Docket: 2005-1974(IT)G

BETWEEN:

KATHRYN KOSSOW,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Before: The Honourable Justice Valerie Miller

Appearances:

Counsel for the Appellant:	A. Christina Tari
Counsel for the Respondent:	Arnold Bornstein

ORDER

1. The Respondent is to provide written answers to items 1, 2, 7, 32, 36, 37, 49, 102 and 103 by August 8, 2008.

2. The Respondent is to provide the documents to items 21 and 48 by August 8, 2008. Any questions arising from the additional documents are to be sent to the Respondent by August 15, 2008. They are to be answered by August 29, 2008.

3. The motion is otherwise dismissed.

4. The Respondent is awarded its costs payable forthwith.

Signed at Ottawa, Canada, this 18 day of July 2008.

"V. A. Miller"

V. A. Miller, J.

Citation: 2008TCC422
Date: July 18, 2008
Docket: 2005-1974(IT)G

BETWEEN:

KATHRYN KOSSOW,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

V.A. Miller, J.

[1] The Appellant has brought this motion for an Order as follows:

1. directing that the paragraphs and subparagraphs described in Schedule "A" be struck from the Reply;
2. alternatively, directing that the Respondent bear the burden of proof with respect to the allegations of fact pleaded as ministerial assumptions of fact in the paragraphs and subparagraphs described in Schedule "A";
3. directing the Respondent to satisfy certain undertakings given at the examination for discovery of the Respondent's nominee where the answers given were incomplete, non-responsive or otherwise ambiguous and to answer certain questions that the Respondent refused or failed to answer at this examination;
4. directing the Respondent to file a further affidavit of documents pursuant to *Rule* 82 containing all the documents in the Respondent's possession that relate to the matters in issue, not only those documents which the Respondent considers "relevant" to the matters in issue;
5. directing the Respondent's nominee to reattend at the Respondent's own expense at a continuation of the examination for discovery to answer all proper questions that the Respondent previously refused or failed to answer, and to also answer any proper questions arising from those answers;
6. directing the Respondent to pay forthwith the costs of this motion, costs thrown away and the costs of the continuation of the examination for discovery.

[2] Schedule “A” referred to in the Appellant’s motion is attached to these Reasons. At the hearing of this motion the Appellant did not refer to Schedule “B” that was attached to her motion. Instead she provided a chart of the questions asked and refused in respect of which she wanted an Order compelling answers. That chart is attached to these Reasons.

[3] The appeal is for the Appellant’s 2000, 2001 and 2002 taxation years. By notices dated September 2, 2004 the Minister of National Revenue (“the Minister”) reassessed the Appellant for those years and disallowed 80% of the charitable tax credits she had claimed. The basis of the Minister’s reassessment was that there was no gift.

[4] On September 9, 2005 the Minister reassessed the Appellant for only the 2002 taxation year to disallow 100% of the claimed charitable tax credit. The 2000 and 2001 taxation years were statute barred.

[5] In reassessing the Appellant for the 2002 taxation year the Minister assumed that there was not a valid gift under section 118.1 of the *Income Tax Act*; that the loan the Appellant received was a sham; and that the general anti-avoidance rule (GAAR) applied. The Respondent pleaded sham and GAAR as alternative grounds for the 2000 and 2001 taxation years.

[6] For ease of reference I have divided these reasons into sections according to the relief sought in the Appellant’s motion.

Motion to Strike

[7] It is the Appellant’s position that the Ministerial assumptions in Schedule “A” are improper pleadings and should be struck as assumptions of fact. The Appellant has categorized the improper pleadings as those the Respondent has admitted are incorrect; evidence pleaded as assumptions of fact; allegations of fact about third parties which are solely within the Minister’s knowledge; allegations of fact about third parties and facts within the Minister’s knowledge which the Minister alleges the Appellant knew; and, conclusions of law.

[8] The grounds for this portion of the motion are:

1. The Reply contains 103 ministerial assumptions of fact, most of which relate to parties other than the Appellant, and most of which and whom the Appellant did not know.

2. Throughout the examination of the Respondent's nominee, Salvatore Tringali, he stated that these assumptions were based not on any particular document that would evidence the alleged fact, but on his interpretation of "all the documents".

