted of interest and legal expenses), totalling about $26.5 million. The 2005 deductions also led CIBC to incur a non-capital loss of $2.1 billion in 2005,

leading CIBC to carry back about $2.04 billion of that loss to its 2003 taxation year and $41 million of that loss to its 2002 taxation year.

[5] The Minister of National Revenue (the "Minister") denied the deductions for various reasons, stating they were offside with s. 3, s. 9 and paragraph 18(1)(a) of the *Income Tax Act*[1] (the "*Act*") as they were not incurred to earn and produce income from business and did not conform to well-accepted business or accounting principles. The Minister says that the costs truly belonged to certain of CIBC's subsidiaries and affiliates, not CIBC itself. The Minister also denied the deductions under additional heads of the *Act*, stating that:

- If the Settlement Amounts were indeed incurred to earn and produce income, they were only capital outlays under paragraph 18(1)(b) of the *Act*;
- The Settlement Amounts would have been reimbursed to CIBC if CIBC were dealing at arm's length with its subsidiaries and affiliates, and therefore the deductions are offside with ss. 247(2)-(3) of the *Act*;
- The deductions were not reasonable and therefore violate s. 67 of the *Act*; and
- The settlement and interest costs were merely contingent liabilities in 2005 and therefore not deductible because of paragraph 18(1)(a) and paragraph 18(1)(e) of the *Act*.

[6] The Minister also assessed CIBC for instalment interest, arrears interest and overpaid refund interest, and added amounts to CIBC's taxable capital for the purposes of Parts I.3 and VI of the *Act*, which added to CIBC's tax payable. The entire outcome of all four appeals essentially turns on whether CIBC can deduct the Settlement Amounts as expenses.

Motion overview

[7] This motion is mostly about privilege and relevance. CIBC is claiming solicitor-client privilege, litigation privilege and settlement privilege over many of the questions and documents in issue in this motion. CIBC states the Respondent's motion is an attempt to run roughshod over privilege by gaining access to information and documents that warrant protection. CIBC also says that various Respondent questions are irrelevant to the tax appeals and were properly refused.

[1] RSC 1985, c 1 (5th Supp).

In particular, CIBC says the Respondent is attempting to retry the Enron litigation that led to the Newby and MegaClaim settlements, when instead the real issue is whether the Settlement Amounts are deductible. Any refusals were therefore justified based on irrelevance or, alternatively, on the principle of proportionality.

[8] The Respondent contends CIBC's privilege claims are unfounded or that privilege has been impliedly waived. The Respondent says waiver occurred either through CIBC putting its state of mind in issue in a manner that relies on legal advice, or through CIBC selectively disclosing some privileged material when fairness dictates that full disclosure should be made.

[9] As for relevance, it is crucial to note again that the Respondent argues that the Settlement Amounts did not belong to CIBC but to certain subsidiaries and affiliates. In other words, the Respondent argues that CIBC should have allocated the Settlement Amount deductions to other related entities instead of taking the full deduction for itself. The Respondent says it was these entities that were engaged in the transactions with Enron that led to the Newby and MegaClaim Litigations. Many of the Respondent's questions are aimed at pursuing this line of inquiry, and the Respondent says they are therefore relevant to the tax appeals and are reasonable given the appeals' complexity and the amounts at stake.

[10] Broadly speaking, the Respondent says CIBC is not answering basic questions about how CIBC booked certain litigation expenses, the advice it relied on in assessing the underlying litigation risk from the Enron litigation, and how it understood the sources of legal exposure for both it and its subsidiaries and affiliates. This is key to the Respondent's case on whether the Settlement Amounts were properly accounted for (including how and when the booking decisions were made), whose income-earning purpose they related to (CIBC's or its subsidiaries'/affiliates'), whether the Settlement Amounts were on account of capital, and how much the subsidiaries would have contributed to the Settlement Amounts had they dealt at arm's length with CIBC.

Relief sought

[11] The Respondent is essentially seeking an order directing CIBC to:

- Answer questions it refused, claimed were privileged, did not sufficiently answer or did not answer at all;
- Provide certain documents CIBC undertook to provide but has yet to do provide;
- Fulfill any unfulfilled undertakings;
- Provide to the Court certain documents for which privilege is claimed, so that the Court may review them to determine if the privilege claims are proper; and
- Update its List of Documents to include more identifying information for certain documents for which privilege is claimed.

Issues

[12] The issues in this motion are as follows:

a. Has CIBC substantiated its privilege claim with respect to documents recording its internal investigations into the Enron matter?
b. Has CIBC waived, or should it be deemed to have waived, its right to claim privilege, either by putting in issue its state of mind (in particular its legal knowledge) concerning the underlying Enron litigation and the resulting settlement or by selectively disclosing some privileged material?
c. Can CIBC rely on settlement privilege to protect information and documents arising from the negotiation and conclusion of the Newby and MegaClaim settlements?
d. Can CIBC rely on litigation privilege that has its root in the Newby and MegaClaim Litigations?
e. Can CIBC claim solicitor-client privilege over certain other questions and documents?
f. Is CIBC's Schedule B deficient because the schedule does not contain enough identifying information for certain privileged documents?
g. Should CIBC be compelled to answer refused questions, including, but not limited to, questions on the circumstances under which CIBC allocated the Enron settlement outlays to itself?
h. Should CIBC be compelled to answer questions and undertakings that the Respondent says CIBC did not fully answer or answer at all?

Rules engaged

[13] This motion engages the following rules under the *Tax Court of Canada Rules (General Procedure)*[2] (the "*Rules*"):

- Rule 82, which governs the List of Documents;
- Rule 84, which governs the description of documents that must be provided in the List of Documents;
- Rule 88, which deals with potential relief if an affidavit of documents is incomplete or privilege is wrongly claimed;
- Rule 95, which governs the scope of an examination for discovery;
- Rule 107, which governs objections to questions during an examination for discovery and how such questions are dealt with; and
- Rule 110, which provides relief for default or misconduct of a person being examined.

Discovery Principles

[14] In *Burlington Resources Finance Company v The Queen*,[3] Justice Campbell canvassed the case law on discovery principles and provided an excellent summary. I note the decision in *Burlington* has been appealed to the Federal Court of Appeal, with the appeal still outstanding. I find the decision most helpful as a review of the relevant case law. I would place particular emphasis on the principles noted from *Kossow v The Queen*,[4] which were approved of by the Federal Court of Appeal,[5] and from *HSBC Bank Canada v The Queen*.[6] The following are excerpts of the principles from *Burlington* that are most relevant to this motion:

> [11] Caselaw is clear and abundant. The core of discovery principles is that its scope should be wide, with relevancy construed liberally, without, however, allowing it to enter the realm of a fishing expedition. These basic principles are essential because the purpose of discovery is to enable parties to know the case they have to meet at trial, to know the facts upon which the opposing party relies, to narrow or eliminate issues, to obtain admissions that will facilitate the proof of matters in issue and, finally, to avoid surprise at trial (*General Electric Capital Canada Inc. v The Queen*, 2008 TCC 668, 2009 DTC 1186, at para 14). This is all

[2] SOR/90-688a.
[3] 2015 TCC 71 at paras 11-17.
[4] 2008 TCC 422.
[5] 2009 FCA 83 at para 24.
[6] 2010 TCC 228.

with a view to making the hearing of an appeal streamlined and to ensure that the parties are focussed on the appropriate issues.

[12] In the decision of *Baxter et al v The Queen*, 2004 TCC 636, 2004 DTC 3497, at paragraph 13, Chief Justice Bowman, as he was then, summarized the principles concerning relevancy of questions in discoveries as follows:

> (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.

[13] A summary of the general principles gleaned from the caselaw was provided by Justice V. Miller at paragraph 60 of *Kossow v The Queen*, 2008 TCC 422, 2008 DTC 4408, as follows:

> 1. The principles for relevancy were stated by Chief Justice Bowman and are reproduced at paragraph 50.[7]
>
> 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.*, [1997] 2 FC 3, at para. 19.
>
> …
>
> 9. It is proper to ask questions to ascertain the opposing party's legal position: *Six Nations of the Grand River Band v. Canada (Attorney General)*, [2000] OJ No. 1431, at para. 14.

[7] These are the four principles in Justice Campbell's preceding paragraph.

…

[14] Justice C. Miller in *HSBC Bank Canada v The Queen*, 2010 TCC 228, 2010 DTC 1159, at paragraphs 14 and 15, after quoting the *Kossow* principles, added the following to his review of the scope of discovery questions:

> [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*, 2010 TCC 94, 2010 DTC 1085.
>
> 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 v. The Queen*, 2009 TCC 345, 2009 DTC 1197.
>
> …

[15] The Federal Court of Appeal in *The Queen v Lehigh Cement Limited*, 2011 FCA 120, 2011 DTC 5069, at paragraphs 34 and 35, described the general limits respecting discoveries:

> [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. Whether this test is met will depend on the allegations the questioning party seeks to establish or refute. See *Eurocopter* [2010] F.C.J. No. 740, at paragraph 10, *Eli Lilly Canada Inc. v. Novopharm Ltd.* 2008 FCA 287, 381 N.R. 93 at paragraph 61 to 64; *Bristol-Myers Squibb Co. v. Apotex Inc.* [2007] F.C.J. No. 1597, at paragraphs 30 to 33.
>
> [35] 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 the party is abusing the discovery process. See *Bristol-Myers Squibb v. Apotex Inc.* at paragraph 34. 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": *Merck & Co. v. Apotex Inc.*, 2003 FCA 438, 312 N.R. 273 at paragraph 10; *Apotex Inc. v. Wellcome Foundation Ltd.*, 2008 FCA 131, 166 A.C.W.S. (3d) 850 at paragraph 3.
>
> [16] Finally, a party may be compelled to answer questions that relate to any issue contained in the pleadings, regardless of whether a party has advised or undertaken that it will no longer place reliance on that position or provision (*ExxonMobil Canada Hibernia Co. v The Queen*, 2014 FCA 168, 2014 DTC 5086).
>
> [17] The jurisprudence is comprehensive and the guidelines well established. As many cases have noted, there is no formula that can be applied in determining whether questions should be answered. The ultimate purpose is to fairly, reasonably and expeditiously move matters along to a hearing….

[15] Further to the issue of relevancy, other judgments of the Tax Court of Canada ("TCC") have noted the role that pleadings play in defining relevancy. In *Teelucksingh v The Queen*,[8] the Court noted that:

> (i) 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.
>
> …
>
> (vi) The examining party is entitled to have production of any documents that are relevant to the matters in issue as defined by the pleadings, but subject to proper claims of privilege.[9]

[16] In *Shell Canada Ltd. v The Queen*,[10] Christie A.C.J. cited the following[11] with approval when discussing pleadings' role in defining relevancy:

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[8] 2010 TCC 94.
[9] At para 15.
[10] [1997] 1 CTC 2208 (TCC).
[11] At para 10. This excerpt was later endorsed (either in full or in part) by the Court in *Fink v The Queen*, [2005] 3 CTC 2474 (TCC) at para 13 and in *General Electric Capital Canada Inc. v The Queen*, 2008 TCC 256 at para 12.

10. See also Holmested & Watson, Ontario Civil Procedure, under the heading "SCOPE OF EXAMINATION: GENERAL, Rule 31.06(1)" at 31–48:

> "What is relevant to the matters in issue, as defined by the pleadings, is extremely broad. The examining party is entitled to discover for the purpose of supporting her own case and to put that case to the opponent to obtain admissions and to limit the issues. She is entitled to interrogate to destroy the adversary's case or to find out the case she has to meet and the facts (and now the evidence) that are relied upon by the adversary in support of his case. And it is not a valid objection that the examining party already knows those facts. The examiner is entitled—indeed, it is a major purpose of discovery—to obtain admissions that will facilitate the proof of that party's case or will assist in destroying the adversary's case. See generally Williston and Rolls, *The Law of Civil Procedure* (1970), 782–787."

And at page 31-49:

> "It is a cardinal rule that discovery is limited by the pleadings. Discovery must be relevant to the issues as they appear on the record: *Playfair v. Cormack* (1913), 4 O.W.N. 817 (H.C.); *Jackson v. Belzburg*, [1981] 6 W.W.R. 273 (B.C.C.A.). The party examining has no right to go beyond the case as pleaded and to interrogate concerning a case which he has not attempted to make by his pleadings. But "everything is relevant upon discovery which may directly or indirectly aid the party seeking discovery to maintain his case or to combat that of his adversary": *McKergow v. Comstock* (1906), 11 O.L.R. 637 (C.A.). While clearly irrelevant matters may not be inquired into, relevancy must be determined by the pleadings construed with fair latitude: *ibid*. The court should not be called upon to conduct a minute investigation as to the relevance of each question and where the questions are broadly related to the issues raised, they should be answered: *Czuy v. Mitchell* (1976), 2 C.P.C. 83 (Alta. C.A.). The tendency is to broaden discovery and the "right to interrogate is not confined to the facts directly in issue, but extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue": *Marriott v. Chamberlain* (1886), 17 Q.B.D. 154."

[17] The pleadings for the underlying tax appeals will therefore go a long way towards defining what is relevant.

[18] The above principles governing discovery thus reveal the following salient points:

- Relevancy is extremely broad and should be liberally construed. The threshold for relevancy on discovery is very low but does not allow for a fishing expedition, abusive questions, delaying tactics or completely irrelevant questions;

- Everything is relevant that may directly or indirectly aid the party seeking the discovery to maintain its case or combat that of its adversary. If the questions are broadly related to the issues raised, they should be answered;

- Discovery is limited by the pleadings to some extent; and

- The examining party conducting the discovery is doing so for the purposes of: supporting his or her own case; obtaining admissions; attacking the opponent's case; limiting the issues at trial; and revealing the case that he or she must meet at trial and the facts that the opponent relies upon.

Issue 1: CIBC's internal investigation documents

[19] This issue involves questions 995, 996 and 1005.

[20] CIBC's productions referred to certain internal investigations in the wake of Enron's collapse and to the CEO's or other management's views of CIBC's conduct in the Enron transactions. The Respondent has essentially asked whether any internal reviews were done by CIBC or its subsidiaries and affiliates, and points in particular to reviews referenced in the minutes of CIBC board meetings and one referenced in an email to a journalist. The Respondent also asked what the outcomes of any such reviews were. CIBC is claiming solicitor-client privilege and litigation privilege over any internal investigation documents.

Which investigations are in issue?

[21] Aside from asking generally for any internal investigations related to the Enron transactions, the Respondent is particularly asking for the details of investigations referenced in the following productions:

- An Oct. 4, 2002, email to a Globe and Mail reporter from CIBC's Senior Vice President for Corporation Communications said CIBC had no reason to believe it did anything inappropriate involving Enron, and that the conclusion had been reached after conducting an extensive internal review of all of CIBC's relationships with Enron over the years.[12]
- The minutes of a CIBC board meeting on Aug. 7, 2003, say there were steps taken by CIBC management to investigate the Enron matter, and that the results would be presented to the board so it could determine if it agreed with the conclusions and strategies of management, "including the appropriateness of CIBC's employees in their dealings with Enron."[13]
- The minutes of a CIBC board meeting on Aug. 20, 2003, say that the CEO and the Chairman of the Board had agreed on the need for the board to examine reputational issues and had asked an "independent evaluator" to look at these issues.[14]
- The minutes of a CIBC board meeting on Oct. 9, 2003, record CIBC's Executive Vice-President and General Counsel providing an update on several matters relating to Enron. The update is redacted in the productions. The update is followed by the CEO expressing management's view that it was in the best interest of CIBC to settle the Enron litigation.[15] (It appears the Respondent believes these minutes suggest a reference to an internal investigation; however, they simply appear to record an update on the Enron litigation. Having said that, the expression of management's view that it was in the best interest of CIBC to settle the Enron litigation could be a tie-in to the internal investigation.)
- The minutes of a CIBC board meeting on Aug. 3, 2005, record CIBC's Executive Vice-President and General Counsel reviewing the "internal investigations" that were done after Enron went bankrupt.[16]

Relevance of the internal investigations

[22] It is clear that investigations on various Enron-related actions by CIBC and related entities, including actions implicated in the litigation that led to CIBC deducting the Settlement Amounts, would be relevant to the Respondent's

[12] Respondent's motion record, volume 2, tab 56, page 715.
[13] Respondent's motion record, volume 2, tab 57, page 721.
[14] Respondent's motion record, volume 2, tab 62, pages 781-782.
[15] Respondent's motion record, volume 2, tab 60, pages 244-245.
[16] Respondent's motion record, volume 3, tab 113, page 1140.

arguments on which entity's business incurred or should have incurred the Settlement Amounts, among other issues. The Respondent notes that in the tax appeals, CIBC is emphasizing its own role in the Enron transactions to justify its deduction of the Settlement Amounts. Any internal reviews of the Enron transactions could include information on which employees and/or entities were involved in the impugned transactions, therefore making them highly relevant to the tax appeals.

Privilege

Criteria

[23] CIBC is claiming solicitor-client privilege and litigation privilege over internal investigation documents. For reasons following, litigation privilege is not available. Therefore, the only issue here is whether solicitor-client privilege applies to any of the internal investigations.

[24] To fall within solicitor-client privilege, a document or communication must fit within the classic criteria. It must be: 1) a communication between solicitor and client; 2) which entails the seeking or giving of legal advice; and 3) which is intended to be confidential by the parties.[17]

[25] The party asserting the privilege bears the evidentiary burden to establish the claim on a balance of probabilities.[18] This means CIBC has the burden of justifying the privilege claim.

[26] The issue turns on who was conducting or directing the internal investigations and whether they were done for the purposes of legal advice. CIBC says the investigations meet the criteria. The Respondent says CIBC fails the test because the investigations were not done or requested by counsel for the purpose of providing legal advice, while in other cases, CIBC's General Counsel was not

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[17] *Solosky v The Queen*, [1980] 1 SCR 821 at 837.
[18] *Thompson v Minister of National Revenue*, 2013 FCA 197 at para 49. See also *Belgravia Investments Ltd. v Canada*, 2002 FCT 649 (FCTD) at para 47, and *R. v McCarthy Tétrault* (1992), 95 DLR (4th) 94 (Ont Ct J (Provincial Division)), at paras 15-21.

acting in his capacity as a lawyer but in his role as a company officer and director of numerous subsidiaries.

Were the investigations *done* or directed by counsel?

[27] CIBC says the available information shows the investigations were conducted by or at the direction of CIBC's internal and/or external counsel. It also points to the fact that in the relevant board minutes, reporting on the internal investigations comes from CIBC's general counsel.

[28] However, counsel involvement in the investigations is not apparent from the productions:

- The Oct. 4, 2002, email to the Globe and Mail reporter does not suggest any counsel involvement;
- The board minutes from Aug. 7, 2003, specifically discuss the steps taken by CIBC *management* to investigate the matter. The minutes further say that the assembled group would decide on whether it agreed with *management's* conclusions and strategies – management, not counsel;
- The investigation described in the Aug. 2, 2003, board minutes is described as being conducted by an "independent evaluator" of the Enron transactions and similar transactions that carry reputational and financial risk to CIBC. There is no indication that it was a counsel investigation;
- The minutes from the Aug. 3, 2005, board meeting show that CIBC's general counsel was leading the discussion on internal investigations that were done. But this may only go to show how legal advice was given *based* on the investigations; it does not show that the investigations themselves were led or conducted by counsel.

[29] Based on the above examples cited by the Respondent, there is no suggestion of counsel conducting investigations or requesting them for the purpose of providing legal advice. Of course, it is reasonable to ask: why else would investigations be done other than for legal advice? It seems apparent that CIBC was trying to figure out what happened, and such an investigation would likely be done, at least in part, to determine CIBC's liability. CIBC, however, has the onus of establishing privilege. I do not believe that it has been shown that the

investigations were done or directed by counsel, thus CIBC has failed to meet the burden to establish this aspect of privilege.

