Docket: 2013-2939(IT)G

BETWEEN:

SUPERIOR PLUS CORP.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on May 30, 2016 at Ottawa, Canada.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the Appellant:	Al Meghji Edward Rowe Joanne Vandale
Counsel for the Respondent:	Raj Grewal Perry Derksen Kristian DeJong

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ORDER

Upon motion made by counsel for the Appellant seeking an order under sections 4, 93, 95, 107(3), 108 and 110 of the *Tax Court of Canada Rules (General Procedure)* (the “Rules”) requiring the Respondent:

(a) to provide complete and better answers to each of the questions taken under advisement listed at “Appendix A” to the Notice of Motion (“Appendix A”) within 15 days of the Order, and to provide full and complete answers to all questions which arise therefrom within 30 days of such follow-up questions being asked;

(b) in the alternative, to present a knowledgeable and fully informed nominee to attend a second examination for discovery of the Respondent at the offices

of Osler, Hoskin & Harcourt LLP in Calgary, Alberta pursuant to section 93 of the Rules, and to provide full and complete answers to all proper questions at that examination, including complete and better answers to each of the questions taken under advisement listed at "Appendix A" and to questions which arise therefrom, the date fixed for such examination to be within 30 days of the date of the Order;

(c) to pay the costs of this motion on a solicitor-client basis in any event of the cause;

And upon reading the affidavits filed and hearing the oral submissions made by and on behalf of the parties;

And upon reading the written submissions filed by counsel for the parties;

For the reasons set out in the attached Reasons for Order, the motion is allowed on terms and the Court orders as follows:

(a) The Respondent is to provide answers to the questions identified as Improperly Refused Questions in the attached Reasons for Order within 90 days of this Order.

(b) Follow-up questions to the answers to the Improperly Refused Questions may not be posed to the Respondent's nominee by the Appellant except by leave of the Court. Such leave may only be sought by motion within 60 days of the answers to the Improperly Refused Questions being provided to the Appellant. I will remain seized of this matter for the purposes of such motion.

(c) No award of costs shall be made.

Signed at Ottawa, Canada, this 29th day of September 2016.

"Robert J. Hogan"

Hogan J.

Citation: 2016 TCC 217
Date: 20160929
Docket: 2013-2939(IT)G

BETWEEN:

SUPERIOR PLUS CORP.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Hogan J.

I. OVERVIEW

[1] The Minister of National Revenue (the "Minister") disallowed the use of certain tax attributes by the Appellant on the basis that, among other reasons, the general anti-avoidance rule (the "GAAR") applied to preclude their use. In so doing, the Minister alleged the existence of a general policy in the *Income Tax Act*[1] (the "*Act*") against the transfer of losses between arm's-length parties. The Appellant disputed whether the Minister actually relied on the existence of such a policy in the assessment and sought the production of certain documents and answers to certain questions dealing with what was prepared in the context of the audit of the Appellant, or considered by the Minister's officials who were charged with that audit, or consulted regarding the application of the GAAR. The Minister refused such production on the basis that the individual views of the Minister's officials and the general mental process of the Minister in assessing were irrelevant.

[2] I granted, in part, the Appellant's motion on the basis that, at the very least, the information sought could aid the Appellant in establishing that the Minister had not relied solely on the alleged policy or had not concluded that the impugned

[1] *Income Tax Act*, RSC 1985, c 1 (5th Supp).

transactions clearly frustrated this policy.[2] As individual Canada Revenue Agency ("CRA") and Department of Finance Canada ("Finance") officials whose views could have informed the Minister's decision to invoke the GAAR could be relevant to this determination, I ordered that such information be disclosed in my Order dated 22 May 2015 (the "2015 Order").

[3] Following the dismissal of the appeal from the 2015 Order,[3] the Respondent, in mid-November, produced unredacted copies of the documents at issue (the "Produced Documents"). On 10 December 2015, pursuant to the 2015 Order, the Respondent provided answers to the questions whose refusal had been ruled improper. On 14 December 2015, counsel for the Appellant wrote to counsel for the Respondent to express their view that the answers so provided were insufficient and improper responses. By reply dated 17 December 2015, the Respondent's counsel affirmed that they were satisfied that the answers were proper and suggested that the Appellant pose follow-up questions at the second round of discovery.

[4] The facts relevant to the imposition of the distribution tax (the "SIFT tax") on specified investment flow-through trusts ("SIFTs") have been adequately summarized in the 2015 Reasons. They also contain an explanation of the tax-deferred conversion methods provided for by the July 2008 amendments to the *Act* (the exchange method and the distribution method), and of the plan of arrangement between the Superior Plus Income Fund (the "Fund") and Ballard Power Systems Inc. ("Old Ballard").

[5] In summary, the Minister reassessed the Appellant on the basis that it was unable to use the favourable tax attributes that had previously accrued to Old Ballard on the grounds that either:

(a) the unit holders constituted a group of persons who acquired control of the Appellant under the plan of arrangement, thereby triggering the application of the so-called streaming restrictions (the "Streaming Restrictions") under subsections 111(4), 111(5), 37(6.1) and 127(9.1) of the *Act*; or

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[2] See paragraph 32 of the 2015 Reasons for Order in *Superior Plus Corp. v The Queen*, 2015 TCC 132 ("2015 Reasons").

[3] The reasons of the Federal Court of Appeal in that matter can be found at 2015 FCA 241.

(b) the GAAR applied because the conversion was structured to circumvent the Streaming Restrictions in an abusive manner.

[6] The motion brought by the Appellant and the Respondent before this Court in February 2015, which led to the 2015 Order, was occasioned by questions arising out of the examination for discovery of the Respondent's nominee, Ms. Salimah Jina, in September 2014 (the "September Discovery").

[7] As noted above, I granted, in part, the Appellant's motion, ordering the Respondent to answer the large majority of questions with respect to which the Appellant sought to compel answers. I also ordered the production of most of the documents sought by the Appellant and the reattendance of Ms. Jina to answer all proper follow-up questions. This constituted, in part, the effect of the 2015 Order.

[8] Following the dismissal of the appeal from the 2015 Order, the Respondent sought to comply with that Order. The Appellant has brought the motion herein ostensibly because of the failure of the Respondent to comply.

[9] The Appellant examined Ms. Jina again in December 2015 so as to put to her follow-up questions arising out of the previously refused questions and the disclosed documents. At that examination (the "December Discovery"), a number of questions were taken under advisement and subsequently refused in a written reply. The Appellant has therefore returned to this Court to compel proper replies by Ms. Jina.

