Docket: 2012-2683(IT)G

BETWEEN:

BURLINGTON RESOURCES FINANCE COMPANY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on June 27, 28, 29 and 30, 2016 at Toronto, Ontario.

Before: The Honourable Justice Johanne D'Auray

Appearances:

Counsel for the Appellant:	Alexander Cobb Andrew Boyd
Counsel for the Respondent:	Erin Strashin Naomi Goldstein Donna Dorosh

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ORDER

UPON Motion by the Respondent for the following relief:

1. an Order directing the Appellant's nominee to re-attend at the Appellant's own expense and answer the questions set out in the Amended Schedule "A" and any proper questions arising from the answers, from the examination for discovery held on July 16-18, July 23, July 29 and December 15-17, 2014, which the Appellant has refused to answer or has not fully answered;

2. in the alternative, an Order requiring the Appellant to fully respond in writing to, and produce all the documents requested

in, all of the questions set out in the Amended Schedule "A" within 90 days of the Order of this Court to this motion;

3. in the alternative, and failing compliance with the Court's Order, an Order dismissing the appeal;

4. costs of this motion; and

5. such further and other relief as this Court may deem just.

AND UPON hearing the submissions of the parties;

IT IS ORDERED THAT:

The motion is allowed in part, the Appellant will have to answer the questions in accordance with the attached Reasons for Order.

A conference call will be held to determine how to proceed, to establish time limits and to discuss the costs for the Motion.

Signed at Ottawa, Canada, this 3rd day of August 2017.

"Johanne D'Auray"

D'Auray J.

Citation: 2017 TCC 144
Date: 20170803
Docket: 2012-2683(IT)G

BETWEEN:

BURLINGTON RESOURCES FINANCE COMPANY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

D'Auray J.

I. Introduction

[1] The Respondent has brought a motion pursuant to rules 4, 7, 95 and 110 of the *Tax Court of Canada Rules (General Procedure)*[1] ("the *Rules*") for an Order:

1. directing the nominee of the Appellant, Burlington Resources Finance Company ("Burlington"), to re-attend at Burlington's own expense and answer certain questions (the "Disputed Questions"), and any proper questions arising from the answers;

2. in the alternative, directing Burlington to fully respond in writing to, and produce all documents requested in, the Disputed Questions; and

3. directing that this appeal be dismissed if Burlington does not comply with the Order of this Court to this Motion.

[2] The Respondent argues that the Disputed Questions are relevant to the matters in issue and that Burlington has either improperly refused to answer, or not fully answered, the questions.

[1] SOR/90-688a.

[3] Burlington opposes this motion and argues that all proper questions have been fully answered and that the Respondent's improper questions have been correctly refused.

[4] Both parties ask for costs payable to them in any event of the cause, and for the opportunity to make submissions with respect to the amount.

II. Facts

[5] The background to the underlying tax appeal is as follows:[2]

1. Burlington was incorporated in February 2000 as a Nova Scotia unlimited liability company ("NSULC") and is wholly-owned subsidiary of Burlington Resources Inc. ("BRI"), a resident U.S. corporation.

2. Burlington's business involved obtaining financing to fund the operations of affiliated Canadian companies. Specifically, Burlington was involved in borrowing funds from public markets and "on-loaning" those funds to its affiliated Canadian entities, which were conducting businesses related to crude oil and natural gas assets.

3. BRI unconditionally guaranteed the payment of the Notes and Burlington "on-loaned" the proceeds to its Canadian sister companies.

4. Prior to the issuance of the Notes, BRI ensured that Burlington would be able to make all the payments due under the bonds, by putting in place a series of transactions, which included intercompany promissory notes, forward purchase agreements, letters of direction, capital contribution agreements, contribution agreements, and swap agreements (collectively referred as the "Hybrid Instruments").

5. Involved in these Hybrid Instruments were:

Burlington Resources Canada LTD. ("BRCL");

[2] A description of the underlying tax appeal is set out at paragraph 5 of Justice Campbell's Order in *Burlington Resources Finance Co. v Canada*, 2015 TCC 71. In my reasons I will refer to [*Burlington* 1]. I have drawn from this description in creating this factual background. I

Burlington Resources Canada Inc. ("BRCI"), which was predecessor to BRCL

Burlington Resources Canada (Hunter) Ltd. ("BRCH");

Canadian Hunter Exploration Ltd.("CHEL"), which was a predecessor to BRCH; and

Burlington Resources Canada Corporation ("BRCC"), which was a predecessor to BRCH.

6. In 2001 and 2002, Burlington borrowed approximately US $3 billion by issuing the below seven bonds (the "Notes") to arm's-length parties:

Issuance Date	Principal	Interest	Maturity
February 12, 2001	US $400 million	6.68%	February 15, 2011
August 24, 2001	US $178 million	6.40%	August 15, 2011
August 24, 2001	US $575 million	7.20%	August 15, 2031
November 16, 2001	US $500 million	5.60%	December 1, 2006
November 16, 2001	US $500 million	6.50%	December 1, 2011
November 16, 2001	US $500 million	7.40%	December 1, 2031
February 25, 2002	US $350 million	5.70%	March 1, 2007

7. Burlington and BRI agreed that Burlington would pay guarantee fees to BRI based on an annual guarantee fee of 50 basis points (or 0.5 percent) of the principal amount of the Notes. According to Burlington, the fees were incurred in exchange for BRI's guarantees and were based upon advice received from investment banks.

8. During its 2002 to 2005 taxation years, Burlington paid approximately $83 million in guarantee fees to BRI.

9. The total tax in dispute for the years under appeal is $21,179,800, but this is a minimum since the liability issues continue until the last bond matures in 2031.

10. BRI and its subsidiaries, including Burlington, were acquired by ConocoPhillips in 2006.

11. Burlington deducted the guarantee fees in computing its income for the 2002 to 2005 taxation years pursuant to section 9 of the *Income Tax Act*[3] (the "*Act*").

12. The Minister of National Revenue (the "Minister") reassessed Burlington in respect of those taxation years, disallowing the deductions of the guarantee fees.

13. The Minister did so by relying on paragraphs 247(2)(a) and (c) of the *Act* to reduce the amount of the guarantee fees to nil in each taxation year, claiming that the terms and conditions of this fee arrangement between Burlington and its parent company were not terms and conditions which would have existed between arm's-length parties.

14. The Minister also relied on subsection 247(3) of the *Act* to impose transfer pricing penalties, alleging that Burlington failed to make reasonable efforts to determine the arm's-length transfer price in respect of the guarantees.

15. The basis of the Minister's assessment is based on the following theories:

    i. Yield Approach: if the yield approach is applicable, there was no economic incentive for Burlington to enter into the transactions in respect of the guarantee fees, because the implicit support of BRI would have equalized the credit rating of Burlington and BRI.

    ii. Price of the guarantee fees: the terms or conditions made or imposed in respect of the guarantees differed from those that would have been made between persons dealing at arm's-length such that the amount of the guarantee fees payable would have been nil had Burlington and BRI been dealing at arm's-length.

    iii. Duplication Factor: Burlington's status as an unlimited liability company formed under the laws of Nova Scotia was duplicative of the guarantees from Burlington's perspective.

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

16. In her Amended Reply to Notice of Appeal, the Respondent also relied on paragraphs 18(1)(a) and 20(1)(e.1) of the *Act*. The paragraph 18(1)(a) argument falls under the duplicative theory, namely that the guarantee fees were not paid to ensure that the outside investors would get their money back, in light of the fact that Burlington was a NSULC and due to the hybrid financing arrangements. Therefore, the guarantee fees were not incurred for the purposes of earning income from a business but for the purpose of obtaining a tax benefit.

17. With respect to paragraph 20(1)(e.1) of the *Act*, the Respondent's theory is that the guarantee fees were not incurred for the purposes of borrowing money because BRI provided the guarantee to Burlington before it had to pay a guarantee fee and before it actually paid a guarantee fee. Therefore, the guarantee fees were not made for the purpose of borrowing money to be used by Burlington for the purpose of earning income from a business but to obtain a tax benefit.

18. In her Amended Reply, the Respondent also relied on paragraphs 247(2)(b) and (d) to deny the deduction of the guarantee fees; however, the Respondent has informed the Court that she is abandoning the argument that the guarantees were not entered into for *bona fide* purposes other than to obtain a tax benefit for Burlington pursuant to paragraphs 247(2)(b) and (d) of the *Act*.

III. Analysis - Principles of Discovery

[6] The purpose of, and principles governing, examinations for discovery are well established in the jurisprudence. It is not surprising therefore that the parties generally referred to the same principles in support of their respective positions. Where they did disagree was on the weight I should give to certain of the principles and on the role played by the principle of proportionality.

[7] There was no disagreement on the purpose of discovery. Discovery is intended to enable the 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 and to avoid surprises at trial. The scope of discovery is determined primarily by reference to the pleadings which set out the matters in issue between the parties.

[8] A party, and in the case of a corporation its nominee, is required by subsection 95(1) of the *Rules* to answer any proper question relevant to any matter in issue.

[9] In support of its position, the Respondent asked that I give particular weight to the following discovery principles:[4]

1. Relevancy is extremely broad and should be liberally construed. The threshold for relevancy on discovery is very low but does not allow for fishing expeditions, abusive questions, delaying tactics or completely irrelevant questions.[5]

2. Everything is relevant that may directly or indirectly aid the party conducting the discovery to maintain its case or damage that of its adversary. If the questions are broadly related to the issues raised, they should be answered.[6]

3. 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.[7]

4. Proportionality is not something to be used as a shield. Given that there are significant issues and a significant amount of tax at stake, proportionality should not be the primary focus in determining whether the Disputed Questions should be answered. Instead, relevancy should be the key driver.[8]

5. A motions judge should not second guess the discretion of counsel by examining minutely each question or by asking counsel to justify each question or explain its relevancy.[9]

6. A 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

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[4] Respondent's Written Submissions, p 12.
[5] *Canadian Imperial Bank of Commerce v Canada,* 2015 TCC 280 [*CIBC*] at para 18.
[6] *CIBC, supra* at para 18.
[7] *Teelucksingh v The Queen*, 2010 TCC 94 [*Teelucksingh*].
[8] *CIBC*, supra at para 18.
[9] *Ibid*.

may consider irrelevant but which, in the context of the evidence as a whole, the trial judge might consider relevant.[10]

7. The discovery process is the most significant stage of the litigation in allowing a party to prepare for trial. It allows the parties to prepare their respective case and prepare full answers to their opponent's case. Full and open discovery gives parties the complete picture.[11]

8. Discovery fails when the parties engage 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 by the well-established discovery principles and the low threshold for relevancy described in *Baxter v The Queen*, 2004 TCC 636.[12]

[10] In response, Burlington asked that I give weight to the following principles:[13]

1. The obligations of a party being discovered are not without limit.[14]

2. A party has no right to go beyond the case as pleaded to interrogate concerning a case it has not attempted to make in its pleadings. A party asking the questions must establish that they are relevant to issues raised in the pleadings.[15]

3. Discoveries should never become general fishing expeditions, that is, an indiscriminate request for production, in the hope of uncovering helpful information.[16]

4. Even where proportionality is not specifically codified, applying rules of court that involve discretion includes an underlying principle of proportionality which means taking account of the appropriateness of the

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[10] *Ibid*.
[11] *CIBC, supra* at para 270.
[12] *CIBC, supra* at para 271.
[13] Appellant's Written Submissions, p 9-14 – Key Principles of Discovery Engaged.
[14] As evidenced in the words of subsection 95(1) of the *Rules*.
[15] *Aventis Pharma v The Queen*, 2007 TCC 629 [*Aventis Pharma TCC*] aff'd 2008 FCA 316; *SmithKline Beecham Animal Health Inc. v Canada*, 2002 FCA 229.
[16] *John Fluevog Boots & Shoes Ltd. v Canada*, 2009 TCC 345 at para 18.

procedure, its cost and impact on the litigation, and its timeliness, given the nature and complexity of the litigation.[17]

5. The role of an examination for discovery is to circumscribe the scope of the dispute to some degree, not to broaden it. A court may terminate an examination for discovery where it is clear that it has become excessive and unjustified.[18]

6. Where there are questions that are not relevant, that amount to a fishing expedition, or that are not proportional, or where the discovery process is being abused, the courts will not require that a party undertake the effort of responding. In determining whether to order a party to respond, this Court has indicated the ultimate purpose is to fairly, reasonably and expeditiously move matters along to a hearing.[19]

IV. Proportionality

[11] As already mentioned, the parties differed when it came to the role played by the principle of proportionality in discovery.

[12] Burlington argued that, while courts once took a "broad and liberal" approach to the concept of relevance in discovery, relevance must now be tempered by proportionality.[20]

[13] Burlington submitted that other courts have declared that "the "broad and liberal" principle has outlived its useful life and "should be abandoned in place of proportionality rules."[21] Burlington suggested that this Court ought to do the same.

[14] In support of this argument, Burlington referred to the recent decisions of the Supreme Court of Canada in *Hryniak v Mauldin* and *Association des parents de l'école Rose-des-vents v British Columbia (Education)*. According to Burlington,

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[17] *Hryniak v Mauldin*, 2014 SCC 7 at para 31 [*Hryniak*].
[18] *Aventis Pharma TCC*, *supra* at para 30.
[19] Justice Campbell's Motion, *supra* at para 11.
[20] Appellant's Written Submissions, p 11, para 40.
[21] Appellant's Written Submissions, para. 41 referencing *Abrams v Abrams*, 2010 ONSC 2703 at para 70; *Warman v National Post Co*, 2010 ONSC 3670 at paras 84-85; *Siemens Canada Ltd v Sapient Canada Inc*, 2014 ONSC 2314 at para 57.

these decisions mean that the principle of proportionality should govern the application of our rules of court, including the discovery process.[22]

[15] The Respondent on the other hand, submitted that in this case, due to the complexity of the issues and the amount of tax at stake in this case, proportionality does not trump relevancy.

[16] While I agree that that proportionality needs to be taken into account, I do not agree with Burlington that it now trumps relevancy in all situations and that the "broad and liberal approach" to determining relevancy must now be ignored. In my view, both principles continue to exist and each situation needs to be examined on its own merits. In some situations, proportionality will trump relevancy and in others, relevancy will remain the key driver in determining whether a question needs to be answered.

[17] The starting point in an examination of the role of proportionality is subsection 4(1) of the Rules. It contemplates a role for proportionality in the application of the Rules: "[t]hese rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits."

[18] The jurisprudence of this Court has also recognized the importance of proportionality. In *Cameco Corp. v Canada*,[23] Chief Justice Rip (as he then was) considered proportionality in the context of discovery in a transfer pricing case. However, he ultimately ordered Cameco to produce more relevant documents even though it had already produced 59,000 hard copy documents and 96,000 electronic documents. Chief Justice Rip reasoned at paragraph 44:

> 44 The facts in this appeal are complex. The Affidavit of Peter Macdonald describes the document collection process and it is apparent that the Appellant has dedicated significant resources including employing expertise, time and costs. Yet, given the complexity of this case and the amount at stake, it is not unreasonable for the Appellant to review and conduct additional searches and make further inquiries into certain documents.

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[22] Appellant's Written Submissions, para 39 citing to *Hryniak, supra* and *Association des parents de l'école Rose-des-vents v British Columbia (Education)*, 2015 SCC 21 [*Rose-des-vents*], *Hryniak, supra* at para 31 and *Rose-des-vents, supra* at para 78.
[23] 2014 TCC 42.

[19] Similarly, in his recent decision in *CIBC*,[24] also involving a motion to compel answers, Chief Justice Rossiter recognized the importance of proportionality in the appropriate case. However, he concluded that proportionality does not always trump relevancy. At para. 276, the Chief Justice stated:

> 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.

[20] The above two decisions are in my view consistent with the ruling in *Hryniak*. They both took proportionality into account and weighed it against the complexity of the issues at stake and the amount of tax at issue.

[21] Contrary to Burlington's submission, *Hryniak* and *Rose-des-vents* do not call for proportionality to be the key driver in all situations. Indeed, while Justice Karakatsanis in *Hryniak* called on courts to actively manage the legal process in line with the principle of proportionality, she also emphasized the importance of taking into account the nature and complexity of the litigation:

> 31 Even where proportionality is not specifically codified, 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" (*Szeto v. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311, at para. 53).

[22] In examining the Disputed Questions I therefore must take into account that "relevance" must be weighed against matters such as, the degree of relevance, how onerous it is to provide an answer, and whether the answer requires fact or opinion of law.[25]

[23] It is also clear that in considering proportionality, I will have to take into account that we are here dealing with a complex transfer pricing dispute involving a large amount of disputed tax. The total tax in issue is $21,179,800 at a minimum. As some of the Notes will be outstanding until the year 2031, the potential total tax recoverable by the Minister in relation to this tax appeal is much higher than this

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[24] *CIBC, supra* at para 276.
[25] *GSC Technologies Corp. v Pelican International Inc.*, 2009 FC 223, at para 11.

amount. In addition, I will be dealing with Conoco Funding Company involving the same issue as Burlington in a separate Order. ConocoPhillips purchased Burlington in 2006. Conoco Funding Company's appeal also raises the issue of the deductibility of guarantee fees paid its parent corporation ConocoPhillips.

[24] Before leaving proportionality, I should mention that I carefully examined Burlington's evidence on proportionality. This evidence did not convince me that proportionality should trump relevance in all situations.

[25] Burlington's evidence on this issue comes from Ms. Lily Hoang ("Ms. Hoang") who is employed by ConocoPhillips Company[26] as Senior Tax Counsel. Ms. Hoang provided an affidavit dated December 28, 2015 explaining how time-consuming, impractical and burdensome it would be for Burlington to carry out the necessary inquiries and searches to locate the information to respond to the Disputed Questions.

[26] Ms. Hoang explains that most documents that may be responsive to the Disputed Questions, and particularly those documents that relate to the guarantees and the guarantee fees, would have been stored in three cities, across a number of separate corporate departments: Houston - Treasury, Legal and Tax Planning; Bartlesville – Accounting; Calgary - Accounting, Tax Planning and Legal.[27] Ms. Hoang states that each of these departments maintains its own records and creates its own indexes as a means to locate files within its stored records.

[27] I understand that the indexes are, essentially, a list of the files in that department's storage facility.[28] Each file item listed on an index corresponds to certain boxes of documents. If a file listed on an index is perceived to be relevant to a Disputed Question, then its corresponding boxes of documents must be pulled from the shelves and their contents reviewed to determine if the sought information is contained therein and is indeed responsive to a Disputed Question.[29]

[28] In terms of the number of boxes involved, Ms. Hoang notes that the treasury department has roughly 3,000 boxes in storage, as do the other departments.[30] Ms.

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[26] ConocoPhillips Company is a subsidiary of ConocoPhillips and the parent of BRI. ConocoPhillips conducts its business through an extensive and frequently changing group of corporations and other business vehicles (collectively, the "ConocoPhillips Group").
[27] Affidavit of Ms. Hoang, p 12 at para 43.
[28] Cross-examination of Ms. Hoang, p. 117, lines 25 and p 118, lines 1 to 20.
[29] Transcript from cross-examination, p 129, question 508.
[30] Cross-examination of Ms. Hoang, p 194, lines 1 to 25.

Hoang emphasizes that while the indexes maintained by each of the departments are extensive, there is no guarantee that they are accurate or complete.[31]

[29] Ms. Hoang states that she has not been able to identify a single comprehensive index that would allow an individual to efficiently search all of the records by subject for any responsive documents.[32] In oral submissions, NSULC for Burlington summed the situation up: "The point is that, even though indexes exist, those indexes are not sufficient to allow Ms. Hoang or anyone else to quickly identify even the boxes where relevant documents or responsive documents might be found."[33]

[30] In her affidavit, Ms. Hoang does not state how much time these searches would take or how expensive it would be to respond to the Disputed Questions. However, counsel for Burlington at the hearing stated that: "if the Respondents got everything they wanted, it would take months if not years to produce [this] colossal amount of information."[34]

[31] Beyond the existence of the indexes and uncertainty around the time and cost required to conduct these searches, Ms. Hoang stresses three central difficulties inherent in responding to the Disputed Questions.

[32] The first difficulty is that there are no current employees within the ConocoPhillips Group with direct knowledge of the transactions in issue, or with knowledge of where or how the documents that may be responsive to the Disputed Questions might be located or organized.