3. This response appears in the examination for discovery 238 times.

4. The pleadings listed in Schedule "A" contain evidence, conclusions of law and facts about which the Appellant had no knowledge and which do not benefit from the presumption of validity.

5. The Reply contains improper pleadings that may prejudice or delay the fair hearing of the appeal and are an abuse of process.

6. Sections 4, 49, 53, 70 and 126(b) and (e) of the *Tax Court of Canada Rules (General Procedure)* (the *Rules*).

[9] Section 53 of the *Rules* reads:

> Striking out a Pleading or other Document
>
> **53.** The Court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,
>
> (*a*) may prejudice or delay the fair hearing of the action,
>
> (*b*) is scandalous, frivolous or vexatious, or
>
> (*c*) is an abuse of the process of the Court.

(a) **Incorrect Pleadings**

[10] At the hearing of the motion counsel for the Appellant sought to have paragraph 39(e) and the word "provincial" in paragraph 39 (yyyy) struck from the Reply. She stated that during the discovery of the Respondent's nominee in April, 2008, she learned that the facts assumed in paragraph 39(e) of the Reply are incorrect. The error is that Penturn and Glatt were not equal shareholders of BFIL. Counsel's argument with respect to paragraph 39(yyyy) is that provincial charitable tax credits are not at issue in this appeal and the word "provincial" should be struck.

[11] The Respondent's counsel admitted that there was an error in paragraph 39(e). It was his position that the pleadings could be amended with leave from the Court. Alternatively, the paragraph could remain as it is. The Appellant has the admission that the paragraph is incorrect and it cannot be used at trial against the Appellant.

[12] With respect to the motion to strike paragraph 39(e), it is my opinion that the Appellant has made this motion within a reasonable time after she knew there was an error in that paragraph. However, I do agree with counsel for the Respondent that the Appellant has the admission of the inaccuracy in paragraph 39(e). The pleading cannot be used against the Appellant at the hearing of this appeal. I do not see the need at this point in time to grant further relief.

[13] I will address the Motion to Strike paragraph 39(yyyy) in my reasons below.

(b) **Evidence, Conclusions of Law, Paragraph 39(yyyy) and Allegations about Third Parties**

[14] The Appellant has asked that the paragraphs which contain evidence (paragraphs 34, 35, 39(y), 39(aaa) and 39(eee)) and conclusions of law (paragraphs 40, 41(a), 41(b), 41(c), 41(d), 41(e) and 41(f)) be struck from the Reply as they are improper pleadings.

[15] The Appellant has also moved to have the paragraphs which contain allegations of fact about third parties struck from the Reply or alternatively, she asked that they remain in the Reply as allegations that the Respondent must prove. In other words she has asked that the onus of proof for these allegations be shifted to the Respondent. The paragraphs in issue are: 10, 31, 33, 39(b), 39(c),39(d), 39(g), 39(h), 39(i), 39(j), 39(k), 39(l), 39(m), 39(n), 39(o), 39(p), 39(q), 39(r), 39(s), 39(t), 39(u), 39(v), 39(w), 39(x), 39(y), 39(z), 39(aa), 39(bb), 39(cc), 39(dd), 39(ee), 39(ff), 39(gg), 39(hh), 39(ii), 39(jj), 39(kk), 39(ll), 39(mm,) 39(nn), 39(oo), 39(pp), 39(qq), 39(rr), 39(ss), 39(tt), 39(uu), 39(vv), 39(ww), 39(xx), 39(yy), 39(fff), 39(ggg), 39(hhh), 39(jjj), 39(kkk), 39(lll), 39(mmm), 39(nnn), 39(ooo), 39(ppp), 39(qqq), 39(rrr), 39(sss), 39(ttt), 39(uuu), 39(vvv), 39(www), 39(xxx), 39(yyy), 39(zzz), 39(aaaa), 39(bbbb), 39(cccc), 39(dddd), 39(eeee), 39(ffff), 39(gggg), 39(hhhh), 39(iiii), 39(jjjj), 39(kkkk), 39(mmmm), 39(oooo), 39(pppp), 39(qqqq), 39(rrrr), 39(ssss), 39(tttt), 39(uuuu), 39(vvvv), 9, 39(f), 39(k), 39(jj), 39(zz), 39(jj), 39(zz), 39(aaa), 39(bbb), 39(eee), 39(ggg), 39(hhh), 39(nnnn), 39(yyyy), 40, 41(a), 41(a), 41(b), 41(c), 41(d), 41(e), 41(f).