[30] The Respondent also suggests that in some cases, CIBC's General Counsel was not acting in his capacity as a lawyer but in his role as a company officer and director of numerous subsidiaries, and that solicitor-client privilege therefore does not apply.[19] There is not enough evidence to conclude that this was the case. The minutes show the General Counsel providing an update on Enron-related matters, and there is no reason to believe he was doing so in any role other than as counsel to CIBC.

Were the investigations done for the purposes of legal advice?

[31] The Respondent argues there is no evidence the investigations were done for the purposes of providing legal advice, saying there is no letter from CIBC to counsel asking for the investigations, nor are there affidavits indicating they were done by counsel for the purpose or providing legal advice.

[32] CIBC says it is clear from the productions that the investigations were done in the wake of Enron's collapse in relation to contemplated and actual litigation. The only reasonable inference, it says, is that the investigations were done under in-house counsel's supervision for the purpose of advising management and the board on matters relating to Enron.

[33] Privilege cannot be established on inferences alone. CIBC has not produced any material that shows the investigations were done under counsel's supervision for the purpose of providing legal advice. As discussed above, while it does indeed seem reasonable to think that internal investigations would have at least some tie-in to providing legal advice, CIBC has not demonstrated how these specific investigations fall into the solicitor-client privilege criteria – it merely asks the Court to infer that the criteria are met.

[34] That inference cannot be made without a reasonable basis to do so. CIBC has the onus of establishing, on a balance of probabilities, that solicitor-client privilege applies to the investigations. It has not done so. There is insufficient

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[19] See *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 10 and *Copthorne Holdings Ltd. v The Queen*, 2005 TCC 491 at para 18.

evidence that the investigations were done or directed by counsel or that they were done for the purpose of giving legal advice. They certainly may have subsequently formed the *basis* for providing legal advice, and such advice would be privileged. But the investigations themselves do not carry the same protection.

Facts can exist independently from a privileged communication

[35] Regardless of whether the investigations meet the solicitor-client privilege test, there are other reasons why the investigations themselves – or at least the parts of them that do not include legal advice – are not privileged.

[36] The Respondent points to the Federal Court's decision in *Belgravia Investments Ltd. v Canada*[20] for the principle that while certain documents may be privileged because they involve the provision of legal advice, facts contained in those documents that are otherwise discoverable will not be privileged.[21] The Federal Court added that no automatic privilege attaches to documents simply because they come into the hands of a party's lawyer.[22] A legal opinion will be privileged, but the facts or documents that happen to be reflected in the opinion will not be privileged if they are otherwise discoverable.

[37] CIBC responds that the internal investigations were done for the main purpose of obtaining legal advice, including getting recommendations based on the facts that were gathered. It points to *Gower v Tolko*,[23] a Manitoba Court of Appeal case, to show that courts have recognized that legal advice also includes ascertaining or investigating the facts upon which the advice will be rendered and that investigation is an important part of legal service if it is connected to providing that legal service.[24] CIBC says its fact-gathering was inextricably linked to the provision of legal advice, and therefore solicitor-client privilege is established.

[38] In *Gower*, however, the Court of Appeal was speaking of fact-gathering that is done *as part of a lawyer*'s *legal services*;[25] in other words, there is still a lawyer

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[20] 2002 FCT 649 (FCTD).
[21] See paras 44-45, citing *Susan Hosiery Ltd. v Minister of National Revenue*, [1969] 2 Ex CR 27, [1969] CTC 353, 69 DTC 5278 at 5282-5283.
[22] At para 46, citing *General Accident Assurance Co. v Chrusz* (1998), 37 OR (3d) 790 (Ont Div Ct) at page 796 (reversed on other grounds (2000), 45 OR (3d) 321 (Ont CA)).
[23] 2001 MBCA 11.
[24] At para 19.
[25] At para 19.

who is conducting or supervising the fact-gathering. As already discussed, there is insufficient evidence that counsel for CIBC was conducting or directing the internal investigations referenced in the productions.

[39] Moreover, courts have been known to divide a lawyer's work product into legal and non-legal parts, with only the former being privileged. In *College of Physicians of British Columbia v British Columbia (Information and Privacy Commissioner)*,[26] a lawyer obtained four expert opinions to help a client assess a complaint against a doctor. The lawyer then prepared memoranda summarizing the opinions of two of the experts and provided her own legal analysis. The B.C. Court of Appeal held that the lawyer was acting in a lawyer's capacity when she obtained the facts necessary to give legal advice to her client, but her summary of the experts' opinions – the facts upon which the analysis was based – was not privileged because those opinions were not privileged on their own since they were communications from the experts to the client. The Court of Appeal concluded that while the lawyer's legal analysis was privileged, the memoranda summarizing the expert opinions were not.

[40] In *Ross v Canada (Minister of Justice)*,[27] a lawyer prepared an investigative report for the Minister of Justice that contained legal advice and recommendations as well as factual findings. The factual findings of the report were produced, but the legal advice and recommendations were redacted on the basis of solicitor-client privilege. The court agreed with this manner of disclosure and upheld the claim for solicitor-client privilege.

[41] It is evident that facts gathered as part of an investigation can be disclosed, while any legal advice arising from those facts remains privileged. Not only is there insufficient evidence that the investigations were conducted or directed by counsel, but there is no reason why the facts gathered as part of the internal investigations cannot be separated from any legal advice given based on the factual findings.

Conclusion

[26] 2002 BCCA 665.
[27] 2013 FC 757.

[42] CIBC has failed to substantiate its broad claim of solicitor-client privilege over the internal investigations. Questions 995, 996 and 1005 must therefore be answered. It is important to note, however, that any portions of the investigations that involved the provision of legal advice will remain privileged; any facts gathered or summaries written, however, must be disclosed.

Issue 2: Has CIBC waived, or should it be deemed to have waived, its right to claim privilege on certain questions?

[43] This issue involves the following questions: 655, 659, 866, 888, 889, 894, 900, 917, 922, 936, 937, 938, 939, 941, 2923, 2924, 3462, 3470 and 3514.

[44] The Respondent says that CIBC has waived solicitor-client privilege by pleading certain conclusions and taking certain discovery positions that put CIBC's state of mind and legal knowledge in issue. The Respondent argues that CIBC relied on legal advice and other privileged communications to arrive at these conclusions.

[45] In particular, the Respondent points to CIBC's position that it was the activities of a CIBC employee, Dan Ferguson, and a CIBC credit committee that represented the source of its legal exposure in the Enron litigation. CIBC used this position to justify its deduction of the Settlement Amounts. The Respondent argues that this position, which relied on legal advice and other privileged communications, put CIBC's understanding of the source of its legal exposure in issue and therefore constituted waiver of solicitor-client privilege.

[46] The Respondent further contends waiver occurred when CIBC disclosed some documents that were partially redacted for privilege. The Respondent says it was prejudiced by not receiving the full disclosure and that legal principles dictate that waiver be found over the remaining privileged portions.

General principles governing waiver

[47] Although the test for claiming solicitor-client privilege has already been noted, it is imperative in the context of waiver to underscore the importance of the privilege.

[48] The Supreme Court of Canada ("SCC") has held that solicitor-client privilege "must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis."[28] The privilege "is part of and fundamental to the Canadian legal system. While its historical roots are a rule of evidence, it has evolved into a fundamental and substantive rule of law."[29] It therefore goes without saying that given solicitor-client privilege's importance, it will not yield easily.

[49] The principles governing waiver are not as clear. Canadian courts have applied various tests for implied waiver, which has led to inconsistent and unpredictable results.[30] This is certainly evident in the parties' submissions in this motion: they cannot agree on the proper test for implied waiver.

[50] The TCC recently dealt with the principles governing waiver in *Gerbro Inc. v The Queen*.[31] Justice Woods quoted *Canada (Citizenship and Immigration) v. Mahjoub*[32] to summarize the general principles on implied waiver:

(a) waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. *S. & K. Processors Ltd. v Campbell Ave. Herring Producers Ltd* (1983), 35 CPC 146, 45 BCLR 218 (SC) (S & K);

(b) where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost. (*S & K*);

(c) in cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at

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[28] *R. v McClure*, 2001 SCC 14 at para 35.
[29] *R. v McClure*, 2001 SCC 14 at para 17.
[30] Adam M. Dodek and Toba Cooper in Adam M. Dodek, *Solicitor-Client Privilege* (Markham: LexisNexis Canada Inc., 2014) at 228, §7.110. This is in many ways a result of courts offering various interpretations of McLachlin J.'s (as she then was) repeatedly cited decision in *S. & K. Processors Ltd. v Campbell Ave. Herring Producers Ltd.*, [1983] 4 WWR 762 (BCSC). See Dodek and Cooper at §7.109-§7.116.
[31] 2014 TCC 179 at para 50.
[32] 2011 FC 887 at para 10.

least to a limited extent. The law then says that in fairness and consistency, it must be entirely waived. (*S & K*);

(d) the privilege will deemed to have been waived where the interests of fairness and consistency so dictate or when a communication between a solicitor and client is legitimately brought into issue in an action. *Bank Leu AG v Gaming Lottery Corp.*, [1999] OJ No 3949 (Lexis); (1999), 43 C.P.C. (4th) 73 (Ont. S.C.) at paragraph 5;

(e) the onus of establishing the waiver rests on the party asserting waiver of the privilege. (*S & K* at paragraph 10).

[51] Furthermore, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require.[33]

[52] Notwithstanding the *Mahjoub* principle in (d) above, I am not convinced that "fairness or consistency" alone are sufficient to lead to waiver.[34] In my view, however, the remaining *Mahjoub* principles are well-supported by the case law, including the fact that the party asserting waiver (in this case the Respondent) has the onus of establishing waiver.

[53] Here the Respondent argues waiver occurred through two separate avenues: first, through CIBC putting its state of mind in issue and relying on legal advice to do so; and second, through CIBC's selective disclosure of privileged material. In some of its submissions, the Respondent itself seemed to mix up these two avenues. It is important to distinguish between them and for the purposes of this decision, I will refer to the first avenue as "implied waiver" and the second avenue as "partial waiver."

Implied waiver

The test

[54] The Respondent and CIBC disagree on the test for implied waiver.

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[33] *S. & K. Processors Ltd. v Campbell Ave. Herring Producers Ltd.*, [1983] 4 WWR 762 (BCSC) at para 6.
[34] See Adam M. Dodek and Toba Cooper in Adam M. Dodek, *Solicitor-Client Privilege* (Markham: LexisNexis Canada Inc., 2014) at 228, §7.109.

[55] The Respondent points to the above principles from *Gerbro Inc.* as well as *Rogers v Bank of Montreal*[35] to say that waiver can be implied where a party has pleaded or advanced its case in a way that makes any legal advice it received relevant in ascertaining what its state of mind was at the relevant time. It also points to *Bank Leu AG v Gaming Lottery Corp*.[36] for the principle that waiver will occur "where the interests of fairness and consistency so dictate or when a communication between a solicitor and client is legitimately brought into issue in an action. When a party places its state of mind in issue and has received legal advice to help form that state of mind, privilege will be deemed to be waived with respect to such legal advice."[37]

[56] *Rogers* is a noteworthy case. The defendant bank asserted that it had relied on a receiver's advice on the law, therefore putting in issue the state of its legal knowledge and, in turn, the nature of the legal advice it received from others in forming that legal knowledge. This led the court to find there was implied waiver over legal advice the bank received. In comparing the bank's defence to the defence in an American decision on waiver, the court focused on the supposed privilege-holder's reliance on the legal advice:

> What underlines both that defense and the defense in this case is that the party claiming the privilege relied upon the advice, in one case of the Government, and in the other case of the Receiver, and acting on that reliance took certain steps. That necessarily involves an enquiry into the corporate state of mind of the Bank when it was induced and decided to act….[38]

[57] CIBC takes a different view of the test for implied waiver. It says the Respondent must establish that:

- CIBC has placed its state of mind in issue by raising an affirmative defence that makes its knowledge or understanding of the law relevant;[39]

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[35] [1985] 4 WWR 508 (BCCA).
[36] (1999), 43 CPC (4th) 73 (ONSC), aff'd (2000) 132 OAC 127 (ONSC – Div Ct).
[37] At para 5.
[38] At para 19.
[39] *Rogers v Bank of Montreal*, [1985] 4 WWR 508 (BCCA). cited with approval in *R. v Campbell*, [1999] 1 SCR 565.

- CIBC relies on its knowledge or understanding of the law to support its state of mind defence by *positively relying* on the privileged communication as part of a substantive position taken in the legal proceedings;[40] and

- Disclosure of the legal advice is "vital or necessary" to the Respondent's ability to challenge CIBC's assertions.[41]

[58] In considering the first two steps in CIBC's proposed test, CIBC emphasizes that a key to implied waiver is there must be reliance on legal advice to resolve an issue at trial. Waiver does not simply occur once a party discloses the fact it received legal advice before taking a course of action; the privilege-holder must have taken a course of action, *relied* on legal advice to do so and somehow placed that reliance in issue at trial.[42] I agree with this interpretation of the waiver jurisprudence. Again, reliance on legal advice in taking a course of action – and then putting that reliance in issue –is crucial. This is what occurred in *Rogers*.

[59] This must be distinguished from a party who simply receives legal advice, forms a particular legal view and then acts. This alone will not lead to implied waiver. There must be reliance on the legal advice and the party must put that reliance in issue. *Gerbro Inc.*[43] is instructive on this point. In that case, the Respondent said that the taxpayer had waived privilege because it pleaded that it had a certain understanding of a proposed legislative amendment. But the Court held that the element of reliance was missing:[44]

> In my view, paragraph 67 does not bring legal advice into issue. This paragraph brings knowledge of the effective date of proposed amendments into issue but it does not state, or even imply, that Gerbro intends to rely on legal advice to establish this knowledge.
>
> It appears that Gerbro has no intention of waiving privilege by relying on this legal advice at trial. Of course, if Gerbro does not waive privilege it takes the risk

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[40] *Guelph (City) v Super Blue Box Recycling Corp.*, [2004] OTC 961 (ONSC) at para 80.
[41] *Gerbro Inc. v The Queen*, 2014 TCC 179 at paras 57-59, and *Superior Plus Corp. v The Queen*, 2015 TCC 132 at para 45.
[42] *Stuart Olson Construction Inc. v Sawridge Plaza Corp.*, [1996] 2 WWR 396 (ABQB) at para 21; *Guelph (City) v Super Blue Box Recycling Corp.*, [2004] OTC 961 (ONSC) at para 108; and *S. & K. Processors Ltd. v Campbell Ave. Herring Producers Ltd.*, [1983] 4 WWR 762 (BCSC) at para 6.
[43] 2014 TCC 179.
[44] At paras 54-55.

> that the trial judge may find that the evidence that was offered is insufficient. But as things currently stand, Gerbro has not brought legal advice into issue.

[60] Justice D'Arcy took the same view of reliance in *Imperial Tobacco Canada Limited v The Queen*:[45]

> The state of mind waiver relates to the situation where a party relies, as part of a claim or defence, on legal advice it has received, where the claim or defence is based, at least in part, on its state of mind. The state of mind waiver arises by implication.
>
> …
>
> Further, a state-of-mind implied waiver requires more than the fact that an appellant's purpose for entering into certain transactions is at issue in an appeal. The implied waiver requires the appellant to take the positive step of relying, in its pleadings or during trial, on legal advice it has previously obtained from its counsel.…

[61] In short, there is no implied waiver without reliance.[46] A privilege-holder's state of mind must be in issue in a way that makes any legal advice it received relevant, and the privilege-holder must place its reliance on that legal advice in issue as part of its position for trial.

[62] The third step of CIBC's proposed test brings an element of materiality into the implied waiver test. This suggested step says disclosure of the legal advice must be "vital or necessary" to the Respondent's ability to challenge CIBC's assertions.

[63] CIBC points to two cases in particular to substantiate this proposal. In *Creative Career Systems Inc. v Ontario*,[47] the Court said that the test for implied waiver requires that:

> 30 … (1) the presence or absence of legal advice is relevant to the existence or non-existence of a claim or defence; which is to say that the presence or absence of legal advice is material to the lawsuit; and …

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[45] 2013 TCC 144 at paras 85 and 92.
[46] Adam M. Dodek and Toba Cooper in Adam M. Dodek, *Solicitor-Client Privilege* (Markham: LexisNexis Canada Inc., 2014) at 232, §7.122, and Robert W. Hubbard et al, *The Law of Privilege in Canada* (Toronto: Canada Law Book, 2006) (loose-leaf revision 29), at 11.220.50.
[47] 2012 ONSC 649.

> (2) the party who received the legal advice must make the receipt of it an issue in the claim or defence.[48]

[64] It then points to *Gerbro Inc.*, which said:

> The parties referred me to a great many judicial decisions regarding implied waiver of privilege. Each case appears to depend on its own particular facts, and the general approach that the courts have taken recognizes the importance of upholding solicitor-client privilege.
>
> In my view, these judicial decisions generally follow the approach described by the British Columbia Court of Appeal in *Procon Mining & Tunnelling Ltd. v McNeil*, 2009 BCCA 281 at para 19: '[t]o establish waiver, the disclosure sought must be "vital" or necessary to the opposing party's ability to answer an allegation.
>
> The bar is set high for a court to require disclosure when the legal advice has not been put in issue by a party. In this motion, the Crown has not established that the legal communications are so important to their case that they should be divulged.[49]

[65] The Respondent says there is no such third step, and that *Procon Mining & Tunnelling Ltd.*, which *Gerbro Inc.* relied on to say that disclosure must be "vital or necessary," represented a misreading of the jurisprudence.[50]

[66] In *The Queen v. Superior Plus Corp*., 2015 FCA 241, the Federal Court of Appeal addressed this issue. The Court held that the "vital or necessary" aspect is examined, but it does not represent a unique or separate relevance test:

> [18] In *Procon*, the British Columbia Court of Appeal came to the conclusion that the legal advice sought did not have to be disclosed because it was not in any way relevant to the state of mind which had been plead by the plaintiff and which had allegedly given rise to an implied waiver (*Procon* at para. 17). That is the context in which the Court said: "[t]o establish waiver, the disclosure sought must be "vital" or necessary to the [requesting[party's ability to answer an allegation." (*Procon* at para. 19)

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[48] At para 30. This test was endorsed in *Leggat v Jennings*, 2015 ONSC 237 at para 47 and *Goodswimmer v Canada (Attorney General)*, 2015 ABCA 253 (CanLII) at para 13.
[49] At paras 57-59. These points were repeated in *Superior Plus Corp. v The Queen*, 2015 TCC 132 at para 45.
[50] In particular, the Respondent says that the court in *Procon* misread *Doman Forest Products Ltd. v GMAC Commercial Credit Corp.*, 2004 BCCA 512 to insert the "vital or necessary" element.

> [19] To be clear, this test does not operate as a different and more demanding standard for determining whether a disclosure of privileged information has given rise to an implied waiver, but as a way of ensuring that an implied waiver not be pronounced unless and until it becomes necessary to do so in order to prevent the unfairness and inconsistency which the doctrine of implied waiver is intended to guard against.

[67] The "vital or necessary" aspect therefore does not operate as a separate step of the implied waiver test, but it can be used to inform the relevance analysis. In my view, this fits within the existing principles governing the threshold for finding implied waiver, which I have outlined above and will use to determine whether implied waiver can be found.

[68] I will turn now to the application of the implied waiver test.