[33] The second difficulty is that Ms. Hoang has been informed that there is no efficient or even reliable way to search all the records of the ConocoPhillips Group to identify documents that could be used to respond to the Respondent's questions and requests as the documents are maintained in different mediums, in multiple locations, and indexed in different ways.

[34] The third difficulty is that, even if such a massive and unguided review were undertaken, it would not likely produce a material number of documents that are responsive to the Disputed Questions as many of the documents were likely destroyed

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[31] Affidavit of Ms. Hoang, p 13 at para 48.
[32] Affidavit of Ms. Hoang, p 13 at para 47.
[33] Transcript from Hearing, Day 3, p 60, lines 14-18.
[34] Transcript from Hearing, Day 3, p 43, lines 12-17.

according to their document retention policies. In other words, it is not just that these searches are inordinately time-consuming, it's that they are time consuming and likely to be futile.

[35] There are a number of shortcomings in Ms. Hoang's evidence. First, she does not indicate how many documents would need to be searched, how long it would take to conduct these searches (although we do have counsel's statement), how many personnel would be required, or how much it would cost.

[36] Second, Ms. Hoang did not contact former employees of BRI who were involved in the transactions at issue. This notwithstanding the fact that she lists the former employees in her affidavit. I agree with the Respondent that Ms. Hoang could have at least attempted to reach out to these key former employees to obtain a better appreciation of the task of responding to the Disputed Questions.

[37] Third, I agree with the Respondent that Ms. Hoang has overstated the difficulty of responding to the Disputed Questions given the existence of these indexes. As the Respondent, pointed out, the indexes would be a useful tool to reduce the burden of responding and make it something less than the "massive and unguided review"[35] that Ms. Hoang alleges.

[38] Ms. Hoang estimated that there are approximately 12,000 boxes of documents stored between the relevant departments, housed in a few different locations. The indexes allow Ms. Hoang to, as she describes in her own words, "get a general understanding of whether there might be relevant documents" in the stored boxes.[36]

[39] While a "quick identification" of documents may not be possible, I agree with the Respondent that, with the help of the indexes, a careful and systematic identification of boxes with responsive documents is surely achievable.

[40] Fourth, counsel for Burlington submitted that responding to the Disputed Questions would necessitate going through the index referencing and box pulling "exercise described by Ms. Hoang again and again and again."[37] Though I acknowledge that this is somewhat dependent on the breadth of the questions asked, I

[35] Affidavit of Ms. Hoang, p 7 at para 19(c).
[36] Cross-examination of Ms. Hoang, p 130, lines 8-25 and p 131, lines 1-2.
[37] Transcript from Hearing, Day 3, p 62, lines 4-8.

have a difficult time appreciating how boxes previously reviewed could not somehow be accounted for in a way that this exercise need not to be approached entirely anew with each subsequent Disputed Question.

[41] Importantly, the Respondent cannot be denied access to information and documents that it is legally entitled to solely because Burlington failed to systematically or adequately maintain a system of records thus making the location of information potentially onerous. If I were to conclude that taxpayers need not produce documents because their records were disorganized and could not be systematically searched, this would create a perverse incentive for taxpayers not to keep organized records of their tax affairs.

[42] The same logic applies to the Burlington's retention policy. The Respondent should not be penalized because Burlington may have destroyed certain documents in accordance with their retention policy. This is entirely out of the Respondent's control.

[43] Another shortcoming, in Ms. Hoang's evidence is that she could not recall when either the IRS audit started or the CRA audit started. These dates are relevant to the application of the Retention Policy. She admitted that in accordance with the Retention Policy of Burlington and/or ConocoPhillips, they had to keep all documents relating to an audit or an appeal, such as this one. Therefore, unless Burlington can positively affirm that a relevant document no longer exists, it will have to search for the document.

[44] One concern of Ms. Hoang that I do find valid relates to the completeness and accuracy of the search.[38] Because the indexes purporting to catalogue the contents of the stored documents were created at different times by different groups, she states that there could be no guarantee that a search would be thorough.

[45] This is a legitimate concern and, correspondingly, a qualification of the exhaustive nature of the required search can be built-in. Where Burlington is ordered to answer questions, it will not need to search beyond the indexes. In other words, a truly unguided rifling through 12,000 boxes would not be required.

[38] Affidavit of Ms. Hoang, p 13 at para 46.

[46] In conclusion, I am not persuaded that the costs, time, and effort involved for Burlington to respond to any relevant questions would be disproportionate, given the amount of money involved which according to the Respondent is close to $100 million, the importance of the case and the complexity of the issues. Proportionality must not defeat the purposes of discovery, particularly in an appeal such as this. Where the issues are complex and fact based and where the amount at stake is considerable, both parties should be able to fully prepare for trial and know their case.

[47] Therefore, I will address proportionality in the following manner. If I find a question relevant, blanket concerns of proportionality will not override the need to respond and to look for documents relying upon the indexes. However, if I am convinced that a question is marginally relevant, and there are proportionality concerns, I may order Burlington not to answer the question, I will analyze each situation on its own merits.

V. Narrowing of the issues in dispute

[48] The precise scope of the underlying dispute has also emerged as a point of contention in this motion.

[49] Burlington alleges that the scope of the underlying dispute has been substantially narrowed by admissions in the Answer with respect to some assumptions of fact made by the Minister and by comments made by the Respondent's nominee at discovery. Accordingly, Burlington argues that many of the questions the Respondent is moving on do not relate to a live dispute between the parties and spending energy in discovery on an admitted fact or conceded issue is improper.

[50] Burlington particularly maintains that the transfer pricing issue is now "off the table"[39] in the appeal. Burlington explains that because the Respondent no longer relies on paragraphs 247(2)(b) and (d) of the *Act*, all that remains of the transfer pricing dispute is the question of the appropriateness of the guarantee fees under paragraphs 247(2)(a) and (c) of the *Act*.

[51] Burlington submitted that in assessing it, the Minister took into account as a presumption of fact that the fee an arm's-length party would require to guarantee Burlington's debts would have been so "exorbitant/more than 50 basis points".

[39] Transcript from Hearing, Day 3, June 29, 2016, p 109, lines 4-6.

Counsel for Burlington argued that since in its Answer to the Amended Reply to Notice of Appeal, Burlington admitted these facts, the Respondent cannot ask questions with respect to them. There is no longer a controversy about what the arm's-length transfer price would have been.

[52] The Respondent argued that the presumptions of fact relied by the Minister, namely that its "exorbitant/more than 50 basis points" does refer to Burlington operating as a finance company on a stand-alone basis and, therefore, the admission by Burlington with respect to this fact, does not defeat its arguments under paragraphs 247(2)(a) and (c) of the *Act*.

[53] I agree with the Respondent. It is clear that the Respondent in her Amended Reply to the Notice of Appeal was referring to Burlington operating on a stand-alone basis. Therefore, there is no agreement about the transfer price that an arm's-length party would charge. This remains a live issue in this appeal. Burlington is attempting to crystallize an inaccurate characterization of the Respondent's position. Therefore, the assertion that the dispute has been drastically narrowed cannot be sustained and the Respondent's discovery rights will not be curtailed to deny her the opportunity discover on an issue that goes to the heart of the dispute.

[54] Burlington also submitted that the Respondent has pleaded that Burlington's functional deficiency and inability to bear risk on a stand-alone basis made it imperative for any arm's-length lender to require a guarantee from BRI.[40] Relying on these facts pleaded by the Respondent[41], Burlington alleges that I should conclude that the admission that the guarantee was necessary for arm's-length lenders means that the guarantee was necessary for Burlington.

[55] I do not agree with Burlington, the Respondent's position is that under 247(2)(a) and (c) of the *Act*, with arm's-length party, in similar circumstances Burlington would have not pay anything for the guarantee since they were no benefit to be had. Therefore, the transfer pricing issue remains a live issue in this appeal.

[56] I turn now to address Burlington's submissions in relation to the Respondent's argument under paragraph 18(1)(a) of the *Act*. The Respondent's position is that under

[40] Further Amended Reply at para 9(t).
[41] Namely, Further Amended Reply at paras 9(s) and (x).

paragraph 18(1)(a) of the *Act* no deductions should be allowed in respect of the guarantee fees as they were not incurred for the purpose of earning income.

[57] Burlington has asked me to conclude that the Respondent's paragraph 18(1)(a) of the *Act* argument is so untenable that it does not warrant the type of onerous searches for information and documents that the Respondent is seeking.[42]

[58] Principally, Burlington alleges that the Respondent's theory that the guarantee fees were not incurred for an incoming-earning purpose is untenable in light of the law regarding paragraph 18(1)(a) of the *Act*. Burlington cites a number of cases that found that a taxpayer is entitled to deduct an expense for valid services, even if a non-arm's length party would have been willing to provide it for free.[43] Therefore, Burlington alleges that paragraph 18(1)(a) of the *Act* cannot be contorted to deny a deduction on the basis that perhaps BRI would have been willing to provide the guarantee without charging for it.

[59] The case law referred to by Burlington only suggests that it cannot be precluded from deducting the guarantee fees by virtue of the fact that BRI had, at one time, provided a guarantee without charging fees. It does not unquestionably lead to the conclusion that the guarantee fees were incurred for the purposes of earning income.

[60] In any event, since the theory of the Respondent with respect to 18(1)(a) of the *Act* is not based on the premises that at one point Burlington did not pay for the guarantee fees, Burlington argument's do not hold.

VI. Recorded refusals

[61] At the examination for discovery, counsel for Burlington refused to answer a number of questions on the ground that the questions were irrelevant. Now before me on some of these questions, Burlington is arguing that it would be too onerous and disproportionate to answer these questions. The Respondent states that a party cannot argue that a question is irrelevant and then later seek to ground its refusal to answer on the basis of proportionality. Proportionality pre-supposes that a question is relevant.

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[42] Appellant's Written Submissions, p 20-23.
[43] Appellant's Written Submissions at paras 70-71.

[62] The Respondent submits that support for this proposition can be found in *CIBC* where Chief Justice Rossiter rejected CIBC's request to re-evaluate its reasons for refusals. CIBC had argued that, in the event that its claim for litigation privilege was defeated, it should be permitted to re-evaluate its documents to determine if their production could be refused on the basis of solicitor-client privilege. CIBC promised to then produce any relevant documents that were not covered by solicitor-client privilege. In denying this request, Chief Justice Rossiter said, essentially, enough is enough.

[63] However, *CIBC* is distinguishable here. CIBC was asking to re-evaluate its refusals after the hearing of the motion, in the event that it was unsuccessful in asserting litigation privilege due to an improper coding of documents by a third-party. In the event that CIBC's subsequently asserted claim of solicitor-client privilege was not accepted by the other party, the parties would have had to return before the Chief Justice for further submissions. In denying this request, the Chief Justice stated at paragraph 185 that "[t]here must be some finality."

[64] In this appeal, both parties knew that proportionality would be raised during this motion. It was the subject of evidence in the form of the affidavit of Ms. Hoang which the Respondent cross-examined on and it was addressed by both parties on the hearing of the motion.

[65] Although I agree with the Respondent that proportionality on a refusals motion is usually only considered if a question is first found to be relevant, I do not accept that a party cannot argue that a question is irrelevant and alternatively if the Court would find it relevant, that it would be disproportionate to require the party to answer it.

[66] Proportionality concerns are embedded within the scope of permissible discovery. When considering whether a party should be ordered to answer a question that they argue is irrelevant, this Court must determine first whether the question is relevant by having reference to the pleadings. Even if the question is relevant, this Court must be alive to the proportionality concerns implicit in the *Rules*.[44]

[67] Thus, Burlington will not be prevented from arguing proportionality where it originally refused to respond to a question on the basis of relevance.

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[44] *Blais v Toronto Area Transit Operating Authority*, 2011 ONSC 1880 at para 15.

VII. Allegations of attempts to create an alternative basis of assessment

[68] Another issue raised by Burlington is whether the Respondent's conduct is tantamount to creating an alternative basis of assessment.

[69] Burlington alleges that the Respondent's questions on discovery amount to an effort to re-audit the taxpayer with an apparent view to developing an alternative basis of assessment that has not been identified or pleaded.[45] Burlington accuses the Respondent of taking an "Ever-Shifting Position" and points out that the Respondent will still attempt to amend her pleadings after this motion.[46] On this basis, Burlington has asked me to limit or terminate the Respondent's discovery rights because she has no right to conduct a broad-range questioning aimed at trying to determine a case to plead.

[70] In terms of terminating the Respondent's discovery rights altogether, Burlington cites the decision of *Aventis Pharma Inc. v Canada*.[47] In that case, the Federal Court of Appeal upheld the decision of Associate Chief Justice Lamarre of this Court to terminate the Respondent's examination for discovery where it was obvious that her aim was to discover with a view to developing an alternative basis of assessment that had not been defined in the pleadings.

[71] Counsel for the Respondent strongly rejected Burlington's submission that she was attempting to misuse the discovery process in an effort to uncover a new basis of assessment.[48] The Respondent admits that she will seek to amend her pleadings after the hearing but explained that the only function of the amendment will be to narrow the issues for trial. The intended amendment will result in the withdrawal of the transfer price re-characterization argument under paragraphs 247(2)(b) and (d) of the *Act*.

[72] Having read the transcript from the examination for discovery and, in light of the refusals that the Respondent is moving on, it is far from obvious to me that the Respondent has attempted to examine on a case which she has not made in her pleadings. I therefore decline to terminate outright the Respondent's discovery rights in a manner akin to *Aventis Pharma*.

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[45] Appellant's Written Submissions at para 4.
[46] Appellant's Written Submissions, p 5-9.
[47] *Aventis Pharma Inc. v Canada*, 2008 FCA 316 [*Aventis Pharma*].
[48] Transcript from Hearing, Day 1, p 49.

[73] This does not mean, however, that I will not intervene to prevent the Respondent from pursuing a particular question or line of questions if I find it to be irrelevant or unsupported by the pleadings.

VIII. Excessive number of questions taken under advisement

[74] A further issue that must be addressed relates to the practice of taking questions "under advisement" during an examination for discovery.

[75] The Respondent argues that refusing to answer questions on the basis that the questions are being taken "under advisement" is a misuse of the examination for discovery process. Burlington's nominee refused to answer a large number of questions on this basis.

[76] The examination for discovery of the nominee of Burlington lasted nine days. The Respondent asked 4122 questions, 1700 questions were taken under advisement, and 1200 of these questions were later refused.

[77] The Respondent insists that by taking so many questions under advisement, Counsel for Burlington is ignoring subsection 107(1) of the *Rules* which requires grounds to be given when objecting to a question. Consequently, counsel for the Respondent was deprived of the opportunity to reformulate, reframe or narrow her questions in order to meet a proper subsection 107(1) objection. The Respondent pointed to exchange below as an example of where the discovery process was so thwarted:

> Q. What I am saying is: Did the appellant ever ask for this guarantee. Is there any document or communication or anything that shows or states or contains any request by the appellant to BRI for this guarantee to be executed or any guarantee to be executed?
>
> Ms. MacDonald: Could you please explain to me the relevance of whether the appellant asked for it or not?
>
> Ms. Mboutsiadis: This has to do with what arm's-length parties would do. If an arm's-length party is someone asking for a guarantee, they would ask for it. We are trying to establish what the guarantee fee is. We are going to look at what other parties would have done. Maybe in another scenario, another party would ask for the guarantee. I think I know what the answer is. These are the tedious questions we talked about.

Ms. MacDonald: Under advisement.

Ms. Mboutsiadis: Why are you taking that under advisement? You can give me an undertaking to find out.

Ms. MacDonald: I would like to take the question under advisement.

Ms. Mboutsiadis: Is there a reason?

Ms. MacDonald: I am not sure whether the appellant asked its parent for this guarantee informs the arm's-length transfer price for the guarantee at issue in this litigation.

Ms. Mboutsiadis:It relates to. It doesn't have to inform anything. All discoveries are about is trying to find out information about facts that relate to everything that is going on, that are part of it.

Ms. MacDonald: You have my position.

Ms. Mboutsiadis: I am trying to explain it so maybe you kill [can] change your position and give me an undertaking.

Ms. MacDonald: I don't intend to change my position.

Ms. Mboutsiadis: Even if I explain to you why it is relevant?

Ms. MacDonald: I would prefer to move on with the questioning of Mr. Delk while he is here.

Ms. Mboutsiadis: I would too. I need to establish this first. Are you saying if I can't [can] explain to you why it is relevant, you are not going to change your mind or even try to think about it?

Ms. MacDonald: Please move on with your questions. I have given you my position.

Ms. Mboutsiadis: I am taking that as a notice to me that, even if I explain the relevance, you won't change your position.

Ms. MacDonald: Please ask your next question.[49]

[49] Examination for discovery, pp 206 - 208.

[78] In response to this submission, I offer some general guidance, starting with the recent decision of the Federal Court of *MediaTube Corp. v Bell Canada*[50]. There the Federal Court criticized the practice of interrupting discovery through the use of quasi-objections. At para. 20, the Court stated:

> 20 The Court does not support the over abundance of interruptions in an examination by the use of a quasi objection such as "under advisement". Witnesses should be permitted to answer proper questions. If the witness does not know the answer then that is the answer and that is when undertakings are appropriate to make further inquiries and provide answers on a follow-up examination or by way of writing if the circumstances are such that answers in writing are acceptable to the party examining. Parties to litigation are expected to generally follow the Rules keeping in mind that flexibility, civility and proportionality must be exercised in all cases.

[79] I will also note that where the tactic of taking questions under advisement without explanation hinders the examination, there may be cost consequences, as in the case of *Glaxo Group Ltd. v Novopharm Ltd*.[51]

[80] In my view, the practice of using the quasi-objection "under advisement" needs to stop. It is not a response contemplated by section 107 of the *Rules*. According to the *Rules*, a nominee either answer the question, refuses to answer and explains the basis for such refusal, or takes an undertaking if he or she does not know the answer. The "under advisement" quasi-objection is often a tactic used to gain time to reflect on which basis the question will be refused, without the party having to explain, at the time of discovery, why such question was refused. It deprives the party asking the question or the opportunity to rephrase the question. In my view, taking a question under advisement amounts to a "refusal".

IX. Third-Party Documents

[81] With respect to the third-party documents requested by the Respondent from BRI and/or BRCC and other members of the BRI's family, I adopt the comments of Justice Campbell Miller in the *HSBC Bank Canada*'s[52]decision where he ordered the Appellant to obtain the documents from its parent. At paragraph 13 of his reasons for Order, he stated as follows:

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[50] 2015 FC 391.
[51] (1999), 3 C.P.R. (4th) 333 (Fed. T.D.).
[52] *HSBC Bank Canada, supra*.

> The Appellant raises another factor, relying on a comment from Justice Hugessen in *Eli Lilly v. Apotex Inc.* cited in the *Michelin* case, that it is proper to require third party information only where one may reasonably expect that it will be honoured because of the relationship between the party and third party. The Appellant contends it would not be reasonable to expect a request would be honoured by the Parents with respect to highly sensitive information, such as the requirements of financial regulatory regimes governing the Parents, nor to documents that lack any connection with the Appellant (eg. other guarantees and comfort letters). Bringing the Parents' documents under the protection of the Confidentiality Order issued in this case should address the Appellant's first concern and alleviate any similar concern of the Parents. With respect to the request for documents to which the Appellant is not a party, I see the issue of reasonable expectation less in terms of the lack of connection as I do in terms of whether or not the document is indeed relevant. Given these views, I have no hesitation in concluding that it is reasonable to expect the Parents to respond positively to relevant inquiries. I see no impediment in exercising my discretion pursuant to *Rule* 83 to order production of relevant documents. This conclusion addresses all those challenges by the Appellant to the Requests based on documents not being in the Appellant's possession or control, where such documents may be in the possession, control or power of the Parents.

X. Examination of Disputed Questions

[82] I want to be clear that in examining the questions in dispute, I will not repeat my findings on the issues that I have just addressed. For example, where Burlington's response to a category of questions is that the transfer pricing is not in issue, in light of the Minister's assumptions of fact and its admissions, I will not repeat my disagreement with Burlington's position. Similarly, I will not repeat my position on proportionality, every time that it is raised by Burlington in respect of a Category.

[83] That said, I will now address the Disputed Questions. The Respondent has grouped the questions into 70 categories, each related to a particular line of questioning.

[84] Categories 1 to 46 contain questions that the Respondent alleges have been improperly refused. Categories 47 to 70 contain questions which the Respondent alleges Burlington has provided answers that are nonresponsive.