[16] The Appellant relied on the decision of Justice Bowie in *Zelinski* v. *The Queen*[1] where he explained the purpose of pleadings:

> [4] The purpose of pleadings is to define the issues in dispute between the parties for the purposes of production, discovery and trial. What is required of a party pleading is to set forth a concise statement of the material facts upon which she relies. Material facts are those facts which, if established at the trial, will tend to show that the party pleading is entitled to the relief sought. Amendments to pleadings should generally be permitted, so long as that can be done without causing prejudice to the opposing party that cannot be compensated by an award of costs or other terms, as the purpose of the *Rules* is to ensure, so far as possible, a fair trial of the real issues in dispute between the parties.
>
> [5] The applicable principle is stated in *Holmsted and Watson:*
>
> This is *the* rule of pleading: all of the other pleading rules are essentially corollaries or qualifications to this basic rule that the pleader must state the material facts relied upon for his or her claim or defence. The rule involves four separate elements: (1) every pleading must state facts, not mere conclusions of law; (2) it must state material facts and not include facts which are immaterial; (3) it must state facts and not the evidence by which they are to be proved; (4) it must state facts concisely in a summary form.

[17] Counsel for the Appellant stated that pleading evidence masqueraded as a fact and pleading conclusions of law or mixed fact and law without first pleading the facts to support the conclusions are improper pleadings and they should be struck from the Reply.

[18] It was the Respondent's position that *Rules* 7 and 8 applied to the paragraphs that the Appellant sought to have struck. Counsel for the Respondent stated that if these paragraphs contained improper pleadings, then that was an irregularity as it is defined in *Rule* 7. He further argued that the present motion was not brought within a reasonable time after the Appellant ought to have known of the irregularity and that the Appellant has taken several other steps in the proceeding.

[19] *Rules* 7 and 8 read:

> 7 A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or direction in a proceeding a nullity, and the Court,

(*a*) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute, or

(*b*) only where and as necessary in the interests of justice, may set aside the proceeding or a step, document or direction in the proceeding in whole or in part.

8 A motion to attack a proceeding or a step, document or direction in a proceeding for irregularity shall not be made,

(*a*) after the expiry of a reasonable time after the moving party knows or ought reasonably to have known of the irregularity, or

(*b*) if the moving party has taken any further step in the proceeding after obtaining knowledge of the irregularity,

except with leave of the Court.

[20] It is my opinion that pleading evidence and conclusions of law are irregularities within *Rules* 7 and 8 and that *Rule* 8 does apply to a motion brought pursuant to *Rule* 53. [2]

[21] *Rule* 8(b) is known as the “fresh step” rule. The purpose of this rule was stated by Justice O’Keefe of the Federal Court in *Vogo Inc.* v. *Acme Window Hardware Ltd.*[3] in these words:

> The purpose of the "fresh step" rule is to prevent a party from acting inconsistently with its prior conduct in the proceeding. By pleading in response to a statement of claim, for instance, a defendant may extinguish their right to complain of fatal deficiencies in the allegations made against them. The fresh step rule aims to prevent prejudice to a party who has governed themselves according to the procedural steps taken by the opposing side, where it would be unfair to permit a reversal in approach.

[22] Associate Chief Justice Bowman, as he then was, explained the fresh step rule as follows:

> The "fresh step" rule is one that has been part of the rules of practice and procedure in Canada and the United Kingdom for many years. There is a great deal of jurisprudence on what constitutes a fresh step but the rule is based on the view that if a party pleads over to a pleading this implies a waiver of an irregularity that might otherwise have been attacked.[4]

[23] The chronology of events with respect to the pleadings in this appeal is:

a) The Notice of Appeal was filed on June 14, 2005;
b) The Reply was filed on August 19, 2005.
c) An Amended Notice of Appeal was filed on December 8, 2005;
d) A Reply to the Amended Notice of Appeal was filed on January 16, 2006;
e) An Amended Reply to the Amended Notice of Appeal was filed on August 18, 2006. The Appellant consented to it being filed and served.
f) A Further Amended Reply to the Amended Notice of Appeal was filed on February 16, 2007 and the Appellant consented to its filing and serving.