Application of the implied waiver test

[69] The Respondent says CIBC has put its state of mind in issue in a manner that leads to waiver in three broad ways.

"Legally and commercially prudent to settle"

[70] In its pleadings for the tax appeals in issue, CIBC pleaded that after being sued over the Enron transactions, CIBC concluded "it would be legally and commercially prudent" for it to settle the Newby and MegaClaim litigations.[51]

[71] The Respondent says these pleadings amount to putting CIBC's state of mind in issue on whether settlement was legally prudent. The Respondent says that this assertion in the pleadings has not been admitted and is still in issue, and the legal advice behind CIBC's understanding of its legal exposure is relevant and should be accessible to the Respondent so that the Respondent can examine the state of CIBC's legal knowledge. It adds that it would be unfair to not allow the Respondent access to information or communications that bear on CIBC's understanding.

[72] CIBC responds that this pleading is not tantamount to putting its state of mind in issue for the purposes of implied waiver. All CIBC has done is plead as a

[51] For example, see paras 20 and 25 of CIBC's pleadings in 2010-2864(IT)G.

fact that it was legally and commercially prudent to settle. CIBC has not raised an affirmative defence that makes its state of mind relevant to resolving an issue at trial, and the pleadings do not in any way rely on legal advice CIBC received in reaching this conclusion about settlement. It adds that the test for implied waiver is not about fairness.

[73] I do not believe that this pleading leads to implied waiver. It appears to me that CIBC is pleading as a fact that was legally and commercially prudent to settle. Also, I believe that CIBC has placed no reliance on legal advice it received in forming this conclusion, and it has certainly not put any such reliance in issue in this case.

Denying certain Respondent assumptions

[74] In its pleadings, the Respondent pleaded assumptions that CIBC did not assume certain risks through providing some credit risk analysis services, nor did CIBC assume any risk through the credit committee's functions.[52] CIBC denied those assumptions. The Respondent now says that CIBC's denial of these assumptions leads to CIBC putting its state of mind in issue, since CIBC is taking a view of whether it incurred specific risks.

[75] CIBC says that denying assumptions does not lead to the inference that CIBC is relying on legal advice. It further says that it will not be relying on any legal advice received during the Enron litigation in order to demolish these assumptions.

[76] Again, I do not believe that this pleading leads to implied waiver. I believe that CIBC has placed no reliance on legal advice it received in forming this conclusion, and it has not put any such reliance in issue.

CIBC statements about its understanding of the source of its legal exposure in the Enron litigation

[52] For example, see paras 16.5 and 16.6 of the Respondent's Fresh as Amended Reply in 2010-2864(IT)G.

[77] This is the most significant of the statements that the Respondent says leads to implied waiver. In essence, the Respondent argues that in CIBC's notice of objection and at discovery, CIBC said its most significant Enron-related liability exposure for the entire CIBC group of entities was created by the parent bank's (CIBC's) own conduct, and that the focus of the Enron litigation was CIBC's own conduct, not that of its subsidiaries or affiliates. This position is central to the issue of whether CIBC properly allocated the deduction of the Settlement Amounts. CIBC says it was proper for it to deduct the Settlement Amounts because it was its own conduct that was at issue, while the Respondent suggests that other CIBC subsidiaries and affiliates were actually the entities involved in the conduct that led to the Enron litigation.

[78] The Respondent says CIBC relied on privileged communications to demonstrate its understanding of the source of its legal exposure. As such, it says there is implied waiver over these privileged communications. CIBC obviously denies that any implied waiver occurred.

[79] As a preliminary issue, CIBC says that statements in its notice of objection and at discovery cannot lead to waiver because they are not in the pleadings. This is incorrect. A party's state of mind can be put in issue through affidavit evidence, discovery statements or in other ways; the pleadings are not the only venue where state of mind can be put in issue.[53]

[80] The waiver issue here is whether CIBC, in stating its position on the source of its legal exposure, has put in issue its reliance on legal advice to justify its position. It is clear from the notice of objection and statements at discovery that CIBC's position is that it was its own conduct, and in particular the role of the credit committee and Dan Ferguson, that resulted in the most significant exposure or liability in the Enron litigation and that this was the focus of the litigation.

[81] The Respondent says that it is evident from minutes of various board meetings that legal advice and other privileged communications contributed to CIBC's state of mind in coming to this conclusion on its liability exposure and the focus of the litigation. These minutes involve various discussions, mostly led by counsel, of various aspects of the litigation and eventual settlements. The minutes,

[53] *Brown v Clark Wilson LLP*, 2014 BCCA 185 at para 30.

many of which were disclosed during the audits that led to the tax appeals, clearly show discussions of legal options and considerations.

[82] At this point, it is important to mention that prior to settling the Newby and MegaClaim Litigations, CIBC had entered an agreement with the U.S. Department of Justice ("DOJ") related to the Enron transactions. That agreement placed certain restrictions on possible defences CIBC could use in the subsequent Enron litigation.

[83] At discovery in these appeals, at question 5591, the Respondent asked CIBC's nominee if, with respect to CIBC's view of Dan Ferguson's conduct, there was any evidence besides the board minutes and the U.S. DOJ agreement about the constraints that the DOJ agreement created in defending the Newby litigation. CIBC's counsel answered no: it was the counsel briefings in the board minutes and the DOJ agreement that informed CIBC's views of Dan Ferguson's conduct and of any impact the agreement had on defending the Newby litigation.

[84] The Respondent says it is this answer in particular that shows that CIBC is relying on legal advice, being counsel briefings to the board, in forming its state of mind regarding the source of its liability exposure and the focus of the Enron litigation.

[85] CIBC says that all of these statements do not put its state of mind in issue, nor do they refer to legal advice or signal any intention to rely on legal advice at trial. The statements are merely factual statements about the status and focus of the Enron litigation and about how CIBC saw its legal exposure. CIBC adds that certain facts will be used at trial to justify its position (including the DOJ agreement itself), but that legal advice will not be relied upon. There can therefore be no waiver arising from the statements in the notice of objection and at discovery.

[86] I agree with the position taken by CIBC. It is true that CIBC will likely advance the position at trial that the focus of the Enron litigation, and the source of CIBC's liability, was CIBC's own conduct, not that of its subsidiaries and affiliates. But this is largely a factual issue. CIBC is not placing its reliance on legal advice in issue in order to justify its position. It seems obvious that its views on its liability exposure and the focus of the Enron litigation were informed by legal advice, but simply taking a position based on legal advice does not mean that

the legal advice can be accessed. CIBC's answer to question 5591 merely states that, among other things, legal advice informed its position. But that answer does not amount to putting its reliance on legal advice in issue in these appeals, nor do any of the other statements the Respondent impugns here. CIBC has not said or shown in any way that it is relying on legal advice to justify its positions regarding liability exposure and the focus of the litigation. There can therefore be no implied waiver.

[87] I believe that CIBC did not impliedly waive its privilege over any of the documents and communications in issue.

[88] On a further point, certain board minutes (which appear to be from 2005 board meetings) were disclosed by CIBC during the audit but then later redacted during discovery. These minutes must remain fully disclosed to the extent they were disclosed during the audit. I understood from the Respondent's counsel that CIBC's only issue was it did not want the audit disclosure to lead to waiver over other privileged documents, hence the subsequent redactions. CIBC's counsel did not dispute this point, and I have now found that there was no waiver over other privileged documents. Since CIBC did disclose these minutes during the audit, they must remain disclosed to this extent. To the extent that any claim of privilege over the disclosed minutes is being made after the fact, that claim cannot stand.

Partial waiver

The test

[89] This is the second avenue by which the Respondent says that CIBC waived privilege over certain documents and communications. It points to, among other cases, a decision of this court[54] for the principle that if a party voluntarily discloses and seeks to rely on parts of privileged communications, there will be waiver over the remainder of the communications.

[90] CIBC says no such waiver occurred. To establish partial waiver, CIBC says the Respondent must show that: without the additional information, the information disclosed is somehow misleading and the party seeking disclosure will be prejudiced if the privilege is upheld; unfairness or inconsistency has resulted

[54] *Richard A Kanan Corp. v The Queen*, 2011 TCC 211 at para 24.

from the disclosure that has been made in the absence of additional disclosure; and it is vital or necessary that the additional disclosure be ordered.

[91] Waiver of privilege for part of a communication can be held to be waiver for the entire communication.[55] What will then lead to partial waiver?

[92] In *Bone v Person*,[56] the Manitoba Court of Appeal said that a party is allowed to waive solicitor-client privilege on a limited basis:

> 10. … However, a reasonable balance must be struck so that the court and the other parties are not misled. The party making the disclosure cannot pick and choose between the favourable and the unfavourable. In *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1995), 46 C.P.C. (3d) 110 (Ont.C.J.,G.D.) Sharpe J., as he then was, put the matter this way, at paras. 41-42:
>
> > It is plainly not the law that production of one document from a file waives the privilege attaching to other documents in the same file. It must be shown that without the additional documents, the document produced is somehow misleading.…
> >
> > The waiver rule must be applied if there is an indication that a party is attempting to take unfair advantage or present a misleading picture by selective disclosure.

[93] This holding was endorsed by the Federal Court of Appeal in *Slansky v Canada (Attorney General)*,[57] which added that "[p]rivilege is not a swinging door, open when there is information to communicate, but slammed shut when information is sought. . . . A party may not cherry-pick privileged communications, disclosing what is helpful to it and withholding the rest…"[58]

[94] It is important to note that partial waiver will only occur when the privileged communications relate to the same subject matter as the formerly privileged but

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[55] *S. & K. Processors Ltd. v Campbell Ave. Herring Producers Ltd.*, [1983] 4 WWR 762 (BCSC) at para 6.
[56] [2000] 5 WWR 199 (MBCA).
[57] 2013 FCA 199.
[58] At para 261.

now-disclosed communications.[59] This Court has previously held that a narrow view should be taken of whether the subject matter is the same:

> 25. *Phipson* suggests that the waiver principle is to be applied narrowly. At para. 26-29:
>
> > What constitutes "the issue in question" will always be a question of fact. It is necessary to identify the purpose of the waiver, and to see what fairness demands in the circumstances. The case law shows that without exception the courts have not extended the ambit of the waiver beyond what is necessary and if in doubt have taken a relatively restrictive view of "the issue in question".
>
> …
>
> 28. I would also note that a narrow application of the waiver rule is consistent with the general approach that Canadian courts have taken with respect to solicitor-client privilege: *Descoteaux v. Mierwinski*, [1982] 1 S.C.R. 860 and *Philip Services Corp. v. Ontario Securities Commission* (2005), 77 O.R. (3d) 209 (ON S.C.).[60]

[95] From the foregoing it can be seen that simply disclosing some privileged information will not automatically lead to waiver over closely related information. If the information over which privilege has been waived can stand alone, severed from the remaining documents or file, then the remaining privilege will stand.[61]

Application of the test

CIBC statements about its understanding of the source of its legal exposure in the Enron litigation

[96] These statements are the same statements dealt with above in the implied waiver analysis. The Respondent points to CIBC's disclosure of the privileged board minutes to say that such disclosure leads to partial waiver over other

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[59] *S. & K. Processors Ltd. v Campbell Ave. Herring Producers Ltd.*, [1983] 4 WWR 762 (BCSC) at para 6, and *Leadbeater v Ontario* (2004), 70 OR (3d) 224 (ONSC) at para 68.
[60] *MIL (Investments) S.A. v The Queen*, 2006 TCC 208 at paras 25 and 28.
[61] Adam M. Dodek and Toba Cooper in Adam M. Dodek, *Solicitor-Client Privilege* (Markham: LexisNexis Canada Inc., 2014) at 212, §7.69. See also *Nova Aqua Salmon Ltd. Partnership (Receiver and Manager of) v Non-Marine Underwriters, Lloyd's London* (1994), 135 NSR (2d) 71, 50 ACWS (3d) 557 (NSSC) at para 10 and *Power Consolidated (China) Pulp Inc. v British Columbia Resources Investment Corp.*, [1989] 2 WWR 679 (BCCA).

privileged communications. It says that if CIBC is going to rely on privileged material that it voluntarily disclosed during the audit, then it should not get to pick and choose which privileged material it can rely on. The Respondent says it is unfair to limit the Respondent's exploration of the veracity of CIBC's claim to only the documents that CIBC discloses. Any additional privileged material on the same subject matter should therefore be disclosed based on the principles governing partial waiver.

[97] CIBC says that providing the board minutes was not selective disclosure that leads to partial waiver. Instead, the minutes were provided in response to an audit query that asked CIBC to make arrangements for the Canada Revenue Agency ("CRA") to review board minutes from CIBC's 2005 tax year. CIBC adds that this scenario is more akin to that in *MIL (Investments) S.A. v The Queen*.[62]

[98] In *MIL*, the taxpayer made some voluntary disclosure in response to a CRA request during the audit. The disclosure included correspondence where lawyers gave advice on the issue the auditor was asking about (the validity of a trust) as well as proposed transactions in a planning memorandum. The planning memorandum appeared to have been prepared in connection with the transactions that were the subject of the tax appeal. The taxpayer waived privilege over the correspondence but not the planning memorandum. The Respondent argued the voluntary disclosure led to waiver over the planning memorandum.

[99] The Court held that it was not unfair for the taxpayer to maintain privilege over the planning memorandum. The only purpose of the voluntary disclosure, the Court ruled, was to provide information on another issue that the auditor had asked about, not to provide insight into the legal advice on the proposed transactions. Moreover, the taxpayer voluntarily waived privilege in response to a specific request from the auditor. The legal advice in the correspondence was only disclosed because it happened to be in the same correspondence as the issue the auditor was asking about.[63] The Court concluded:

> The respondent suggests that the planning memorandum might reveal why the validity of the trust was the subject of such scrutiny in the first place. Although this is possible, there is nothing on the face of the material before me that would suggest it. Unless the respondent can provide some basis for the suggestion that

[62] 2006 TCC 208.
[63] See paras 30-41.

> the appellant is hiding something, I do not think that it is appropriate to apply the waiver principle, which is founded on the basis of fairness.
>
> If there were a real doubt as to whether the appellant was hiding something, the respondent could have suggested that I review the planning memorandum. There is precedent for this in one of the earlier cases that was referred to me but the respondent did not suggest it."[64]

[100] The Respondent has made no similar review request in this motion.

[101] I agree with CIBC's submissions on this point. CIBC disclosed the board minutes for a specific purpose in response to a specific query. There is certainly some similarity to *MIL*, but not entirely. In *MIL*, the Respondent said that even though CRA had asked for disclosure relating to one subject area (a trust's validity), it should get disclosure relating to another subject area (advice on the proposed transactions). Here, the Respondent says disclosure relating to one subject area (counsel briefings in the board minutes) entitles it to the information that led to the development of those briefings. Still, the point is well-taken that CIBC's disclosure was a response to a specific question.

[102] Moreover, and perhaps most crucially, the Respondent has not shown that the disclosures are misleading in any way. They have only asserted that it would violate the principles of fairness and consistency to require waiver over the remaining documents. But simply because CIBC opened the door to some disclosure does not mean that the Respondent gets to kick the door down. There is insufficient evidence of selective disclosure that is misleading in any way. CIBC is entitled to keep the remaining information privileged, and any redactions based on privilege are allowed to stand.

Individual questions about redacted board minutes

[103] The Respondent also seeks an order to compel answers to certain individual questions related to the redacted board minutes.

i. Questions 3462, 3470 and 3514

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[64] At paras 42-43.

[104] While there is no waiver of privilege related to these questions, CIBC is claiming litigation privilege over these questions. For reasons discussed below, I find that the litigation privilege claim cannot be sustained.

[105] In response to question 3462, CIBC says that it "appears likely that the discussion is informed by legal advice." This answer is not sufficient to claim solicitor-client privilege, if that is indeed what CIBC is claiming. If a claim of solicitor-client privilege is being made, CIBC must make it more thoroughly. I agree with the Respondent that any conclusions reached by the board are not covered by solicitor-client privilege. Any legal advice, however, is privileged.

[106] Therefore, to the extent that these questions are not asking for legal advice, CIBC must answer these questions.

ii. Questions 888 and 894

[107] There is no waiver for these questions, but it remains in issue whether these questions are privileged in the first place. I will deal with this issue further below.

CIBC's understanding of its liability exposure under U.S. law

[108] This involves questions 917, 936 and 939.

[109] In its pleadings, CIBC referred to its possible status as a "control person," which could have potentially led to liability under U.S. law for the actions of its subsidiaries.[65] The Respondent then asked for CIBC's risk assessment but says that CIBC only partially disclosed the litigation risk analysis. It says that if CIBC is going to rely on that risk analysis, the Respondent is entitled to see the rest of the analysis that is protected by privilege.

[110] I find that there is no partial waiver here for the same reasons as above. The Respondent has not shown that the disclosure that was made is misleading without the remaining privileged material.

[111] In the event that the Respondent is claiming that there was implied waiver over this litigation risk analysis, that claim also does not hold water. CIBC has not

[65] See paragraph 19, footnote 11, of CIBC's Notice of Appeal in 2010-2864(IT)G.

placed any reliance on legal advice in issue in taking a position on potential U.S. liability. No implied waiver can therefore be found.

[112] There is one further note on question 917. This question asks for CIBC's position as to its true financial exposure on certain claims in the Enron litigation. The Respondent takes issue with CIBC's response that if CIBC intends to rely on these points of law to support its argument, it will deliver an expert report in keeping with the *Rules*. I see no reason to take issue with CIBC's answer. CIBC may file an expert report, and the Respondent can question CIBC on that report and fit these questions into the Respondent's view of where CIBC's legal exposure resided. This question therefore requires no further response.

Conclusion

[113] Questions 3462, 3470 and 3514 must be answered to the extent that they are not asking for legal advice. There is no waiver of privilege for any of the remaining questions related to this issue.

Issue 3: Can CIBC rely on settlement privilege to protect information and documents arising from the negotiation and conclusion of the Newby and MegaClaim settlements?

[114] This issue involves questions 845, 848, 849, 866, 871, 894, 900, 911, 922, 923, 927, 928, 3119 and 5757.

[115] Most, if not all, of these questions are about CIBC's representations to the Newby plaintiffs about which CIBC entities had the ability to pay any settlement. The Respondent generally wants to know more about these representations. CIBC intends to lead expert evidence at trial on the ability to pay issue, and the Respondent says that since the issue is in play, the Respondent should have access to related materials. The Respondent also asked questions about: material CIBC relied on during mediation; communications between CIBC and the Newby plaintiffs; production of certain materials used during mediation; and production of a summary of the mediation.

[116] CIBC claims settlement privilege over all material arising from the negotiation and conclusion of the Newby and MegaClaim settlements. It says that if a third party (the Respondent) can attack the privilege and access information from the settlement negotiations, then the idea of settlement privilege providing a safe space to conduct negotiations is an illusion.

[117] As will be seen below, the real issue is not whether settlement privilege applies on its face, but whether there is an exception to the privilege that allows the Respondent to access the information it seeks.

General principles governing settlement privilege

[118] Settlement privilege is a class privilege that applies even after a settlement is reached.[66] It is clear that generally, documents prepared to assist with mediation fall under settlement privilege.[67] So, too, do negotiations undertaken for the purpose of settlement.[68]

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[66] *Union Carbide Canada Inc. v Bombardier Inc.*, 2014 SCC 35.
[67] *Ontario (Liquor Control Board) v Magnotta Winery Corp.*, 2010 ONCA 681.
[68] *Sable Offshore Energy Inc. v Ameron International Corp.*, 2013 SCC 37 at para 14 and *Globe and Mail v Canada (Attorney General)*, 2010 SCC 41 at para 80.