[85] At the hearing, counsel for Burlington asked that I rule on a category-by-category basis such that, if any of the questions in a category are held to be improper,

none of them have to be answered.[53] I have not adopted this approach with respect to all categories. In some categories, my ruling on the propriety of the questions varies depending on the individual question.

[86] Certain categories of questions are no longer in dispute and are not discussed in these reasons. The category numbering is sequential, but some numbers are not dealt with.

[87] As well, during the hearing, counsel advised that the following questions are no longer part of this motion: 168, 175, 177, 206, 226, 227, 748, 828, 892, 1537, 1560, 1601, 1606, 1607, 1618, 1619, 1681, 1685, 2524, 2525, 2526, 2587, 2588, 2589, 2590, 2591, 2601, 2602, 2603, 2604, 3183, 3185, 3187, 3189, 3233, 3236, 3239, 3240, 3241, 3243, 3244, 3245, 3247, 3248, 3250, 3251, 3252, 3253, 3254, 3255, 3256, 3258, 3261, 3262, 3263, 3264, 3265, 3266, 3267, 3268, 3269, 3270, 3271, 3273, 3274, 3276, 3280, and 3281.

A. Improper Refusals

Category 1: Questions relating to the preparation of Burlington's nominee for examination

Questions 1929-1933, 1967-1970, 1975-1979, 1983-1987, 1991-1995, 2053-2057, 2061-2065, 2069-2073, 2077-2081, 2096-2100, 2104-2108, 2112-2116.

[88] This category of questions relates to inquiries made by Mr. Delk to inform himself in preparation for the second part of the examination for discovery in December 2014. In particular, the Respondent asked Mr. Delk what information and documents were provided to him by certain named employees at ConocoPhillips or BRI in order to prepare for his examination.

Respondent's Position

[89] The Respondent states that its questions are relevant and targeted. Specifically, the Respondent characterizes the request as dealing with the specific information learned and documents gathered, not the steps Mr. Delk took to inform himself. The Respondent indicates that it falls within the ambit of subsection 95(2) of the *Rules*

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[53] Transcript from Hearing, Day 3, p 67, lines 1-12.

that a nominee has to inform himself and make inquiries during the entire discovery process. Burlington is not relieved of its burden of answering the questions solely on the basis that privilege 'may' apply - a claim that is insufficient and does not constitute a proper claim of privilege. Importantly, asserting that privilege "may" apply because the nominee is a lawyer is contrary to the purpose of discovery and obstructionist.

Burlington's Position

[90] Burlington contends that these questions are irrelevant, broad and vague. In particular, it submits that Mr. Delk gave evidence as to matters he had learned as a result of having informed himself of various matters. Burlington characterizes the Respondent's questions as akin to a witness statement and cites case law which provides that "a party is not required to provide a summary of the evidence of its witnesses or possible witnesses".

[91] Burlington therefore submits that the questions are improper insofar as they are questions seeking information on the steps taken by Mr. Delk to inform himself. It is of the view that the Respondent is capable of asking relevant questions that will show the product of Mr. Delk's labours to inform himself. As well, Burlington invokes a possible privilege applying to further excuse their refusal to answer these questions because Burlington's nominee, Mr. Delk, is counsel.

Court's Decision

[92] It was established in *HSBC Bank Canada,*[54] that the files reviewed by the nominee in preparation for an examination for discovery are *prima facie* relevant.

[93] Counsel for Burlington's objection on the basis that solicitor-client privilege "may" apply does not stand. Communications between employees and Burlington's nominee are not privileged simply because the nominee is a lawyer. Indeed, asserting privilege "may" apply as the nominee is counsel is contrary to the purpose of discovery.

[94] The Respondent is not asking Mr. Delk to describe the steps that he took to inform himself or to provide a summary of potential witnesses' evidence, which have

[54] *HSBC Bank Canada*, supra at para.15

been found to be improper questions.[55] It goes without saying that the documents that are privilege do not have to be provided. Burlington has to answer the questions.

Category 2: Questions relating to the necessity of the Guarantee Fees

Questions 1028-1032

[95] This category involves essentially two separate but related questions:

> Question 1028 - Whether Burlington had to pay the guarantee fees in order for BRI to give the guarantee; and
>
> Question 1032 - Whether BRI had to charge Burlington for the guarantee fees in order to give it the guarantee.

Respondent's Position

[96] The Respondent states that these are proper questions of fact relevant to the Respondent's theory about the purpose of the guarantee fees under paragraphs 18(1)(a) and 20(1)(e.1) of the *Act*. The information sought by these questions would be relevant to understanding why the guarantee fees were incurred by Burlington, and also may be relevant in addressing whether the guarantee fees had any value at all. It is the Respondent's position that the guarantee fees were paid, not in consideration for the guarantees, but for the sole purpose of gaining a tax benefit.

Burlington's Position

[97] Burlington claims that these questions are overly vague, irrelevant and speculative. It contends that it is unclear whether the Respondent's question is whether the guarantee fees were legally required, commercially necessary, or "had to be paid" in some other sense. Insofar as the questions in this Category ask more than this, Burlington submits that they do not relate to any of the issues on appeal. It is of the view that whether BRI could have theoretically provided the guarantees for free does not go to whether Burlington paid the guarantee fees for the purpose outlined under paragraphs 18 (1)(a) and 20(1)(e.1) of the *Act*.

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[55] *Loewen v The Queen*, 2006 DTC 498.

Court's Decision

[98] These questions do not have to be answered. The questions are speculative. Is the Respondent asking if BRI was legally required to charge guarantee fees? That said, at Question 1037 and following, Mr. Delk answered these questions. For example, at Question 1037 his answer was:

> A. Legally, I do not know if the guarantee fees are required or not. What I know is BRI provided the service to the Appellant and, in providing that service to the Appellant and, in providing that service, would have expected to be compensated.

Category 4: Questions relating to other guarantees in the BRI corporate family.

Questions 1175, 1178, 1180, 1182, 1185, 1193, 1197, 1201, 1203, 1205-1207, 1210, 1212, 1215, 1221, 2731-2757, 2759-2780, 2782-2831, 2833-2838, 2840-2933, 2935-2982, 2987-3032, 3035-3080, 3083-3143, 3145-3176

[99] The Respondent asked Mr. Delk to produce any documents with respect to specified and unspecified guarantees given by BRI to related entities.

[100] During the hearing, the Respondent restricted the questions to any documents relating to seven Specified Guarantees given by BRI to related entities namely, Burlington Resources Canada Exploration Ltd. ("BRCEL"), Poco Petroleum, Burlington Resources Canada Partnership, BR (Global Holdings) BV, Burlington Resources Capital, and Burlington Resources Capital II (collectively, the "Named Guarantees"). Therefore, all questions relating to the unspecified guarantees have been withdrawn and do not have to be answered.

Respondent's Position

[101] The Respondent argues that guarantees given by BRI to other non-arm's length entities and the facts relating to those guarantees, such as whether BRI charged guarantee fees, are relevant to determining the issue of whether the guarantee fees in this appeal were incurred for the purpose of earning income under paragraphs 18(1)(a) and 20(1)(e.1) of the *Act*. The Respondent clarifies that it is not asking to view and compare the terms and conditions of other non-arm's length guarantees. Rather, the Respondent seeks information on the circumstances surrounding the sister corporation guarantees (i.e. whether similar hybrid subscription agreements were in place, the

treatment of the recipient of the guarantee's credit ratings, and whether the recipient was an unlimited liability company, and whether guarantee fees were paid).

[102] The Respondent maintains that answers to these questions would go to establishing whether the guarantee fees were incurred for the purpose of earning or producing income from its business. Specifically, it posits that an absence of any charge for a guarantee given to another non-arm's length entity by BRI could suggest that the purpose of paying the guarantee fees was to obtain a tax benefit. For example, if another of BRI's non-arm's length subsidiaries was receiving a guarantee from BRI for no charge, then one could ask why would Burlington incur an expense for the same thing. The answer may be that the only reason Burlington incurred the guarantee fees was to obtain a tax benefit.

[103] In support of its position, the Respondent points to Justice Campbell Miller's decision in *HSBC Bank Canada* - a decision which also stemmed from a refusals motion relating to a transfer pricing dispute.

[104] In *HSBC Bank Canada*, the Respondent had asked the taxpayer to justify why it had been treated differently by the parent company than other, non-Canadian subsidiaries.

[105] In response to this disputed question, Justice Campbell Miller commented that information with respect to non-arm's length dealings may be relevant to the "factual paradigm" in which transfer pricing cases could be considered:

> While I appreciate that the transfer pricing provisions do not call for comparison with other non-arm's length transactions, I can certainly see some relevance to how sister corporations were treated in connection with determining the issue of whether the fee was incurred for the purpose of earning income. Without having to determine the relevance of circumstances surrounding the implicit support of the Parent in connection with the transfer pricing, I find that such information is generally relevant in determining the question of whether the fee was incurred for the purpose of earning income.[56]

[106] Further, at paragraph 23 of *HSBC Bank Canada*, Justice Campbell Miller held explicitly that questions regarding differential treatment between other non-arm's sister corporations were potentially relevant for the purposes of paragraph 18(1)(a):

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[56] *HSBC Bank Canada*, supra at para 15.

> The question seeks the reasoning behind what on its face appears to be different treatment. This may be relevant, again not so much for purposes of any comparison between different non-arm's length arrangements, but to get an understanding why the fee was incurred by the Appellant. Request 9 is answerable.

[107] Drawing on the above two passages, the Respondent asserts that the differential treatment of non-arm's length entities is sufficiently relevant to the issues engaged by paragraphs 18(1)(a) and 20(1)(e.1) of the *Act* to be discoverable.

[108] The Respondent distinguishes the decision in *GE Capital Canada*[57] where Justice Valerie Miller determined that questions regarding a non-arm's length sister corporation's guarantees were not relevant. The Respondent argues that *GE Capital Canada* is distinguishable from the present matter as there was no reliance by the Respondent in *GE Capital Canada* on paragraphs 18(1)(a) or 20(1)(e.1) of the *Act*. Because Justice Valerie Miller was not called to consider the relevance of non-arm's length transactions to paragraphs 18(1)(a) or 20(1)(e.1), the Respondent argues that her findings should not be read as a rejection of Justice Campbell Miller's aforementioned conclusions.

[109] Both parties also made arguments based on proportionality in relation to this Category.

[110] Burlington contends that the questions in this category need not be answered due to their disproportionate nature. Ms. Hoang's evidence, discussed at length above, is offered by Burlington in support of this position.

[111] Ms. Hoang states in her affidavit that she made inquiries of the Houston treasury department and was informed that the department does not maintain a master list of all guarantees provided to any of the entities in the ConocoPhillips Group.[58] Yet, the Respondent points out that Ms. Hoang never even asked the treasury group about BRI's guarantees:

> Counsel for the Respondent: But we're not just talking about that in general terms. We're talking about BRI. You never had a discussion with the treasury group about BRI's guarantees; right?

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[57] *General Electric Capital Canada Inc. v Canada*, 2008 TCC 668 [*General Electric*].
[58] Affidavit of Ms. Hoang, p 18 at para 67.

Ms. Hoang: I asked - no.[59]

[112] Though the above exchange was directed narrowly at determining whether BRI ever executed a guarantee agreement or provided a guarantee to any entity or partnership other than Burlington, the Respondent submits that the fact the treasury department was never questioned on how to locate BRI's guarantees undermines Ms. Hoang's statement on the proportionality of responding to the questions in Category 4.

[113] Additionally, Ms. Hoang's states in her affidavit that she does not have any efficient and reliable way to respond to these questions.[60] The Respondent notes that Ms. Hoang does not state that there is no efficient or reliable way to respond to the questions because she never asked the treasury department about how to locate BRI's guarantees. The Respondent argues that it cannot be ruled out that such searches can be reliably conducted.

[114] The Respondent also highlights the existence of a general index of what is contained in the boxes of documents of comprising ConocoPhillips' records. Ms. Hoang stated that the existence of this general index provided little certainty as to its accuracy and completeness. Still, the Respondent argues that the existence of this general index is an important tool in reducing the burden of this task. The Respondent contends that Ms. Hoang should be able to rely on the general index, as well as the indexes created by the treasury and other departments, to identify relevant and responsive documents related to the named guarantees. In addition, Ms. Hoang has never consulted the ex-employees who were knowledgeable with these transactions to find out, if they could answer some of the questions and whether they knew if Burlington had given guarantee to sister corporations of Burlington.

[115] To conclude, the Respondent states that Ms. Hoang has provided insufficient evidence of the onerous burden involved in responding to the questions of Category 4. The Respondent points to the indexes, including the general index, as important tools in reducing the burden of responding to these questions. Moreover, drawing on Justice Campbell Miller's comments in *HSBC Bank Canada*, the Respondent submits that the questions in Category 4 are relevant to justify the cost and effort of responding, in any event.

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[59] Transcript from cross-examination of Ms. Hoang, p 163 at paras 10-15, Question 642.
[60] Affidavit of Ms. Hoang, p 22 at para 74.

Burlington's Position

[116] Burlington's position is that all these questions are irrelevant because the issues on appeal relating to paragraphs 18(1)(a) and 20(1)(e.1) of the *Act* are taxpayer and transaction specific. If it were to find that BRI has given guarantees without a fee to a sister corporation of Burlington, the circumstances could be so different that it would have no impact on this appeal. In addition, Burlington states that the Respondent is effectively asking it to perform a comprehensive review of all its records to determine the existence of any guarantees provided by BRI and why, including a specific search for details relating to the Named Guarantees. Burlington claims that all of these questions are both irrelevant to the issues on appeal and onerous to answer. Burlington submits that questions relating to guarantees involving other entities in different circumstances will not help the Court determine why it incurred the guarantee fees.

[117] Burlington points to the decision in *HSBC Bank Canada*, where questions on the parent companies' valuation of the explicit guarantee were refused for two reasons – first, the specific documentation sought could not be presumed to exist since any explicit guarantee by the parents would not distinguish such a guarantee's value from the implicit guarantee provided by the parents (that is to say, such documentation would only have been produced by a third party guarantor assessing the value of its granting an explicit guarantee in light of the parents' implicit support); and second, the information sought would not inform whether the taxpayer had paid the fee for the purpose of producing income.[61] Burlington calls attention to the latter point as clearly showing that the Respondent's questions are irrelevant. It also is of the view that the Respondent's attempt to distinguish the guarantee terms and conditions at issue in *HSBC Bank Canada* from the Respondent's questions on the circumstances of the guarantees in this matter is splitting hairs, as both are irrelevant for the same reasons.

[118] Burlington also relies on the decision of Justice Valerie Miller in *General Electric* [62] and the decision of Chief Justice Rossiter in *CIBC*.[63] With respect to the latter decision, Burlington draws a parallel between the Named Guarantees provided by BRI to other non-arm's-length entities and non-Enron litigation and settlements where a CIBC entity was sued along with an arm's-length co-defendant. In both cases, the Respondent viewed the other transactions as providing potentially useful internal

[61] Affidavit of Ms. Hoang, p 22 at para 74.
[62] *General Electric, supra*.
[63] *CIBC, supra*.

comparables, and Burlington highlights that Chief Justice Rossiter found the other settlements to be irrelevant to the matter at issue.[64]

[119] Burlington further submits that the assumptions to which any of these questions relate were only relevant to the application of paragraphs 247(2)(b) and 247(2)(d) of the *Act* - specifically, to the inquiry as to BRI's motivation for charging the guarantee fees. Arguments relating to those paragraphs are no longer being advanced by the Respondent. As a result, inquiries around BRI's motivations for charging the guarantee fees are no longer relevant in light of the Respondent's abandonment of its position.

[120] Burlington thus requests that I conclude that the questions in Category 4 amount to a fishing expedition and need not be answered.

[121] Burlington further emphasizes that any potential relevance of these questions is disproportionate to the effort it would take to properly answer them. Requesting all facts about certain transactions, agreements and terms of such agreements are submitted to be too general and grossly disproportionate in the way they are tailored. Citing *HSBC Bank Canada*, Burlington submits that the questions in this Category exemplify an approach that seeks to produce as much as possible regardless of how marginally relevant it is.

[122] In her affidavit, Ms. Hoang attests to the difficulty associated with locating the information needed to properly answer these questions, including a lack of complete records of guarantees given by BRI and the passage of time. She testified in cross-examination that she would need to identify the individuals who worked on a given transaction and obtain from them information as to where responsive records would be kept. Following this, a search for any responsive documents in places identified by those individuals, if they are still able to so direct Ms. Hoang, would have to be done involving the review of multiple indexes to pull such records. Ms. Hoang emphasized that this would need to be done for many of the remaining questions. Therefore, Burlington submits that answering the questions would be disproportionate and therefore improper as a request.

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[64] *Ibid* at para 251.

[123] In response to the Respondent's arguments on proportionality, Burlington notes that the records held by ConocoPhillips' treasury department are not as comprehensive as the Respondent tries to make out.

[124] Burlington thus submits that it has provided sufficient evidence to justify that it is too onerous to respond to the questions in Category 4 given the allegedly marginal relevance of the questions at issue.

Court's Decision

[125] I disagree with Burlington that the Respondent's assumptions of fact to which the questions in Category 4 relate to were only relevant to the application of paragraphs 247(2)(b) and 247(2)(d) of the *Act* - whether the guarantees would not have been entered into by persons dealing at arm's-length and can reasonably be considered not to have been entered into primarily for *bona fide* purposes other than to obtain a tax benefit. It is abundantly evident that these questions instead relate to the Respondent's theory in relation to paragraphs 18(1)(a) and 20(1)(e.1) of the *Act*.

[126] I am of the view that since there was no reliance by the Respondent in *GE Capital Canada* on paragraphs 18(1)(a) and 20(1)(e.1) of the *Act*, this case is not persuasive in deciding the issues before me. *GE Capital Canada* must be differentiated from the present matter. For this reason, I need not to comment on the Respondent's argument that *GE Capital Canada* was wrongly decided on the above point.

[127] In the case of *HSBC Bank Canada*, the Respondent had asked the taxpayer to justify why it had been treated differently by the parent company than other non-Canadian subsidiaries. Such questions regarding differential treatment were held to be relevant for the purposes of paragraph 18(1)(a) of the *Act*. I disagree with Burlington that this conclusion was reached solely because of the existence of an intercorporate transfer pricing policy that related to both the taxpayer and its affiliates.

[128] Drawing on *HSBC Bank Canada*, questions relating to the differential treatment between Burlington and its subsidiaries are relevant since they relate to the position of the Respondent under the paragraph 18(1)(a) of the *Act*.

[129] Further, contrary to Burlington's arguments, Chief Justice Rossiter's decision in *CIBC* to deny the questions directed at potential "internal comparables" is

distinguishable here. The Respondent in *CIBC* asked broadly for information relating to non-Enron litigation that featured arm's-length co-defendants of CIBC. The Chief Justice held that non-Enron litigation and settlements could be completely different so as to be "utterly useless as a comparator."[65]

[130] Thus, relying on *HSBC Bank Canada*, I find that the questions in Category 4 are relevant. I now turn to whether if it would be too onerous to do so, taking into account the principle of proportionality.

[131] The searches for the seven Specified Guarantees will be done based on the indexes maintained by each department. I do not find that this is disproportionate. In cross-examination, Ms. Hoang agreed that the indexes list essentially what documents are in the boxes.

[132] I note that the Respondent has asked Burlington to provide all U.S. Securities and Exchange Commission filings relating to the guarantees. This information is in the public domain. Drawing from *HSBC Bank Canada* at paragraph 54, I conclude that if Burlington or BRI has gathered this information, it should provide the information to the Respondent. However, if after an appropriate search, this information is not available, then the Respondent ought to source the information itself in relation to these questions; namely 2786, 2836, 2885, 2933, 3032, 3080, 3128, and 3176.