II. POSITIONS OF THE PARTIES

[10] In its motion, the Appellant initially sought a continuation of the discovery of Ms. Jina on the basis that the discovery had been adjourned to seek this Court's directions on whether the Appellant could probe the mental process of the Minister. The Appellant submitted that it was entitled to continue its questioning so as to broach new lines of inquiry in any further examination of Ms. Jina.

[11] Following the oral hearing, the Appellant gave notice that it was no longer seeking this relief.[4]

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[4] See letter dated June 9, 2016 from the Appellant's counsel to the Registrar of the Tax Court.

[12] As a result, the Appellant's principal position is that the questions that are currently the subject of dispute are all proper follow-up questions arising out of the answers provided and documents produced by the Crown pursuant to the 2015 Order.[5]

[13] In the alternative, the Appellant seeks leave under subsection 93(1) of the *Tax Court of Canada Rules (General Procedure)* (the "Rules") to conduct a second examination for discovery of Ms. Jina.

[14] The Appellant also sought the production of the documents described at paragraph 1 of its Notice of Motion. The Appellant alleged that the Crown had repeatedly interpreted the 2015 Order in an overly narrow manner so as to thwart the effective discovery of Ms. Jina, such that only full production would move the discovery process along in an effective manner. However, the Appellant has now informed the Court that it no longer seeks this relief.[6]

[15] Finally, the Appellant seeks costs of its motion awarded on a solicitor-client basis. It submits that an analysis of the factors under subsection 147(3) of the Rules[7] leads to a conclusion that it is so entitled, even if the Crown has not engaged in egregious or scandalous conduct.

[16] The Respondent, in her oral and written submissions, has opposed the motion on the basis that the disputed questions do not logically and necessarily flow from the answers previously provided. By this, the Respondent means that certain follow-up questions could have been or were in fact posed to Ms. Jina at the September Discovery. The Respondent therefore submits that the questions at issue are not proper follow-up questions, as they flow from information available to the Appellant as of the September Discovery or were effectively abandoned by the Appellant for strategic purposes in the proceedings leading to the 2015 Order.

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[5] The Appellant sought to compel answers to a larger number of questions and requests in the first iteration of this motion. For reference, the Appellant no longer seeks to compel answers to Requests 109, 116, 118, 132, 139, 140, 141, 155, 159, 162, and 165. Request 116 was withdrawn in response to assurances by counsel for the Respondent that the information sought would relate to a different taxpayer and a different matter, while Request 118 was withdrawn following the Respondent agreeing to provide a full and complete response. This leaves Requests 107, 108, 110-115, 117, 122-131, 146-152, 154, 156-158, 160, 161, 164, 167, 169-171, 182, 191, 192, 194, 197, 198, 208, and 210-213 at issue in this motion.

[6] See letter, *supra*, footnote 4.

[7] SOR/90-688a.

[17] The Respondent also submits that certain questions posed and documents sought relate to internal communications of Finance that are irrelevant and not considered as falling within the ambit of the 2015 Order. I take it that the Respondent's position is that these questions embark on a new line of inquiry that seeks to go beyond the narrow focus of the 2015 Order, and that this new line of questioning will lead to the obtaining of irrelevant information having nothing to do with the process of the Minister in assessing the Appellant.

[18] The Respondent finally submits that certain of the documents in question are protected as cabinet confidences, relying on the decision of the Supreme Court of Canada in *Babcock*[8] for relevant principles in this regard.

III. ANALYSIS

A. Follow-Up Questions and General Principles

[19] Determining whether a certain question is proper follow-up is necessary if the principal examination for discovery of the nominee is otherwise complete. This is because the examining party would otherwise be free to pursue new lines of inquiry that have not been dealt with in the previous examination. Where an examination has concluded, subject to proper follow-up questions, the examining party is confined to posing proper questions arising from the answers provided following the end of the examination.[9] Absent leave being granted under subsection 93(1) of the Rules, the examining party is no longer able to pursue a new line of inquiry unless it is through a question arising out of information provided to fulfil an undertaking, to correct or clarify a previous answer, to answer a question taken under advisement or to answer a question to which an objection had been made.[10] If the question whereby it is sought to open this new line of inquiry does not arise out of the answer given, then the door to that line of inquiry is closed to the examining party.

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[8] *Babcock v Canada (Attorney General)*, 2002 SCC 57 at para. 18, [2002] 3 S.C.R. 3.

[9] This is the case even if the examination has not technically ended. See *Mercer v Cronin*, 2014 NBQB 207; affirmed on appeal, 2015 NBCA 13.

[10] *MIL (Investments) S.A. v The Queen*, 2006 TCC 208 at para. 17 (MIL), citing the reasons of Justice Sharlow in *SmithKline Beecham Animal Health Inc. v The Queen*, 2002 FCA 229, [2002] 4 C.T.C. 93. The relevant discussion in the latter decision is found at paras. 35-37.

[20] Even if a question arises from the answer given, the Court must still determine that the question is proper in the circumstances before it will compel the nominee to answer. Whether a question is proper is a discretionary determination requiring that a given question be relevant and arise out of the answer given.[11] Those however, are not the only considerations. As noted by the Federal Court of Appeal, the "[t]ask of distinguishing proper questions from improper ones requires consideration of the factual and procedural context of the case, informed by an appreciation of the applicable legal principles."[12]

[21] A relevant consideration in this determination is whether the question could have been posed in the earlier examination.[13] However, the case law shows that the fact that a question "could" have been posed in the prior examination does not necessarily make it improper.[14] This can be contrasted with the contrary holding in *Seabreeze Electric*, where the disputed follow-up questions arose out of undertakings given by a cooperative party and could have been posed without any reliance on the answers to undertakings.[15]

[22] In this case, the Appellant was able to ask some of its questions in the September Discovery but subsequently sought to pose those questions, or substantially similar ones, in the December Discovery as proper follow-up. I have highlighted examples in the context of Ontario civil litigation where follow-up questions that could have been posed at the original examination were considered not to be "proper". There are cases going the other way where different circumstances led to a different conclusion on whether a question was proper. In either instance, the disputed questions arose logically out of the responses of the examined party but could have been posed at the principal examination for discovery, without having the nominee provide the answer subsequently.