[119] The rationale for settlement privilege is important to remember: settlement discussions and conclusions must be protected in order to allow for full and frank exchanges between parties.[69] The privilege "is intended to encourage amicable settlements and to protect parties to negotiations for that purpose. It is in the public interest that it not be given a restrictive application...."[70]

Question 871: Production of the mediation agreement

[120] In this question, the Respondent seeks production of a mediation agreement with the Newby plaintiffs. It says this question arises because of CIBC's claims that any waiver of privilege required the Newby plaintiffs' consent. The Respondent says CIBC has not substantiated that claim or approached the Newby plaintiffs for their consent, therefore the mediation agreement should be produced to see if legitimate confidentiality concerns exist.

[121] The Respondent points to a decision of this Court that dealt with a similar situation. In *Fink v Canada*,[71] the taxpayers were shareholders of a company that had negotiated a settlement in separate litigation with the Ontario Securities Commission. At issue in the tax appeals was the taxability of payments the taxpayers received as shareholders. The Respondent sought the disclosure of settlement communications from the prior separate litigation; the taxpayers argued that settlement privilege protected the communications. Justice Bonner wrote:[72]

> … [W]hen the ambit of the [settlement] privilege is properly understood, it is evident that the privilege does not attach to cases where the discussion or settlement document is relevant to establish not the liability of a party to the settlement for the conduct which gave rise to the dispute but rather to arrive at a proper interpretation of the agreement itself.…

[122] Since the Respondent in this motion indeed wants an interpretation of the settlement document, it argues that Justice Bonner's decision allows disclosure of the mediation agreement. The Respondent further says Justice Bonner's decision is consistent with a recent Ontario decision,[73] which held that if information will not

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[69] *Globe and Mail v Canada (Attorney General)*, 2010 SCC 41 at para 78.
[70] *Middelkamp v Fraser Valley Real Estate Board* (1992), 96 DLR (4th) 227 (BCCA).
[71] [2002] TCJ No 712 (TCC).
[72] At para 28.
[73] *R v Nestlé Canada Inc.*, 2015 ONSC 810.

be used to cause prejudice or risk to the party whose information it is, then there is no rationale for maintaining settlement privilege.[74]

[123] It is certainly true that *Fink* provides a basis for producing the mediation agreement in order to interpret it. But generally speaking, overruling settlement privilege requires a "competing public interest" to outweigh the public interest in encouraging settlement.[75] There is no competing public interest in interpreting the agreement when the only reason for interpretation is to see if confidentiality concerns exist. It is already apparent that settlement privilege protects the mediation agreement. CIBC is clearly not waiving its privilege over the document, therefore even if for some reason the Newby plaintiffs consented to disclosure, the issue is moot because CIBC offers no such consent.

[124] While *Nestlé Canada Inc.* does support the principle the Respondent suggests, it is not an analogous case. The Court there found that the parties who were contesting disclosure would not suffer any prejudice from that disclosure since they were not involved in the subsequent litigation. In this case, CIBC could certainly be prejudiced by disclosure.

[125] Moreover, the mediation agreement itself does not go to issues that are at the "heart of this litigation" and "crucial to a proper resolution of the matters," as one decision ruled in ordering production of settlement documentation,[76] nor does the mediation settlement change the landscape of the litigation.[77]

[126] The mediation agreement therefore remains privileged and CIBC is not required to answer this question.

Is there an applicable exception to the settlement privilege?

The principles governing exceptions

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[74] At paras 44, 47 and 48.
[75] *Sable Offshore Energy Inc. v Ameron International Corp.*, 2013 SCC 37 at para 19.
[76] *Ontario (Ministry of Correctional Services) v McKinnon*, 2010, ONSC 3896 (CanLII).
[77] *Moore v Bertuzzi* (2010), 99 CPC (6th) 287 (Ont SCJ).

[127] The Respondent says that the mediation materials and questions fall into an exception to settlement privilege. It says this exception allows documents used in a settlement between Party A (the Newby/MegaClaim plaintiffs) and Party B (CIBC) to be used in unrelated litigation between Party B (CIBC) and Party C (the Respondent). It points to cases in Ontario[78] that reference Sopinka, Lederman and Bryant's *The Law of Evidence*[79] to come up with the following exception:

> The exceptions to the rule of privilege find their rationale in the fact that the exclusionary role was meant to conceal an offer of settlement only if an attempt was made to establish it as evidence of liability or a weak cause of action, not when it is used for other purposes. Where documents referable to the settlement negotiation or the settlement document itself have relevance apart from establishing one's liability, and apart from showing the weakness of one party's claim in respect of those matters, the privilege does not bear production.

[128] In other words, if material ordinarily covered by settlement privilege is not going to be used as evidence of either CIBC's liability in the Enron litigation or of a weak defence in the Enron litigation, then the material can be disclosed. The Respondent also points again to the decision in *Nestlé Canada Inc.*,[80] which held that if information will not be used to cause prejudice or risk to the party whose information it is, then there is no rationale for maintaining settlement privilege.[81]

[129] CIBC's general argument is that none of the cases cited by the Respondent create an exception to settlement privilege as far as this motion is concerned. For example, it says *Sabre Inc.* concerned only a settlement agreement, yet this motion is not about settlement documents but about information related to negotiations. Regarding *Nestlé Canada Inc.*, it says that was a criminal competition law case that found that settlement privilege could not prevail over an accused's right to full answer and defence, a public interest that is not at stake in this motion.

[130] In general, to come within any exception to settlement privilege, the party seeking disclosure must show that:[82]

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[78] *Mueller Canada Inc. v State Contractors Inc.* (1989), 71 OR (2d) 397 (Ont HCJ), and *Sabre Inc. v International Air Transport Assn.*, [2009] OJ No 903 (ONSC), which quotes *Mueller Canada* at paras 20-22.
[79] Sidney N. Lederman et al, *The Law of Evidence in Canada*, 4th ed (Markham: LexisNexis Canada Inc., 2014) at para 14.343, page 1044.
[80] *R v Nestlé Canada Inc.*, 2015 ONSC 810.
[81] At paras 44, 47 and 48.
[82] *Sable Offshore Energy Inc. v Ameron International Corp.*, 2013 SCC 37 at para 19.

> …on balance, 'a competing public interest outweighs the public interest in encouraging settlement' (*Dos Santos Estate v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4, 207 B.C.A.C. 54, at para. 20). These countervailing interests have been found to include allegations of misrepresentation, fraud or undue influence (*Unilever plc v. Procter & Gamble Co.*, [2001] 1 All E.R. 783 (C.A.), *Underwood v. Cox* (1912), 26 O.L.R. 303, and preventing a plaintiff from being overcompensated (*Dos Santos*).

[131] The jurisprudence on exceptions has come from two avenues: *Middelkamp*[83] in B.C., and *I. Waxman*[84] in Ontario.

[132] *Middelkamp* emphasized that settlement privilege was crucial to the public interest in encouraging settlements.[85] The B.C. Court of Appeal held that this public interest generally protected settlement documents and communications from being produced to third parties. The Court also noted that there were exceptions to this rule, including where the fair trial of most issues requires broad disclosure of relevant material.[86] A concurring judgment in *Middelkamp* added that disclosure to third parties of settlement communications arising from a specific action should not be ordered if "the disclosure could fairly be said to inhibit the parties from settling that action or any other actions." *Middelkamp*'s line of cases eventually led to the SCC stating that overruling settlement privilege requires a "competing public interest" to outweigh the public interest in encouraging settlement.[87]

[133] *I. Waxman* led to a line of cases that emphasized a particular exception to settlement privilege. In that decision, the Ontario Court of Appeal stated the general rule that settlement privilege protects communications from disclosure to third parties.[88] The Court of Appeal then added that certain exceptions existed and listed cases explaining those exceptions.

[134] More than 20 years later, *Mueller*[89] expanded on what these exceptions in *I. Waxman* were about:

> … In discussing those exceptions, Sopinka and Lederman, op. cit., at p. 201 say:

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[83] *Middelkamp v Fraser Valley Real Estate Board* (1992), 96 DLR (4th) 227 (BCCA).
[84] *I. Waxman & Sons Ltd. v Texaco Canada Ltd.*, [1968] 2 OR 452-453 (CA).
[85] At para 18.
[86] See paras 11 and 19.
[87] *Sable Offshore Energy Inc. v Ameron International Corp.*, 2013 SCC 37 at para 19.
[88] At paragraph 2.
[89] *Mueller Canada Inc. v State Contractors Inc.* (1989), 71 OR (2d) 397 (Ont HCJ).

> The aforesaid exceptions to the rule of privilege find their rationale in the fact that the exclusionary rule was meant to conceal an offer of settlement only if an attempt was made to establish it as evidence of liability or a weak cause of action, not when it is used for other purposes.
>
> … Where documents referable to the settlement negotiations or the settlement document itself have relevance apart from establishing one party's liability for the conduct which is the subject of the negotiations, and apart from showing the weakness of one party's claim in respect of those matters, the privilege does not bar production.[90]

[135] This led courts to subsequently find exceptions to settlement privilege where third parties sought privileged communications for a purpose other than: establishing a party's liability for the conduct at the centre of the settlement negotiations; and demonstrating the weakness of one party's claim relating to that conduct.[91]

[136] This is the exception the Respondent now seeks to rely upon. It says the communications it seeks will not be used to establish CIBC's liability for its conduct in the Enron transactions (which was the subject of the Newby and MegaClaim Litigations) but will be used in the entirely separate tax litigation. Nor will the communications be used to demonstrate the weakness of CIBC's claims relating to its conduct in the Enron transactions; again, those questions were put to rest with the Newby and MegaClaim settlements.

[137] There appears to be only one case from the Federal Courts that has explored both *Middelkamp* and *I. Waxman*. In *Bertram v Canada*,[92] the Federal Court of Appeal endorsed both decisions, and noted that there is an exception to settlement privilege if the privilege is wrongly being used to protect evidence of misrepresentation or dishonest dealing. After quoting from *Middelkamp*, the Court of Appeal noted:

> These quotations make it plain in my view that the concern of the Courts is to protect parties from being embarrassed by attempts at concession or compromise

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[90] At paras 12-13.

[91] *Stevenson v Reimer*, [1993] OJ No 2440 (Ont Gen Div) at para 16; *Seanco Investments Inc. v Betovan Construction Ltd.*, [2006] OJ No 274 (Ont SCJ) at paras 43-44 and 47; *Sabre Inc. v International Air Transport Assn.*, [2009] OJ No 903 (ONSC) at para 22.

[92] [1996] 1 FC 756.

> or even by confessions of weakness. In short, what parties say against their interest during negotiation is without prejudice in the sense that it cannot subsequently be used against them. The purpose of the rule, however, is not to protect dishonest dealing and there is no policy reason for excluding what one party puts forward in its own interest and to the prejudice of the other. …[93]

[138] A separate Federal Court decision is also instructive on the exception. In *Samson Indian Nation and Band v Canada*,[94] the Respondent was making a similar argument as the Respondent in this motion: that documents protected by settlement privilege could be removed from the privilege's cover if they were not being used to demonstrate the weakness of the privileged party's case. While MacKay J. declined to decide if the exception applied, he made a useful comment: "…I note in passing that the Crown's argument, in my view, gives little or no weight to the intent of the party creating a document at the time it is created, while emphasizing the intent for use of the document by the other party at a later time."[95] This raises a pertinent issue with exceptions: they involve a *post-hoc* analysis that does not necessarily consider what the party claiming privilege might have done had it known that the documents could be used in later litigation, even if that litigation does not involve precisely the same subject matter as the settlement negotiations.

[139] In this Court, the only decision aside from *Fink* that appears to have dealt with the exception is *Tremblay Estate v Canada*.[96] In that case, the Respondent sought copies of all settlement agreements and documents relating to those agreements stemming from litigation between the taxpayer and a third party. Justice Little quoted *Fink*, and concluded that because the settlement agreements and documents could contain information necessary to arrive at a proper interpretation of the issue in the tax litigation, the agreements and documents should be disclosed.

[140] *Tremblay Estate* has yet to be cited by any other reported case. It did not delve deeply into the rationale for the exception or engage in a significant weighing of the interests; the Court simply concluded that that the settlement information could help resolve the tax litigation and, based on *Fink*, the reliance on privilege was unnecessary. But the decision demonstrated that settlement privilege

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[93] At para 26.
[94] [2000] FCJ No 127 (FCTD).
[95] At para 16.
[96] 2008 TCC 500.

could be lifted when information previously protected by the privilege was necessary to arrive at a proper interpretation of the issue in the tax litigation.

[141] In sum, the *Middelkamp* and *I. Waxman* line of cases offer specific examples of when settlement privilege can be lifted. Both focus on the public interest in promoting settlement and protecting settlement communications from third parties. There is a small distinction between them, however. The *Middelkamp* decision and its progeny, which have been noted by the SCC, raise the issue of requiring a competing public interest to outweigh the public interest in promoting settlement in order for settlement privilege to be lifted. Conversely, the *I. Waxman* line of cases chose to adopt Sopinka et al.'s underlying rationale that the privilege can be breached if the communications will not be used to demonstrate a party's liability or a weak claim in relation to the specific conduct that was the subject of the settlement. These cases do not explicitly discuss the need for a competing public interest to overturn settlement privilege.

[142] This does not mean that the *I. Waxman* cases ignore whether a competing public interest outweighs the interest in promoting settlement. Indeed, it could be said that in adopting the exception that the Respondent seeks to rely on in this motion, these cases considered that the public interest in having full access to material in order to have a full and fair trial outweighed the public interest in promoting settlement, particularly when there would be no prejudice to the party relying on the privilege since the communications could not be used against them for the same conduct that was the subject of the settlement. It is true that the exception means that settlement communications could be used against the privilege-holder in later litigation involving a different issue (for example, a tax appeal). But the *I. Waxman* cases demonstrate that there is a justifiable reason available to do so.

[143] I will now turn to whether those examples apply in this motion.

Application of the principles governing exceptions to this motion

[144] In general, the Respondent's argument rests on the exception that the material it seeks is relevant for purposes other than for use as evidence of CIBC's liability or of a weak defence in the Enron litigation where the settlement was reached. CIBC, on the other hand, essentially points to principles that provide policy reasons for maintaining settlement privilege.

[145] I must also quickly deal with one related argument from the Respondent. In a motion seeking preliminary approval of the Newby settlement, CIBC disclosed some of the general tone of the settlement negotiations, noting in particular that during the mediation, the parties debated CIBC's ability to pay. The Respondent says that this "public disclosure" of settlement negotiations militates towards a lifting of the settlement privilege. I reject this notion. Inserting a vague comment in a court document, a comment which may even be required in order to gain approval of the settlement, does not have any bearing on whether the settlement privilege claim can stand.

Question 3119

[146] CIBC had advised that drafts of the Stipulations of Settlement for both Newby and MegaClaim were exchanged between CIBC and the respective plaintiffs before the final versions were signed. The Respondent asked in this question if there were any issues in the Terms Sheets that were objected to by either CIBC or the plaintiffs. The Respondent argued that this could bear upon the characterization of the Terms Sheets and Stipulation of Settlement as contingent. CIBC claimed settlement privilege since this question asks for details of negotiations.

[147] This question is not protected by settlement privilege. It fits within the exception for disclosure to third parties discussed in *I. Waxman* and *Mueller*, since it will not be used as evidence of CIBC's liability in the Enron litigation or a weak defence in the Enron litigation.

Question 849

[148] In this question, the Respondent asked for an unredacted version of an "Impact Assessment" that CIBC used during a mediation session, saying it is directly related to the ability to pay issue. It was provided in partially redacted form to CRA during the audit. The Impact Assessment referred to the effect of a settlement on the tax position of one of CIBC's U.S. subsidiaries. The Respondent says this document could therefore be relevant to the ability of CIBC subsidiaries to pay a portion of the Settlement Amounts.

[149] CIBC responds by noting that the production to CRA specifically stated that disclosure did not lead to waiver of settlement privilege over the redacted parts of the document, and that settlement privilege still applies.

[150] In creating the Impact Assessment for settlement discussions, it is possible that CIBC made certain admissions in an effort to promote a settlement in the Enron litigation, and that those admissions would not have been made otherwise. Yet there is certainly a public interest in having full disclosure of the Impact Assessment for the tax litigation, particularly if CIBC is arguing one thing but the Impact Assessment says another.

[151] Production of this document will not interfere with CIBC's liability for the Enron transactions; it will only potentially prejudice CIBC in the tax litigation. The tax litigation itself is predicated on the interpretation of the Settlement Amounts and how they can be classified. CIBC has already willingly provided much of the document, and while that does not lead to waiver or lift the privilege itself, it does demonstrate that CIBC considers some admissions or details to be less prejudicial than others.

[152] We are then left to partially guess about CIBC's mindset in crafting the Impact Assessment: was it only stating the redacted information in order to encourage settlement, and would it not have done so if not for the settlement context?

[153] In this case, I would side with disclosure. It fits within the exceptions described above, and while it may certainly cause some prejudice to CIBC, it does not impact any liability for the actions in the settlement itself, nor does it weaken CIBC's claim in the Enron litigation. I am aware that ordering such disclosure could be seen as impacting the fullness and frankness of settlement discussions and negotiations. Courts must obviously protect the cloak of settlement discussions so that parties are encouraged to settle. But I do not see the impact as being any different than the decision in *Tremblay Estate*, where other documentation was ordered disclosed so that the tax litigation issue could be fully and properly resolved. CIBC has already said it will lead evidence on its ability to pay, and clearly this is an important issue in this case.

[154] I am sympathetic to the view that this kind of order could place a chill on settlement discussions, since it could mean that taxing authorities could get their

hands on all relevant documents from settlement negotiations in non-tax litigation. Parties may be more hesitant to speak openly or creatively, and thus settlements may be harder to come by. Indeed, this could be seen as putting CRA in the room during the mediation, having access to every relevant document, even if they are only able to use it much further down the road in reduced circumstances. It seems apparent that CIBC would alter its behavior during mediation discussions if CRA was in the room with it.

[155] But the small yet significant feature of tax litigation over the deductibility of payouts and expenses related to lawsuits is that, compared to other civil litigation such as that often described in the settlement privilege cases, it turns not necessarily on the underlying allegations but on how the legal payouts and expenses were dealt with once those allegations were resolved. There is a public interest in having this information, particularly to present a full view of CIBC's understanding of its entities' positions.

[156] Many of the settlement privilege cases focus on protecting communications from being used against a party in litigation that is based on the *same subject matter* as the settlements. For example, in *Mueller*, the defendant had originally settled a separate action against two third parties. The plaintiff in *Mueller* then launched an action against the defendant and both third parties, and the allegations and relief sought were *substantially the same* as those claimed by the defendant in its earlier action.[97] In *Sabre Inc.*, the plaintiff had concluded a previous settlement with a third party. The defendant in *Sabre Inc.* was a similar type of company as the third party and was sued by the plaintiff for largely the same reason; again, *the same subject matter* underlay the litigation. Even then, the Court found that an exception to settlement privilege applied. Finally, in *Bertram*, which was a tax case, the communications specifically involved settlement discussions between the taxpayers and officials from the Department of National Revenue on the *very same subject matter* that was the eventual focus of the tax litigation. The court looked to policy to determine that the privilege could not protect dishonest dealing, but it was cautious in doing so, mindful of the fact that courts should be wary of allowing evidence from settlement discussions to be available in the litigation that arises from the same subject matter as those discussions.

[97] See para 3.

[157] It certainly makes logical sense that courts will be cautious in finding such an exception, since they do not want a party's admissions related to certain subject matter to be used against them in later litigation with third parties relating to the same subject matter (or even in the same litigation when settlement negotiations are not successful).