[24] Paragraph 39(yyyy), the paragraphs that contain allegations about third parties and the paragraphs that the Appellant has asked to be struck because they contain evidence, have been in the Respondent's pleadings since August 19, 2005 and those that contain conclusions of law have been in the Respondent's pleadings since January 16, 2006. The Appellant did not make this motion to strike the pleadings until June 6, 2008.

[25] Counsel for the Appellant stated that the Appellant objected to the Respondent's pleadings as early as 2006. She referred to the decision of Chief Justice Bowman in *Kossow v. The Queen*[5].

[26] The Appellant did file a Notice of Motion dated February 17, 2006. I have reviewed the Motion and Chief Justice Bowman's Order and Reasons for the Order. None of these documents support counsel's assertion that the Appellant objected to the Respondent's pleadings at an earlier date. The Motion on February 17, 2006 was for a "determination, before hearing, of a question of law, or a question of mixed law and fact raised by a pleading". The question as stated by Chief Justice Bowman and his reasons for dismissing the Motion were as follows:

> [12] The only thing I have to decide is whether the first ground of assessing (no gift/material benefit) constitutes a separate and discrete question that can be answered ahead of the trial.
>
> [13] I do not think the first basis of assessment should be severed from the rest of the case and dealt with separately. I say this for several reasons.
>
> (a) Whether the making of the donation entailed a corresponding benefit to the appellant involves a substantial factual issue that can best be dealt with by the trial judge in the context of the overall hearing.
>
> (b) It is inappropriate for me, as a motions judge, to set the matter down for determination before one judge and have that judge's determination tie the hands of the judge who hears the other issues (sham and GAAR). The factual and

> legal issues in the first question are inextricably bound up with those in the second and third bases. One judge should be free to deal with all issues at one sitting.
>
> (c) A decision on the question that the appellant wants to have heard as a preliminary matter under Rule 58 will not be determinative of the entire case. The other two grounds will require adjudication. Therefore, there will be no appreciable shortening of the trial.
>
> (d) The first ground (no gift/material benefit) is something up on which both parties should hold discoveries. To try to determine the question in the abstract without a factual underpinning is in my view premature.
>
> [14] A number of authorities were cited by both counsel. Some preceded the amendment to Rule 58. To some extent the court's discretion must in part be based on convenience, efficiency and fairness. The court has as much of an interest as the parties in having cases dealt with expeditiously. I do not, however, think that splitting the case into separate adjudications achieves that result.

[27] The Appellant filed an Amended Notice of Appeal after she was made aware of the pleadings in paragraphs 34, 35, and the subparagraphs of 39 that she now wishes to strike. She did not complain of the pleadings at that time or at anytime until the present motion. The Appellant pleaded over the Reply and in my opinion this implied that she accepted the irregularities and the pleadings in these paragraphs.[6]

[28] The conclusions of law that the Appellant seeks to strike from the Respondent's pleadings speak to the reassessment of the 2002 taxation year made on September 9, 2005.

[29] The Appellant has taken several fresh steps since she knew or ought to have known of the irregularities and the pleadings that she now seeks to strike. The Appellant's counsel conducted the examination for discovery of the Respondent's nominee, Salvatore Tringali, on January 17, 18, 19, 22 and 23, 2007. Subsequent to this, on February 13, 2007, Appellant's counsel sent a list of 10 questions to the Respondent. These questions related to all the assumptions in the Respondent's pleadings including those that the Appellant now seeks to strike out. The Respondent answered these questions by letters dated April 20, April 30, May 1, and June 8, 2007. The Appellant was not satisfied with the responses to questions 3, 4, 5, 6 and 10 and she filed a Notice of Motion dated October 11, 2007 pursuant to section 4 of the *Rules* to compel the Respondent to provide detailed, complete and responsive answers, in writing, to these questions. Justice Campbell Miller heard the motion on November 20, 2007. His Order was as follows:

1. The Appellant's motion with respect to compelling the Respondent to provide detailed, complete and responsible answers is dismissed;

2. The Appellant's motion with respect to full disclosure is allowed, and the Respondent is to make full disclosure pursuant to Rule 82 by January 31, 2008, but such disclosure does not apply to documents relating specifically to donor taxpayers other than the Appellant, nor to Canada Revenue Agency generated documents other than already disclosed pursuant to Rule 81;

3. The Appellant is to make full disclosure pursuant to Rule 82 by December 14, 2007;

4. Further examinations for discovery, if required as a result of full disclosure, are to be completed within six weeks of receipt by the Appellant of the Respondent's full production, on the understanding that the Appellant will require no more than five further days of discovery; if the Appellant requires more than five days, she is required to obtain a Court Order to that effect;

5. The Respondent's motion is allowed and the Appellant will attend on examination for discovery on November 28, 2007; if a second day is necessary, the Appellant will attend on a day prior to December 31, 2007 and to be determined by the parties;

6. The hearing of this appeal is scheduled to commence on Monday, June 16, 2008, at 9:30 a.m., for two (2) consecutive weeks, at the Tax Court of Canada, Federal Judicial Centre, 180 Queen Street West, 6th floor, Toronto, Ontario.

7. A case management teleconference will be held on Wednesday, January 16, 2008, at 1:00 p.m.

8. Costs of these motions will be in the cause.

[30] The Appellant did have five additional days in April, 2008 to discover the Respondent's nominee.

[31] The Appellant has not met either provision in *Rule 8.*[7] The motion to strike was not brought within a reasonable time after she knew or ought to have known of the irregularities and the pleadings as a whole and she has taken several fresh steps after obtaining knowledge of the irregularities and the pleadings as a whole.

[32] The Appellant's motion to strike is dismissed.

(c) Onus of Proof

[33] The Reply is 37 pages in length plus a schedule titled Ideas Leveraged Donation Scheme. There are 138 pleaded assumptions and many of these

assumptions refer to the Scheme, the parties involved in the Scheme and their dealings with each other.

[34] The Appellant acknowledged that it is trite law that in tax litigation matters the onus is on the taxpayer to demolish the assumptions of fact made by the Minister.[8] In her memorandum she stated that the rule respecting ministerial assumptions is "a matter of policy in light of the common-sense proposition that the material facts underlying an assessment are peculiarly within the knowledge of the taxpayer and not the Minister". She argued that the rule ought not and does not extend to facts assumed by the Minister that an Appellant could not reasonably or practically be expected to either prove or disprove.[9]

[35] It is the Appellant's position that the decision in *Johnson*[10] was not intended to cover the present situation where the majority of the assumptions relate to third parties, their dealings with each other and a Scheme.

[36] The Appellant relied on this court's decision in *Redash Trading Inc. v. Canada*[11] to assert that facts which are peculiarly within the knowledge of the Minister do not carry a presumption of correctness that the taxpayer has to disprove. Further, she argued, the Federal Court of Appeal's decision in *Transocean Offshore Ltd. v. Canada*[12] has recognized that fairness requires that no onus be cast on a taxpayer respecting facts solely within the Minister's knowledge.

[37] In conclusion the Appellant relied on Chief Justice Bowman's decision in *Gould v. Canada*[13] where he stated that the Minister likely bears the onus of proof regarding these allegations about third parties and their dealings.