[23] Instances where the Court has found such questions to still be proper and has compelled an answer include instances where the representative of the taxpayer had provided contradictory and incomplete information such that the Crown felt it

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11 *Stanfield v The Queen*, 2007 TCC 480 at para 53. See also *Ontario v Rothmans Inc.*, 2011 ONSC 2504 at para. 98, 5 C.P.C. (7th) 112 – leave to appeal refused, 2011 ONSC 3685 (Div. Ct.).

12 *Bristol-Myers Squibb Co. v Apotex Inc*., 2007 FCA 379 at para. 35.

13 For examples in the context of Ontario civil litigation, see *Hollycorp Investments Ltd. v Genna Foods Ltd.* (2001), 105 A.C.W.S. (3d) 1032 (Ont. S.C.J.); *Seabreeze Electric Corp. v Young Estate* (2005), 142 A.C.W.S. (3d) 50 (Ont. S.C.J.).

14 *MIL*, *supra*, at paras. 9, 13, 14, 18.

15 See *Seabreeze Electric*, *supra*, at paras 27-32.

necessary to demand a new nominee. In such a case, Justice Woods determined that questions that could have been asked at the examination of the first representative were still proper and allowed to be posed to the new representative as follow-up questions given the procedural context of the case, for which the examining party should not have been faulted.[16]

[24] In *Teranet Inc. v The Queen*,[17] Justice Miller refered to *Blais v Toronto Area Transit Operating Authority* in which are outlined the following principles that I find to be a useful guide as to the factors that I should consider in exercising my discretion to compel or not compel the Respondent to answer the Refused Questions.

- As a general principle a party giving undertakings or answering refusals may be required to reattend to complete the discovery by giving the answers under oath and answering appropriate follow up questions. A party being examined may not compel the examining party to accept answers in writing simply by refusing to answer questions or by giving undertakings.

- On the other hand, the court will not automatically make an order for follow up discovery if it serves no useful purpose. Examples in which an order may not be appropriate would be cases in which a full and complete written response has been given to a simple question, in which the answer demonstrates that the question was not relevant or in which the parties have agreed that written answers will suffice.

- The court will generally make such an order if it appears necessary in order to fulfill the purposes of discovery. Examples of situations in which an order would be appropriate are situations in which the answers appear cursory or incomplete, where they give rise to apparently relevant follow up questions that have not been asked, if newly produced documents require explanation, or the discovery transcript supplemented by the answers will not be understandable or useable at trial.

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16 See *MIL*, *supra*, at paras 13-19. Other instances include those where the answers given during the principal examination were so vague as not to be amenable to detailed follow-up questions (see *Apotex Inc. v Wellcome Foundation Ltd.*, 2007 FC 236) and where certain questions had previously been posed in the principal examination by one party and a third party sought to compel answers in a later stage of the proceeding without any determination of the propriety of the questions having been made (see *Zündel v Canada (Attorney General) et al.* (1998), 157 F.T.R. 59, 82 A.C.W.S. (3d) 867 (FC-TD)).

17 *Teranet Inc. v The Queen*, 2016 TCC 42 at para. 43, citing *Blais v Toronto Area Transit Operating Authority*, 2011 ONSC 1880 at paras 61-63. Paragraph 63 of *Blais* in turn reproduces these principles from paragraph 7 of *Senechal v Muskoka (Municipality)* (2005), 138 ACWS (3d) 639 (Ont S.C.J.).

- Even if answers do appear to require follow up, the court has discretion to order answers in writing or to decline to order further examination where it appears the cost or the onerous nature of what is proposed outweighs the possible benefit or where for any other reason it appears unjust to make such an order. Such discretion should be exercised only if the interests of justice require it.

[25] The Court therefore retains discretion under section 110 of the Rules to determine whether to compel the party to answer and to reattend for follow-up questions. In so doing, the Court may take into account the above considerations with regard to whether the question should have been posed at the original examination, whether the cost or the onerous nature of answering the question outweighs the possible relevance of the answer, or whether, for any other reason, it appears unjust or contrary to the goals and purposes of the discovery process to compel an answer.[18] As noted by the Supreme Court of Canada in *Hryniak*,[19] "applying rules of court that involve discretion 'includes . . . an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and impact on the litigation, and its timeliness, given the nature and complexity of the litigation'".

[26] The Respondent has highlighted the decision of Justice Potts of the Ontario Court (General Division) in *Muslija*[20] in support of its contention that the Appellant's follow-up questions are improper because they could have been asked at the September Discovery. I would note that the case before Justice Potts involved a moving party who had unilaterally adjourned the examination for discovery of the other party's nominee to compel an answer to a disputed question. That question was found to have been properly refused, but the moving party later sought to continue the examination of the nominee. Justice Potts concluded that the principal examination had finished and that there were no grounds to grant leave for a second examination. That decision thus speaks to identifying when the principal examination for discovery has concluded and when leave may be granted under subsection 93(1) of the Rules for a second examination for discovery. It does

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[18] Many of these considerations were looked at in the 2015 Reasons, in which such principles were reproduced from *HSBC Bank Canada v The Queen*, 2010 TCC 228. Most recently, the Federal Court of Appeal reproduced the extract in question in *Cherevaty v The Queen*, noting that it was a summary of the principles that had been applied up to 2010 by the Tax Court of Canada in relation to discovery examinations. See 2016 FCA 71 at para. 18. I note the reaffirmation of these principles in *Canadian Imperial Bank of Commerce v The Queen*, 2015 TCC 280. I also note the principles, referred to above, contained in *Senechal*.

[19] See *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 at para. 31, (citations removed).

[20] *Muslija v Pilot Insurance Co.* (1991), 3 O.R. (3d) 378, 50 C.P.C. (2d) 179 (Ont. Ct. Gen. Div.).

not support the Respondent's contention that any questions arising out of that which was provided to the Appellant pursuant to the 2015 Order are categorically excluded from being proper follow-up simply because they could have been asked at the September Discovery.

[27] The principles arising out of *Direct Source Special Products Inc. v Sony Music Canada Inc.*[21] are similarly clear. In *Direct Source*, the plaintiff unilaterally adjourned examination for discovery under the *Federal Courts Rules* equivalent of section 108 of the Rules after less than two hours of examination. The full day had been peremptorily set for examination, and the prothonotary before whom the motion was argued concluded that the defendants' nominee had been cooperative with the plaintiff's counsel. He found that the examination for discovery had concluded upon the adjournment of the examination. Justice Heneghan of the Federal Court upheld the decision on the basis that it was not "clearly wrong" insofar as it was a discretionary decision based upon a factual finding by a case management prothonotary and therefore to be given significant deference on appeal.[22] This decision however, as does *Muslija*, speaks to the question of whether the Appellant may embark on new lines of inquiry in examining Ms. Jina, not whether the refused questions before me now are proper follow-up.