[158] This case, however, involves two different subject matters. The Newby and MegaClaim Litigations were about CIBC's liability relating to certain Enron transactions. The tax appeals, however, are about the deductibility of the Settlement Amounts that arose out of the litigation. There is no danger that disclosure from the first subject matter will prejudice CIBC in litigation surrounding that subject matter; that litigation is concluded. Many of the policy reasons for protecting settlement privilege thus fall away. The tax appeals are about a separate issue, and while they are certainly based on the first issue, they are not the same thing. Communications and information from the first litigation are certainly relevant to resolving the tax litigation, since they will go to whether the Settlement Amounts are deductible. I believe there is a distinction to be drawn that militates towards lifting the settlement privilege. Moreover, the *I. Waxman* line of cases provides an applicable exception to settlement privilege. CIBC must therefore answer this question.

Questions 845 and 848

[159] Question 845 asked for material referring to ability to pay that was used in certain mediation discussions. Question 848 asked whether the mediation featured discussions about allocation or CIBC's ability to pay alone (or together with its affiliates and subsidiaries), and to advise whether there was any other information in that respect. The Respondent says again that since CIBC has put ability to pay in issue, the Respondent ought to have access to material discussing ability to pay that was used in mediation discussions.

[160] CIBC cannot claim settlement privilege here for the same reasons as question 849. These questions fit within the *I. Waxman* line of exceptions, and the questions must therefore be answered.

Questions 922 and 923

[161] In these questions, the Respondent seeks information on how the Newby plaintiffs came up with the $3.9 billion damages figure discussed during the mediation. The Respondent says this is relevant to CIBC's understanding of its legal exposure and the allocation of the Settlement Amounts, since it could show how the Newby plaintiffs viewed CIBC's legal exposure and which entities were responsible. CIBC says that the broad view of settlement privilege espoused by the SCC certainly extends to any documents that were "potentially" used mid-negotiation. It adds that it is not clear if any such documents exist.

[162] I note that CIBC says the documents were "potentially" used. If they were not used, then there is no settlement privilege.

[163] If the documents were indeed not used, there is still no settlement privilege, for the same reasons as above. I note that in answer to question 922, CIBC says it was unable to locate any such document and does not know if any such document exists. CIBC must therefore search for such a document.

Questions 927 and 928

[164] These questions asked for production of any documents where CIBC took the position that: its true exposure under the relevant statute was much less than that claimed by the Newby plaintiffs; and that other banks were more culpable than CIBC. CIBC took this position in the mediation sessions. To the extent that CIBC made statements about its true exposure on the claims in play during mediation, the Respondent wants to know what those positions were so it can see how they correspond to the positions CIBC seeks to advance in this proceeding. CIBC again responds by pointing to the broad, overriding policy rationale to protect discussions and documents connected to settlement negotiations.

[165] I find that settlement privilege does not apply to these questions, for the same reasons as above. There is an applicable exception, and the effect on promoting settlement is outweighed by the interest in having full access to CIBC's mediation positions on its legal exposure in order to contrast that to its positions in this proceeding. CIBC can certainly use the trial to address any conflicts between the positions, and therefore has a mechanism for dealing with inconsistencies raised by its answers to these questions.

Question 5757

[166] This question relates to a conversation between a lawyer for Newby and a reporter for Le Soleil. The Newby lawyer told the reporter that since CIBC's head office signed the Newby settlement, most of the deduction of the settlement payout would be in Canada. The Respondent asked CIBC if the lawyer was speaking on the basis of some particular fact or conversation that had formed part of the settlement negotiations between the parties; in other words, was he just speculating or was he proceeding on the basis of something that had come up during the negotiations?

[167] CIBC replied that it had no information that tax treatment was discussed, and said that any such discussions are covered by settlement privilege. CIBC says the question specifically references settlement negotiations and is therefore clearly privileged. The Respondent says the same exception applies here as in the above questions.

[168] I find that settlement privilege does not apply to these questions, for the same reasons as above. There is an applicable exception, and the effect on promoting settlement is outweighed by the interest in having full disclosure of the information relevant to the disposition of this litigation, including CIBC's potential tax considerations in concluding the settlement.

Questions 866, 894 and 900

[169] Before CIBC settled the Enron litigation, it was part of a group of arm's length bank defendants that had discussions about a combined approach to the Enron litigation. The Respondent asked for information on progress made among the so-called Bank Group of defendants and whether any commitment letters were drafted or signed. The Respondent argues that this information would provide evidence of how arm's length co-defendants might agree to share the costs of settling or of the behaviour of arm's length parties.

[170] CIBC says any such discussions are protected by settlement privilege.

[171] I find that settlement privilege does not apply to these questions, for the same reasons as above. There is an applicable exception, and the effect on promoting settlement is outweighed by the interest in having full access to how arm's length co-defendants dealt with each other during this litigation.

Questions 911

[172] This question asks where to find in the productions the "various charts and graphs that were used with the mediator", as referenced in an internal CIBC document. If the charts and graphs are not in the productions, the Respondent wants CIBC to produce them.

[173] CIBC says it has not been able to locate any such documents in the productions, which means that the Respondent now wants them produced. CIBC, however, says settlement privilege protects any such documents against production.

[174] I find that settlement privilege does not apply to these questions, for the same reasons as above. These documents must therefore be produced.

Issue 4: Can CIBC rely on litigation privilege that has its root in the Newby and MegaClaim litigation?

[175] CIBC is claiming litigation privilege for hundreds of documents, including 670 documents where litigation privilege is the sole ground. The Respondent says this claim is invalid because the Enron litigation has ended. It therefore seeks a ruling that litigation privilege has ceased to the extent that CIBC's litigation privilege claim is grounded in CIBC's involvement in any Enron litigation (including Securities Exchange Commission proceedings, DOJ proceedings and the Newby and MegaClaim proceedings). The Respondent in turn wants CIBC to produce any documents and answer any questions solely covered by litigation privilege. CIBC maintains that the litigation privilege still applies.

[176] I agree with the Respondent that the litigation privilege claim cannot stand.

[177] In *Blank v Canada*,[98] the SCC made it clear that litigation privilege "comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege."[99] Of course, the issue then becomes what constitutes "closely related proceedings"? The SCC said that:

> … [T]he privilege may retain its purpose — and, therefore, its effect — where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. In this regard, I agree with Pelletier J.A. regarding 'the possibility of defining . . . litigation more broadly than the particular proceeding which gave rise to the claim' (at para. 89); see *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 90 A.R. 323 (C.A.).
>
> At a minimum, it seems to me, this enlarged definition of 'litigation' includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action (or 'juridical source'). Proceedings that raise issues common to the initial action and share its essential purpose would in my view qualify as well.
>
> As a matter of principle, the boundaries of this extended meaning of 'litigation' are limited by the purpose for which litigation privilege is granted, namely, as mentioned, 'the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate' (Sharpe, p. 165). This purpose, in the context of s. 23 of the *Access Act* must take into account the nature

[98] 2006 SCC 39.
[99] At para 36.

> of much government litigation. In the 1980s, for example, the federal government confronted litigation across Canada arising out of its urea formaldehyde insulation program. The parties were different and the specifics of each claim were different but the underlying liability issues were common across the country.[100]

[178] In this case, the parties are not the same as the Enron litigation, and the cause of action is completely different. The Enron litigation was about CIBC's actions related to certain transactions it concluded with Enron; this tax litigation is essentially about whether the Settlement Amounts are deductible. CIBC submits that many of the documents from the Enron litigation fit within the boundaries of related, apprehended litigation. I disagree. It seems reasonable to conclude that any limitation periods arising from the same cause of action as the Enron litigation have passed. Indeed, CIBC offers no more detail on what this "apprehended litigation" may be. In my view, the litigation privilege claims are invalid.

Can the claims of litigation privilege be re-evaluated for protection by solicitor-client privilege?

[179] If litigation privilege does not apply, as I have found, CIBC claims that many of the documents covered by the litigation privilege claim are now covered by solicitor-client privilege. CIBC notes that litigation privilege and solicitor-client privilege often overlap, as noted by the SCC in *Blank*.[101]

[180] As an example, in a sample of 60 documents for which CIBC claimed privilege, there were 19 documents that were originally coded as litigation privilege alone. A further examination of the sample by CIBC revealed that only one document actually remains subject to litigation privilege alone. The remaining 18 documents are covered by other claims, including solicitor-client privilege, settlement privilege or irrelevance.

[181] If the Respondent succeeds on its litigation privilege argument, as it now has, CIBC says the Court's order should be for CIBC to review the 670 documents in Schedule B that are coded as litigation privilege alone to determine whether they are also subject to solicitor-client privilege and settlement privilege and to determine relevancy. CIBC would then produce any relevant, non-privileged documents.

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[100] At paras 38-40.
[101] At para 49.

[182] Counsel for CIBC said at the hearing that the coding for privilege went awry because CIBC used third-party providers, which is necessary with electronic production. Counsel said these providers do the best they can but that they make mistakes.

[183] The Respondent says allowing CIBC to go back and do another review is a piecemeal approach to CIBC's disclosure obligation that raises issues of fairness for the Respondent. It also says that there are in fact more than 670 documents that would be subject to re-evaluation.

[184] While I am sympathetic to CIBC's position that the documents were wrongly coded, the fact is that CIBC engaged this third-party provider because it was the most efficient avenue to review the disclosure, both in terms of time and cost. To now say that they need more time, and to incur more costs, to further review the documents after they have already been coded is, at the least, incompatible with its previous position. CIBC made a choice, and both CIBC and the Respondent were forced to work with that choice.

[185] CIBC's submissions on this point raise the issue of whether we should now question all of the other documents that have been coded a certain way. The Respondent has not challenged the other coding in such a manner, but it begs the question. To add further delays to this case, which has already taken years in its pre-trial stages, is inefficient, unfounded and unfair to the Respondent. There is certainly something to be said for making sure everything is done properly, and this would be CIBC's argument. But it had plenty of opportunity to do it properly; it chose a certain way of doing it, and it cannot now, many months later, ask for a mulligan. There must be some finality.

[186] CIBC is therefore not granted its request to re-evaluate the documents that were coded as litigation privilege alone.

Issue 5: Can CIBC claim solicitor-client privilege over certain questions and documents?

[187] There are certain questions and documents for which CIBC is claiming solicitor-client privilege. The Respondent challenges these claims and says the privilege does not apply. About half of these questions and documents are subject to other privilege claims as well, but in the event that I am wrong on those

questions, I will deal with whether CIBC has properly claimed solicitor-client privilege.

Questions 877 and 878

[188] The Respondent says that certain board minutes showed a consultant was reviewing CIBC's ability to pay during the Newby mediation and was examining issues on damages and related strategy. The Respondent wants disclosure of any report produced, saying a lawyer's communications with a third party to obtain expert or other assistance enjoys no privilege.

[189] This question appears to be the result of some confusion on the Respondent's part, partially because of CIBC. When Newby negotiations started in late July 2005, CIBC suggested that the Newby plaintiffs, not CIBC, hire an expert to assess CIBC's ability to pay a judgment relative to other bank defendants' abilities to pay. But the Newby plaintiffs never hired a consultant, and therefore there is nothing to produce in terms of a consultant's report. The board minutes the Respondent refers to in asking for the consultant's report substantiate this. I accept CIBC's submission that no such report exists.

[190] CIBC then created some ambiguity in its answers to undertakings/under advisement in this matter: CIBC told the Respondent that CIBC's U.S. counsel in Newby had hired a consultant on damages and related strategy to enable CIBC's counsel to advise the bank. CIBC is claiming solicitor-client privilege over these communications between the consultant and counsel, as well as over the consultant's report itself. The Respondent responds that the damages consultant's report was originally coded for litigation privilege, yet CIBC is now claiming solicitor-client privilege. It says the only privilege in play is litigation privilege.

[191] Despite the fact that the Respondent says this was first coded as litigation privilege and that CIBC should not get the benefit of now claiming solicitor-client privilege, and despite my earlier finding that CIBC would not be granted its request to review documents for additional privilege claims, I will grant CIBC the opportunity to claim solicitor-client privilege here. While there is certainly some element of unfairness to the Respondent, the fact is the Respondent had adequate time to prepare submissions on whether solicitor-client privilege applied. CIBC changing its claim has also not added additional time or cost to the litigation

process, unlike CIBC's proposal to re-evaluate the 670 documents would. I will therefore examine whether solicitor-client privilege applies.

[192] CIBC says that communications between a lawyer and third parties can still be shielded by solicitor-client privilege where the third party's retainer extends to a function essential to the existence or operation of the client-solicitor relationship. It points to *General Accident Assurance Co. v Chrusz*:[102]

> …I think that the applicability of client-solicitor privilege to third party communications in circumstances where the third party cannot be described as a channel of communication between the solicitor and client should depend on the true nature of the function that the third party was retained to perform for the client. If the third party's retainer extends to a function which is essential to the existence or operation of the client-solicitor relationship, then the privilege should cover any communications which are in furtherance of that function and which meet the criteria for client-solicitor privilege.

[193] The Respondent takes a different view. In *General Accident Assurance Company*, an insurance adjuster (the third party) was ordered to perform an investigation and then report and take instructions from counsel in connection with contemplated litigation. The court found that only litigation privilege applied, not solicitor-client privilege. The insurance adjuster was expected to be honest in doing his job, and no special legal protection was necessary to ensure a candid report. The Respondent says the damages consultant is akin to the insurance adjuster, whose information was not covered by solicitor-client privilege and was only covered by litigation privilege.

[194] The Respondent also points to the seminal decision in *Susan Hosiery Ltd. v Minister of National Revenue*[103] for the principle that when a lawyer communicates with a third party to obtain expert or other assistance, that communication enjoys no solicitor-client privilege.

[195] CIBC responds by saying that *Susan Hosiery* does not say that all communications between a lawyer and third party are unprivileged; indeed, that decision held that if a third party "is a person employed as an agent on the part of the client to obtain the legal advice of the solicitor, of course he stands in exactly

[102] (1999), 45 OR (3d) 321 (ONCA).
[103] [1969] 2 Ex CR 27.

the same position as the client as regards protection, and his communications with the solicitor stand in the same position as the communications of his principal with the solicitor." CIBC also says that the Respondent's *Susan Hosiery* principle is distinguishable because the damages consultant was essential to CIBC's U.S. counsel's provision of legal advice.

[196] I agree with the Respondent that the damages consultant is only covered by litigation privilege, not solicitor-client privilege. The damages consultant is not essential to the existence or operation of the client-solicitor relationship: the consultant was not providing legal advice but preparing documents that would assist U.S. counsel "on issues of damages and related strategy in connection with the litigation," as CIBC answered in question 877. The consultant was not providing legal advice to the client, nor was the consultant standing in the client's place to obtain legal advice. He was providing assessments that, while useful, were not essential to the solicitor's provision of legal advice and were not central to the solicitor-client relationship.

[197] As Lederman et al. write:[104]

> Once the individual engages upon an investigative function and gathers information from outside sources or proffers opinions in respect of his or her findings, then such individual, although retained by the solicitor, acts outside the narrow scope of 'agency'. There is a difference between communications with persons enlisted for the purpose of directly giving and receiving legal advice and those communications or information from persons that relate to the legal problem in issue and are useful to the lawyer. Protection for such latter information that is generated from such persons should fall within an analysis under litigation privilege rather than solicitor-client privilege.

[198] I further agree with the Respondent that the damages consultant is more akin to the insurance adjuster in *General Accident Assurance Company*. As that decision held: "If the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client, or if the third party is retained to act on legal instructions from the solicitor (presumably given after the client has instructed the solicitor), the third party's function is not essential to the maintenance or operation of the client-solicitor relationship and should not be protected." In my view, this applies to the damages

[104] Sidney N. Lederman et al, *The Law of Evidence in Canada*, 4th ed (Markham: LexisNexis Canada Inc., 2014) at §14.121, at p. 961.

consultant. The report was done in contemplation of litigation and would therefore be covered by litigation privilege.

[199] Given my earlier finding that litigation privilege no longer applies, CIBC must therefore answer these questions.

Question 3119

[200] As discussed above, this question asked if there were any issues in the Terms Sheets that were objected to by either CIBC or the Newby plaintiffs. CIBC says solicitor-client privilege protects communications relating to whether there were any objections. CIBC's submissions say that solicitor-client privilege protects confidential communications between lawyer and client in furtherance of providing legal advice.

[201] I agree, but I fail to see how solicitor-client privilege would cover the question of whether CIBC or the Newby plaintiffs objected to any of the conditions in the Term Sheet. This is about communications between parties during a negotiation; this does not appear to be asking for legal advice between CIBC and its counsel. To the extent that the question is doing so, the answer would indeed be covered by solicitor-client privilege. But the question actually appears to be asking for certain details of the settlement negotiations. This is clearly something that would fall under the issue of settlement privilege, not solicitor-client privilege. Solicitor-client privilege therefore does not apply to this question.

Questions 927 and 928

[202] As discussed above, these questions asked for production of any documents where CIBC took the position that its true exposure under the relevant statute was much less than that claimed by the Newby plaintiffs, and that other banks were more culpable than CIBC. CIBC took this position in the mediation sessions. To the extent that CIBC made statements about its true exposure on the claims in play during mediation, the Respondent wants to know what those positions were.

[203] Once again, it is unclear how solicitor-client privilege would be claimed here. This question appears to be asking for documents and positions presented during the negotiations. To the extent that the question is asking for legal advice between CIBC and its counsel, the answer would indeed be covered by

solicitor-client privilege. But to the extent that it is not, solicitor-client privilege does not apply.

Questions 888 and 889

[204] These questions ask for any documents related to the mock jury trials that CIBC's U.S. counsel ran at CIBC's request as part of the Newby litigation. The Respondent asks for the outcome of the trials and wants to know how CIBC defended itself against the Newby claim in the mock jury trials. The Respondent says these details are potentially relevant to CIBC's understanding of the nature of its legal exposure and to examine the degree that the defences focused on the conduct of subsidiaries and affiliates.

[205] The Respondent says solicitor-client privilege does not apply because the trials involved communications between a lawyer (U.S. counsel) and a third party (the mock jurors). If the privilege does apply, it was waived because the defences were disclosed to the third parties.

[206] CIBC says the mock jury was done solely to assist counsel in providing legal advice to CIBC, and therefore the questions are rebuffed by solicitor-client privilege. It points to *General Accident Assurance Company* for the principle that privilege covers any communications between a lawyer and a third party that are in furtherance of a function essential to the existence of the client-solicitor relationship and that meet the solicitor-client privilege criteria. It also says these questions are irrelevant, saying the manner in which CIBC framed its defence in the mock jury trials is irrelevant to any issue in the tax appeal.

[207] Regarding question 888, I agree with CIBC: to the extent that the communications describing the trials' outcomes are between U.S. counsel and CIBC, those communications are privileged. Given that these mock jury results were referenced in a board meeting, it would seem apparent that U.S. counsel communicated the results to CIBC as part of its legal advice. U.S. counsel were the ones who conducted these trials, and even though a third party was involved (the mock jury), these results would remain privileged. This was part of U.S. counsel's legal advice to CIBC, part of its fact-finding and analysis that contributed to its legal advice. There is certainly no waiver of that privilege either.

[208] The answer to question 889 is also protected by solicitor-client privilege. The Respondent clearly wants to locate any conflicts between how CIBC is framing its view of its liability exposure in this appeal versus how it framed it in the actual Enron litigation. But the defences that CIBC put forward are part of the analysis that counsel conducted in its provision of legal advice to CIBC and are therefore privileged. I also question the relevance of this question. How the defence was framed is about strategy; any defence could have been used as a test by CIBC, regardless of its accuracy. Its relevance to the tax issue of deductibility is highly questionable.