[133] I also conclude that any question asking whether it was in the guarantors' interest to give the guarantees to other non-arm's length affiliates need not be answered. In *HSBC Bank Canada*, questions about the parent company's valuation of the guarantee were refused because the information sought would not inform whether the taxpayer had paid the fee for the purpose of producing income.[66] Drawing on this reasoning, questions asking about BRI's interest in providing guaranteed to non-arm's length affiliates are irrelevant. Therefore, the following questions relating to the guarantors' interest in providing these guarantees need not be answered: 2748, 2750, 2751, 2752, 2753, 2754, 2755, 2803, 2804, 2805, 2806, 2807, 2808, 2809, 2810, 2853, 2854, 2855, 2856, 2857, 2858, 2859, 2860, 2901, 2902, 2903, 2904, 2905, 2906, 2907, 2908, 2949, 2950, 2951, 2952, 2953, 2954, 2955, 2956, 3000, 3001,

[65] *CIBC, supra* at para 251. Chief Justice Rossiter writes that these "would yield little to no value in this case, not to mention the enormous effort it would require to answer these questions."
[66] *HSBC Bank Canada, supra* at paras 63-64.

3002, 3003, 3004, 3005, 3006, 3007, 3048, 3049, 3050, 3051, 3052, 3053, 3054, 3055, 3096, 3097, 3098, 3099, 3100, 3101, 3102, 3103, 3143, 3144, 3145, 3146, 3147, 3148, 3149, 3150, and 3151.

[134] Finally, Ms. Hoang states in her affidavit that questions in Category 4, as posed, could conceivably relate to all types of guarantees ever entered into with BRI including performance or contract completion guarantees.[67] I disagree. Context is important. However, for greater certainty, the questions in Category 4 relate only to financial guarantees with respect to the seven Specified Guarantees mentioned in paragraph 99 of my reasons.

Category 5: Question as to whether BRI would support its Canadian subsidiary during financial difficulties

Question 703

[135] This question arose while discussing a document of Salomon Smith Barney analyzing the creditworthiness of a Canadian operating subsidiary ("BR Canada") in which the "implied support" of BRI is viewed as having a positive impact on BR Canada's credit quality. Against this backdrop, the Respondent asked Mr. Delk if BRI would have provided support to BR Canada (a Canadian subsidiary to whom Burlington on-loaned) if BR Canada faced financial difficulties.

Respondent's Position

[136] The Respondent contends that this is a factual question about the extent to which BRI would have demonstrated its implied support should BR Canada have needed.

[137] The Respondent argues that this question is relevant. Burlington relied on the investment bank letters in substantiating its choice of a guarantee fee rate. In its opinion, the investment bank letters reference both the implied support that BRI would give, and the close ties between Burlington's stand-alone credit quality and the subordinated credit quality of BR Canada. Since BRI's implied support of BR Canada would be relevant to the ability of BR Canada, as debtor of Burlington, to repay the

[67] Affidavit of Ms. Hoang, p 18 at para 69.

amounts on-loaned to it from by Burlington, the Respondent submits that it is relevant to fixing the appropriate arm's-length amount for the guarantee.

Burlington's Position

[138] Burlington submits that this question is impermissibly speculative. Counsel highlighted the uncertainty on what constitutes "financial difficulties" and emphasized that the nature of financial difficulties was not characterized by the Respondent with sufficient precision to allow anything more than a vague and speculative issue. Furthermore, Burlington cited *HSBC Bank Canada*, in which Justice Campbell Miller notes that questions asking a nominee to speculate on an issue that will ultimately have to be decided by the trial judge are improper. Burlington considers that the mere fact that the investment bank letters contained speculation in support of their opinion does not mean that it is appropriate to ask Burlington to speculate. It furthermore submits that the answer would be irrelevant, as the parties are in agreement that an arm's-length guarantor would charge more than 50 basis points for the guarantee. Finally, Burlington submits that gaining the appropriate background information as to what was transpiring between 2000 and 2005 to answer the question accurately would be onerous.

Court's Decision

[139] At the hearing, I raised the question of whether this question had already been answered. Questions 1006 et seq.[68] covered the same ground and were answered.

[140] At question 1007, Mr. Delk provides the following response when discussing whether BRI would have assisted the Canadian operating subsidiaries in the event that they experienced financial problems (i.e. unable to meet their payments, potential bankruptcy):

> I cannot say they would, no. As I said before, there is a reason why legal entities are used. Although a parent company and BRI would be expected to provide financial support - let's say natural gas prices were depressed for a period of three to four years, so the company needed access to short-term funding or maybe the company needed capital to make an acquisition or needed capital in order to find its own development, then yes. If the company was bankrupt - the implied support is not unfettered support. I don't think anybody can say

[68] Transcript of Hearing, Day 4, p 29-31.

> that Burlington Resources Inc. would have stepped in and provided an unlimited amount of funding to its subsidiary. It was a subsidiary, and there is a purpose for using subsidiaries.

[141] Even though initially Mr. Delk may have been confused about which entities were being discussed during this line of questioning, by question 1009, it was clear that the questions related to BRI's implied support of its Canadian operating subsidiaries.

[142] In my view, Question 703 has already been answered by the responses given to Questions 1007 and 1009. Therefore, there is no need to answer Question 703. If the Respondent wanted to ask follow-up questions, she should have done so at the time of the examination for discovery, when Mr. Delk answered Question 703. She cannot now state for the purpose of asking follow-up questions, that this question has not been answered.

Category 6: Question on the concerns of BRI if Burlington was unable to meet its obligations.

Question 1015

[143] The Respondent asked Mr. Delk whether BRI would have been concerned about the effect on its reputation if Burlington was unable to meet its obligations.

Respondent's Position

[144] The Respondent characterizes this as a factual question about BRI's interest during the years under appeal. The Respondent submits that the issue of implied support by BRI is raised as a factor in the evaluation of Burlington in the investment bank letters and these letters were relied on by Burlington when deciding what guarantee fee rate to charge. Therefore, given Burlington's position with respect to the investment bank letters, the Respondent argues that whether BRI would have been concerned if Burlington had been unable to meet its obligations is not hypothetical.

Burlington's Position

[145] Burlington submits that it is not clear what 'concern' means, and that the question calls for speculation. Even if implicit support is at issue in the appeal, Burlington submits that this would be a question of what BRI would do, not what its

concerns would be. It is also irrelevant and would be onerous to answer, for reasons similar to those relating to Category 5.

Court's Decision

[146] This question calls for speculation. There is no meaningful way to assess whether BRI would have been "concerned" and thus Mr. Delk cannot be expected to respond to this question.

Category 7: Question on the previous imputation of a credit rating

Question 755

[147] The Respondent asked Mr. Delk whether BRI had previously imputed the credit rating of one "sister" corporation to another "sister" corporation.

Respondent's Position

[148] The Respondent argues that this question is relevant to the issue of the operation of paragraphs 247(2)(a) and (c) of the *Act* in this case. The Respondent alleges that, according to the investment bank letters, the credit rating of Burlington may be imputed from the sister corporations to which it on-loaned funds to. The Respondent seeks to better understand this methodology, and wants to know whether BRI has employed this methodology in other instances. If BRI has not, this is helpful to the Respondent's position because it shows that this case is an abnormality. However, to the extent that BRI has used this imputed rating methodology before, the Respondent seeks to understand the circumstances surrounding this.

[149] The Respondent also notes that Burlington's case on having contemporaneous documentation such as to avoid the application of penalties depends in part on whether the imputation approach used by the banks is appropriate.

Burlington's Position

[150] Burlington submits that any previous imputation by the Parent of a credit rating in other circumstances is irrelevant to the inquiry before this Court, for reasons similar to why Category 4 is concerned with irrelevant considerations of other guarantees. Whether the method had been used before says little about whether it is accurate.

Burlington finally notes that such an inquiry would be quite onerous to answer, and that any marginal relevance to the answer is outweighed by the onerous inquiry necessary to answer it.

Court's Decision

[151] BRI's use of the imputed rating methodology in other instances is relevant to the application of paragraphs 247(2)(a) and (c) of the *Act* and more particularly, for the purpose of the penalty under subsection 247(3) of the *Act*. Therefore, the question needs to be answered.

Category 8: Question relating to Burlington's interest in obtaining its own credit rating evaluation

Question 842

[152] After asking Mr. Delk why BRI or Burlington did not consult a credit rating agency to find out Burlington's credit worthiness, the Respondent asked Mr. Delk whether it would have been in Burlington's interest to consult a credit rating agency so as to receive a more accurate score for determining the guarantee fee.

Respondent's Position

[153] The Respondent submits that the question is a proper, factual question as to what Burlington thought was in its interests.

[154] The Respondent argues that this question goes to whether Burlington made reasonable efforts to establish an arm's-length price in this case.

Burlington's Position

[155] Burlington submits that the question is improperly speculative, as well as being irrelevant to the question of whether Burlington made reasonable efforts to determine a transfer price or whether the price agreed on was not one that would be paid to an arm's-length party in circumstances identical to Burlington's.

Court's Decision

[156] Following Question 842, at Question 843, Mr. Delk stated that "Burlington did not issue commercial paper or other financial instruments that did not include a guarantee from its parent. Therefore, there was no need for Burlington to be rated by a rating agency" is a sufficient answer.[69] In my view, this is an adequate answer. In any event, as to whether it was "in the interest" of Burlington to get a credit rating from a credit rating agency, is a question that calls for speculation.

Category 9: Question comparing the yield difference between BRI and BR Canada

Question 2509[70]

[157] The Respondent asked Mr. Delk what the difference in yield would be between the credit ratings of BRI and the company indebted to Burlington (in this case, BR Canada).

Respondent's Position

[158] Burlington relied on the credit rating of the corporation holding the underlying debt to determine its credit rating, as stated in the investment bank letters. Therefore, the Respondent submits that this entity's credit rating and BRI's credit rating are relevant for the purposes of determining what the appropriate guarantee fee rate should have been.

Burlington's Position

[159] Burlington submits that the question seeks irrelevant information, as it argues that the parties have agreed that an arm's-length party would charge Burlington more than 50 basis points. It submits that the risk analysis necessary to determine a credit spread is irrelevant to any argument under paragraph 18(1)(a) of the *Act*.

[160] Furthermore, Burlington submits that the question seeks evidence on the difference in yield between BRI's credit rating and that of BR Canada, which is a finding that will be made by the trial judge on expert evidence. Burlington relies on the decision of Justice Campbell in Burlington for the proposition that questions

[69] Examination for discovery of Chris Delk, July 17, 2014, p 338, lines 8-18.
[70] This question was initially taken under advisement and then subsequently refused by Burlington pending the decision of Justice Campbell.

seeking information as to the opinion of a party "on the appropriate method to be employed in a determination of [Burlington's] credit rating for the purposes of applying the yield approach" are improper, as the underlying issue would be one that would be for the trial judge to determine.[71] Burlington argues that its view on the difference in yield before retaining expert opinion on the point is irrelevant.

[161] Justice Campbell's decision in *Burlington* mentioned in the above paragraph deals with the same appeal as this one. Justice Campbell dealt with a Motion by Burlington to compel the Respondent to answer some of the questions that her nominee had refused to answer.

Court's Decision

[162] In my view, this question need not be answered. According to Mr. Delk, the credit rating for BRI was AAA and for BRCC it was BBB. The Respondent is asking for the difference in yield between these two credit ratings. This question seeks for an expression of opinion from Mr. Delk.

Category 10: Questions relating to the equivalency between Burlington's credit rating and BR Canada's rating

Questions 2504, 2512, 2513

[163] For clarity purposes, I will set out the questions in this category.

> Question 2504 - What facts relate to the Appellant's position that its credit rating would be the same as the corporation holding the underlying debt owed to the Appellant?
>
> Question 2512 - In ascertaining any of the credit rating just mentioned, does the Appellant say that implicit support should be taken into account or should not be taken into account?
>
> Question 2513 - And, if so, what does the Appellant say is the Appellant's credit rating for purposes of applying the yield approach and taking implicit support into account?

Respondent's Position

[71] *Burlington, supra* at para 41.

[164] The Respondent argues that these questions are relevant under paragraphs 247(2)(a) and (c) of the *Act*. As a result, they are proper to this inquiry and must be answered. The Respondent argues that these questions ask for the facts in support of Burlington's position and for Burlington's position on whether implicit support should be taken into account.

Burlington's Position

[165] Burlington submits that the answers to these questions are irrelevant to the issues on appeal because the admissions have dramatically narrowed the dispute. Furthermore, Burlington submits that the request in question 2504 for all facts relating to its position on this issue is overly broad given how marginally relevant such facts may be, quoting Justice Campbell Miller in *HSBC Bank Canada*.

[166] Finally, Burlington submits that the issue of how implicit support of BRI for Burlington should be considered in the section 247 analysis is one of the ultimate issues to be decided on by the trial judge.

Court's Decision

[167] Question 2504 is relevant and should be answered. It seeks the underlying facts which support the position that Burlington's credit rating would have been the same as the corporation holding the underlying debt, as described in the investment bank letters.

[168] However, in my view questions 2512 and 2513 are improper and need not be answered, since the Respondent is asking for an expression of opinion from a person who is examined for discovery.

Categories 11-19: Requests for Identification of Documents

Questions 2259, 2264, 2279, 2289, 2294, 2370, 2375, 2396, 2401, 2422, 2447, and 2452

[169] Burlington has agreed to answer most of the questions in these Categories. It maintains its refusal for the following question:

> If the documents have already been produced and are in the Appellant's productions or in the Respondent's productions, provide a list of these documents with their productions number?

Respondent's Position

[170] The Respondent submits that it is appropriate to ask Burlington to note the location of responsive documents in the productions due to the way that Burlington has produced its documents. She argues that it does not constitute the segregation of document by issue and that she is not asking for the work product of Burlington's counsel. The Respondent states that she has included in her productions all the documents that were given by Burlington to CRA at the audit stage, (the IRS documents contained in 18 boxes, without any description ("the document dump"). In addition, the Respondent states that Burlington has only 72 documents listed, but contained in those 72 documents are the product of ATIP requests that have bundles of thousands of documents without any description.

Burlington's Position

[171] Burlington states that it is improper to ask opposing counsel to segregate documents according to the issue to which they relate, citing the decision of Justice Bowie in *Teelucksingh*[72]. To ask Burlington to sort through documents in the possession of the Respondent to identify responsive documents, both those produced by Burlington and those produced by the Respondent all of which are already in the Respondent's possession would constitute an expenditure of "great time and effort to obtain information within the [Respondent]'s "means of knowledge""[73], something to be avoided in discovery.

Court's Decision

[172] I am of the view that what the Respondent's request amounts to the segregation of documents. It is asking for a work product. Burlington would have to search for the requested documents and then prepare a list indicating which documents are already in Burlington's List of Documents or/and the Respondent's List of Document with the production number.

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[72] *Teelucksingh, supra*.
[73] Citing *HSBC Bank Canada, supra* at para 4.

[173] I would hope, that if Burlington were to realize that a document emanating from these questions, were already produced either in its own production or in the Respondent's production, that it would advise the Respondent. This would be the courteous course of action.

Category 20: Request for the Final Steps Memo

Questions 294 and 296

[174] I will reproduce these questions for clarity purposes.

> Question 294 - There are a number of documents that look like a steps memo. They have many different versions. Would you please undertake to let me know which document is the one that served as the plan to follow or the steps to follow prior to, I guess the first transaction executed on February 12, 2001?
>
> Question 296 - Would you undertake to find out for me if there is a final memo and to a copy to me?

Respondent's Position

[175] The Respondent states that the refusal of Burlington to answer the question is improper in light of the sheer amount of documents that were provided by Burlington to the Minister during the audit process, the so-called "document dump".

Burlington's Position

[176] Burlington states that the final steps memo has already been produced to the Respondent. Therefore, it submits that the requests improperly ask it to segregate documents according to the issue to which they relate.

Court's Decision

[177] During the examination for discovery, Counsel for Burlington stated that if the Respondent were to provide Mr. Delk with the various versions of the steps memos

and ask him to confirm which of these was the final version, then "that would be a different question."[74]

[178] The Respondent needs to know which steps memo is the final version. It goes without saying that it is relevant. We are dealing with a specific document. Burlington knows which document is the final version and needs to so advise the Respondent.

Category 21: Request for Documents relating to Negotiations of the Guarantees

Question 1605

[179] The Respondent asked Mr. Delk to undertake to provide any documents that relate to Burlington and BRI negotiating what the guarantee fees would be, aside from the actual guarantee fees agreements that were signed.

Respondent's Position

[180] The Respondent states that the question is relevant since it relates to factors considered in the negotiation, whether the tax benefit was a driving factor, and whether there was a higher number discussed for the guarantee fees.

Burlington's Position

[181] Burlington states the request is improper as it is overbroad, not being limited by documents in a particular party's possession or by any timeframe. Moreover, any documents produced would be irrelevant. Burlington states that whether the guarantee fees were extensively negotiated or agreed to at first instance is irrelevant to whether they were equivalent to an arm's-length price.

[182] During the hearing, Counsel for Burlington stated that there is no mystery about how the guarantee fees came about. He referred to the answer to Question 587, namely, that Ernst and Young suggested that a guarantee fee should be charged to Burlington by BRI. Then he added, that Mr. Delk had already answered identical questions. Indeed, Burlington was asked a similar question at Question 919. Mr. Delk answered that he was not aware of any documentation or information relating to Burlington or BRI negotiating what the guarantee fees would be. Burlington was then

[74] Examination for discovery of Chris Delk, July 16, 2014, p 120-121, lines 20 to 5.

asked to give an undertaking that "if it happened to come across, they would provide the documents". Counsel for Burlington's summarize the response to the undertaking at trial as:

> And it is in that context (the Ernst and Young indicating that a fee should be charged for the guarantees) that Burlington is being asked: Go look through the warehouses of documents and see if there is anything else, in circumstances where we have already told them, there is nothing, and they know how the guarantee fee originated and how the amount of it was determined having examined Mr. Delk.

[183] Finally, Burlington submits that the relevance of any other documents is outweighed by proportionality concerns and the Retention Policy.

Court's Decision

[184] I agree with Burlington that it was asked a similar question. However, I do not agree with Burlington that the question is too broad and would produce irrelevant documents. To the contrary, I find this question relevant, more particularly since Mr. Delk at questions 916 and following assumed that there were negotiations with respect to the fees for the guarantees between BRI and Burlington. If there were some sort of negotiations, it would make sense to have documents with respect to these negotiations.

[185] That said, at the hearing Counsel for Burlington was clear, "there is nothing", no documents relating to the negotiations. Therefore, Burlington does not have to answer a question where a clear answer has been given.

Category 22: Subject-specific requests for Documents

Questions 2132-2136, 2142-2156.

[186] The Respondent asked Mr. Delk to undertake to find out if ConocoPhillips, BRI or Burlington has any documents that mention the liability of a shareholder as a result of any actions taken by an NSULC contrary to its articles or *Nova Scotia Companies Act*.

[187] The Respondent then asked Mr. Delk to find out if ConocoPhillips, BRI or Burlington has correspondence documents between Burlington and/or BRI and those from corporations' auditors from one year prior to the incorporation of the Appellant

to December 31, 2005, that refer to matters in the appeal including implicit support, going concerns or other types of valuations, solvency, parental guarantees or covenants.

[188] The Respondent also asked Mr. Delk to find out if ConocoPhillips, BRI or Burlington has any correspondence documents between Burlington and/or BRI and those from corporations' external advisors from one year prior to the incorporation of the Appellant to December 31, 2005, that refer to matters in the appeal including implicit support, going concerns or other types of valuations, solvency, parental guarantees or covenants.

[189] Finally, the Respondent asked Mr. Delk to find out if ConocoPhillips, BRI or Burlington has any correspondence documents between Burlington and/or BRI and the banks that those corporations did business with from one year prior to the incorporation of the Appellant to December 31, 2005, that refer to matters in the appeal including implicit support, going concerns or other types of valuations, solvency parental guarantees or covenants.

[190] And to provide with respect to each set of questions, the documents if not already produced.

Respondent's Position

[191] The questions relate to matters raised in the pleadings. For example, Burlington's status as a NSULC is raised in the pleadings, and questions relating to the liability of BRI for Burlington's debts are relevant both to the purpose test and to the question of implicit support. Finally, the Respondent submits that responsive documents should be included "in the files maintained with respect to the transactions relating to the appeal".[75] She also emphasizes that the phrasing of each particular question must be considered. Particularly, the Respondent submits that many of the questions in this Category are limited to requests for correspondence documents between particular parties.[76] The Respondent submits that its requests are not onerous, are not overly broad and do not constitute a fishing expedition.

Burlington's Position

[75] Respondent's Written Submission, Improper Refusal Category 22.
[76] Transcript from Motion, day 4, p 101, lines 16-28, p 102, lines 1-7.