[28] Finally, I would note my general observations on the procedural and factual circumstances giving rise to this motion, insofar as to do so is proper for the exercise of my discretion under section 110 and subsection 93(1) of the Rules and for my award of costs. I note that this motion originated from the improper but good-faith refusal to answer certain questions at the September Discovery, based on a principled stance by the Respondent that was unfortunately incorrect. These circumstances, while not rising to the level of egregiousness seen in *MIL*, also, in my view, distinguish this case from those in which an examining party seeks "to test a theory, possibly developed since the examination, to which the answers may or may not have contributed".[23]

[29] In my analysis of the parties' representations on the merits of the refused questions, I have been guided by the need to balance the nature of the appeal, the potential relevance of the information sought, the impact that full and responsive

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21 2003 FC 1227.

22 *Ibid.*, paras 20-22.

23 *Labow v The Queen*, 2008 TCC 511 at paras. 11-12.

answers to the questions posed may have on the length of the discovery process, the information obtained to date by the Appellant in support of its position and a host of other similar considerations that must be taken into account in the exercise of my discretion to compel the Respondent to answer the questions.

[30] The transactions at issue in this appeal were fully disclosed in public documents, which were subject to a very high level of disclosure under applicable securities law. The Appellant has also received a vast number of documents from the Respondent. In this context, the parties should to a large extent be able to agree on a large number of the material facts. In my opinion, this should have facilitated the discovery process. Unfortunately, it was all overshadowed by the inability of the parties to come to an agreement on what is and is not potentially relevant in the history of the audit and assessment process. As a result, the parties appear to have adopted a more combative approach, which in my opinion will lead to more delays and costs for both parties. The parties appear to be engaged, yet again, in a full-fledged pugilistic encounter. The history of heated procedural skirmishes in this matter appears to have prevented calmer discourse and useful cooperation from gaining a toehold in the pre-trial proceedings. As motion judge, it is my duty to set this matter on a better course, having regard to the fact that the information sought in this motion is, in my view, of very limited importance. I trust that the parties will now turn their attention to working on an agreed statement of facts.

[31] The Appellant has raised a point that it views as the distinguishing feature of this appeal – that an amendment to the *Act* was made, supposedly using the transaction at issue in this appeal as a template with a view to denying tax benefits arising on a prospective basis. The Appellant says that broader leeway to explore the process involving the enactment of that amendment is necessary in light of this exceptional circumstance and the Minister's invocation of the GAAR.

[32] I disagree that this is so exceptional a circumstance as to render Finance's internal deliberations in enacting the amendment relevant to whether the Minister assumed the existence of the policy at issue or whether the policy actually does exist in the *Act*. It is certainly not exceptional for Finance to react to information received from the Minister on tax-planning strategies encountered during audits. The reasons why Finance decided to propose a prospective amendment for Parliamentary consideration do not establish the Minister's assumptions in reassessing the Appellant under the GAAR. Any impact that the amendment has on

the inquiry in that regard will likely be determined by principles outlined in case law.[24]

[33] The Appellant highlights the fact that the documents disclosed to date show that there was an ongoing debate among senior CRA officials as to whether or not the GAAR could be invoked to deny the tax benefit received by the Appellant. I surmise that the Appellant wishes to advance this as evidence to show that the policy underlying the provisions that the Minister is purported to have assumed were abused was not sufficiently clear to warrant the GAAR assessment. This is why Finance sought to amend the Act, partly on the basis of representations from the Minister. The determination of policy is however a question of statutory interpretation for the trial judge, who will have to put the legislative amendment in its proper context, having regard to principles outlined in the case law and the submissions of the Respondent at trial on the existence of the policy. It is, at best, unclear to me how much more the Appellant can hope to find in the files of Finance that would help it refute the anticipated case to be made by the Respondent on this point.

[34] As discussed more fully in my treatment of individual questions, I am however of the view that the Appellant's submissions conflate the Minister's awareness of Finance's deliberations in deciding how to deal with the issue raised by the Appellant's conversion and the actual deliberations undertaken by Finance. It seems to me that the internal communications or deliberations in the halls of Finance to which the Minister was not privy could not be relevant to the Minister's mental process in auditing and assessing the taxpayer. Nor could they be relevant to ascertaining Parliamentary intent for the purposes of the GAAR analysis at trial.

[35] Since I have concluded that the Respondent does not need to answer the questions that are irrelevant, they could not form the basis for a successful application under subsection 93(1) of the Rules for leave to conduct a second examination. Insofar as the Appellant might seek to examine Ms. Jina a second time on questions that I have determined to be irrelevant and improper follow-up questions, leave to do so is refused. The only questions that the Respondent must answer are those outlined in this Order.

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24 See, among others, paragraphs 54-57 of *Gwartz v The Queen*, 2013 TCC 86, for a statement of such principles.

[36] The transactions at issue in this appeal, while difficult for a lay person to assess, are not that complex in the eyes of this Court. The principles that the Court must apply in determining the validity of a GAAR assessment have become well established in the seminal decisions of the higher courts. In my opinion, this appeal appears more than ripe for hearing. In this context, it is hard for me to imagine how the Appellant's case will be prejudiced if the Respondent is not compelled to answer the questions that I have identified as having been properly refused or properly answered. In my opinion, the foregoing also justifies my decision to not allow further follow-up questions arising from the answers given pursuant to this Order to be asked without leave of the Court.

[37] I now turn to examining the disputed questions in light of the 2015 Order and in the context of the September Discovery.