Questions 866, 894 and 900

[209] As discussed above, the Respondent asked for information on progress made among the so-called Bank Group of defendants and whether any commitment letters were drafted or signed. CIBC says that information is protected by solicitor-client and common interest privilege.

[210] The questions and documents involved here fit perfectly into the common interest privilege defence to waiver, and specifically within the oft-noted description of common interest privilege described by Lord Denning in *Buttes Gas and Oil Co. v Hammer (No. 3)*.[105] That description was endorsed in *General Accident Assurance Company*, which held that common interest privilege "may occur where the disclosure is made to a person or party with a common interest in sharing the trial preparation effort."

[211] As Dodek and Cooper write:[106] "In Anglo-American law, the common interest privilege will clearly apply in the litigation context when parties share a 'selfsame interest' in the litigation. This 'selfsame interest' will apply to co-defendants with different counsel … It will also apply to parties who share a common interest in anticipated litigation … They must 'anticipate litigation against a common adversary on the same issue or issues'; they need not have the same position, just sufficient common interest."

[105] [1980] 3 All ER 475 at pp. 483-84, [1980] 3 WLR 668 (CA).
[106] Adam M. Dodek and Toba Cooper in Adam M. Dodek, *Solicitor-Client Privilege* (Markham: LexisNexis Canada Inc., 2014) at 247, §7.164.

[212] However, the issue is whether the shared privilege is litigation privilege or solicitor-client privilege. If the banks themselves were just holding discussions, this would be common interest litigation privilege, but since litigation privilege no longer stands, these documents would not be privileged. However, if the discussions involved the banks and their counsel and included discussions of joint defences, options for settlement, etc., then this would be solicitor-client privilege. It appears likely that the latter is what would apply. Therefore, to the extent that the discussions involved banks and their counsel, these questions are rebutted by privilege; to the extent they do not and are just discussions involving the banks themselves, privilege does not apply.

Questions 2923 and 2924

[213] These questions ask for information on why CIBC did not bring cross-claims against bank co-defendants. The Respondent wanted to know if it was a legal or strategic decision, and says it is relevant to potential information about the behaviour of arm's-length parties in the Newby litigation, just like the questions about the Bank Group. CIBC says this analysis is privileged because it is part of its overall legal strategy and is irrelevant to the tax litigation, since the Respondent is not disputing the reasonableness of the settlements.

[214] I agree with CIBC. These questions are clearly covered by solicitor-client privilege, and their relevance is questionable. A decision on whether to sue other parties does not help inform the issue of deductibility.

Issue 6: Is CIBC's Schedule B deficient because the schedule does not contain enough identifying information for certain privileged documents?

Which Schedule B should be used?

[215] Before examining whether CIBC's Schedule B is deficient, there is a preliminary issue of which Schedule B the parties should be relying on. CIBC filed three Schedule B's: one filed with the Affidavit of Documents in August 2014; one filed shortly before this motion was filed in May 2015; and one that the Respondent received on July 13, 2015.

The Respondent wants to use the first Schedule B because that was the only one for which an affidavit was sworn. The Respondent says the July 13, 2015 Schedule B has many changes from the original, and the Respondent cannot track which documents were modified in the revised Schedule B. Some privilege claims were clarified or changed, and some documents were removed altogether. The Respondent takes particular issue with documents' removal, since those documents were deemed relevant in August 2014 when the affidavit was sworn. The only modification the Respondent seeks to the original Schedule B is that where common interest privilege was claimed and CIBC subsequently identified the underlying privilege, the Respondent wants that underlying privilege to remain.

[216] CIBC says the unique document identification numbers that appear for each Schedule B document have never changed, and that the July 13, 2015 Schedule is the appropriate one for use.

[217] The List of Documents was served under s. 82 of the *Rules*. Section 82(4) says that the List of Documents shall be verified by affidavit (Forms 82(4)A and 82(4)B), while s. 87 says that "where, after the list of documents has been served under either section 81 or section 82, it comes to the attention of the party serving it that the list has for any reason become inaccurate or incomplete, that party shall serve forthwith a supplementary list specifying the inaccuracy or describing the document."

[218] It is clear that the Respondent cannot follow what has happened with the subsequent Schedule B's. It may be that CIBC has generally complied with the *Rules* and everything is in order, but this is pointless if the Respondent cannot

follow the updates. The volume of documents in this proceeding means that there needs to be some consistency to how documents are tracked.

[219] A supplementary affidavit filed in support of this motion by Karen Hodges, a senior paralegal with the Department of Justice, says that she and the Respondent's counsel have not fully determined how CIBC's second Schedule B differs from the original one from August 2014. This presumably applies to the third Schedule B as well.

[220] Given CIBC counsel's earlier statement that the third-party provider that conducted the document review process made errors, it appears quite likely that some of the documents were removed from the first Schedule B because they were not actually relevant. But the Respondent cannot track that and has no way of knowing that; even if the document numbers are the same, a proceeding like this with thousands of documents needs some continuity and order for the parties to be able to properly manage the volume of paper.

[221] It is also quite likely that the latter two lists are more accurate since CIBC had a chance to more thoroughly look at the Schedule B list. But again, accuracy is irrelevant if it cannot be tracked.

[222] The only Schedule B accompanied by a sworn affidavit is the first one. While s. 87 of the *Rules* does not specifically say that the updated list requires an affidavit, it is apparent to me that it should come with an affidavit. Forms 82(4)A and 82(4)B clearly show that one of the purposes of the affidavit that is filed with the list of documents is for the affiant to confirm that Schedule B documents are privileged based on specific grounds. It follows that filing a revised Schedule B should also involve filing an affidavit where the affiant attests to the contents of the revised schedule.

[223] I therefore grant the Respondent's request that the first Schedule B be used, subject to modifications to identify the nature of the underlying privilege for which common interest privilege is claimed. I would expect the parties to work together to build off of the first Schedule B and use it as a basis for updating it for accuracy and relevancy. It would seem logical that in order to track changes to Schedule B, any further revised Schedule B's should delineate the additions, deletions and modifications made to the original, similar to the delineations made in amended pleadings that allow for a comparison to the original pleadings.

Is CIBC's Schedule B deficient?

[224] The Respondent says that CIBC's Schedule B is deficient in two ways: there is an insufficient description of certain documents listed in Schedule B, and there are claims of privilege over documents that do not appear to be privileged. I will deal with each of these in turn.

Insufficient description of documents

[225] Section 84 of the *Rules* requires that a list made in compliance with s. 82 must list the documents or bundles in a convenient order, and that each document or bundle "shall be described sufficiently to enable it to be identified."

[226] The Respondent says many Schedule B descriptions fall short because they have little or no description. Some are only described as "Word document," "Powerpoint presentation" and "electronic file", with no indication of the author, recipient or date. There are also more than 5,422 documents in Schedule B that are described as attachments to emails but that lack any description of the subject matter or the date.

[227] For all of these documents, the Respondent wants the author and/or sender, the recipient and the date of creation. It says this would be a sufficient description in compliance with s. 84.

[228] CIBC says that given the volume of electronic documents, the only way to code the documents accurately for identifying information was to use the metadata embedded in the documents. Metadata describes certain properties automatically assigned to a document by a computer. It can provide the date of creation, date of modification, and the user name of the computer where the document was created, among other things.

[229] Each Schedule B document was given a unique numerical identifier, and the identifying information shown in Schedule B was derived from the available metadata. CIBC says the descriptions satisfy s. 84 and, given the volume of documents, it is unreasonable to require CIBC to provide additional coding beyond what is available in the metadata. CIBC noted that in response to the Respondent's concerns about the email attachments, it provided the metadata for the email attachments.

[230] CIBC acknowledged that metadata is not perfect. The date listed could either be the date of the document's creation or the date it was last opened, while the user name assigned to the document only belongs to the computer where the document was created, not necessarily the person mainly responsible for the document. It says, however, that this is standard practice for electronic document production, and indeed the only reasonable practice. It also points to a decision of this Court[107] for the principle that using metadata as a descriptor is adequate for compliance with s. 84.

[231] There appear to be virtually no reported cases that deal with whether metadata is an adequate identifier. Before examining that issue, we must understand the point of describing documents, meaning we must look at the rationale for s. 84.

What is the point of description?

[232] The point of description is generally seen to be to enable the opposing side to know if privilege is properly claimed or to enable a court to assess the privilege claim.[108] The issue then becomes how much description is necessary to achieve these ends.

[233] I find the decision of the Alberta Court of Appeal in *Canadian Natural Resources Ltd. v ShawCor Ltd.*[109] to be highly persuasive on this point. The Court of Appeal held that "a party preparing an affidavit of records must, short of revealing information that is privileged, provide a sufficient description of each record for which privilege is claimed to assist other parties in assessing the validity of the claimed privilege. While the objective is to reduce the need for parties to seek recourse to other time-consuming and costly litigation steps, we are equally satisfied that this can be accomplished in a manner that does not injure valid privileges."[110]

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[107] *Cameco Corp. v The Queen*., 2014 TCC 45.
[108] *Visa International Service Assn. v Block Bros. Realty Ltd.* (1983), 11 CPC (3d) 147 (BCCA) at para 5; *Canada (Minister of Citizenship and Immigration) v Dueck* (1998), 146 FTR 89 (FCTD); and *Canada (Minister of National Revenue) v Thornton*, 2012 FC 1313.
[109] 2014 ABCA 289.
[110] At para 8.

[234] The Court of Appeal wrote that the *Alberta Rules of Court*,[111] which are similar to the *Rules*, "accept that it is not too onerous for a party to briefly describe every record (or bundle of records) they object to produce. In this technological age, there can be no practical barrier to a party's preparing the necessary brief description of relevant and material records it claims are privileged. Indeed, in major litigation cases, this would typically be done as a matter of routine for the party's internal purposes alone."[112]

[235] And further: "A contrary approach means that a party would provide no useful information whatever about records claimed to be privileged. It is difficult to fathom how such a system could operate effectively when an opposing party has no knowledge of what documents are subsumed under the blanket claim of privilege."[113]

[236] The court noted that other jurisdictions, including Saskatchewan, Ontario and the Federal Courts, have adopted solutions favouring greater disclosure of information to support privilege claims so that claims can be challenged without immediate resort to the courts.[114] It concluded by stating that "for each record, a party must state the particular privilege being asserted and describe the record in a way, again without revealing information that is privileged, that indicates how the record fits within the claimed privilege."[115]

Is metadata a sufficient descriptor?

[237] The question in this motion then becomes whether metadata is a sufficient descriptor to meet the rationale behind s. 84 of the *Rules*: does it provide enough information to the Respondent to allow the Respondent to challenge any privilege claim?

[238] In *Cameco Corp. v Canada.*,[116] Rip C.J., as he then was, dealt with a very similar question. The document descriptions in that case were based on metadata, leading each document to have a unique numerical identifier. This metadata

[111] AR 124/2010.
[112] At para 54.
[113] At para 60.
[114] At para 70.
[115] At para 72.
[116] 2014 TCC 45.

identifier sometimes conflicted with the listed author and date of a document, likely because, as explained above, metadata does not always accurately reflect a document's date or author. The Respondent in that case said that the descriptions were unhelpful, and then commented at the hearing that it would actually be more helpful to only use the document identifier number as a descriptor. Chief Justice Rip agreed, so long as the taxpayer provided sufficient description of documents using a numerical identifier for each document. The metadata-based identifier was therefore allowed, and CIBC in this case says this shows that metadata is a sufficient descriptor for the purposes of s. 84.[117]

[239] In my view, however, *Cameco Corp*. is distinguishable from the present case. For one, the Respondent in *Cameco Corp*. specifically gave its consent to only using the metadata identifier; no such consent is given here. Secondly, Chief Justice Rip pointed to an Ontario case[118] which said that cases with large volumes of documents call for a more practical system of documents to be described using an alpha-numeric or numeric identifier.[119] But that case was specifically discussing a Schedule A, not a Schedule B. Description is much more crucial to Schedule B since the opposing party cannot see the document's details and can only rely on the description in order to assess privilege claims.

[240] I also note that the *Sedona Canada Principles Addressing Electronic Discovery*[120] say that there is "a real danger that some metadata recorded by the computer may be inaccurate." For loose electronic files such as word-processing documents, "[t]o capture the true date, author, recipient, subject line, etc. of a set of documents, the parties cannot rely on such metadata alone—this information often must be derived from the text of the electronic document itself. Email metadata, on the other hand, is often accurate and extremely useful for litigation purposes." Metadata's unreliability as described by the Sedona Canada Principles has been noted in at least one decision.[121]

[241] I am certainly conscious that proportionality is a significant concern here. Karen Hodges' affidavit dated May 15, 2015, estimated that there are around 21,000 documents on Schedule B, and that the Schedule B list itself runs to

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[117] See paras 58-62.
[118] *Solid Waste Reclamation Inc. v Philip Enterprises Inc.*, [1991] OJ No 213, 2 OR (3d) 481 (Ont Gen Div).
[119] See *Cameco Corp*.at para 61.
[120] Second Edition, February 2015 at Section 1.F.5, page 7.
[121] *GRI Simulations Inc. v Oceaneering International Inc.*, 2010 NLTD 85 at para 25.

3,121 pages. But the other concern, which in my view is more pressing, is that the Respondent has insufficient information with which to assess the privilege claims. Descriptions like "Word Document" do not offer any useful information. Moreover, metadata is unreliable as an identifier when it comes to documents that are not emails.

[242] Somebody is going to have to do the heavy lifting on the Schedule B document. Either CIBC gives a sufficient document description to meet the requirement of s. 84 so the Respondent can determine the validity of the privilege claim, even on a quick review basis, or the Respondent will have to review each document thoroughly. It appears to me that CIBC is trying to pass on the heavy lifting to the Respondent when it itself is seeking the protection of Schedule B. There is a lot of money at stake in this appeal, and money spent at this end will pay dividends at the other end of the litigation and could be much better money spent than all the litigation, and disputes that have taken place in the litigation to date.

[243] I would therefore grant the Respondent's request and order that CIBC provide the author and/or sender, the recipient, the date of creation, subject line and describe the record in a way without revealing information that is privileged for all non-email documents listed in Schedule B.

Claims of privilege over documents that do not appear to be privileged

[244] The Respondent made a request that, based on s. 88 of the *Rules*, the Court review a sample of 60 documents to determine the validity of the privilege claimed for each document. At the motion hearing, the Respondent said it did want this review. But then in a letter to the Court on July 17th, the Respondent noted that CIBC had conducted its own review of the 60 documents. The Respondent says in the letter that these documents can be used to satisfy the review requirement, but that the Respondent maintains its request that a description of the attachments in Schedule B be provided or an indication that the attachment has been produced in Schedule A. I confirmed it still sought a review by the Tax Court of Canada of 60 documents in order to assess the claims of privilege made by the Appellant as to whether or not those communications were privileged.

[245] The Court will conduct the review as requested in the recent correspondence from the Respondent of October 23, 2015.

Issue 7: CIBC's refusals

[246] The Respondent seeks an order compelling CIBC to answer certain questions which CIBC refused at discovery. The refusals fall into three broad categories:

1) questions about other CIBC litigation and settlements not related to Enron;

2) questions about how CIBC allocated the Settlement Amounts and any potential tax motivation behind that allocation; and

3) various specific individual questions.

Questions about non-Enron litigation and settlements

[247] This issue involves questions 1369, 1370, 2828, 2829, 2864, 2865, 2868, 5916, 5917, 5918, 5919, 5921, 5922 and 5925.

[248] Overall, these questions are about other non-Enron litigation and settlements where a CIBC entity was sued along with an arm's-length co-defendant. The questions sometimes asked broadly about whether such litigation existed, and sometimes asked a little more specifically about specific claims and litigation that the productions referred to involving a CIBC entity and an arm's-length co-defendant.

[249] The Respondent says these questions are relevant because they represent potential "internal comparables" in transfer pricing, and s. 247 is in issue in the tax appeals. It is seeking other instances where CIBC group members were sued or settled claims involving the CIBC group and other arm's-length co-defendants. It says that details on such non-Enron litigation could provide evidence of how CIBC and its related entities might behave in allocating the Settlement Amounts had they been at arm's length. It says that even if the litigation subject matter has no resemblance to the Enron litigation, that litigation can still be useful to understand CIBC's approach and handling of any settlements. It notes that comparators are

often not identical in all material respects,[122] and that the best comparator to the Enron litigation is simply other litigation.

[250] CIBC says questions about other non-Enron litigation are irrelevant. It says the questions are much too broad and would lead to fruitless and laborious inquires, particularly since the Respondent has not provided CIBC with the characteristics the Respondent considers to be relevant in identifying a comparator. It adds that every non-Enron CIBC litigation would have to be examined in-depth in order to determine if it could act as an appropriate comparator, a process that would be incredibly time-consuming and costly.

[251] While I am mindful of the low threshold for relevancy that is associated with discovery under s. 95 of the *Rules*, I agree with CIBC that these questions are so broad and over-reaching as to be irrelevant. Even where there was litigation with an arm's-length co-defendant, and even if that litigation involved some CIBC group members, the litigation could still be completely different so as to be utterly useless as a comparator. Broadly asking for non-Enron litigation that only features arm's-length co-defendants, without asking for any further comparable information, would yield little to no value in this case, not to mention the enormous effort it would require to answer these questions. Even the more specific questions offer little potential value.

[252] I note that the Respondent did not ask CIBC for its procedure manual or other specific questions that could have illuminated whether CIBC had a general strategy for dealing with claims of the type featured in the Enron litigation. The Respondent says they did ask questions about litigation brought against CIBC entities with arm's-length co-defendants that were similar in nature to the Enron claims. For example, at question 2828, in a discussion about another settlement that involved a CIBC payment from several class actions alleging material misstatement or omission, the Respondent asked CIBC's counsel to inquire about whether that settlement involved other co-defendants. CIBC counsel refused to answer the question. It is true that this is a more specific question, but the only similarity is that there was a settlement payment from a class action involving some allegations potentially similar to the Enron litigation. It is still difficult to see how this could be useful as a comparable even if there were arm's-length co-defendants. While it is certainly true that comparators are rarely identical in all

[122] *Canada v GlaxoSmithKline Inc.*, 2012 SCC 52.

material respects, asking broadly about other litigation while providing few characteristics to narrow the comparison means that the questions are ultimately irrelevant to the tax appeals, even with the low threshold for relevancy.

[253] I therefore find that CIBC properly refused questions 1369, 1370, 2828, 2829, 2864, 2865, 2868, 5916, 5917, 5918, 5919, 5921, 5922 and 5925.

Questions about CIBC's allocation of the Settlement Amounts and any potential tax motivation

[254] This issue involves questions 1734, 1735, 1771, 1772, 2225, 2296, 2297, 2298, 2299, 2356, 2378, 2388, 2390, 2391, 2393, 2394, 2395, 2441, 2442, 2443, 2446, 2449, 2480, 2481, 2491, 2497, 2498, 2499, 2500, 2513, 2514, 2611, 2627, 2632 and 2633.

[255] These questions essentially ask about the Settlement Amounts' accounting treatment, focusing on two particular aspects:

1) how CIBC made the decision on how to allocate the Settlement Amounts to itself only; and

2) whether tax motivation played any role in that allocation decision.

[256] On allocation, it is important to recall the Respondent's key position that the Settlement Amounts should have been allocated to other entities because they, not CIBC, were the ones involved in the Enron transactions. The Respondent therefore had questions about how some of the CIBC entities and reporting units operated and related to each other, and about how any reserves that CIBC established for the Enron payout may have changed, particularly in the 10 months leading up to the concluded settlements.