[192] Burlington submits that these requests are overly broad and would require an amount of effort entirely disproportionate to their relevance in order to produce. Questions requiring Burlington to identify responsive documents that are already in the Respondent's possession amount to improperly requesting the work product of counsel. Burlington notes that the Respondent's requests are not limited to documents within a particular party's control, and would require Burlington and its parent corporations to undertake an enormous search of its records to find something marginally relevant. The requests could also cover documents that merely mention one of the issues noted in the requests (NSULC status, implicit support, etc.). Citing *HSBC Bank Canada*, Burlington submits that this overly broad request is improper.

[193] Furthermore, Burlington points to Ms. Hoang's affidavit, in which the turnover of employees from the relevant period is mentioned. In addition, Ms. Hoang describes a general corporate policy to destroy "transitory correspondence" after a maximum of one year's retention. As a result, Burlington submits that this "mammoth" search through its files is unlikely to actually reveal a significant amount of responsive materials.

Court's Decision

[194] The questions under this Category are too vague and too broad. These questions are not specific enough. For example, what does the Respondent means by "going concerns." Is the Respondent requesting all parental guarantees. What are the "other type of valuations" requested. What does the Respondent means by the "external advisors", the accountants, the consultants, or the lawyers. The same is true for the banks, which banks are contemplated. Burlington does not have to answer these questions.

Category 23: Documents with respect to the Guarantees

Questions 2173-2178

[195] The Respondent asked Mr. Delk to undertake to provide documents that mention a request to BRI to provide the guarantee that is at issue in this appeal. He was asked to make inquiries to Burlington, BRI and ConocoPhillips.

Respondent's Position

[196] The Respondent submits that the documents requested pertain specifically to its theory under paragraphs 18(1)(a) and 20(1)(e.1) of the *Act* - whether the non-arm's length guarantee fees were paid for the purpose of earning income.

[197] Any such requests from Burlington speak to the factors considered in determining the guarantee fees and fixing the amount. Furthermore, the Respondent again submits that responsive documents should be included "in the files maintained with respect to the transactions relating to the appeal".[77] Further, the Respondent submits that its request is not onerous and does not constitute a fishing expedition.

Burlington's Position

[198] Burlington submits that this request seeks information that is irrelevant to the appeal and would require an amount of effort entirely disproportionate to their relevance in order to produce. Finally, a question requiring Burlington to identify responsive documents that are already in the Respondent's possession amounts to improperly requesting the work product of counsel. Burlington claims that the purpose of incurring the guarantee fees is not at issue in this appeal, as both parties are apparently in agreement that the guarantees were necessary for Burlington. Therefore, whether Burlington asked BRI for the guarantee is irrelevant.

[199] Furthermore, Burlington points to Ms. Hoang's affidavit, in which the turnover of employees from the relevant period and a general policy of document destruction after a certain time are referenced. Ms. Hoang's affidavit highlights a general corporate policy of destroying "transitory correspondence" after a maximum of one year's retention. Burlington further submits that the information sought will be of marginal relevance, if at all, to the question of deductibility under paragraph 18(1)(a) of the *Act*.

Court's Decision

[200] These questions should be answered since it is relevant to the theory of the Respondent under paragraphs 18(1)(a) and 20(1)(e.1) of the *Act*. I will limit the search to "the files maintained with respect to the transactions relating to the appeal".

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[77] Respondent's Written Submission, Improper Refusal Category 23.

Category 24: Documents with respect to the Guarantee Fees

Question 2182

[201] The Respondent asked Mr. Delk to produce documents that mention considerations, reasons and/or requests for the guarantee fees that are in issue in this appeal.

Respondent's Position

[202] The Respondent submits that the information sought is relevant to the purpose of the guarantee fees, which is at issue in the pleadings. In addition, the Respondent referred the Court to the answer of Mr. Delk to Question 2179:

> Question 2179 - Mr. Delk are there any documents that mention considerations, reasons and/or requests for the guarantee fees that are in issue in this appeal.
>
> The answer given by Mr. Delk was "yes".

Burlington's Position

[203] Burlington submits that this request is vague and overly broad, as it does not limit itself to any particular timeframe or to documents in a certain party's possession. Even if such a request is limited to documents in the possession of Burlington, BRI or ConocoPhillips, it is still a request for all documents mentioning "considerations" about the guarantee fees, Burlington's reasons for paying the guarantee fees, BRI's reasons for charging the guarantee fees, or any entity's request for the guarantee fees. Therefore, Burlington submits that the notion of "considerations" is either impermissibly vague or of overwhelming breadth. Quoting *HSBC Bank Canada*, Burlington submits that this overly broad request is improper.

[204] Furthermore, Burlington notes that the request necessarily demands irrelevant documents, as the Respondent is asking for all documents even mentioning a reason for BRI to charge the guarantee fees. While Burlington submits that the reasons for charging or requesting a guarantee fee are irrelevant to this appeal, it further submits that this request would involve producing documents that do not pertain even to those irrelevant issues.

[205] Finally, Burlington points to Ms. Hoang's affidavit, which mentions the turnover of employees from the relevant period and a general policy of document destruction after a certain time. In addition, Ms. Hoang's affidavit highlights a general corporate policy to destroy "transitory correspondence" after a maximum of one year's retention.

Court's Decision

[206] In my view, this question is relevant, and should be answered. It is clearly at issue in the pleadings. In addition, Mr. Delk stated that the documents existed.

Category 25: Documents relating to BRI's credit rating

Questions 2318-2322

[207] The Respondent asked Mr. Delk to produce any formal or informal credit reports and all documents provided to BRI by a credit reporting agency or a credit rating agency that mentions BRI's credit rating and/or credit score for 2000-2005. To find out from BRI and ConocoPhillips if there are such documents and to produce such documents. The Respondent is also asking Burlington to let her know if the documents have been already produced in her or Burlington's List of Documents.

Respondent's Position

[208] The documents sought are corporate documents that directly relate to BRI's credit rating, and as such will aid the Respondent in determining the credit rating of Burlington and its debtors.

Burlington's Position

[209] Burlington submits that this request seeks irrelevant information. Furthermore, it states that the value of any information produced is disproportionate to the amount of effort that will be expended by Burlington in complying.

[210] Burlington points to Ms. Hoang's affidavit**,** which refers to the turnover of employees from the relevant period and a general policy of document destruction after a certain time in order to demonstrate the difficult search required to produce the documents.

Court's Decision

[211] These questions must be answered. It goes without saying that the credit ratings are relevant in this appeal. However, as I already stated Burlington does not have to tell the Respondent if the documents are already produced. That said, if Burlington knows where the documents are in the productions it would be courteous to do so.

Category 26: Relevant documents provided to the SEC by BRI

Questions 2323-2327

[212] The Respondent asked Mr. Delk to produce all the US Securities Exchange Commission public filings, including form 6-K for the years 2001 to 2005 made by BRI and all other documents provided to the SEC by BRI that relate to matters in this appeal. If already produced to let the Respondent know where?

Respondent's Position

[213] The documents sought should be ordinary corporate documents that directly relate to BRI's credit rating, and as such will aid the Respondent in determining the credit rating of Burlington and its debtors. Such documents would contain information on the guarantees and potentially on other guarantees given by BRI in the period at issue. They could also contain discussion of various facts that could be indicia of implicit support.

Burlington's Position

[214] Burlington submits that this request seeks irrelevant information. It also notes that any questions requiring counsel to segregate documents by issue improperly seeks the work product of opposing counsel. Furthermore, Burlington notes that these filings are publicly accessible.

Court's Decision

[215] Drawing from *HSBC Bank Canada*, at paragraph 54. I conclude that if Burlington or BRI has gathered this information, it should provide the information to the Respondent. However, if after an appropriate search this information is not

available, then the Respondent ought to source the information since these documents are publicly accessible.

Categories 27 and 28: Correspondence documents related to and from Burlington Resources Canada Corporation from 2001 to 2005 and correspondence documents to or from Burlington Resources Canada (Hunter) Limited.

Questions 2356-2360, 2381-2386, 2407-2412, 2433-2437

[216] The Respondent asked Mr. Delk to produce correspondence to or from Burlington Resources Canada Corporation, from 2001 to 2005, that refer to matters in the appeal, which includes implicit support, going concerns or other types of valuations, solvency, parental guarantees or covenants. The Respondent also requested similar documents to or from Hunter or BRCEL. The Respondent wants Mr. Delk to ask Burlington, BRI, ConocoPhillips and Burlington Resources Canada Corporation if there any such documents.

Respondent's Position

[217] The documents sought are ordinary documents maintained contemporaneously with the development of the transactions at issue. The documents in question relate to the purpose of incurring the guarantee fees, which is relevant to their deductibility under paragraphs 18(1)(a) and 20(1)(e.1) of the *Act*. In addition, the Respondent submits that documents from Hunter, insofar as they go to show the strategic importance of Hunter within its corporate family, would relate to implicit support and therefore the arm's-length guarantee fees to be determined under section 247 of the *Act*. The Respondent submits that its requests are not onerous and do not constitute a fishing expedition.

Burlington's Position

[218] Burlington submits that these requests are overly broad, seek irrelevant information, constitute a burden disproportionate to any relevant information that may be produced, and require counsel to segregate documents by issue.

[219] Burlington submits that a request to review correspondence of three entities that are not party to this appeal is presumptively overbroad. In addition, Burlington quotes *HSBC Bank Canada* in stating that a request for documents that simply mentions the

issues in question is overbroad. Burlington notes that the Respondent bases its request for these documents on the pleading of issues relating to paragraph 18(1)(a) of the *Act* but without specifying the material facts to which these requests relate. Furthermore, Burlington points to Ms. Hoang's affidavit, in which the turnover of employees from the relevant period and a general policy of document destruction after a certain time are referenced. In addition, Ms. Hoang's affidavit highlights a general corporate policy to destroy "transitory correspondence" after a maximum of one year's retention. As a result, Burlington submits that this line of inquiry is unlikely to yield much in benefit relative to its excessive costs for compliance.

Court's Decision

[220] The questions do not need to be answered. The questions refer to all correspondence to or from Burlington Resource Canada and to or from Hunter or BRCEL. Requests would have to be made to BRI, Burlington, ConocoPhillips and Burlington Resources Canada Corporation with respect "to matters under appeal, which includes implicit support, going concerns, or other type of valuations or solvency, parental guarantees, or covenants. I agree with Justice Campbell Miller in *HSBC Bank Canada* that these types of question are too broad.

Category 29: BRCC credit ratings

Questions 2361-2365

[221] The Respondent asked Mr. Delk to produce or otherwise indicate any documents that are formal or informal credit reports and related documents provided to Burlington Resources Canada Corporation or BRI by a credit reporting agency or a credit rating agency that mentions Burlington Resources Canada Corporation's credit rating and/or credit score for the period 2001 to 2005.

Respondent's Position

[222] The documents sought are ordinary documents relating to BR Canada's operations and were most likely maintained. These documents are relevant to the implicit support that BRI would offer BR Canada if it experienced financial difficulties, which was a key factor mentioned in the investment bank letters relied on by Burlington in support of its position. The Respondent submits that its requests are not onerous and do not constitute a fishing expedition.

Burlington's Position

[223] Burlington submits that these requests seek irrelevant information, constitute a burden disproportionate to any relevant information that may be produced, and require counsel to segregate documents by issue. Burlington also notes that the relevant point in time to inquire after BRCC's credit rating is the time of the hybrid transaction. The variations in that credit rating at other times are submitted to be irrelevant to the issue before the Court, which is time-specific. In addition, the credit rating of BRCC has no impact on the question of the 'strategic importance' of BRCC to its corporate family. Burlington submits that further background detail on the evaluations done at the relevant time should not be provided to the Respondent.

Court's Decision

[224] The questions must be answered. The credit rating or credit score of the sister corporation BRCC is relevant. Burlington has loaned BRCC the funds, to which some of the notes are in issue. In addition, the credit rating of BRCC has been imputed to Burlington. The questions are relevant to the issue under 247 (2) of the *Act*.

Category 30: Tab E of the Respondent's Motion Record Volume 1 of 3. Burlington Resources Canadian Financing Transactions 2001 to 2003, Consolidated Hybrid Documents

Question 3937

[225] The Respondent asked Mr. Delk if the letter agreement dated February – 2001 between Burlington BRCI (now BRCL) re: characterization of interest on Note, was executed and, if so, to provide the executed copy.

Respondent's Position

[226] The Respondent submits that the matter of the hybrid financing transactions is raised in the Reply (specifically, the material facts pleaded at paragraph 10(d) relating to the "Hybrid Instruments"). The hybrid financing documents bear on the transfer pricing issue and the Respondent's theory of the case under paragraphs 18(10(a) and 20(1)(e.1) of the *Act*.

Burlington's Position

[227] Burlington submits that this request seeks irrelevant information and constitutes a burden disproportionate to any relevant information that may be produced. It argues that the hybrid nature of the transactions allowing for the ability to claim interest deductions on the debt is not relevant to any matter in issue in this appeal. The interest deductibility is not at issue in this appeal, and therefore this background information on one of the Hybrid Instruments is irrelevant to the matter before the Court. Furthermore, Burlington submits that the turnover of employees from the relevant period would make it quite difficult to find the executed copy of the agreement. As a result, Burlington submits that this line of inquiry is unlikely to yield much in benefit relative to its excessive costs for compliance.

Court's Decision

[228] The document at Tab E, entitled the *Burlington Resources Canadian Financing Transactions 2001 to 2003 - Consolidated Hybrid Documents*, is a summary of all the Hybrid Transactions between 2001 and 2003. In that document, there are some references to a *Letter dated February – 2001 between Burlington BRCI (now BRCL) re: characterization of interest on Note***.**

[229] The question need not be answered. Burlington has established that the document is not relevant, since it deals with interest deductibility, which is not an issue under appeal. During the examination for discovery, Mr. Delk, explained that the document described as *Letter agreement dated August 24, 2001, between Burlington and BRCL re: characterization of interest Note* only dealt with the tax treatment of the interest deduction. The document requested by the Respondent has the same title but bears an earlier date. To ask Burlington to search for a document that is likely irrelevant is not acceptable and would be disproportionate.

Category 31: JP Morgan Opinion

Questions 4014-4015, 4020-4021

[230] The Respondent, in discussing an opinion letter provided by JP Morgan, asked Mr. Delk if JP Morgan took into account any or all of the contribution agreements, directions and/or forward purchase agreements listed in the document titled *Burlington Resources Canadian Hybrid Financing Transactions, 2001 to 2003. Consolidated Hybrid Documents* for the purposes of preparing the letter. If not, the Respondent asked Mr. Delk why not.

[231] At the hearing the Respondent clarified the questions by asking what information BRI as the guarantor provided to JP Morgan. Therefore, the question is whether BRI provided to JP Morgan, the contribution agreements, directions and/or forward purchase agreements listed in the document titled *Burlington Resources Canadian Hybrid Financing Transactions, 2001 to 2003. Consolidated Hybrid Documents* for the purposes of preparing the letter.

Respondent's Position

[232] The Respondent argued that it is relevant to know what BRI provided to JP Morgan, in order to establish the guarantee fees.

Burlington's Position

[233] At the hearing, counsel for Burlington took the Court through several examples of questions asked and properly answered which provided complete information to the Respondent as to what was provided to JP Morgan for its consideration. Burlington also notes that the JP Morgan opinion letter makes specific reference to the subscription agreements, showing that it not only was provided with information on the Hybrid Transactions but also took them into account.

[234] To the extent that the request asks what JP Morgan actually considered in formulating its opinion, Burlington submits that this request seeks information in the possession of JP Morgan, that it is irrelevant and would be disproportionately burdensome to answer. Burlington submits that the Crown is improperly trying to examine JP Morgan through Mr. Delk, who would not know what JP Morgan considered. Burlington submits that it is improper to ask Burlington to find out this

information when alternative means exist for the Crown to directly inquire of JP Morgan.

[235] Furthermore, Burlington points to Ms. Hoang's affidavit, in which both the aforementioned turnover of employees from the relevant period and a general policy of document destruction after a certain time are referenced. As a result, Burlington submits that this line of inquiry is unlikely to yield much in benefit relative to its excessive costs for compliance.

Court's Decision

[236] I agree with Burlington that Questions 4014-4015, 4020-4021, as asked during the examination for discovery "is whether JP Morgan, considered the hybrid nature of the transactions". Since JP Morgan was not in the same corporate family as Burlington. I am of the view, that the Respondent should have filed a Motion requesting leave to interrogate non-party with respect to these questions.

[237] That said, at the hearing the Respondent made it clear, that the questions were: "Did BRI tell the investment banks about the hybrid financing transaction? And if so, what did they tell them?"

[238] Burlington's position at trial was that it had already answered these questions in Items 25, 26 and 27 of the Responses to the Undertakings, Volume 3 of the Respondent Motion's Record. I understand from the responses to the undertakings that BRI would have told the investment bankers about the hybrid financing transactions. In addition, Burlington referred to the letters sent by Burlington's employees to the investment bankers at Items 1226 and 2943 of the Respondent's List of Documents. That said, these questions are highly relevant. Not having access to the contents of these documents, I will order Burlington to answer the questions as to what BRI provided to JP Morgan for the purposes of the letter at Exhibit 29. If the information is included at Items 1226 and 2943 of the Respondent's List of Documents, it will then be easy for Burlington to respond.

Category 32: Burlington's opinion on the Morgan Stanley, Citibank, and JP Morgan Letters

Questions 4005, 4027, 4028, 4044, 4045, 4059, 4060, 4072, 4073

[239] The Respondent asked Mr. Delk for Burlington's position as to whether JP Morgan, Morgan Stanley, Citigroup should have taken into account any or all of the contribution agreements, directions and/or forward purchase listed in Exhibit 2, for the purposes of the letter identified in Exhibit 28.

Respondent's Position

[240] The Respondent states that the question properly seeks Burlington's position on what should be factored into the calculation of an appropriate guarantee fee. As Burlington uses the investment bank letters to support its claim of reasonable efforts so as to avoid the imposition of penalties, the Respondent says that what Burlington's position will be at trial on the accuracy of these letters is critical to the Respondent's ability to prepare for trial. The Respondent also says that these questions will allow it to understand Burlington's position on what the guarantee fees should have been.

Burlington's Position

[241] Burlington submits that these questions all improperly seek evidence as to the appropriate method to be used in determining its credit rating. Burlington submits that questions seeking information as to the opinion of a party on the appropriate method to be employed in a determination of its credit rating for the purposes of applying the yield approach is improper, as the underlying issue is one for the trial judge to determine on the basis of expert evidence. Burlington submits that these questions are even more improper insofar as they ask it to speculate on how a third party should have calculated its credit rating.

Court's Decision

[242] I agree with Burlington. The Respondent is asking for an expression of opinion on the method for the determination of the credit rating. The questions need not be answered.

Category 33: Cash Pay Amendments

Questions 2201-2205

[243] The Respondent asked Mr. Delk to produce or otherwise indicate where documents can be found that mention considerations and/or reasons for the cash pay

amendments that took place on or around February 5, 2002 and April 15, 2003, as mentioned in subparagraph 10(d)(iv) and (v) of the Reply to Notice of Appeal.

Respondent's Position

[244] The Respondent submits that the amendments are mentioned in the Reply, and are integral to the transactions relating to the guarantees and guarantee fees. As information relating to the Hybrid Transactions, these questions are relevant to the question of implicit support and whether the guarantees provided nothing of value to Burlington.

Burlington's Position

[245] Burlington notes that the relevant paragraphs of the Reply simply state that the amendments occurred and speak to their effect rather than put into question why the amendments were made. It is therefore not clear what relevance the purpose of the amendments would have to any issue in the appeal. Burlington also notes that Ms. Fawcett, the Respondent's nominee, admitted in discovery that the change from payment of interest in preferred shares to cash does not change the transfer pricing analysis of the guarantees and guarantee fees. Since the cash amendments were made after the guarantee fees were agreed to, Burlington submits that details on the cash pay amendments are irrelevant. Burlington also submits that these inquiries are disproportionate. It also notes that any questions requiring counsel to segregate documents by issue improperly seeks the work product of opposing counsel.

[246] Furthermore, Burlington points to Ms. Hoang's affidavit, in which the turnover of employees from the relevant period and a general policy of document destruction after a certain time are referenced. Insofar as the Respondent is asking for documents mentioning such considerations or reasons, the marginal relevance of these questions is overshadowed by the disproportionate nature of the request.