B. QUESTIONS RELATING TO THE ADAMS-ERNEWEIN E-MAIL CHAIN

[38] The Appellant asked Ms. Jina to confirm whether a chain of e-mails, reproduced at Tab 1 of Tab 2.P. of the Motion Record and presented to Ms. Jina at the December Discovery, represents the entire chain of e-mails between Mr. Wayne Adams and Mr. Brian Ernewein, or whether there are further communications between Mr. Adams and Mr. Ernewein with respect to the subject matter of these e-mails.[25] Ms. Jina was also asked to find out if a record exists of the discussions that occurred between Finance and the CRA Income Tax Rulings Directorate ("Rulings") with respect to the subject matter in question.[26]

[39] The Appellant also asked Ms. Jina to inquire of Mr. Ernewein regarding what documents or correspondence he may have with respect to the e-mail chain.[27] In addition, the Appellant has asked Ms. Jina to ask Mr. Adams why he identified certain other individuals (Mr. Marc Vanasse, Mr. Mark Symes and Mr. Yves Moreno) as contacts with respect to the subject matter of these e-mails.[28] The Appellant then asked Ms. Jina to produce any documents at Rulings dealing with such subject matter[29] and to follow up with Mr. Vanasse, Mr. Symes,

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25 See Requests 107 and 108, "Appendix A" to the Appellant's Notice of Motion. These e-mails were referred to as Document 4 in the 2015 Reasons.

26 See Request 112.

27 See Request 110.

28 See Request 111.

29 See Request 113.

Mr. Moreno and Mr. David Palamar to determine whether they are aware of any documents dealing with the subject matter discussed in the e-mails.[30]

[40] These questions arise out of, and are logically connected to, the production of the e-mail dated December 18, 2008 from Mr. Adams to Mr. Ernewein, as redacted by the 2015 Order. They are relevant insofar as they go to the same issue as Document 4 did, that being the facts and circumstances surrounding the pleading of the policy. In the e-mail, Mr. Adams cites the (at the time proposed) conversion of the Fund into what is now the Appellant, using an existing corporation, as an example of the loss-shifting transactions involving income funds that were causing the erosion of "billions of dollars" from the tax base.

[41] The Respondent had submitted that a redacted copy of the e-mail in question had been obtained by the Appellant under the *Access to Information Act*[31] (referred to in these reasons as an "AIA document") and that the portions that were unredacted on that copy gave sufficient information to allow the Appellant to pose these questions at the September Discovery. The Respondent notes that the Appellant did in fact pose questions to Ms. Jina at the September Discovery that are similar to those now in dispute, but that the Appellant did not move with regard to those questions when bringing its original motion. It is the Respondent's view that the Appellant should suffer the consequences of its strategic narrowing of the issues and should not be permitted to revive under the guise of follow-up questions previously refused.

[42] The Appellant submits that the proper prism through which to view the context of these questions is that the produced e-mail is essentially a different document from the AIA document because of the relevant redactions that were made in the latter document. While I agree in principle that redactions in a document can effectively make it a different document insofar as the information it conveys is restricted or altered, the differences between the now produced e-mail and the AIA document version would only be relevant if a party could not have been reasonably expected to ask the questions at issue when confronted with the AIA document version. As noted by the Respondent, the Appellant had asked questions at the September Discovery that were broadly similar to those upon

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[30] See Requests 114 and 115.
[31] R.S.C. 1985, c. A-1.

which it now seeks to move. In my view, this strongly suggests that these questions do not necessarily arise out of Document 4.

[43] This, however, does not end the matter. The Respondent has demonstrated in her replies to other questions posed at the December Discovery that she is able to contact the persons needed for the purpose of providing an answer.[32] The Respondent, apart from making clear in oral submissions her view that this matter is ready for trial, has provided no other reason why all of these requests should be refused. There is no suggestion that they are irrelevant, or onerous, or constitute a fishing expedition[33] or are otherwise at variance with the principles I have enunciated above. Having reviewed the e-mail chain, I would view the subject matter of the e-mail chain as being characterized by the following taken from Mr. Adams' e-mail of December 18, 2008: "[the notification of Finance of the] revenue loss resulting from the use of unaffiliated corporations having deductible tax accounts to continue the activities of income trusts". I am of the view that information relating to the views of CRA officials on that subject is relevant to the Minister's pleading of the alleged policy.

[44] In the circumstances of this case, I am inclined to order answers to Requests 107, 108, 110, 111, and 112.

[45] In contrast, the Respondent has objected to Requests 113, 114 and 115 on the additional basis that these requests are overbroad insofar as they seek both relevant and irrelevant information. I believe that these concerns do not arise on my view of the subject matter of the e-mail chain. Furthermore, I do not view the Appellant as being precluded from asking for responsive documents because it sought and then abandoned its quest for unredacted relevant documents earlier in this appeal. As these requests may be relevant to the case that the Appellant is attempting to make before the trial judge and are otherwise proper, the Respondent should answer these questions.

C. ROLES OF THE PARTIES TO THE CHAIN OF E-MAILS OF 5 MARCH 2010

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32 Even those who have retired from work with the CRA – see Respondent's Answer to Request 134, as summarized in Appendix A to the Respondent's Written Submissions.

33 Request 109, which asked where the e-mail chain was found and whether it was in an electronic or hard copy folder, was withdrawn by the Appellant's counsel in the aforementioned letter to the Registrar after the hearing. The Respondent had opposed it as a fishing expedition.

[46] This category follows up on the production of Document 20, referred to as such in the 2015 Reasons, which was an e-mail from Mr. Ted Cook, a former official at Finance, to Mr. Gérard Lalonde, one of his Finance colleagues, that is dated March 5, 2010 and which forwarded an attached chain of e-mails in which CRA officials were discussing "Trust Conversions" and which had been provided to Mr. Cook by Mr. Symes of the CRA. While the Appellant had an AIA document version of this prior to the 2015 Order, the portion containing the discussion between the CRA officials had been redacted.

[47] The Appellant asked Ms. Jina to find out what the involvement of each participant in the e-mail chain (Mr. Palamar, Mr. Vanasse, Mr. Moreno, Mr. Prud'homme and Mr. Bisson) was in the subject matter discussed in that chain.[34]

[48] It seems clear that the follow-up question arises from the production of the unredacted document. While the subject line of the e-mail chain between the CRA officials was not redacted, the content of the discussion was unavailable to the Appellant at the time of the September Discovery. The Appellant would have therefore been unaware of the exact content of the e-mail chain beyond knowing that it could contain representations communicated by the Minister to Finance relating to the introduction of paragraph 256(7)(*c.1*) of the *Act*. In this situation, I view this to be a proper set of follow-up questions regardless of whether the Appellant could or could not have posed these questions in the September Discovery.

D. DISCUSSIONS WITH MR. PALAMAR

[49] The Appellant asked Ms. Jina to inquire of Mr. Palamar regarding what records he or Rulings may have about discussions with Finance on the amendment of paragraph 256(7)(*c*) of the *Act*, to produce such records or to advise of the circumstances under which such records were destroyed or deleted, as applicable.[35]

[50] The Appellant submits that these questions are also proper follow-up to the disclosure of the unredacted e-mail chain of 5 March 2010. I agree and am of the view that these questions should be answered for reasons substantially similar to

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34 See Request 117.