[257] On tax motivation, the Respondent pointed to several discovery statements and documents that it said raised the issue of whether tax motivation played a role in the Settlement Amounts' accounting treatment. In particular, it pointed to CIBC's nominee saying that tax deductibility opportunities are not the basis for accounting. The Respondent said this represents CIBC's position that accounting is not driven by tax consequences. It then noted certain answers or productions that it said raised questions about whether tax motivations played any role in the

Settlement Amounts' accounting treatment, saying that these questions were proper given CIBC's position on the non-role of tax consequences in accounting.

[258] The Respondent also made a general point about proportionality, knowing that some questions ask for a significant amount of information. It argued that the complexity of the case and the amount at stake militate against curtailing discovery rights.[123]

[259] CIBC refused all of these questions and says it properly did so. It says that questions about how the allocation was made and the accounting treatment are irrelevant; all that matters is that CIBC deducted the Settlement Amounts for itself. The appeals should therefore focus on whether that deduction was justified, not about the various accounting decisions CIBC made.

[260] CIBC also takes issue with questions about tax motivation, saying that the Respondent's pleadings fail to raise the relevance of tax motivation to any issue in play. It further adds that paragraphs 247(2)(*b*) and (*d*) of the *Act* are not being pursued by the Respondent, and since these are the only transfer pricing sections that invoke tax motivation, tax motivation is irrelevant to the case. Since no tax motive was pleaded, none is in issue, and therefore the Respondent cannot pursue this line of questioning.

[261] In response, the Respondent says that CIBC's objections amount to second-guessing the Respondent's theory of the case on how the Settlement Amounts were and should have been allocated. It says that discovery and refusals motions are not the place for this second-guessing, and that it should have the chance to lay the evidentiary foundation for its arguments. It points to a decision of this Court[124] for the principle that it is important to know what lies behind the accounting treatment of an outlay, and says this provides justification for looking into the facts and considerations that went into the Settlement Amounts' accounting treatment.

[262] On tax motivation, the Respondent says there is no need to specifically plead tax motivation because it pleaded that the Settlement Amounts violated paragraph

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[123] *Ontario Public Service Employees Union Pension Trust Fund (Trustees of) v Clark* (2005), 77 OR (3d) 38 (SCJ), aff'd, (2006), 270 DLR (4th) 429 (CA), particularly at para 67.
[124] *IKEA Ltd. v Canada*, [1993] TCJ No. 874, at paras 13 and 18.

18(1)(*a*) and s. 9 of the *Act*. Each of these sections could involve looking at tax motivation, particularly since the pleadings say that the allocation did not accord with GAAP. It says tax motivation does not need to be singled out as something that needs to be specifically pleaded, since tax motivation is just one of many reasons why CIBC's deduction could be offside with either paragraph 18(1)(*a*) or s. 9.

[263] The Respondent also points to *McKesson Canada Corporation v The Queen*,[125] which said that tax motivation may be part of the factual context that needs to be considered for paragraphs 247(2)(*a*) and (*c*) of the *Act*, both of which are still in play in the tax appeals.[126]

[264] In my view, the questions on allocation are generally relevant for the reasons the Respondent proposes. The Respondent has shown that questions on different entities, reporting units, reserves and other allocation questions meet the threshold for relevancy, particularly in relation to its key argument that Settlement Amounts should have been allocated to other entities. I also agree with *IKEA Ltd. v Canada* [127] that accounting treatments are relevant.

[265] The questions on tax motivation are also generally relevant given the productions raising it as a potential issue and in light of CIBC's deponent stating that tax motivation was not the basis for accounting. The issue though is whether the questions are proper. CIBC argued that the reason that the allocation went through multiple changes was that things were very fluid: from negotiation to settlement, it was a matter of weeks. That point is well-taken, but that does not mean the Respondent cannot ask questions relevant to its theory of the case.

[266] As for whether a specific pleading of tax motivation is needed, I would go so far as to suggest that there is always motivation, conscious or subconscious, for a course of conduct, and to suggest otherwise is naive. I would note that many of the questions about tax motivation are based on documents the Respondent received in discovery. It seems illogical to prevent the Respondent from asking questions about an issue because it did not specifically mention the point in the pleadings, when in actuality it only became aware of the issue once productions occurred. The

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[125] 2013 TCC 404.
[126] See para 275.
[127] [1993] TCJ No. 874, at paras 13 and 18.

Respondent is entitled to follow up on issues raised through discovery. It would be overly restrictive to force parties to rigidly stick to pleading specific facts when discovery yields additional information or a train of inquiry that is relevant and worth exploring. Something was behind the manner in which the deduction was presented – what was it? It is difficult to imagine how or why the reasoning behind CIBC's course of action would not be relevant.

[267] What is particularly persuasive, in my view, is that paragraphs 247(2)(*a*) and (*c*) of the *Act* are still live in these appeals. *McKesson Canada Corporation* noted that tax motivation may be part of the factual context that needs to be considered for these subsections, and given the low relevancy threshold associated with discovery, I find that these questions are generally proper and should not be broadly deemed to be irrelevant. Some may prove to be irrelevant upon closer examination, but to say they are irrelevant because they deal with accounting treatment and tax motivation is incorrect.

[268] One further note on these questions: they often focus on process. For example, one question asks for drafts, working papers and materials that CIBC staff had when making their recommendations on allocations. CIBC argues that process is irrelevant because all that matters is whether the accounting treatment was right or wrong. The Respondent says that process can show there was pressure or motivation to do something in a certain way, and that this process is therefore relevant.

[269] Generally speaking, I agree with the Respondent. It is true that the end result is what is at stake, but the considerations and process that went into that end result are generally relevant to these appeals. The Respondent demonstrated in the motion that the process featured shifts in CIBC's positions regarding how the allocation would be done, and it is entitled to explore why those shifts were occurring, particularly given the high relevance of questions about allocation. Exploring these shifts could yield information relevant to the Respondent's argument that the Settlement Amounts should have been allocated differently. I might normally agree that all that matters is the correctness or incorrectness of CIBC's deductibility decision; but in this case, the Respondent has shown that the process leading up to that decision may be connected to information relevant to the Respondent's case.

[270] I must also again emphasize the purposes of discovery. The discovery process is the most significant stage of the litigation in allowing a party to prepare for trial. It allows both parties to identify all relevant issues and then narrow them down. It allows the parties to prepare their respective cases and prepare full answers to their opponents' cases. Full and open discovery gives parties the complete picture. It promotes settlement by allowing the parties to completely assess the risk in proceeding with the litigation beyond the discovery stage. It also encourages proper and efficient trials.

[271] Discovery fails when the parties are engaged in obfuscation. The purpose is no longer disclosure but how to avoid disclosure. When that occurs, discovery's purposes are no longer being served, and neither is the administration of justice. Every effort should therefore be made to allow for full and proper disclosure, and courts must be guided in this endeavour by the discovery principles discussed at the very outset of this decision, particularly the low threshold for relevancy described in *Baxter* and *Burlington*.

[272] I will now deal with each of the questions covered in the allocation and tax motivation category.

Questions 1771 and 1772

[273] These questions focus on how the wording of a footnote in one CIBC subsidiary's 2004 financial statements is slightly different from the wording of a similar footnote in the 2004 financial statements of another CIBC entity. One footnote says that the subsidiary will pay *CIBC's share* of any Enron settlement if CIBC requests it, while the second footnote says the related entity will *pay CIBC* for an allocated portion of Enron-related settlements that apply to the entity and are not covered by insurance. The Respondent wants to know why the wording differs and whether anything turns on it, but CIBC refused to answer based on relevance.

[274] Question 1771 asks for the identities of all people who were responsible for any footnotes in the consolidated and non-consolidated financial statements of the various CIBC entities. Question 1772 asks for the working papers that led to the preparation of the footnotes. CIBC takes issues with these questions based on both relevance and the proportionality principle.

[275] Given the low relevancy threshold for discovery, and given the purposes of discovery, I find that these questions are relevant, proper and should be answered. CIBC contends that "the financial statements are the financial statements" and that the footnote authors' identities and the working papers behind the statements are irrelevant. But the Respondent's questions are about what it says are subtle differences in some of the statements, particularly in the footnotes. To that end, the authors' identities and working papers could be relevant to the allocation issue in that they could show the process by which CIBC arrived at its final financial statements.

[276] As for any issue of proportionality, the principle is certainly a worthy and important one, and efforts should certainly be made to keep costs down. But proportionality is not something to be used as a shield. In considering these appeals, and particularly the issues at stake and the quantum, proportionality is not the primary focus of decisions on discovery for these appeals. Relevancy is the key driver. As I have already stated, the Respondent has shown that the process by which CIBC arrived at its decision could yield information relevant to both its own case and to its countering of CIBC's case. The same goes for information such as working papers that may ordinarily seem tangential but that in this case provide a potential window into the decision-making process and justification behind the deduction of the Settlement Amounts. Proportionality must not defeat the purposes of discovery, particularly in appeals of this magnitude.

[277] These questions must therefore be answered.

Question 2225

[278] The Respondent says that at some point in CIBC's 2005 tax year, there was a decision to change the allocation methodology from that used in the previous tax year. During an Aug. 3, 2005, conference call between CIBC and analysts who cover it, CIBC's Senior Executive Vice-President and CFO, Tom Woods, said that CIBC had determined the best accounting case for the allocation in conjunction with its outside auditors, and the split was very heavily weighted towards CIBC's U.S. entities. This is not the allocation that ended up being used: CIBC itself took the full allocation. This question asks for notes or records of the consultation with CIBC's auditors, Ernst & Young ("EY"). CIBC responded that all such notes or records it has identified are subject to privilege.

[279] The Respondent argues that it is not apparent why a consultation with outside auditors would be privileged. It may be that CIBC is claiming privilege based on legal advice it received about the underlying Enron litigation, not about the allocation.

[280] The Respondent adds that allocation is at the heart of these tax appeals, and that at the point of the conference call, CIBC had made a specific allocation decision with its outside auditors and the Respondent is entitled to know what the consultations with the outside auditor said. It notes that no lawyers appear to be involved in providing legal advice to CIBC in relation to this question. Even if there were, the Respondent argues that simply because a lawyer was explaining how the case settled does not mean that CIBC can claim privilege over all related material, including consultations about the accounting treatment. The content of the consultations does not attract privilege.

[281] This question is made more difficult to deal with because CIBC did not make submissions about why it claimed privilege. The only representation in the record is CIBC's written answer to the Respondent, which simply says the notes and records are privileged. CIBC has the onus of justifying privilege. Based on the record in front of me, I do not see any reason why these notes and records should be privileged. These notes and records should therefore be produced.

Question 2296

[282] In this question, the Respondent points out an Aug. 4, 2005, email from Francesca Shaw, CIBC's Chief Accountant, that says CIBC is anticipating booking the Enron settlement liability and expense in the CIBC parent bank entity, but that this has not been concluded yet. The Respondent wants to know on what basis this booking was anticipated, including what were the facts upon which the decision was made. If no decision had been made yet, the Respondent wants an answer based on the eventual point in time when the decision was made.

[283] CIBC refuses on relevance and says that all that matters is how it was eventually booked by the bank. It says Ms. Shaw's decision on booking is irrelevant to the issues in the appeal.

[284] While it is true in some sense that all that matters is the bank's final deductibility decision and the reasons for that decision, the Respondent is clearly

interested in the process leading to that decision, and I have already noted that process will be relevant in some scenarios. Ms. Shaw certainly played a significant role in this decision, and it is also clear given the various correspondence that the decision was not hers alone. The facts behind this decision, even if it is a tentative one, are relevant. Given my statements above on relevancy and the purposes of discovery, this question should be answered.

Questions 2297, 2298 and 2299

[285] In these questions, the Respondent points to an Aug. 3, 2005, analyst conference call transcript that shows Mr. Woods saying that for the moment, the bulk of the settlement would get allocated in the U.S. (meaning not to CIBC). The Respondent asks what led to the change in booking positions from that taken in the conference call to that shown in Ms. Shaw's Aug. 4 email, which says that CIBC is anticipating booking the deduction to CIBC.

[286] CIBC says the Respondent has cherry-picked a position from the conference call. Indeed, Mr. Woods says in the call that the allocation issue is still being looked at and more of the Enron liability may be deducted in Canada. It is therefore clear no final decisions have been made.

[287] These questions are asking about interim positions when things were very fluid. I agree with CIBC that the Respondent may be cherry-picking by trying to suggest a change in position. It is clear that things were very much in flux at this point. But that does not mean that CIBC can simply refuse the question. If CIBC has a point to make about the question's premise or context, it can make that point in its answer. There is no reason to refuse the question. It is relevant and proper, and therefore should be answered.

Question 2356

[288] This question points to an email that suggests a decision was made on August 6, 2005, to turn an Enron reserve in the subsidiaries into a booking for CIBC. The question asks CIBC to advise if it was not the case at this point that a decision had been made as to how the booking was to be done. CIBC counsel refused on relevance, saying it was clear how the Settlement Amounts were

booked and in which quarter. CIBC says whether a final decision had been made is of little consequence.

[289] For the same reasons as above regarding relevancy, discovery and process, this question is proper and should be answered.

Question 2378

[290] This question asks if there was a revision or change to a booking referenced in a specific email. CIBC refused the question on relevance, saying the Respondent already knows how the booking was done in the third quarter of 2005.

[291] Again, this question is proper and relevant to the issue of allocation. This question should be answered.

Question 2388

[292] This question asks who would have to tell a CIBC employee that he could okay the booking of the entries referred to in a specific email chain. CIBC refused the question on relevance, saying the minutiae that individuals at CIBC discussed during the regular course of booking entries is of no consequence. For the same reasons as above, I find this question is proper and should be answered. The involvement and discussions of certain employees in determining the specific allocation of the Settlement Amounts is relevant to the tax appeals.

Questions 2390 and 2391

[293] These questions, based on the same email chain as question 2388, ask if there is a document in the production that can show that a decision has been made and communicated and to provide such a document. CIBC also refused this question on relevance.

[294] These questions go to the chronology of certain decisions regarding the Settlement Amounts, and the Respondent has said that the chronology of the decisions is relevant to its theory of the case. While CIBC points to the fact that there is already information on when the decision was generally made and the rationale behind the decision, the Respondent is making an issue of how certain

decisions unfolded. These questions are therefore relevant to the Respondent's arguments and should be answered.

Questions relating to a memo from the CIBC Chief Accountant

[295] During the fluid period when CIBC was determining the accounting treatment for the Settlement Amounts, CIBC's Chief Accountant, Ms. Shaw, wrote a memo with draft recommendations regarding the management accounting for the Enron settlement. The memo, dated Aug. 7, 2005, recommended a certain allocation and provided justification for the allocation. These recommendations differed from other allocation positions CIBC had taken in the previous week. It is clear that at this point, no final allocation decision has been made. It is also clear that this memo is about management accounting, not legal entity accounting, but the Respondent says it is still relevant to the chronology that led up to CIBC's ultimate allocation decision.

[296] The Respondent asked various questions relating to this memo, all of which were refused.

Question 2441

[297] This question asked who provided feedback on the memo. CIBC refused based on relevance. It is difficult to see the relevance of this question. The Respondent is trying to show there were changes to the accounting treatment that should be explored, notwithstanding CIBC's statements that everything was very much in flux at the time. The Respondent may want to know who gave feedback so that evidence may potentially be given at trial.

[298] But asking for the names of anybody who provided feedback on the memo is irrelevant. Ms. Shaw is clearly the named author, and that is what is relevant. Moreover, the content of the memo is available to the Respondent and can be tested at trial. The identities of those who provided feedback do not offer any useful value to the tax appeals, since this is truly the minutiae of the back-and-forth involved in producing a document. What matters is that the document was eventually produced, by a specific author, and with a specific position. This question was properly refused.

Questions 2442 and 2443

[299] The Respondent wants to know who else contributed to drafting the memo. For the same reasons as question 2441, these questions were properly refused.

Question 2446

[300] This question asked if the Chief Accountant had ever had to prepare a similar memo for another booking. It was refused on relevance. The Respondent could be asking this question in order to understand if these memos were standard practice. Again, given the low relevancy threshold, I would allow this question since it goes to process.

[301] However, I would note that a potential follow-up question could be to ask for some of these memos. I would have a difficult time finding the relevance in this type of question, since comparing one memo to another (not to mention locating a similar memo that would be appropriate) appears to be of little relevance to the issues. This question is about process, and standard practice may be relevant. But looking at two different memos does not go to process. There are numerous reasons why memos may contrast in certain ways, and only this memo, and whether it might have fit with how things typically unfolded, is of particular relevance.

Question 2449

[302] This question asked if memos like this were prepared for other litigation and was refused on relevance. This question is different from question 2446, since it is asking if similar memos were prepared arising out of other litigation, not just bookings. The relevance of other litigation has already been dealt with above: it is of little relevance. Even in trying to understand whether there was a standard practice, this question does not fit. Trying to tie in other litigation is of little relevance, even with the low threshold. This question was properly refused.

Questions 2480 and 2481

[303] These questions asked about the assumptions that formed a specific part of the memo. Mr. Woods, the deponent, answered that he suspected that Ms. Shaw would have verified the assumptions. The Respondent asked who Ms. Shaw did so with. CIBC refused the question on relevance and said Ms. Shaw no longer works for CIBC.

[304] I agree with the Respondent's contention that, given Mr. Woods' statement, it is entitled to ask with whom Ms. Shaw would have verified her assumptions in order to substantiate Mr. Woods' statement. CIBC argues that individual conversations have limited relevance to the matters under appeal. But again, the Respondent is pursuing the line that things changed over time and it wants to know why changes were made. This memo is a very specific document, not simply Ms. Shaw's general work. These questions should be answered.

Question 2491

[305] This question sought information from a current CIBC employee on whether Ms. Shaw reviewed any of the Enron transactions before writing the memo. CIBC refused it on relevance. The Respondent says the question was reasonable given Ms. Shaw's position as Chief Accountant.

[306] While this question partly goes to process, what Ms. Shaw did and did not look at could lead to an endless chase. However, the Respondent did narrowly frame the question to ask an employee who was still with the bank. Again, the background to all of this is the allocation and potential tax motivation. These are highly relevant, and so some latitude on these questions is allowed. This question should be answered.

Questions about the decision to allocate the Enron settlement to CIBC

[307] An email from Aug. 8, 2005, shows that the journal entry for the Enron settlement had been prepared and that the booking would be done under CIBC. Again, this decision to fully allocate the Enron settlement payout to CIBC differed from previous CIBC positions, including Ms. Shaw's management accounting draft recommendations. While it again must be noted that this time period was characterized by fluidity, this email appears to show when CIBC made the decision to allocate the Enron settlement to CIBC. It thus represents a crucial point in the chronology in this appeal. The Respondent asked several questions related to this decision.

Questions 2393 and 2394

[308] The Respondent asked when and how the decision was made to book the Enron settlement into CIBC, who made the decision and how and to whom the decision was communicated. These questions were refused based on relevance.

[309] CIBC says the Respondent is aware of when and how the entries were booked, and that is all that is relevant. But it is clear that the Respondent wishes to pursue the process behind the decisions so that it can inquire about why certain decisions were made. This email was a crucial step in the process. It is thus a proper question to ask when the decision was finally taken, who made the decision, how the decision was communicated and to whom it was communicated. Given the importance of this stage in the process, and the relevance of questions on allocation, this question is relevant and should be answered.

Question 2395

[310] This question asks in what format the decision was communicated. This question is redundant given questions 2393 and 2394, but to the extent it is not, it should be answered.