Court's Decision

[247] In my view, the questions are not relevant. Ms. Fawcett, the nominee for the Respondent, acknowledged during her examination for discovery that the cash pay amendments are not relevant for the transfer price of the guarantees. The questions need not be answered.

Category 34: Accounting Documents

Questions 2219-2228

[248] The Respondent asked Mr. Delk to produce**,** or otherwise indicate where can be found, BRI's accounting documents and Burlington's accounting documents that relate or pertain to the transfer of funds between BRI and Burlington from the date of Burlington's incorporation to December 31, 2005.

[249] At the hearing, the Court was informed that Burlington will agree to answer all questions in this Category with the exception of Questions 2223 and 2228.

[250] In those questions, the Respondent asked Burlington, if it were to find responsive documents that already are in its production or in the Respondent's production, to provide a list of these documents with their productions number.

Respondent's Position

[251] The Respondent's submissions are identical to those made in respect of the questions in Categories 11-19.

Burlington's Position

[252] Insofar as Burlington's position is that any questions requiring counsel to segregate documents by issue improperly seeks the work product of opposing counsel, its position is the same on this as on Categories 11-19 (namely, that the Respondent's request constitutes an improper request to segregate documents by issue).

Court's Decision

[253] My decision is the same that I gave for Category 11-19, namely, that the Respondent's request amounts to the segregation of documents. It is asking for a work product. Burlington would have to search for the requested documents and then prepare a list indicating which documents are already in Burlington's List of Documents and the Respondent's List of Document with the production number.

[254] I would hope, that if Burlington were to realize that a document emanating from these questions, were already produced either in its own production or in the

Respondent's production, that Burlington will advise the Respondent. This would be the courteous course of action.

Category 35: The Liquidity of Burlington's Assets

Questions 2516-2521

[255] The Respondent asked Mr. Delk for Burlington's position on the liquidity of its assets during the period under appeal and on the liquidity of its assets on each day that it issued bonds in 2001 and 2002. The Respondent asked if Burlington's position is that its assets were not liquid or were highly liquid. The Respondent asked how Burlington describes the liquidity of its assets during the years under appeal, and what facts Burlington will rely on to show the level of liquidity of its assets during those years.

Respondent's Position

[256] The Respondent submits that Burlington is not being asked for its opinion but rather for specific facts and for information on what its position will be at trial on the liquidity of its assets, which is at issue in this appeal. Insofar as the liquidity of Burlington's assets is tied to its financial strength, the questions deal with a central issue necessary to discuss in determining what Burlington's credit rating should have been.

Burlington's Position

[257] Burlington submits that these questions are irrelevant to whether the guarantee fees were incurred for the purpose of earning income, and are also irrelevant to the issue of the arm's-length price. Burlington submits that the parties are in agreement on the necessity of incurring the guarantee fees and on the question of whether the borrowed funds were used for an income-earning purpose. The question of the liquidity of Burlington's assets is submitted to be irrelevant. Even if the issue of the liquidity of Burlington's assets is relevant, Burlington states that such a factor will be evaluated by experts in determining Burlington's financial strength for the purpose of the analysis. As a result, Burlington says that its position on its assets is irrelevant to what the opinions of an expert will be on such a question.

Court's Decision

[258] In my view, these questions are factually based and relevant to the issues under litigation, namely, the credit rating assessment of Burlington. These questions should be answered. The Respondent is entitled to know what will be Burlington's position at trial.

Category 36: Burlington's Position at Trial

Questions 2722, 2724-2729

[259] The Respondent asked Mr. Delk if it is Burlington's position that an arm's-length party would provide a guarantee and that an arm's-length party would have charged a guarantee fee for that guarantee. If so, the Respondent asked what is Burlington's position on what such a party would charge; is it Burlington's position that the amount of the guarantee fee would be more than 50 basis points or less than 50 basis points.

[260] Mr. Delk was also asked whether it is Burlington's position that it would have been willing to pay for such a guarantee from an arm's-length party; if not, what facts that would have made Burlington unwilling to pay; and finally what does Burlington say would be the terms and conditions of such a guarantee.

Respondent's Position

[261] The Respondent argues that what an arm's-length party would do is relevant to the transfer pricing issue. The Respondent is entitled to know what Burlington's position will be at trial on these points in order for the Respondent to prepare for trial.

Burlington's Position

[262] Burlington submits that these questions improperly seek Burlington's evidence on how the yield analysis should be conducted. Burlington points to its Notice of Appeal for its position and states that the elaboration sought by the Respondent of the issue would entail discussing expert evidence to be tendered at trial. Burlington relies on Campbell J.'s decision on Burlington's motion to compel for this proposition, and on C. Miller J.'s decision in *HSBC Bank Canada* for the point that having Burlington speculate on what could have occurred years after the transactions at issue were established is improper.

Court's Decision

[263] Questions 2722 and 2724 should be answered. The questions invite a "yes" or "no" answer. The Respondent needs to know what will be Burlington's position at trial.

[264] With respect to the Questions 2725 and 2726, Burlington stated in Category 54: "that an arm's-length party would charge Burlington more than 50 basis points". The questions have therefore been answered.

[265] I find Questions 2727 to 2729 to be hypothetical and speculative. They need not be answered.

Category 38: Necessity for the Guarantee

Questions 3191-3195

[266] The Respondent asked Mr. Delk for the facts that Burlington has that relate to the position that BRI'S guarantees were necessary. The Respondent also asked Mr. Delk to produce copies of the documents that relate to the position that BRI's guarantee was necessary. As part of this line of questioning, Mr. Delk was asked whether the guarantee was required by the third-party investors and to produce copies of any documents that relate to the third-party investors asking for the guarantee.

Respondent's Position

[267] The Respondent states that the parties are not in agreement that the guarantees were necessary to Burlington. Therefore, the Respondent argues that the questions are relevant.

Burlington's Position

[268] Burlington submits that the dispute between the parties is clear. Burlington submits that the parties have agreed that the guarantee was necessary for the arm's-length third party investors. It states that there is no dispute between the parties as to whether it was necessary for those investors. If it is necessary for them, it was implicitly necessary for Burlington.

[269] Burlington notes that the Respondent is of the view that it could not have operated as a finance company without the guarantees. As the dispute will be over whether Burlington should have paid the guarantee fees to BRI because the guarantees were redundant, Burlington submits that the position of the parties is clear.

Court's Decision

[270] I do not agree with Burlington's argument. The Respondent's position is that the guarantees were not necessary for Burlington, it was necessary only for the third-party lenders.

[271] The questions are factually based and address issues raised in the pleadings. The questions are therefore relevant. Burlington must answer the questions and provide the facts and related documents it relies upon in stating that it needed a guarantee as well as the facts and related documents on whether the third party investors required a guarantee.

Category 39: Burlington's Credit Rating

Questions 3377, 3379-3381, 3383-3385, 3387-3389, 3391-3393, 3395-3397, 3399-3401, 3403, 3405-3407, 3409-3410, 3412, 3414-3416, 3418-3419, 3421, 3423-3425, 3427-3429, 3431-3433, 3435, 3436, 3438, 3440, 3441

[272] With respect to the first group of questions, the Respondent asked Mr. Delk for Burlington's credit rating on the following dates, keeping in mind BRI's guarantee:

3377. prior to February 12th, 2001;

3381. on February 12th, 2001;

3385. on August 24th, 2001;

3389. on November 16th, 2001; and,

3393. on February 25th, 2002

and for the supporting facts and documents.

[273] With respect to the second group of questions, the Respondent asked what Burlington says its credit rating would have been on those dates without BRI's guarantee, and for the supporting facts and documents.

[274] With respect to the third group of questions, the Respondent asked what Burlington says its credit rating would have been on those dates without BRI's guarantee but taking into account the subscription agreements that were part of the hybrid financing transactions, and for the supporting facts and documents.

Respondent's Position

[275] The Respondent submits that that these are proper questions that must be answered. Burlington's creditworthiness at the relevant times is integral to the transfer pricing dispute, as it has a direct impact on the arm's-length price appropriate for the guarantee fees. The Respondent submits that to date Burlington's answers to these questions have been nonresponsive and evasive.

Burlington's Position

[276] Burlington submits that it has already answered these questions to the full extent that is proper. It states that it relies on the investment bank letters for its credit rating at the relevant times, and that without the guarantee Burlington would not have been able to obtain an investment-grade credit rating.

[277] Burlington submits, to the extent these questions go beyond what it has already answered, they are overly broad, irrelevant and disproportionate. Insofar as they ask what Burlington says its credit rating actually was, they seek its opinion on a matter that will be the subject of expert evidence at trial. In particular, Burlington notes that the Respondent asks for facts or documents "related to" its position, which could include facts not relied on or facts about the requests that are irrelevant to issues under appeal, or documents not relied on from any time period or not in Burlington's possession. Given that such facts and documents would include every document that could be used to assess Burlington's business and financial risk, it submits that this constitutes a massive undertaking. This extends beyond the characteristics of any individual company and could include market analyses of the energy sector. The requests also are submitted to extend beyond the time when the transactions at issue in this appeal took place.

[278] Furthermore, Burlington points to Ms. Hoang's affidavit, in which the turnover of employees from the relevant period and a general policy of document destruction after a certain time are referenced.

Court's Decision

[279] I understand the first group of questions to be: what was the credit rating of Burlington at the time of the issuance of the Notes. Burlington's response is that the credit rating of Burlington is to be found in the bank investment's letters produced by Burlington at Items 45, 46 and 47.

[280] In my view, this response does not answer the questions of the Respondent as to what was the credit rating at the time of the issuance of each Note. If the credit rating, at the time of the issuance of the Notes and prior to February 12, 2001, is the same as indicated in the bank investment's letter, so be it. Burlington may easily confirm this information. If not, Burlington has to respond what was the credit rating of Burlington at the time of the issuance of the Notes and on what basis. If Burlington does not know what its credit ratings were at the time of issuance of the Notes, it has to confirm it. These questions are relevant, more particularly, in light of the response of Burlington to Questions 2707 and following, namely that the parties (BRI and Burlington) agreed on the amount to be charged as a guarantee fee on the effective date of each guarantee fee agreement. Therefore at each issuance on the Notes, the parties agreed what would be the guarantee fees, hence the credit rating at each issuance of the Notes, is relevant.

[281] With respect to the second group of questions dealing with what would have been the credit rating of Burlington without the guarantee. Burlington has already answered these questions.

[282] With respect to the third group of questions, Burlington should not answer these questions, the Respondent is asking for an expression of opinion.

Category 46: BRI's capital contributions to BRCL

Questions 3587-3588

[283] The Respondent, having provided Mr. Delk with a copy of an agreement between BRI and BRCL, asked Mr. Delk to find out if BRI ever made payments to BRCL for the purpose of paying interest to Burlington on the Notes.

Respondent's Position

[284] The Respondent states that the questions are relevant to material facts pleaded by the Respondent on the transactions – in particular, in relation to the alleged fact that interest due on the promissory notes was payable to Burlington in cash if BRI had made a capital contribution of cash to BRCL. The Respondent says this is also relevant to the allegations of intentional undercapitalization of Burlington and the lack of a *bona fide* purpose for the guarantee fees other than to give Burlington a tax deduction. These questions are also submitted to relate to the question of implicit support of BRCL by its parent, which would constitute implicit support of Burlington given the relationship between BRCL and Burlington.

Burlington's Position

[285] Burlington considers these questions to be irrelevant and disproportionate. In particular, it states that there is no issue in this appeal as to interest payments received by Burlington from BRCL, much less how BRCL funded such payments. As such, the agreement in question is irrelevant to determining whether the guarantee fees are subject to adjustment under subsection 247(2) of the *Act*. In addition, the Respondent has previously admitted in the examination of her nominee, Ms. Fawcett, that the "cash pay" amendments do not affect the transfer pricing analysis. As a result, the agreement and questions about it are irrelevant to the appeal, in the same way as the questions in Category 33.

[286] Furthermore, Burlington points to Ms. Hoang's affidavit, in which turnover of employees from the relevant period is noted. This affidavit also attests to how difficult it would be to retrieve bank statements of non-Canadian entities within the ConocoPhillips group and BRI accounting documents from 2001-2006. As a result, Burlington submits that it would be disproportionately burdensome to provide responsive information.

Court's Decision

[287] I disagree with Burlington. The questions do not have anything to do with the cash payments and the deductibility of interest which are not at issue under this appeal. Instead, they are aimed at determining whether BRI made payments to BRCL so that it could pay the interest due to Burlington. The questions are relevant to the issue of implicit support and must be answered.

B. Nonresponsive Answers

Category 47: The Necessity of the Guarantee to Burlington

Questions 3299, 3300, 3304, 3305

[288] The Respondent asked Mr. Delk if Burlington will take the position at trial that the guarantee was necessary for it, and for facts and documents related to this position.

[289] Burlington's response was:

> The Respondent takes the position that the guarantee was necessary, and the Appellant's agrees.

Respondent's Position

[290] The Respondent claims that Burlington's reply is "completely nonresponsive" and misrepresentative of the Respondent's position.

Burlington's Position

[291] Burlington states that the parties are in agreement that the guarantee was necessary for the third-party investors, and Burlington advances that such a state of affairs necessarily means that the guarantee was necessary for Burlington. Burlington points to the characterization of the Respondent's position made by Campbell J. and accepted by the Respondent as accurate.[78] Burlington states that it is entitled to rely on the Respondent's "admission" and does not have to provide any other reply, insofar as the guarantee is acknowledged by the parties to be necessary for Burlington to operate

[78] See paragraph 46 of that decision.

as a finance company. As a result, any further information requested in this Category is unnecessary to provide since it deals with a point that is not in dispute.

Court's Decision

[292] I have already decided that these types of question are relevant see: Category 38. The Respondent is asking if the guarantee was necessary for Burlington and not for the third-party lenders. The answer given by Burlington misrepresents the position of the Respondent and is nonresponsive. As I have already stated, in my view the issue regarding transfer pricing is still under litigation. Although at trial Burlington's position will likely be that the guarantee was necessary, the Respondent is entitled to have Burlington confirm as much on discovery. The Respondent should know whether Burlington position at trial will be that the guarantee was necessary for itself, and not for the third-party lenders. The questions are relevant and must be answered.

Category 48: The Benefits of the Guarantee to Burlington

Questions 3302, 3303

[293] The Respondent asked Mr. Delk to advise of all the benefits Burlington received from BRI's guarantee and what the guarantee did for Burlington directly.

[294] Burlington replied to this question by stating that the parties in this litigation agree that Burlington would have been unable to carry out its financing activities or obtain an investment-worthy credit rating without an unconditional guarantee from BRI, and that any arm's-length lender would require an unconditional guarantee from BRI.

Respondent's Position

[295] The Respondent claims that Burlington's reply is "completely nonresponsive".

Burlington's Position

[296] Burlington states that it is entitled to rely on the Respondent's "admission" and not have to provide any other reply. Furthermore, the statement that it would not have been otherwise able to conduct business as a finance company is, in Burlington's view, wholly responsive to the question of what benefits the guarantee provided.

[297] Furthermore, Burlington points to Ms. Hoang's affidavit, in which a general policy of document destruction after a certain time is referenced. This affidavit also attests to how difficult it would be to retrieve BRI accounting documents from 2001-2006. As a result, Burlington submits that it would be disproportionately burdensome to provide responsive information.

Court's Decision

[298] Although once again, Burlington is misrepresenting the position of the Respondent. That said, I find that Burlington's answers are adequate. There is no need to elaborate. In addition, Questions 397 and following and Question 1449 and following of the examination for discovery of Mr. Delk address these questions.

Category 49: The Tax Benefits of the Guarantee Fees to Burlington

Questions 3307-3309

[299] The Respondent asked Mr. Delk whether incurring the guarantee fees provided Burlington with a tax benefit and if so, the nature of the benefit. The Respondent also asked what services Burlington received for paying the guarantee fees.

[300] Burlington replied by stating that it incurred "the Fees" as consideration for the guarantee and that it deducted the fees.

Respondent's Position

[301] The Respondent claims that Burlington's reply is "completely nonresponsive".

Burlington's Position

[302] Burlington states that its reply is responsive and proper.

Court's Decision

[303] I find Burlington's answer to be responsive.

Category 50: Other Benefits of the Guarantee Fees to Burlington

Questions 3310, 3313-3316, 3318-3320, 3322-3324, 3326, 3327, 3329, 3331, 3334-3340, 3342, 3342

[304] The Respondent asked Mr. Delk:

> Question 3310 - If BRI's guarantees affected the interest rate Burlington was able to get on the bonds.
>
> Question 3313 - What the effect of BRI's guarantees was on the interest rate on the bonds.
>
> Question 3314 - Whether BRI's guarantees enabled Burlington to issue the bonds with interest rates lower than what the interest rates would have been without the guarantee.
>
> Question 3315 - Whether it was Burlington's position that the guarantees did nothing to change the interest rate that it would have received with respect to the bonds.
>
> Question 3318 - What facts Burlington has that relate to the position that BRI's guarantees enabled Burlington to borrow at a lower interest rate than without the guarantee.
>
> Questions 3319, 3320 - Whether Burlington is aware of any other fact in support of its position that the guarantees allowed for a lower interest rate, apart from what is pleaded in paragraph 9(s) of the Reply and for any documents supporting Burlington's position.
>
> Question 3323 - Whether anyone informed Burlington or BRI that Burlington could obtain a lower interest rate with the guarantees than without them, and the identities of such person(s) and the documents relevant to such information being exchanged.
>
> Question 3329 - Whether it is Burlington's position that the guarantee was necessary to obtain lower interest rates and for the facts and documents that support this position.
>
> Question 3333- What will Burlington rely on at trial to show that BRI's guarantee was necessary to achieve a lower interest rate than without the guarantee.
>
> Question 3335 - Whether anyone informed Burlington or BRI that the guarantee was necessary for Burlington to receive a lower interest rate than without it, as well as the identities of such person(s) and for facts and documents relevant to such information being exchanged.

> Question 3342 - What the interest rate would be if the facts in this appeal were the same but with no guarantee. The Respondent also asked for facts and documents relating to the answer to this question.

[305] Burlington replied that the parties in this appeal agree that it could not obtain an investment-worthy credit rating without the guarantees provided by BRI and that Burlington was unable to carry out its financing activities without an unconditional guarantee from its parent**.** In addition, three separate investment banks advised in 2001 and in 2002 that the guarantee provided a savings in interest cost.

Respondent's Position

[306] The Respondent claims that Burlington's reply is "completely nonresponsive".

Burlington's Position

[307] Burlington maintains that the Respondent has conceded that an arm's-length party would charge Burlington more than 50 basis points for the guarantees in question. Therefore, Burlington states that it is entitled to rely on the Respondent's "admission" and not have to provide any other reply.

[308] Burlington states that the hypothetical interest rate is irrelevant, as in any event it would not have allowed for an investment grade rating necessary for Burlington to function as a finance company. Insofar as the Respondent seeks anything more on its position, Burlington submits that this is a request for expert evidence and a fishing expedition for facts and documents that is overbroad and disproportionate in light of all of the facts and all of the documents that have already been exchanged and the breadth of the requests that have been made.

Court's Decision

[309] I find the questions relevant for the purposes of subsection 18(1)(a) of and 20(1)(e.1) of the *Act*. Burlington's response was that the guarantees provided a saving interest cost, this response addresses some of the questions. However, Burlington did not address Questions 3318 to 3320 and Question 3323. Burlington has to provide responsive answers in respect of these questions, these questions are relevant.

Category 51: BRI's guarantee before August 2001

Question 3458

[310] The Respondent asked Mr. Delk if, prior to August 2001, Burlington had promised to pay BRI anything in order for BRI to provide the guarantee dated February 12, 2001.

[311] Burlington responded that it did not pay or agree to pay guarantee fees to BRI prior to August 24, 2001.

Respondent's Position

[312] The Respondent claims that Burlington is not answering the question asked.

Burlington's Position

[313] Burlington states that its reply is responsive and proper.

Court's Decision

[314] Burlington did not answer the question as to whether Burlington had promised to pay BRI for a guarantee. The question is not responsive and must be answered.

Category 52: Third-Party Investors

Questions 3196, 3198-3201, 3204, 3205, 3207-3212, 3214-3217, 3219, 3222-3229

[315] The Respondent asked Mr. Delk if any of the third-party investors had asked that BRI provide the guarantees. If so, the Respondent wishes to know to whom the investors made such a request and in what form was it communicated. The Respondent then asked whether BRI was asked to provide the guarantees by anyone other than the third-party investors and if so, by whom. The Respondent also asks for all facts and documents relating to such requests.