35 See Requests 122, 123 and 124.

those involving the roles of the various CRA officials involved in the e-mail chain. As noted above, I do not view the Appellant as being precluded from asking for responsive documents because it sought unredacted relevant documents earlier in this appeal.

[51] I would note that the Respondent in her submissions has raised the potential for documents responsive to this series of questions to be properly subject to cabinet confidence. My decision cannot be viewed as dispositive of that issue, as no certificate to that effect has been presented under section 39 of the *Canada Evidence Act*.[36] I expect that a timeframe acceptable to both parties for the review of responsive documents and answers will be determined following the issuance of these reasons, so as to provide appropriate time for such certificates to be issued as needed.

E. DISCUSSIONS WITH MR. COOK

[52] In a similar vein, the Appellant asked Ms. Jina to inquire of Mr. Cook whether he has documents respecting his discussions with Rulings, including Mr. Palamar, on the amendment of paragraph 256(7)(*c*) generally and Mr. Palamar's comments in particular.[37] Ms. Jina was also asked to find out what documents exist within Rulings in respect of the point made by Mr. Symes to Mr. Cook regarding how the amendments were an incomplete response to the SIFT loss trading problem,[38] and to find out as well whether any such documents were destroyed and, if so, how.[39] These questions, it is submitted, are proper follow-up to the disclosure of the unredacted e-mail chain of March 5, 2010, as are the inquiries made with respect to Mr. Palamar.

[53] I agree with the Appellant that these are proper follow-up questions, and would answer similarly to how I answered with respect to Requests 122-124. While these questions do involve making inquiries of a former Finance official, they are relatively closely tailored to catch documents relating to his conversations with Rulings on a particular topic. To the extent that Request 125 deals with correspondence between Rulings and Mr. Cook or documents summarizing such conversations, it is proper. The Respondent has furthermore made no submissions

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36 *Canada Evidence Act*, R.S.C. 1985, c. C-5.
37 Request 125.
38 Request 126.
39 Request 127.

claiming that a disproportionate burden is placed on her in having to contact Mr. Cook to make these inquiries. As a result, these requests are proper. As mentioned above, this ruling is in no way dispositive of the issue of cabinet confidence, should it be properly invoked.

F. OTHER REQUESTS RELATING TO RULINGS' CONCERN REGARDING THE AMENDMENT PF PARAGRAPH 256(7)(*c*)

[54] The Appellant asked Ms. Jina to inquire of Mr. Palamar, Mr. Vanasse, Mr. Moreno, Mr. Prud'homme, Mr. Bisson, and Mr. Symes whether the e-mail chain of 5 March 2010 as already produced is the entire chain of e-mails dealing with Rulings' concerns that the amendment was an incomplete response by Finance,[40] and to produce all e-mails and correspondence dealing with the communication with Finance about paragraph 256(7)(*c*) not being a complete response to the SIFT loss trading problem.[41] Ms. Jina was also asked to inquire of Rulings regarding documents in their possession dealing with paragraph 256(7)(*c*) being an incomplete response to the SIFT loss trading problems and to produce the said documents.[42]

[55] In addition, the Appellant has asked Ms. Jina to inquire of Mr. Lalonde, Mr. Wach, and Mr. Isabella what documents they may have respecting Rulings' view that the amendment was an incomplete response to the SIFT loss trading problem.[43]

[56] For reasons similar to those provided above, I find that most of these questions are proper follow-up questions and should be answered. With respect to Request 131, however, I have trouble understanding how that request, concerning the documents relating to Rulings' alleged view on paragraph 256(7)(*c.1*) that Finance officials had in their possession is proper. It would produce information that is either in the hands of the Minister already (and thus discoverable on that basis) or irrelevant as being information to which the Minister was not privy. While I admit the possibility that documents to which the Minister was privy but of which no record exists in the Minister's files could exist, Request 131 casts too wide a net over irrelevant and duplicative information in order to gain such

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40 Request 128.
41 Request 129.
42 Request 130.
43 Request 131.

potentially relevant information. It makes broad reference to documents "respecting Rulings' view", which I find casts too wide a net. I view it to be improper.

G. REQUESTS ARISING OUT OF THE 28 NOVEMBER 2011 E-MAIL

[57] This question follows up on the production of Document 21, referred to as such in the 2015 Reasons. That document consisted of internal Finance correspondence between Mr. Shawn Porter and Ms. Annemarie Humenuk, one of his Finance colleagues, that is dated December 21, 2011 and which forwarded an attached chain of e-mails involving Ms. Humenuk and other Finance officials who were drafting submissions to the GAAR committee on the GAAR's application "relating to loss trading in the context of SIFT conversions". While the Appellant had the AIA document version prior to the 2015 Order, a significant amount of the chain, including the majority of the draft submissions had been redacted.

[58] The Appellant noted a statement in those draft submissions to the effect that legislation is only announced with retroactive effect in clearly defined and exceptional circumstances.[44] The Appellant asked Ms. Jina if she knew whether Finance had a document detailing these circumstances[45] and asked her to produce this document.[46] In case of a refusal to do so, the Appellant asked Ms. Jina to inquire of Ms. Humenuk what she meant in that e-mail, why she stated that such circumstances did not exist in the circumstances leading to this appeal, whether there is a record of Finance's consideration of this issue (following the GAAR Committee's request), whether such a record may be provided to the Appellant and, if it no longer exists, when it was destroyed and under what circumstances.[47]

[59] The Respondent has refused to make inquiries with a view to obtaining internal Finance documents not disclosed to the CRA, doing so on the basis that such inquiries would be for irrelevant material and that, therefore, these are not proper follow-up questions.

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44 The statement in question was kept in the draft and formed part of the submissions made to Mr. Phil Jolie of the GAAR committee on December 21, 2011.

45 Request 146.

46 Request 147.

47 Requests 148-152.

[60] I am inclined to agree. As noted by the Respondent, it is not by reference to the confidential musings of individual Finance officials that the Respondent will try to establish the alleged policy upon which the GAAR assessment depends. Such materials will also not help the Appellant in seeking to disprove the existence of such a policy. In short, they will not be relevant to the inquiry undertaken by the eventual trial judge in this matter.