Question 2513

[311] This question points to an email that says a senior CIBC employee reviewed the booking with Ms. Shaw. The question then asks if this employee met with Ms. Shaw. This question was properly refused. The Respondent can see through the productions that the employee reviewed the booking with Ms. Shaw. Whether or not they held a meeting is irrelevant.

Question 2514

[312] This question asked who else was at any potential meeting with the senior employee and Ms. Shaw and to produce notes or other records from such a meeting. Again, this is about process. Notes and records relating to the meeting are not irrelevant given the importance of this decision in the entire chronology. Asking who else was there is also proper given the magnitude of this decision. This question should be answered.

Questions relating to the second version of a memo from the CIBC Chief Accountant

[313] The Respondent had questions about the second version of Ms. Shaw's management accounting memo.

Questions 2497, 2498, 2499 and 2500

[314] In an email circulating the second version of the memo, Ms. Shaw wrote that while everyone agrees with the revised recommendations, she would appreciate any comments about considerations and language. These questions asked who agreed with the recommendations (2497), how any such agreement was reached (2498), if there was anything documenting the agreement (2499) and if there were any notes on any meeting to discuss the recommendations (2500).

[315] Questions 2497, 2498 and 2499 were properly refused for irrelevance. The details sought are of such miniscule relevance, if any at all, that the questions should not be answered.

[316] Question 2500 is of borderline relevance. The second version of the memo appears to be much less crucial than the first, but it does represent a firming up of CIBC's position on how to book the settlement payout, and it is therefore relevant to the Respondent's inquiry into what considerations were in play in making the recommendations. Given the low relevancy threshold at discovery, this question should be answered.

Questions 1734 and 1735

[317] The memo states that the applicable strategic business unit for the Enron settlement payout transactions is one called "World Markets – Other," which is within CIBC. The Respondent notes that CIBC's management accounting treatment differed from its legal entity treatment of the Enron revenues, which were booked to investment banking and related business lines, not "World Markets – Other." These questions asked for a legal entity breakdown of the revenues, assets and liabilities for "World Markets – Other" for 2004/2005.

[318] CIBC refused this question based on relevance and says the allocation to the strategic business unit is irrelevant to these appeals. It says it has already provided

the Respondent with the relevant financial statements, but the Respondent says it is entitled to explore inconsistencies in CIBC's treatments of the Settlement Amounts.

[319] Given the significance of the allocation question, and given this memo discussing the strategic business unit that will take the booking, drilling down into the revenues, assets and liabilities of the strategic business unit is relevant to this appeal. It is true that the Respondent already has relevant financial statements, but CIBC's statement that "the allocation to the strategic business units is not relevant" certainly does not mix with the fact that this entire case is largely predicated on allocation.

[320] CIBC made a further point that obtaining this information would not be a simple task. But this information goes to an important question, even if it is on the management accounting side. The Respondent is correct when it argues that the merits of the case are not what matter at this point. All that matters is that the information is relevant. These questions must therefore be answered.

Questions 2611, 2627, 2632 and 2633

[321] These questions relate to a memo produced by a senior CIBC employee on the Enron reserve reversal in the U.S. subsidiaries group. They ask for: the circumstances under which the employee was asked to prepare the memo; production of the entire file the employee had in respect of the booking of the Enron allocations and reversal; and for CIBC to advise whether the employee was restating the content of Ms. Shaw's memo or whether he made an independent determination of these facts.

[322] CIBC refused all of these questions on relevance, saying that the circumstances surrounding preparation of the memo are irrelevant. I agree with CIBC. The specific circumstances sought here are not relevant; it is the content that matters. I also agree that there is already a process for obtaining relevant documentary disclosure; there is no need for CIBC to produce the entire file the employee had. Finally, asking CIBC to advise on the employee's internal thinking or process is completely irrelevant to this appeal. The content of the memo can be tested at trial, but asking CIBC to provide insight into the employee's thought process in arriving at a conclusion is irrelevant. These questions were properly refused.

Specific individual questions

Question 3454

[323] At a CIBC board meeting, business strategies relating to CIBC World Markets' U.S. business were discussed. At the meeting, material was circulated titled "Update on the CIBC World Markets U.S. Business" and "US Market Expansion/Acquisition Scan." The Respondent asked for these materials, but CIBC said they were irrelevant. The Respondent says the material is relevant to what CIBC's business strategies were at or around the time the decisions were made to settle the Newby and MegaClaim Litigations. It also says the material is relevant because OECD guidance for application of the arm's-length principle lists "business strategies" pursued by the parties to the transaction being reviewed as being relevant.[128] Based on this point, and on the material's potential relevance to the ability to pay issue, this question was a proper question and should be answered.

Questions 2889 and 2891

[324] These questions ask CIBC to make inquiries of a former employee. A journalist from Le Soleil had asked CIBC about whether CIBC would be deducting the Enron settlements in Canada. This employee was handling the journalist's request and sought guidance on the tax deductibility issue. Mr. Woods, the CFO and nominee at discovery, was eventually asked to provide guidance to the employee, but CIBC could not produce any record of Mr. Woods' response. CIBC further advised that the employee no longer worked at CIBC.

[325] The Respondent is asking firstly for CIBC to search the former employee's email records to see if Mr. Woods' response could be located. If it cannot, it asks CIBC to make inquiries of the former employee, and bases that request on s. 95(2) of the *Rules*. This rule calls for reasonable inquires to be made to past employees so that a nominee can inform himself.

[326] CIBC says Mr. Woods was a named custodian and if there was any relevant response available, it would already be in the productions. While this may be true, I see no reason why an email search cannot be done, particularly because CIBC is

[128] 2010 OECD Transfer Pricing Guidelines, para 1.36, 1.59-1.63.

aware of the date, persons involved and content of the discussion, all of which would help narrow the search immensely. CIBC must conduct this email search (question 2491).

[327] As for s. 95(2), CIBC says the Respondent misapprehends the rule and that it is only about making inquiries of people *before* discovery in order to prepare, not about hunting people down afterwards. I disagree. The wording of s. 95(2) does not suggest that making inquiries of employees is limited only to the pre-discovery period.

[328] The allocation issue is obviously central to this appeal, and the Respondent wishes to explore what public statement may have been made regarding the allocation around the time the settlement was actually agreed upon. Question 2489 is therefore proper and should be answered if the search of email records bears no fruit.

Questions 372 and 384

[329] The Respondent asked for minutes of board meetings of CIBC subsidiaries and affiliates that relate to the Enron transactions and litigation, including the negotiation and decision that led to the Settlement Amounts in 2005 and 2006. CIBC's answer was incomplete: minutes were only produced for two entities. CIBC said searches were done for minutes between 2002 and 2006, but the only results were the minutes for the two entities.

[330] In my view, CIBC must provide a full answer to these questions. It stands to reason that they should be available, including for the 2005 and 2006 years, and I have not heard any proper reason why they were not produced. CIBC must fully answer these questions.

Question 1698

[331] The Respondent asks CIBC to provide information on whether EY expressed a specific opinion on the $2.4B booking of the Enron settlement. The Respondent points to a specific note in CIBC's consolidated financial statements and asks if by writing this note, EY was expressing an audit opinion on the allocation of the Settlement Amounts to CIBC. The Respondent says CIBC cannot

say that EY concluded the overall statements conformed with GAAP and then refuse to ask EY if they were expressing an audit opinion on the $2.4B booking.

[332] The problem here is the question: it specifically asks if EY, by writing the note, was expressing an audit opinion on the allocation. But as CIBC points out, EY did not write the note; CIBC did. EY only audited certain financial statements and provided an audit opinion on them, and CIBC says the opinion was that those financial statements aligned with GAAP. The Respondent seems to be trying to ask that if EY, by saying that the financial statements aligned with GAAP, was also saying that the $2.4B booking aligned with GAAP. But again, that is not what the question asks. This question asks whether EY's writing of the note meant that EY was expressing an audit opinion on the booking. EY did not write the note. There is therefore no need to answer this question.

Questions 1451 and 2712

[333] These questions relate to EY's working papers. Question 1451 asks CIBC to approach EY to ask if they have any documents that match defined search terms that CIBC used for documentary discovery, and to search for a period ending at the end of 2007. Question 2712 asks CIBC to ask EY whether they have any documents that matched the search terms used to run the original searches, including working papers, communications, correspondence and documents that relate to the booking of certain Enron allocations. CIBC did not make these requests to EY.

[334] The Respondent cites case law to justify production of an auditor's working papers.[129] CIBC, on the other hand, points out that for documentary production, CIBC ran email searches for a number of custodians of documents, and the Respondent is now asking CIBC to ask EY to run the same search through EY's entire audit file. It says the Respondent has failed to show why the Respondent is entitled to such a broad, onerous and costly request, and that the results would have limited value and therefore violate the proportionality principle. It characterizes these requests as a fishing expedition, and says it has already provided relevant EY documents (which the Respondent in turn says were cherry-picked). CIBC also

[129] *Callinan Mines Ltd. v Hudson Bay Mining and Smelting Co.*, 2011 MBQB 159, and *Ontario Public Service Employees Union Pension Trust Fund (Trustees of) v Clark* (2005), 77 OR (3d) 38 (SCJ), aff'd, (2006), 270 DLR (4th) 429 (CA).

says the Respondent has failed to move against EY for third-party discovery under s. 86 of the *Rules* or even explain how the Respondent meets the test for production of documents from third parties.

[335] These questions are clearly an extremely onerous request. The Respondent is asking CIBC to approach a non-party to search its entire audit file for an extended period of time of at least several years. It is clear that EY had relevant interactions with CIBC on the treatment of the Settlement Amounts, and therefore EY would have relevant documents. The issue is therefore one of proportionality.

[336] The Respondent's difficulty is that it is hard for it to narrow its request since the file was so big and spanned several years. It could, however, have narrowed it to specific dates (including the dates surrounding the active period immediately before and after the settlement), though there was certainly no requirement for it to do so.

[337] I might have allowed these questions if they were narrower. But their broad terms lead me to conclude that CIBC is right in saying that a motion under s. 86 of the *Rules* should have been made, since that is the avenue for getting documents from a non-party, particularly on a request like this. Section 86 has its own test and rules that help limit over-discovery of non-parties, and that is the mechanism that the Respondent should have used. CIBC therefore does not have to answer these questions.

Issue 8: Questions which the Respondent says CIBC did not answer at all

[338] These are various questions that the Respondent says CIBC did not answer at all. The Respondent is seeking an order to compel answers to these questions.

Questions 208, 211 and 227

[339] These questions ask: whether someone in the U.S. kept records on the volume and nature of civil actions; what the nature of the actions brought or pending as of the 1999 fiscal period was; and what the level of litigation was with a certain CIBC subsidiary from 1999 to 2004. All of these questions are broadly asking about non-Enron litigation, which I have already held to be irrelevant. These questions offer no relevance to the appeal and were properly refused.

Question 404

[340] The Respondent asks for a full version of a specific CIBC policy for either 1999 or 2000. CIBC produced a full version for 2001 and says this version is equally relevant, but the Respondent has clearly asked for a version from 1999 or 2000. It is not up to CIBC to decide that the 2001 version is equally relevant. CIBC must answer this question.

Questions 947 and 948

[341] These questions refer to a paragraph in the documents forming CIBC's Notice of Objection. The paragraph says one important factor relevant to the decision to settle was the constraining effect that the U.S. DOJ agreement might have had on CIBC's litigation defence in the class actions. There was some concern that the DOJ might view some of CIBC's potential legal positions as violating the DOJ agreement. The Respondent asked which specific positions CIBC was concerned about and to advise of those positions. CIBC's response was that the paragraph in the notice of objection spoke for itself, and that anything else would be subject to solicitor-client privilege. The Respondent says CIBC has failed to fulfill an undertaking by not answering this question and has not shown how this is privileged.

[342] It seems reasonable to assume that any concerns about certain legal positions being offside with the DOJ agreement would be based on legal advice. But CIBC

has not done enough to meet its onus in establishing that this information is privileged. It may be reasonable to make an assumption about privilege, but there is nothing on the record to demonstrate how solicitor-client privilege applied. CIBC must therefore answer the question.

Question 1383

[343] This question asked why a certain individual ceased being a CIBC employee. CIBC refused the question on relevance.

[344] The lead-up to this question in the transcript shows that CIBC paid this former employee's legal bills related to Enron-related investigations and litigation. The question of why he stopped being an employee, in this context, is therefore relevant, since CIBC points to the conduct of certain CIBC employees as justification for CIBC's deduction of the Settlement Amounts. Questions about this specific employee could therefore lead to information relevant to allocation. This question should therefore be answered.

Question 1482

[345] This question asks whether, if it turns out there were discussions between the Newby plaintiffs and CIBC on the possible tax treatment of any settlement, CIBC would claim privilege over those communications. CIBC refused the question, calling it a hypothetical that was not appropriate for discovery. I agree. The question was properly refused.

Question 1688

[346] This question asked whether CIBC's position at trial would be that in expressing its audit opinion, EY approved of the reversal of the Enron allocations out of the subsidiary corporations. CIBC responded by simply providing an opinion from EY. The question did not ask for EY's opinion; it asked for the bank's position, which the Respondent is entitled to. This question must be answered.

Question 2057

[347] This question asks for any document that would be analogous to an insurance application that is related to the insurance CIBC had in place from 1997 to 2001. The Respondent says the question goes to the issue of what risk was perceived or reported for insurance purposes for business carried on by the bank. CIBC says it is irrelevant. I agree with the Respondent, particularly given the low relevancy threshold in discovery. The issue of perceived risk could be relevant to how CIBC perceived its activities and its potential liability exposure, which in turn could be relevant to CIBC stating what its actual source of exposure was in the Enron transactions. This question should be answered.

Question 2063

[348] This question asks if the insurance policy prior to Nov. 1, 2000, was materially different and if it was, to provide it. It is relevant and should be answered for the same reasons as question 2057.

Question 2071

[349] This question asks whether there was a dispute with the insurers about whether the kind of transactions undertaken with Enron would be covered under the policy. CIBC says it is unable to provide specifics on the issue but there was no dispute over CIBC's receipt of insurance proceeds, the value of the insurance proceeds or how the insurance proceeds applied. This does not quite answer the question. The Respondent wants to know if there was a dispute over the policy, and CIBC's answer is that in the end CIBC received the proceeds. CIBC must answer this question. If it cannot provide specifics, so be it, but it must at least address the question.

Question 2311

[350] The Respondent wants CIBC to ask a non-party who attended a CIBC board meeting whether they have any documents relevant to the tax appeal litigation. CIBC says the Respondent has offered no explanation for how the Respondent's request satisfies s. 86 of the *Rules* for production from non-parties. I agree. The Respondent has not shown in any way why this non-party would have relevant documents. This is the definition of a fishing expedition and was properly not answered.

Questions 2539 and 2540

[351] The Respondent wants to know how much of the line of business revenues and expenses from the investment banking line of business were picked up by CIBC for the years during which the Enron dispute were undertaken. CIBC took this under advisement but did not provide a response, and CIBC has offered no submissions on why no response was offered. This question should be answered. Given that allocation is in issue, this is a relevant question.

Question 2810

[352] The Respondent wants to know if there are any earlier versions of a certain document for 1998-2000. CIBC's answer is that a search was done and there was no record that the document was discussed with the board. But this does not answer the question. The Respondent simply wants any versions of the document from specific years. This question must be answered.

Question 2960

[353] The Respondent says CIBC first made an undertaking to advise how the $250M figure was arrived at in the MegaClaim settlement and then failed to fulfill the undertaking. However, I agree with CIBC that there was actually no undertaking given; this was simply an error by the court reporter. CIBC counsel was merely saying that the settlement document provides the information on what relief was claimed and why. This question does not need to be answered.

Questions 3127, 3131, 3132, 3133, 3142, 3143, 3144, 3145

[354] These questions relate to what filings CIBC made with the Office of the Superintendent of Financial Institutions ("OSFI"). CIBC says it has offered to question OSFI and is still waiting for an answer from the Respondent, or presumably an order from the court, on whether to do so. CIBC is therefore ordered to approach OSFI as it has said it is prepared to do.

Questions 3499 and 3500

[355] The Respondent wants to know why it was determined that three employees should be fired on account of their involvement in the Enron transactions. CIBC

says it is unable to advise on what basis the employees were fired, but that the three were no longer employed by the CIBC group of companies following the Enron collapse. The Respondent says this answer is not sufficient. I agree. CIBC must provide an answer as to why it was determined that the three employees should be fired.

Question 3733

[356] The Respondent wants to know how a certain amount related to a transaction was reflected in a balance sheet. CIBC took it under advisement but did not provide an answer, nor did it provide submissions on this question. I see no reason why no answer was given. CIBC must answer this question.

Questions 3819, 3820, 3821 and 3822

[357] These questions relate to a memo regarding a proposal for a CIBC subsidiary to provide US$250M of equity capital to CIBC World Markets Corp. ("CIBC WMC"). Part of the rationale in the memo was that the New York Stock Exchange ("NYSE") had periodically questioned the financial stability of CIBC WMC, and CIBC WMC would be subject to additional NYSE scrutiny based on certain thresholds. The Respondent wants to know if the NYSE ever put its concerns in writing. CIBC responds that the NYSE's views are not relevant, but the Respondent says they are indeed relevant to the ability to pay issue. I agree with the Respondent. It wants to pursue the ability to pay issue, and the NYSE's third-party view on whether CIBC WMC was over-leveraged or financially unstable in any way is relevant to that line of inquiry.

Question 5902

[358] The Respondent wants to know whether CIBC has any understanding of the extent to which Texas law, compared to New York State law, would govern the MegaClaim. CIBC replied that the answer would be best answered with help from U.S. counsel, then said that if it intends to rely on these points of law in support of its arguments, CIBC will deliver reports in accordance with the *Rules* and lead expert evidence at trial.

[359] This question is asking for an opinion. Questions asking for an expression of an opinion are not generally permissible during an examination for discovery

unless the witness is an expert whose expertise is put in issue in the pleadings.[130] CIBC therefore properly answered this question.

Lack of specification on where privileged documents appear in the productions

[360] For questions 871, 909, 911, 917, 922 and 927, the Respondent says that CIBC's answers rely on privilege but fail to specify where the requested documents appear in the productions. The Respondent says that without this information, it is difficult to assess CIBC's privilege claims. In these answers, CIBC either has not specified where the documents appear or says it has not been able to locate them.

[361] For all questions except 922, CIBC must either specify where the documents appear in the productions and/or make further efforts to locate the documents in the productions. Regarding question 922, CIBC is unaware if any such document exists, and there is therefore no need to undertake a further search for this document.

Conclusion

[362] I have dealt with each specific question and document in issue. I would like to add one final point. In recent times the Tax Court of Canada has had numerous motions similar to this motion. The litigating parties to some extent do not appear to understand what discovery is about. I invite them to examine my comments on discovery made earlier in this decision at paragraphs [270] and [271]. This particular motion seems in large part to be the result of obstruction by CIBC when it comes to the discovery process. Discovery is about allowing both sides to fully prepare for trial and identify all relevant facts and issues. Full and open discovery promotes settlement and proper and efficient trials. Discovery is not about curtailing information production – it is about production of relevant information.

[363] The parties would be better served if they forged ahead and engaged in proper discovery, which would allow them to truly arrive at the facts and issues that are relevant to these appeals. I for one do not believe that obstruction is the

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[130] *Rivtow Straits Ltd. v B.C. Marine Shipbuilders Ltd.* (1976), 14 NR 314 (FCA).

proper way to litigate, and there are certainly consequences to that strategy that the Court should and will consider.

[364] Submissions on costs may be made orally on this decision, at a date to be fixed.

Signed at Toronto, Ontario, this 2nd day of December, 2015.

"E.P. Rossiter"

Rossiter C.J.

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