[316] The Respondent then asked Mr. Delk what Burlington's position at trial will be as to whether the investors asked BRI to provide the guarantees.

[317] The Respondent asked Mr. Delk whether any of the investors required or demanded the guarantees. The Respondent also requested any documents in support

of this supposed requirement. Finally, the Respondent asked Mr. Delk if any investor was asked by BRI or by Burlington if a guarantee was required. The Respondent also asked Mr. Delk for any facts or documents related to this question.

[318] Burlington's response was that the parties agreed in this litigation that the guarantees were necessary. The Appellant relies on the admission that an unconditional guarantee was imperative for any arm's-length lender (made at paragraphs 9(t) of the Further Amended Reply and l(j) of the Answer), on the admission that it could not have obtained an investment- worthy credit rating without a guarantee (made at paragraph 9(s) of the Further Amended Reply and paragraph 1(i) of the Answer) and on admissions obtained on discovery from the Respondent.

Respondent's Position

[319] The Respondent submits that Burlington's responses as "evasive and completely nonresponsive".

Burlington's Position

[320] Burlington maintains that the parties are in agreement that Burlington could not have obtained an investment-worthy credit rating without the guarantee provided by BRI and that Burlington could not carry on its financing activities without an unconditional guarantee from its parent. As a result, Burlington submits that these questions are irrelevant to any matter in dispute. Furthermore, Burlington cites *HSBC Bank Canada* for the proposition that the questions of the Respondent for any facts "related to" Burlington's position and documents that could be from any time period or in any particular party's possession are overly broad and need not be answered. Burlington also submitted that the relevant prospectus stated that the borrowing would be guaranteed explicitly by BRI. Therefore, this line of questioning would only make sense if there was some allegation of material undisclosed information about this offering being given to an investor prior to the drafting of the prospectus. With respect to whether anyone asked BRI about providing a guarantee, Burlington states that the timeline is clear as to when the idea of providing a guarantee came to be - the hybrid financing plan pitched by Salomon Smith Barney included the guarantee from the beginning.

[321] Furthermore, Burlington points to Ms. Hoang's affidavit, in which the turnover of employees from the relevant period and a general policy of document destruction after a certain time are referenced.

Court's Decision

[322] The questions are relevant. The answers given by Burlington are non-responsive. The Respondent is entitled to ask questions that will serve to nail down Burlington's position at trial. It is relevant for the Respondent to know whether Burlington will take the position at trial that third-party investors asked BRI or Burlington for a guarantee and to whom they made their request and how they communicated it. It is also relevant for the Respondent to know whether Burlington will take the position at trial that someone other than the third-party investors asked for a guarantee, or, if any investor was asked by BRI or Burlington if a guarantee was required. If as argued by Burlington, in light of the prospectus, it made sense that no third-party investors would have asked for a guarantee, Burlington could answer that no third-party investors asked for a guarantee and explain why. The questions must be answered and the documents sought provided.

Category 53: BRI's Necessary Support of Burlington

Questions 3468-3470, 3473-3478

[323] In response to questions as to what Burlington's position would be at trial on what constituted the "necessary support" of the parent as referred to in the Notice of Appeal, Burlington replied it was the guarantee**.** The Respondent asked Burlington to advise of all the facts that relate to what Burlington says is the "necessary support" of its parent BRI and if it is anything beyond the guarantee. The Respondent also asked why BRI's support is necessary for Burlington; whether someone advised Burlington that BRI's support was necessary, and if so, who. The Respondent also asked Burlington to provide all facts and documents related to this line of questioning or to Burlington's knowledge that BRI's support was necessary to Burlington.

[324] Burlington replied that "necessary support" "refers to enhancement of [Burlington's] creditworthiness". It maintains that the only form of support relevant to this proceeding – in which the necessity of the guarantee is uncontested – is the guarantee, which enhanced Burlington's creditworthiness. It also maintains that the

parties are in agreement that 50 basis points was less than the arm's-length price for the guarantee.

Respondent's Position

[325] The Respondent characterizes Burlington's responses as "nonresponsive and evasive".

Burlington's Position

[326] Burlington states that the answers given are responsive and describe its position. While the Respondent may not agree with its position, Burlington submits that its answer is proper. Furthermore, the questions of the Respondent ask for any facts "related to" Burlington's position and documents that could be from any time period or in any particular party's possession. As such, Burlington submits that certain of the questions are overly broad and a fishing expedition.

Court's Decision

[327] The questions aimed to determine what Burlington's position at trial will be on whether the guarantee was the only support necessary to enhance its creditworthiness. Burlington provided a clear answer on this issue by stating that it was only the guarantee (see: Questions 3416 and 3462). Therefore, the answers to these questions are adequate.

Category 54: Arm's-Length Price for Necessary Support

Question 638

[328] Reading the answers to Questions 638 and following, I understood that Burlington undertook to inform the Respondent as to what the arm's-length range price was for the guarantee fees.

[329] Burlington replied that the "guarantee fees of 50 basis points did not exceed amounts that would have been determined if the term and conditions in respect of the guarantees had been those that would have been made between persons dealing at arm's-length".

Respondent's Position

[330] The Respondent characterizes Burlington's response as evasive, insofar as it does not answer what the arm's-length amount is in Burlington's view.

Burlington's Position

[331] Burlington maintains that the Minister's reassessment is not accurate and that the parties agree, that an arm's-length party would charge Burlington more than 50 basis points. Burlington submits that this is a complete response.

Court's Decision

[332] As I stated earlier, the dispute is over whether the "arm's-length amount" referred to in the pleadings was one number or a range. The answer by counsel for Burlington during the examination for discovery was that it was a range. Therefore, its pleading should be interpreted in this manner. Burlington has an obligation to disclose its position on the range since it undertook to provide an answer.

Category 55: Burlington's Position on its Credit Rating

Questions 2484, 2486, 2487, 2489, 2490, 2492, 2502, 2505-2508, 3353, 3354, 3359-3361, 3363-3365, 3367-3369, 3371-3373, 3375, 3376

[333] For clarity purposes, the questions are:

> Question 2484 - What is Burlington's position as what its credit rating was at the time of the issuance of each bond issuance? Question 2486 - What facts does the Appellant have that relate to its position as to what credit rating was at the time of each bond issuance?

[334] Burlington's response with respect to Question 2484, was that no credit rating agency assigned a credit rating to Burlington at the time of each bond issuance. The bonds were rated; those ratings were produced at item 10 of the Appellant's List of Documents.

[335] The Respondent is arguing that Burlington answers were not responsive for the entire series of questions.

Court's Decision

[336] Question 2484 is the same as the questions asked by the Respondent in Category 39. I will give the same answer that I gave in Category 39, if the credit rating, at the time of the issuance of the Notes and prior to February 12, 2001, is the same as indicated in the bank investment's letter, so be it. Burlington may easily confirm this information. If not, Burlington has to provide its credit rating at the time of the issuance of the Notes and on what basis. If Burlington does not know what its credit ratings were at the time of issuance of the Notes, it has to confirm it.

> Question 2487 - What is Burlington's position as what its credit rating should have been at the time of each bond issuance? Question 2489 – What facts does Burlington have that relate to its position as what its credit rating should have been at the time of each issuance?

[337] Burlington's response was that regarding the hypothetical question of what the Appellant's rating should or would have been, to the extent that the question is proper, the Appellant relies on the admission that it could not have obtained an investment-worthy credit rating without a guarantee, made at paragraph 9(s) of the Further Amended Reply and paragraph 1(i) of the Answer.

Court's decision

[338] Burlington does not have to answer. The questions "As to what should have been the credit ratings at the time of each bond insurance" calls for speculation.

> Question 2490 - For the purposes of the trial what is the Appellant's position on what its credit rating is or was for purposes of applying the yield approach? Question 2492 - What facts does the Appellant have that relate to its position on what the Appellant's credit rating is or was for the purposes of applying the yield approach?

[339] Burlington's response to Questions 2490 and 2492, was that it could not obtain an investment-worthy credit rating without a guarantee.

Court's decision

[340] Burlington gave an estimate as to what its credit rating is, by providing the bank investment letters. As to what will be its credit rating at trial, this information will be provided by way of expert reports. Therefore, the question does not have to be answer.

> Question 2502 - What facts relate to the Appellant's position that the Appellant's credit rating is, was or should be lower than BRI credit's rating?

[341] Burlington's response to Question 2502 was that it relies on the admissions made at paragraph 9(s) of the Further Amended Reply and paragraph 1(i) the Answer, namely that it could not obtain a credit-rating without the guarantee provided by its parent.

Court's decision

[342] Burlington's answer is not responsive. A better answer should be given. The question is relevant and factually based.

> Question 2505 - Does the Appellant say that the Appellant's credit rating for purposes of the yield approach changed during the period under appeal? Question 2506 – If the answer is yes, please advise of the changes? Question 2507 – Advise of the facts giving rise to those changes? Question 2508 - What is the difference in yield between the credit ratings of BRI and the Appellant, in the Appellant's view?

[343] Burlington's response to Questions 2505 to 2508 was that the relevant times to ascertain its credit rating for purposes of applying the yield approach were February 12, 2001 for the first debt issuance, August 24, 2001 for the second and third debt issuances, November 16, 2001 for the fourth, fifth and sixth debt issuances and February 25, 2002 for the final debt issuance.

Court's decision

[344] Burlington is not being responsive. The questions, except for Question 2508, are factually based and relevant. Therefore, Burlington should adequately respond to the questions except for Question 2508, since it is asking Burlington to provide an opinion.

> Question 3353 – Will it be the Appellant's position at trial that the Appellant did not have a credit rating at any time during the years at issue in this appeal?
>
> Question 3354 – For the purposes of this appeal, and taking into account BRI's explicit guarantee, what does the Appellant say was the Appellant's credit rating prior to February 12, 2001? Question 3359 - What fact does the Appellant have that relate to the position as to what its credit rating prior to February 12, 2001? Question 3360 - To provide copies of such documents?
>
> Question 3361 and following- same questions as question 3354 and following except the credit rating is for February 12, 2001.
>
> Question 3365 and following – same questions as asked in Questions 3354 and following except that the credit rating is for August 24, 2001?
>
> Questions 3369 and 3371, same questions as asked in Questions 3354 and following except the credit rating is for November 16, 2001?
>
> Questions 3373–3375 and 3376, same questions as asked in Question 3354 and following except the credit rating is for February 26, 2002?

[345] Burlington's response for these questions was that no credit rating agency assigned a credit rating to the Appellant during the period under appeal, except for the credit ratings produced at item 10 of the Appellant's List of Documents, and the credit rating estimates provided by Citibank, Morgan Stanley and JP Morgan in letters produced at Ttems 45, 46 and 47 of the Appellant's List of Documents.

Court's Decision

[346] Burlington has not specifically answered Question 3353, the question was not if Burlington was rated by a credit agency. The question is what will be the position of Burlington at trial. The question is relevant and a responsive answer should be given. With respect to all the other questions, the questions are identical to the questions asked by the Respondent under Category 39. I stand by my decisions in Category 39.

Category 56: Burlington's Position on its Notice of Appeal

Question 1370

[347] The Respondent asked Mr. Delk to undertake to find out what Burlington says the "terms and conditions in respect of the guarantees" would have been if they had been made between arm's-length parties, referring to paragraph 22 of the Notice of Appeal. The Respondent then asked Mr. Delk to undertake to provide the facts and documents concerning reasonable efforts made to determine and use arm's-length transfer prices for the guarantees, as outlined in paragraph 23 of the Notice of Appeal. The Respondent also asked Mr. Delk what the range of arm's-length transfer prices for the guarantees would have been, and with respect to paragraph 22 of the Notice of Appeal, what the arm's-length transaction or series of transactions to which Burlington is comparing the impugned transactions are.

[348] Burlington's response was to refer to paragraph 22 of the Notice of Appeal, and advise that it intends to advance at trial, that the reassessments under appeal are incorrect because the amount of the guarantee fees, calculated at the rate of 50 basis points on the outstanding guaranteed debt, did not exceed the fee that the arm's-length parties would have agreed. At the time when the guarantee fees were established in 2001 and 2002, the Appellant relied upon advice from the investment banks as to a reasonable commercial charge for the guarantees. Such advice speaks for itself concerning comparison transactions.

Respondent's Position

[349] The Respondent characterizes Burlington's response as evasive and not providing answers to the questions asked.

Burlington's Position

[350] Burlington maintains that it has provided appropriate answers to these questions, given that it is not asserting that a particular range of values is appropriate and that the parties are in agreement that the arm's-length price would have been at least 50 basis points. Insofar as its position is that the Minister's reassessment is inaccurate, it does not believe it is required to go beyond its replies.

[351] Furthermore, Burlington points to the documents disclosed to the Minister in the context of the audit and any subsequent productions, stating that they contain all the information on the reasonable efforts undertaken by it. However, it will not segregate those documents by issue. Burlington does note that it will give a better reply to certain portions of Question 1370.

Court's Decision

[352] An undertaking was given for Question 1370. In my view, this question is relevant, it deals with allegations of facts made by Burlington in its Notice of Appeal. The responses provided by Burlington are inadequate. I have already ordered Burlington to answer this question: see Category 54.

Category 57: Burlington's Answer to the Reply

Questions 1672, 1674-1676, 1683, 1691, 1692, 1695, 1698

[353] The Respondent asked Mr. Delk what was the factual basis that Burlington had to deny subparagraphs 9(z)-(gg), (ll), (rr), (uu)-(ww) and 10(c) of the Further Amended Reply.

[354] Burlington answered that it denies subparagraph 9(z) of the Further Amended Reply, an assumption that BRI's Canadian operating subsidiaries could have borrowed funds on the open market for a lower interest rate than that provided by Burlington, because at the time when the guarantee fees were established in 2001 and 2002, Burlington relied upon advice from the investment banks as to a reasonable commercial charge for the guarantees. With regards to the remainder of paragraph 9 raised by the Respondent in this Category, Burlington denies them on the basis that they involve statements of law or mixed fact and law rather than fact. Finally, Burlington states that its Answer provides its position on subparagraph 10(c) of the Further Amended Reply.

Respondent's Position

[355] The Respondent characterizes Burlington's response as evasive and not providing answers to the questions asked.

Burlington's Position

[356] Burlington maintains that it has completely answered the Respondent's questions.

Court's Decision

[357] I agree with Burlington that its answers are adequate. In my view, except for paragraph 9(z), the allegations under paragraph 9 of the Amended Reply of the Notice of Appeal are statements of law or mixed fact and law rather than fact.

Category 58: Existence of certain Documents

Questions 1434, 1582-1584, 2127, 2129-2131, 2183, ~~2185~~

[358] The Respondent notified the Court at the hearing that it is no longer moving on Question 2185.

[359] With respect to Question 1434, the Respondent referred to the Notice of objection filed by Burlington. In the Notice of the Objection, it was stated that:

> The yield approach supports a guarantee fee of 50 basis points payable by Burlington to BRI. If the notes had not been guaranteed, the credit rating assigned to the notes would have been lower and the related spread in interest rates for the relevant maturities and during the relevant period wold have exceeded 50 basis points.
>
> Question 1434 - The Respondent is asking Mr. Delk to undertake to provide any documents, if they exist, that relate to this statement, apart from the investor banks' opinion?

[360] Burlington's answer was that at the time when the guarantee fees were established in 2001 and 2002, the Appellant relied upon advice from the investment banks as to a reasonable commercial charge for the guarantees. The advice speaks for itself on the question of whether the credit ratings assigned to the notes would have been lower if the notes had not been guaranteed.

> Questions 1582-1584 - The Respondent asked Mr. Delk to find out if there was an agreement relating to the note holders having an indirect claim on the assets of BR Canada Inc., BR Canada Ltd. or BRCEL.
>
> Questions 2127, 2129–2131 - The Respondent also asked Mr. Delk to produce any correspondence documents in the possession of Burlington, BRI or ConocoPhillips **,** that

> mention considerations and/or reasons for Burlington's incorporation and why it was structured as an NSULC, or to indicate if such documents have already been produced.

[361] Burlington's response was that to the best of its knowledge, all agreements with a potential bearing on this issue have been produced by the parties in this litigation. The interpretation of agreements, however, is a question of law.

Respondent's Position

[362] The Respondent characterize Burlington's responses as evasive and not providing answers to the questions asked.

Burlington's Position

[363] Burlington maintains that it has completely answered the Respondent's questions. It claims that it is not required to give a legal opinion on the effect of documents sought by the Respondent. In addition, certain of the questions need not be answered because Burlington says that it is uncontroversial that it could not have functioned as a finance company without the guarantee. Finally, to the best of its knowledge, it has produced all responsive documents.

Court's Decision

[364] Question 1434 should be answered. The question is relevant. The Respondent is asking for documents apart from the investor bank letters. The answer given by Burlington is inadequate.

[365] Questions 1582-1584 should also be answered. These questions are relevant. Burlington has to provide the documents whereby the note holders have an indirect claim on the assets of BR Canada Inc. If such document does not exist, Burlington should confirm it.

[366] Questions 2127 - 2129 asked whether there were correspondence dealing with Burlington's incorporation as a NSULC and to provide such correspondence. Counsel for Burlington stated at trial, they have looked for such documents, but they were not able to find any document relevant to that issue. I am satisfied with the response provided by Burlington.

[367] Questions 2131 and 2183 asked to let the Respondent know if some of the documents requested have already been produced. As I have stated, in my view the Respondent's request amounts to the segregation of documents.

Category 60: Financial Documents of Successor Corporations- Segregation of documents

Question 2406

[368] The Respondent is moving on only one question, Question 2406, in this Category. This question asks Burlington to indicate where in the existing productions can be found the audited and/or unaudited financial statements for BRCEL for 2002 to 2005.

[369] Burlington's answer was that Burlington Resources Canada Energy Limited amalgamated on September 17, 2001 to form Burlington Resources Canada Ltd. The financial statements of Burlington Resources Canada Energy Limited for the year ended September 16, 2001 were attached at Tab 3.

Respondent's Position

[370] The Respondent states that it is not asking Burlington to segregate documents in its production. Instead, the Respondent is just asking to be directed to those responsive documents in its production, to the extent that they have already been produced.

Burlington's Position

[371] Burlington maintains its previous opposition to the "segregation of documents by issue", as outlined above.

Court's Decision

[372] For the reasons given above in Category 11 to 19, Burlington does not have to advise that a document is in the Respondent's production or in its own production. However, as I have already stated, Burlington as a courtesy should where feasible indicate to the Respondent where the documents are; particularly with respect to this question, since Burlington seems to know where the documents can be found.

Category 61: Burlington's List of Documents

Questions 2631-2635, 2641, 2647, 2653, 2659, 2665, 2671, 2677, 2683, 2689, 2695, 2701

[373] The Respondent asked Burlington why it had placed "Burlington Resources Inc., Annual Report on Form 10K, years ending December 31st, 2002, December 31, 2003, December 2004, December 2005, without exhibits" in its List of Documents. Was the document included on the Burlington's List of Documents to establish or assist in establishing allegations of fact or to rebut or assist in rebutting allegations of fact? What will be Burlington's use of this document at trial?

[374] The Respondent asked Burlington similar questions with respect to the following documents in Burlington's List:

- Press release regarding the 2000 budget;
- a document entitled "Information Document Request to Burlington Resources Inc. and Affiliates, Number 146";
- a document entitled "Information Document Request to Burlington Resources Inc. and Affiliates, Number 147";
- a document entitled "Information Document Request to Burlington Resources Inc. and Affiliates, Number 148";
- a document entitled "Information Document Request to Burlington Resources Inc. and Affiliates, Number 149";
- a document entitled "Response to information document requests 146 to 149, excluding attachments and document production"; and,

- a document entitled "Office of Chief Counsel, Internal Revenue Service, Memorandum Number AM 2006-001".

[375] Burlington replied that the documents in question were placed on the List of Documents so that they might be used as evidence at trial. However it refused to elaborate on the specific use to be made of the documents.

Respondent's Position

[376] The Respondent characterizes Burlington's response as evasive and not providing answers to the questions asked. Citing Campbell J.'s decision in this matter,[79] it says it is entitled to know why documents are on the List of Documents and to be given a general sense of its proposed relevance.