[61] Internal Finance documents that go neither to informing the search for Parliamentary intent in the purposive analysis of the GAAR nor to establishing the Minister's state of mind in applying the GAAR are not relevant to the matter at issue. These requests were properly refused.

H. EDITS BY MS. ROACH

[62] In the same e-mail chain as that referenced in the previous category, Ms. Davine Roach makes reference to edits made by her to the draft submissions to the GAAR committee. This is contained in her e-mail to Ms. Humenuk dated December 6, 2011. The Appellant asked Ms. Jina to obtain a copy of a document outlining these changes.[48] The Crown has refused this request, stating that the request would concern an internal Finance communication, as the particulars of Ms. Roach's edits were not shared with the CRA. The Appellant highlights its view that a blanket refusal to disclose internal Finance communications goes against the spirit of the 2015 Order.

[63] For the same reasons as those stated above, I do not see how these changes would have a semblance of relevance to the inquiry mandated by this appeal. The request was properly refused.

I. GAAR COMMITTEE DOCUMENTS

[64] The Appellant has asked Ms. Jina to inquire of Finance what documents exist regarding the GAAR Committee's inquiry, to produce such documents or to indicate if responsive documents have been destroyed (as well as when they were destroyed and the circumstances under which they were destroyed).[49]

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[48] Request 154.
[49] See Requests 156-158.

[65] The Respondent is of the view that Finance documents prepared internally, even if prepared to develop Finance submissions to the GAAR Committee, are irrelevant. I am inclined to agree. We are not dealing with the representations of the Finance representative on the GAAR Committee to CRA colleagues or with communications otherwise involving the parties who came to the conclusion that the GAAR should be applied to the Appellant. This inquiry would produce documents that would be neither relevant for the purpose of rebuttal with regard to whether the Minister actually assumed the supposed policy nor relevant to the assessment of Parliamentary intent to be undertaken by the trial judge. These questions were properly refused.

J. MS. HUMENUK'S E-MAIL DATED 7 DECEMBER 2011

[66] The Appellant drew Ms. Jina's attention to a portion of an e-mail, contained in the Document 21 chain of e-mails, in which Ms. Humenuk stated that, after having reviewed certain files, she concluded that the proposed paragraph 256(7)(*c.1*) was not intended to preclude the application of the GAAR to transactions arising before 5 March 2010, and in which she made reference as well to a discussion she had had with two other individuals. The Appellant then asked Ms. Jina to find out to what files Ms. Humenuk referred and to produce them,[50] and to find out what the discussion was and produce it.[51]

[67] The Respondent maintains that this request is improper for the same reasons as those provided for having objected to the other requests for internal Finance communications. For reasons substantially similar to those resolving those objections, these requests for information are improper.

K. INTERNAL FINANCE DOCUMENT

[68] The Appellant asked Ms. Jina about the internal Finance document whose subject is "GAAR Committee Referral (November 1, 2011, as a follow up to April 19, 2011 meeting)". Specifically, she was asked:

a. Who its author is;

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[50] Request 160.

[51] Request 161.

b. When it was created;

c. The purpose for which it was created;

d. In which file it was found (and what other documents are in that file);

e. With whom it was shared;[52]

f. Who the "members" described as being "concerned" are;[53]

g. What information the author had when he or she wrote Item 5 of this document;[54]

h. What persons expressed the concerns characterized as the "CRA's concern" in Item 5 of this document, and what division they are from;[55]

i. With regard to a statement in Item 5 that seems pessimistic as to the successful application of the GAAR in this case, to provide:

    i. Particulars of the basis for this statement,

    ii. The source of this statement,

    iii. What was relied on in making this statement, and

    iv. What informed this statement, etc.[56]

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52 Request 164.

53 Request 167.

54 This item seems to characterize the CRA's concern with the application of the GAAR in this case as somewhat similar to the Appellant's position.

55 Request 169.

56 Request 170.

j. With regard to a statement in the document in question that "[w]e do not propose to oppose the CRA" in its position against invoking the GAAR, who precisely within the CRA is being referred to.[57]

[69] The Respondent has refused those questions and requests on the basis that questions on the applicability of paragraph 256(7)(*c*) are irrelevant since that paragraph was not applied. She also submits that it is "obvious" that the paragraph in question "only applies to corporations". The Crown has stated a caveat to its answers about the document: it will not make further inquiries for internal Finance communications if those documents did not arise in the context of the audit of the Appellant or were not considered by officials engaged in the audit. The Respondent has stated that Ms. Humenuk is probably the author of the document in question. The Respondent has also noted that the document "would have been prepared about a week before the GAAR committee meeting, possibly in late October 2011. [Ms. Humenuk] cannot recall who it was shared with, but it would have been officials in the Tax Policy Branch at . . . Finance." The Respondent states that the document was never shared with the CRA. With respect to the "some members" who were noted to have concerns in the document, the Respondent affirms after further inquiries, that it was actually one member, Mr. Dan Rivet. The Crown further asserts that it has produced all of Finance's correspondence addressed to the GAAR Committee.

[70] To the extent that the dispute between the parties deals with a disagreement over whether the Respondent has provided sufficient information to respond to the Appellant's questions about this document, I am of the view that the Respondent has answered. Furthermore, the requests for other documents in the same file as this one would be for internal Finance documents that are not relevant to the appeal.

L. ATPD'S POSITION AT THE GAAR COMMITTEE MEETING

[71] Ms. Jina was asked whether the Respondent agrees with the Appellant that a particular chain of e-mails, found in Document 22 of the documents produced following the 2015 Order, confirms that at the GAAR Committee meeting the

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[57] Request 171.

Aggressive Tax Planning Division (ATPD) was of the view that the GAAR should not be invoked in the matter under appeal.[58]

[72] The Respondent states that she is not in agreement, as the e-mail chain is dated before the GAAR Committee meeting. The Appellant seeks to compel an answer on the basis that the response is incomplete, as the e-mails clearly reference the upcoming GAAR Committee meeting and the ATPD's position thereat.

[73] The Appellant is of the view that the Respondent's reply is overly technical. It seems to me, however, that the Respondent's reply has responded fully to the question posed regarding the Respondent's position.

M. FINANCE'S POSITION ON THE RETROACTIVITY OF THE AMENDMENT

[74] The Appellant asked Ms. Jina whether the Respondent has knowledge of whether Finance considered making a retroactive amendment, and if the Respondent has no such knowledge, to make inquiries to determine the answer, and to inquire of Finance whether it considered such a step.[59]

[75] The Respondent refuses the question on the basis that this is not proper follow-up and that the question could have been asked at the September Discovery. In the alternative, the Respondent submits that internal Finance communications or analyses neither arising in the context of the audit nor considered by officials involved in the audit are not relevant. Moreover, any fully responsive answer would require information most likely subject to Cabinet confidence.

[76] While the Appellant draws parallels between these questions and the questions put to Ms. Jina at the September Discovery, it is clear that they have a broader ambit. Question 4 dealt within the 2015 Order read as follows: "With regard to when the Department of Finance introduced the 2010 amendment, do you have any facts, information or knowledge as to whether the Department of Finance considered making that amendment retroactive?" This question would deal with the CRA's knowledge of Finance's deliberations with respect to making the amendment retroactive.

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[58] See Request 182.
[59] See Requests 191, 192 and 194.

[77] The Appellant's questions here, in contrast, ask Ms. Jina to make inquiries of Finance to find out whether it did in fact consider such retroactivity. She is called upon to answer for both the CRA and for the Department of Finance, and to examine internal Finance documents in making such a determination.

[78] This would of course stray beyond the ambit of calling into question whether the Minister truly believed in the existence of the purported policy, as it is not limited to communications made to the CRA by Finance. It goes to determining the Department of Finance's internal deliberations on retroactivity and whether Finance believed such a policy underpins the *Act*.

[79] The problem presented is that, as the Respondent notes, the views of Finance on the matter are irrelevant to determining whether such a policy actually does exist. The existence of the alleged policy is a question of law, with the Respondent having the onus to clearly identify the policy underlying the relevant legislation that is said to be frustrated.[60] It is with reference to legislative intent, not the intent of an individual official of Finance, that the GAAR analysis is made. Whether individual Finance officials believe such a policy to exist has no bearing on the object, spirit or purpose of the relevant provisions enacted by Parliament.

[80] As a result, I am unconvinced that these questions, to the extent that they are not confined to the knowledge of the CRA, are properly tailored. They seek irrelevant information and are overly broad, in contrast to Question 4 in the 2015 Order.

N. USE OF THE WORD "CLARIFY" IN THE TECHNICAL NOTES

[81] The Appellant asked Ms. Jina to inquire of Finance why it chose to change the word "extend" in the technical notes accompanying the enactment of paragraph 256(7)(*c.1*) to "clarify".[61] The Appellant then followed up by asking Ms. Jina to inquire of persons previously mentioned, at Finance and the CRA, whether the reason behind the change of terminology was a conversation between Finance and

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60 *Canada Trustco Mortgage Co v The Queen*, 2005 SCC 54 at paras. 64-65, [2005] 2 S.C.R. 601.

61 See Request 197. A similar question was posed as Request 213, though it was phrased as a request for an undertaking to find out why "extend" appears in the first set of technical notes while "clarify" appears in the second set.

the CRA that highlighted the possibility that a trial judge might not accept the Crown's argument on the GAAR.[62]

[82] Later on in the December Discovery, the Appellant asked Ms. Jina to inquire as to the role of the Finance members of the GAAR Committee, and as to Mr. Wach's role in this matter.[63] It also asked her to inquire of Mr. Wach on whether he has any facts, information or knowledge regarding why the language of the technical notes was changed, or whether he was otherwise involved in the change.[64]

[83] Requests 197, 198 and 211 through 213 all seek information arising out of internal Finance communications and deliberations. Request 198 has been answered to the extent that it relates to information within the knowledge of the CRA. Any further answer would provide irrelevant information, and so the question was properly refused.

[84] Requests 208 and 210 are, however, in the Appellant's submissions proper follow-up and should be answered. Request 208 arises out of the replies made to questions posed and taken under advisement during the September Discovery. Those questions dealt with whether certain Finance officials were standing members of the GAAR committee or whether they were specially invited for the March 6, 2012 meeting. In the responses to undertakings, the Respondent informed the Appellant that those Finance officials were not standing members, and that the Director of the Tax Legislation Division at Finance would select who from Finance would attend GAAR Committee meetings. From those answers, it would seem that Mr. Lalonde, the Director of the Tax Legislation Division, would have been provided with the agenda of any GAAR Committee meeting and associated materials so that he might select officials from Finance to attend the meeting.

[85] Request 208 is not a proper follow-up question to the answers to the undertakings given by Ms. Jina. As emphasized by the Appellant itself, the central dispute in the prior motion to compel was over whether the Appellant had the right to probe the Minister's mental process. While I have allowed other questions in this motion because answers to them would similarly have been refused by the

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62 Request 198.
63 Requests 208 and 210.
64 Requests 211 and 212.

Respondent given her position in the prior motion to compel, I do not see how inquiring about the role of Finance officials at the GAAR Committee logically follows from the questions that were the subject of the 2015 Order. Such inquiry does not arise logically out of questions answered or documents produced as a result of the 2015 Order. The presence of Finance officials at the GAAR Committee was known to the Appellant as of the September Discovery. The request was therefore properly refused as not being a follow-up question.

[86] I can conclude that Request 210 is however proper follow-up in these circumstances. While the involvement of Mr. Wach in the e-mail chain at Document 20 of the documents disclosed by the 2015 Order is apparent, how important that e-mail chain might be to the Appellant's case was not easily discernable to the Appellant because of the substantial redactions made to the AIA document copy. While the Appellant could have made Request 210 at the September Discovery, the disclosure of the contents of the e-mail chain could also have changed the extent to which the Appellant was interested in the response. Indeed, the Appellant was not shy about asking questions of Ms. Jina in the September Discovery. The fact that it now seeks to pose this question, which arises logically out of the properly disclosed Document 20, implies that it is the previously redacted contents of the e-mail chain that have opened the Appellant's counsel's eyes to the relevance of this question to the case the Appellant seeks to put before the trial judge. The request should therefore be answered.

IV. COSTS

[87] While both parties have sought their costs in this motion, the mixed success of each party and my previous observations on the procedural and factual context giving rise to this motion have allowed me to conclude that each party should bear its own costs.

[88] As a result, the motion to compel is allowed with respect to the improperly refused questions, which are Requests 107, 108, 110, 111, 112, 113, 114, 115, 117, 122, 123, 124, 125, 126, 127, 128, 129, 130 and 210.

Signed at Ottawa, Canada, this 29th day of September 2016.

"Robert J. Hogan"

Hogan J.

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