Burlington's Position

[377] Burlington maintains that the Respondent is not entitled to any more than knowing that these documents may be used in evidence at trial, relying on the decision of V. Miller J. in *Kossow*.[80]

Court's Decision

[378] In the same appeal as this one, Justice Campbell in *Burlington's* motion to compel, the nominee of the Crown to answer, stated that the opposing party is entitled to know why a document appears on a List of Documents and to be given some general sense of its proposed relevance. At paragraph 82 of her reasons, she states as follows:

> [82] The Respondent's list of documents contains over 3,000 items. The Appellant's submissions indicated that this appeal also involves a U.S. audit of the U.S. transactions and that product was shared with the CRA. Whatever the origin, the end result is a significant number of documents to potentially deal with at a hearing. In such circumstances, the opposing party is entitled to know why a document appears on a list and to be given some general sense of its proposed relevance. The relevancy of documents, as in the case of questions, will be determined by the pleadings. This is just one of the aims of discovery: to herd the parties in the proper direction in preparation for trial.

[79] *Supra*, at para 82.
[80] *Supra*, at para 60.

[379] The same principle is also found in *Piersanti* v *The Queen*[81] and in *Loewen* v *The Queen*[82]. Accordingly, Burlington needs to give a better response. The Respondent is entitled to know why a document is being produced and to what fact in issue the listed document relates to or what the document has to do with the case. Therefore, Burlington has to answer adequately the questions.

Category 62: Contribution Agreements

Questions 3492, 3494, 3860-3868, 3870, 3871, 3877, 3878, 3882, 3884, 3887-3888

[380] The Respondent asked Mr. Delk to explain what the document entitled "Contribution agreement dated February 12, 2001" was.

[381] The Respondent asked Mr. Delk, to explain the document entitled "Amended and Restated Contribution Agreement dated Aug 11, 2003", to explain the transaction contemplated therein, to explain why the transaction was entered into, what was supposed to be achieved by or happen as a result of the transaction, what its purpose is, and whether it was a "subscription agreement**".**

[382] The Respondent then asked Mr. Delk if the transaction helped create a mechanism whereby Burlington would receive funds at any point in time and, if so, to explain how. The same questions were asked with respect to other documents.

[383] Burlington replied that the documents in question speak for themselves.

Respondent's Position

[384] The Respondent submits that Burlington's response is evasive and not responsive to the questions asked.

Burlington's Position

[385] Burlington maintains that the documents speak for themselves and that some of the questions are vague or ask Mr. Delk to provide an opinion on the legal effect of documents. In particular, Burlington submits that questions asking Mr. Delk about the

[81] 2010 TCC 430
[82] 2007 DTC 600.

documents and asking him to explain the underlying transactions are vague. The Respondent should have asked, what was 'hoped' to be accomplished or what Burlington 'was trying to accomplish. Burlington also submitted that some of the questions such as, "whether the document was a subscription agreement", "whether the transaction operated as designed", or "whether the transaction helped create a mechanism whereby Burlington would receive funds at any point in time", amounted to asking Mr. Delk for a legal opinion.

[386] In addition, Burlington highlights the extent to which Mr. Delk had previously been examined on the hybrid transactions, stating that these questions add nothing relevant and proper to what had already been asked of, and answered by, him.

Court's Decision

[387] I do not see any issues with a party asking what the document is and what it does. However, it is not proper to ask about the legal consequences of a document or to ask a nominee to interpret a document. The relevant test is will the answers to the questions enable a party to advance its case or damage the case of its adversary. With these guidelines in mind, Burlington has to provide a better answer than "the documents speak for themselves".

Category 64: Documents provided to Morgan Stanley

Questions 3993, 3994

[388] The Respondent asked Mr. Delk to advise what documents or information Burlington has that relates to BRI or Burlington providing documents to Morgan Stanley in relation to the preparation of the Morgan Stanley opinion letter, and to indicate them if they have already been produced.

[389] Burlington replied that in 2006, it produced to the Minister all responsive documents not protected by privilege. Such documents have also been listed by the parties to the litigation.

Respondent's Position

[390] The Respondent classifies Burlington's response as evasive and nonresponsive.

Burlington's Position

[391] Burlington stands by its answer. In addition it noted that going through the productions for the purposes outlined by the Respondent is, in its view, "segregation of documents by issue". Furthermore, searching for any more documents would be extremely onerous, given the large number of records held by Burlington, BRI and ConocoPhillips, the high turnover of relevant employees from that period, and the document retention policies of ConocoPhillips.

Court's Decision

[392] I am satisfied with Burlington's response at trial. The documents provided to Morgan Stanley for the purpose of the letter at Exhibit 29 are found in the responses to Undertakings (UT 26 and 27).

Category 65: The Investor Banks

Questions 3996-4004, 4006, 4016, 4018, 4019, 4022-4026, 4032-4043, 4046-4058, 4061-4071

[393] I have reproduced the questions with respect to Morgan Stanley. Similar questions were asked with respect to JP Morgan and Citibank.

> Question 3996 – Does the Appellant say that Morgan Stanley took into account any of these contribution agreements, directions or forward purchase agreements?
>
> Questions 3997, 3998 - Please provide all facts and documents that relate to Morgan Stanley taking into account any or all of the subscriptions agreements, which include the contribution agreements, the directions and the forward purchase agreements, so any or all of those that were listed in Exhibit 2, for the purposes of this letter which is Exhibit 28.
>
> Question 3999 – If Morgan Stanley did not take into account any or all of the contribution agreements, directions or forward purchase agreements that are listed in Exhibit 2, explain why Morgan Stanley did not take them into account?
>
> Question 4001 – Was Morgan Stanley advised or instructed by anyone not to take into account any or all of the contribution agreements, directions or forward purchase agreements that are listed in Exhibit 2, into account for the purposes of this letter which is Exhibit 28.

> Question 4002 – Who advised or instructed Morgan Stanley not to take into account any or all of the contribution agreements, directions or forward purchase agreements that are listed in Exhibit 2, into account for the purposes of this letter which is Exhibit 28.
>
> Question 4003 – When was Morgan Stanley advised or instructed not to take into account any or all of the contribution agreements, directions or forward purchase agreements that are listed in Exhibit 2, into account for the purposes of this letter which is Exhibit 28.
>
> Question 4004 – Provide copies of all documents that related to Morgan Stanley being advised or instructed not to take into account any or all of the contribution agreements, directions or forward purchase agreements that are listed in Exhibit 2, into account for the purposes of this letter which is Exhibit 28.

[394] Burlington responded that Morgan Stanley was involved in all significant aspects of the transactions in the pleadings that closed around November 16, 2001 and that the letter from Morgan Stanley dated November 16, 2001 speaks for itself. Burlington gave the same responses for questions relating to JP Morgan and Citibank.

Respondent's Position

[395] The Respondent characterizes Burlington's response as evasive and not providing responsive answers to the questions asked.

Burlington's Position

[396] Burlington states that these questions seek information within the banks' knowledge and as such are improper attempts to discover the banks through Burlington, as well as being overly broad and disproportionate. Burlington may be able to find out what the banks were instructed to consider, but it would not know what the banks did consider. Furthermore, Burlington notes that the Respondent asks for facts or documents "related to" its position, which could include facts not relied on or facts about the requests that are irrelevant to issues under appeal, or documents not relied on, from any time period or not in Burlington's possession. Finally, Burlington states that the questions are disproportionate as the relevance of the instructions to the banks is minimal. Burlington points to Ms. Hoang's affidavit, in which turnover of employees from the relevant period and a general policy of document destruction after a certain time are referenced. In addition, Ms. Hoang's affidavit highlights a general corporate policy to destroy "transitory correspondence" after a maximum of one year's retention.

Court's Decision

[397] In my view, some of the questions in this Category can be distinguished from the questions in Category 31, which dealt with information specifically in the knowledge of the investment banks. In this Category, some of the questions in dispute principally represent requests for information from Burlington on the interactions between it and the investment banks with respect to their opinion letters. Burlington did not adequately answer the questions. Accordingly, except for Questions 3997, 3998, 3999, 4018, 4019, 4035, 4036, 4037, 4046-4052 and 4061-4065 which dealt with information specifically in the knowledge of the investment banks, all the other questions should be fully answered by Burlington.

Category 66: Miscellaneous Information

Questions 1629, 2543

[398] The Respondent asked Mr. Delk to inquire of BRI and anyone else who may have relevant information as to what BRI's debt-to-equity ratio was immediately before February 12, 2001, and what BRI's debt-to-equity ratio was immediately after February 25, 2002, or thereabouts. The Respondent also asked for related documents. Later, the Respondent asked Mr. Delk to describe Burlington's business history from incorporation to the day before the first bond issuance on February 12, 2001.

[399] Burlington's response was that the debt-to-equity ratios for Burlington Resources Inc. are set out in the 10-K reports produced by Burlington at items 1 to 5 of its List of Documents. With respect to Question 2543, Burlington stated that it will provide a better answer to the Respondent.

Burlington's Position

[400] Burlington states that it has indicated where in the evidence information responsive to the questions posed by the Respondent can be found. Furthermore, the request to inquire of "anyone else who may have the relevant information" is a fishing expedition

Respondent's Position

[401] The Respondent submits that Burlington's response is evasive and does not provide answers to the questions asked.

Court's Decision

[402] I did not have access to the document referred to by Burlington and therefore I do not know if it voluminous. In any event, instead of referring the Respondent to its List of Documents, Burlington should answer the question with respect to BRI's debt-to-equity ratio at the dates asked by the Respondent. However, the inquiry should be limited to BRI.

Category 67: Miscellaneous Dates

Questions 787, 1578, 1610, 1612, 1613, 1615, 1617, 2707-2709.

> Question 787 - The Respondent asked Mr. Delk when the Morgan Stanley letter, which is Exhibit 28, was delivered to BRI and/or Burlington and to whether Burlington or BRI had documents establishing when the letter was delivered?

[403] Burlington responded that after having made best efforts, no document was located that shows when the letter found at Exhibit No. 28 was delivered to BRI and/or Burlington. Counsel for Burlington stated that to the best of Burlington's knowledge, the letters would have been delivered around the dates on the letters.

> Question 1578 - Whether BRI or Burlington filed with the SEC a copy of the July 24, 2000 guarantee and the date that it was filed with the SEC.

[404] Burlington responded that it understands that the guarantee was provided to the SEC in connection with the correspondence listed at Items 48 and 49 of the Appellant's List of documents.

> Question 1610 – To inquire as to whether the guarantee fees agreement dated August 24, 2001 was executed on the date stated on the document and if not, to find out the date as to when it was executed? Questions 1612, 1613, 1615 and 1617 same inquiry as Question 1610 except for the guarantee fees agreement dated September 17, 2001 and February 25, 2002.

[405] Burlington responded that the guarantee fees agreement dated August 24, 2001, September 17 2001 and February 25, 2002 were executed on or around the date stated on the documents.

> Questions 2707-2709 - What is Burlington's position with respect to the date upon which BRI decided on the amount to charge as a guarantee fee?

[406] Burlington's response is that the parties agreed on the amount to be charged as a guarantee fee on the effective date of each guarantee fee agreement.

Respondent's Position

[407] The Respondent characterizes Burlington's response as evasive and not providing answers to the questions asked. The Respondent states that Burlington should either give the exact date or admit that it does not know the date.

Burlington's Position

[408] Burlington states that it has answered these questions to the best of its ability, given the passage of time. In any event, Burlington submits that questions on when documents were filed, delivered or executed are irrelevant and disproportionately burdensome to answer.

[409] It acknowledges that the fact that guarantee fees were only charged after the first note was issued, will no doubt be an issue at trial with respect to the purpose test, but that the exact dates on which the agreements were executed is irrelevant.

Court's Decision

[410] I find the answers from Burlington responsive except for the answers dealing with the guarantee fees agreements. These agreements are important for the purposes of this appeal. The Respondent ought to know when these agreements were executed.

Category 69: Miscellaneous Facts

Questions 1416, 1609, 1611, 1614, 1616, 2560, 2619, 2621.

> Question 1416 - The Respondent showed Exhibit 43 of the Respondent List of Document. The Document is entitled "*Amendment No. 1, Form S-3, Registration Statement Under The Securities Act of 1933.*" Turning to page 5 of the document, the Respondent highlighted the following: *"subject to completion dated June 27th 2001" and then prospectus and then $1.5 billion, Burlington Resources Inc., debt securities, common stock, preferred stock, and then Burlington Resources Capital 1, Burlington Resources Capital 2, trust preferred securities fully, and unconditionally guaranteed by Burlington Resources Inc".* The Respondent then told Mr. Delk that were more than one occurrence with respect to Capital 1 and Capital 2. She then asked Mr. Delk to find out, as to why? She also asked Mr. Delk, if he could undertake to find out more about the document and why this information was filed with the SEC.

[411] Burlington's answer to Question 1416, was that the document was filed with the SEC. It also added at the hearing, that this document was irrelevant.

> There are two questions 1609 on the Examination for Discovery's transcript. The first Question 1609 - is to make inquiries to determine why an opinion or advice on what to charge for a guarantee fee was not solicited by BRI or sought by BRI around or before the first issuance of the notes, which is February 12, 2001, and to provide me with that answer?

[412] Burlington's answer to the first Question 1609 is it has made inquiries and it was unable to determine a response to this question.

> Second Question 1609 - The Respondent asked Mr.Delk, to find out who drafted the August 24, 2001 guarantee fees agreement, the September 17, 2001 guarantee fees agreement, the November 16, 2001 guarantee fees agreement and the February 25, 2002 guarantee fees agreement, and to provide the Respondent with the name of the person, the name of the entity for which they worked and contact information.

[413] Burlington's answer to second Question 1609 was that the guarantee fees agreements were drafted by counsel.

> Question 2619 - The Respondent asked Mr. Delk to provide all of the facts and documents that relate to a request or the seeking of information about the Burlington's assets and their liquidity by the third-party lenders or investors involved with the bond issuances in this appeal. Question 2621 - The Respondent asked Mr. Delk to provide all of the facts and documents that relate to the Appellant, BRI or anyone acting on behalf of the Appellant or BRI providing information about the Appellant's assets and their liquidity to the third-party lenders or investors involved with the bond issuances in this appeal. Question 2560 - The Respondent asked Mr. Delk to provide with all of the facts and documents that relate to the Appellant, BRI or anyone acting on behalf of the Appellant or BRI providing information

> about the Appellant's activity in the capital markets to the third-party lenders or investors involved with the bond issuances in this appeal.

[414] Burlington's answers to Questions 2619, 2621 and 2560 was that it had made inquiries and located no responsive documentation beyond the documents listed by the parties in this litigation.

Respondent's Position

[415] The Respondent submits that Burlington's response as having "failed to answer all parts of each questions and [answering] only the parts it wanted to answer".

Burlington's Position

[416] Burlington states that it replied appropriately, insofar as it directed the Respondent to e-mails from counsel at Bennett Jones in respect of the August 2001 and November 2001 agreements. It also highlighted final versions of the February 2002 agreement and otherwise replied as best as it could. It states that it has made reasonable inquiries and some questions were unable to be answered.

[417] Burlington also stated with respect to Question 1416, that the "*Amendment No. 1 to registration statement under the Securities Act."*, dealing with the amendment of one of the contribution agreements in 2003, is irrelevant to the matters under appeal. With respect to communications of Burlington's activities to third-party lenders or investors involved with the bond issuances, it stands by its answer that it has not found anything.

Court's Decision

[418] Burlington's answers with respect to Questions 1416 and the first Question 1609 are responsive. With respect to Questions 2619 2621, and 2650, Burlington's response is that it located no responsive documents beyond the documents listed by the parties. I find Burlington's answer ambiguous, that said at the hearing Counsel for Burlington stated clearly that Burlington did not find anything. I find the answer for the second Question 1609 nonresponsive. In *CIBC*[83], Chief Justice Rossiter ordered identities of all people who were responsible for any footnotes in the consolidated and

[83] Supra, at paras 274 and 275.

non-consolidated financial statements of various CIBC entities and any working papers that led to the preparation of the footnotes, even if some of the information was marginally relevant. Therefore, since the guarantee fees agreements are central to this appeal, these questions are relevant. Accordingly, Burlington has to give to the Respondent, the name of the person who drafted the guarantee fees agreements, the name of the entity for which they worked for, and the contact information

Category 70: Interactions between the Lenders and the Hybrid Financing Transactions

Questions 3282, 3284-3286, 3288-3296

> Question 3282 – Did any of the third-party investors ask for all or any of the hybrid financing transactions, but with the exception of the guarantee?
>
> Question 3284 – Advise of all of the facts that the appellant has that relates to whether any of the third-party investors asked or didn't ask for any or all of the hybrid financing transactions with the exception of the guarantee.
>
> Question 3285 – Provide copies of all documents that relate to the third-party investors asking for all or any of the hybrid financing transactions.
>
> Question 3286 – Did any of the third-party investors require or demand all or any of the hybrid financing transactions with the exception of the guarantee?
>
> Question 3288 – Advise of all of the facts that the appellant has that relates to whether any of the third-party investors required or demanded any or all of the hybrid financing transactions with the exception of the guarantee.
>
> Question 3289 – Provide copies of all the documents that relate to the third-party investors requiring or demanding all or any of the hybrid financing transactions with the exception of the guarantee.
>
> Question 3290 – Did BRI ever ask any third-party investor as to whether all or any of the hybrid financing transactions, with the exception of the guarantee, could be used instead of a guarantee?
>
> Question 3291 – Advise of all the facts that the appellant has that relate to BRI asking a third-party investor as to whether the hybrid financing transactions could be used instead of a guarantee.

> Question 3292 – Advise of all the facts that the appellant has that relate to BRI asking a third-party investor as to whether all or any of the hybrid financing transactions, with the exception of the guarantee, could be used instead of a guarantee.
>
> Question 3293 – Provide copied of all the documents that relate to BRI asking a third-party investor as to whether all or any of the hybrid financing transactions, with the exception of the guarantee, could be used instead of a guarantee.
>
> Question 3294 – Did the appellant ever ask any third-party investor as to whether all or any of the hybrid financing transactions, with the exception of the guarantee, could be used instead of the guarantee.
>
> Questions 3295 – Advise of all the facts that the appellant has that relate to the appellant asking a third-party investor as to whether all or any of the hybrid financing transactions, with the exception of the guarantee, could be used instead of the guarantee.
>
> Question 3296 – Provide copies of all the documents that relate to the appellant asking a third-party investor whether any or all of the hybrid financing transactions, with the exception of the guarantee, could be used instead of the guarantee.

[419] Burlington replied to these questions by stating that it is in agreement with what it characterizes as the Respondent's position – that Burlington could not carry out its financing activities or obtain an investment-worthy credit rating without an unconditional guarantee from BRI, and that any arm's-length lender would require an unconditional guarantee from BRI.

Respondent's Position

[420] The Respondent classifies Burlington's response as nonresponsive and evasive, despite Burlington not having refused the question.

Burlington's Position

[421] Burlington submits that the parties are in agreement and therefore its answer is proper. In addition, Burlington submits that the requests for facts and documents are overly broad, since they include facts not relied on and facts irrelevant to the matter, as well as an overbroad scope of document production (not being constrained by time period or which party is in possession of the document). Specifically, it is of the view that communications by such investors or lenders to Burlington after the issuance of

the prospectus does not inform why the guarantee arrangement, which is noted in the prospectus, was entered into by BRI and Burlington.

[422] Furthermore, Burlington points to Ms. Hoang's affidavit, in which both the aforementioned turnover of employees from the relevant period and a general policy of document destruction after a certain time are referenced.

Court's Decision

[423] All these questions were taken under advisement. In my view, this amounts to a refusal.

[424] It is clear that Burlington did not respond to the questions. However, the prospectus included that the debt was unconditionally guaranteed by BRI. From what I understand, the hybrid financing transactions are not part of the prospectus. First, how would a third party investor know about the hybrid financing transactions. Second, why would a third party investor be interested by the hybrid financing transactions when its debt is unconditionally guaranteed by BRI. Therefore, even if the questions were to be relevant, in my view, they are marginally relevant with respect to the question under appeal, more particularly in light of proportionality concerns.

XI. Conclusion

[425] The motion is allowed in part, the Appellant will have to answer the questions in accordance with the above Reasons.

[426] A conference call will be held to determine how to proceed, to establish time limits and to discuss the costs for the Motion.

Signed at Ottawa, Canada, this 3rd day of August 2017.

"Johanne D'Auray"

D'Auray J.

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