[38] The appeal in *Gould* is similar to the present appeal and the Minister's pleadings are almost identical to his pleadings in the present appeal. In that appeal, Chief Justice Bowman refused to strike portions of the Reply including those paragraphs that dealt with third parties. His reasoning was as follows:

> 21 With respect, I am unable to ascribe to either the *Status-One* decision or the case which it followed, *The Queen v. Global Communications Limited*, 97 DTC 5194, the effect contended for by counsel for the appellant. A central component in the assessment which disallowed the charitable donations is the existence of a "scheme" in which it is alleged that the appellant participated and which enabled the participants to obtain what the Crown sees as artificial or inflated charitable tax credits. It of necessity involved third parties and if the existence of a scheme is essential to the Crown's case it should be able to plead and prove all of the components of the scheme. To say, as the appellant does, that *Global* and *Status-One* preclude any reference to third party transactions unless the appellant knows of or is privy to those transactions goes too far. If the existence of a scheme is germane to the disallowance it cannot be ignored

> whether or not the Minister assumed that the appellant knew about or was a party to the third party transactions that, according to the Reply, were an integral part of the scheme. If any of the facts assumed are truly within only the Crown's knowledge the Crown probably has the onus of proving them although this is ultimately for the trial judge to decide.

Analysis

[39] The initial onus of disproving the Minister's assumptions is on the Appellant.[14] As stated by Justice L'Heureux-Dubé:

> 92 It is trite law that in taxation the standard of proof is the civil balance of probabilities: *Dobieco Ltd. v. Minister of National Revenue*, [1966] S.C.R. 95 (S.C.C.), and that within balance of probabilities, there can be varying degrees of proof required in order to discharge the onus, depending on the subject matter: *Continental Insurance Co. v. Dalton Cartage Ltd.*, [1982] 1 S.C.R. 164 (S.C.C.); *Pallan v. Minister of National Revenue* (1989), 90 D.T.C. 1102 (T.C.C.) at p. 1106. The Minister, in making assessments, proceeds on assumptions (*Bayridge Estates Ltd. v. Minister of National Revenue* (1959), 59 D.T.C. 1098 (Can. Ex. Ct.), at p. 1101) and the initial onus is on the taxpayer to "demolish" the Minister's assumptions in the assessment (*Johnston v. Minister of National Revenue*, [1948] S.C.R. 486 (S.C.C.); *Kennedy v. Minister of National Revenue* (1973), 73 D.T.C. 5359 (Fed. C.A.), at p. 5361). The initial burden is only to "demolish" the *exact* assumptions made by the Minister but no more:*First Fund Genesis Corp. v. R.* (1990), 90 D.T.C. 6337 (Fed. T.D.), at p. 6340.

[40] It is premature for the Appellant to ask that the onus of proof for the allegations of fact with respect to third parties be shifted to the Respondent. This is a decision that should ultimately be made at the hearing by the trial judge.[15]

[41] In *Tolley v. The Queen*[16],Justice Bell, as he then was, succinctly explained his decision in *Redash*, to the effect that the onus of proof will be addressed at trial once the Appellant has initially demolished the assumptions of the Respondent:

> 86. In *Redash Trading Incorporated* (*supra*) I discussed at length the effect of no evidence being adduced by the Respondent in a situation where the onus had clearly shifted to the Respondent. I refer to that entire discussion and conclusion on this matter. Specifically, I set out here statements from *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336 where the Supreme Court of Canada stated:
>
> As I have noted, the appellant adduced clear, uncontradicted evidence, while the respondent did not adduce any evidence whatsoever. In my view, the law on that point is well settled, and the respondent failed to discharge the burden of proof ...

> The law is settled that unchallenged and uncontradicted evidence "demolishes" the Minister's assumptions: ... As stated above, all of the Appellant's evidence in the case at bar remained unchallenged and uncontradicted ...
>
> Where the Minister's assumptions have been "demolished" by the appellant, the onus ... shifts to the Minister to rebut the *prima facie* case made out by the appellant and to prove the assumptions.
>
> and
>
> Where the burden has shifted to the Minister, and the Minister adduces no evidence whatsoever, the taxpayer is entitled to succeed.
>
> The Respondent has simply not responded to the shifted onus in this case.

[42] Counsel for the Appellant stated that the Appellant testified at the examination for discovery that she did not know the third parties referred to in the Minister's pleadings. Counsel specifically referred to excerpts of the discovery examination of Kathryn Kossow which were contained in the affidavit of Michelle Julfs, an employee of Richler & Tari. The Respondent objected to this use of the discovery transcript.

[43] The use of discovery evidence at the hearing of a motion is contained in *Rule* 75:

> 75. On the hearing of a motion an examination for discovery in the proceeding may be used in evidence and section 100 applies with necessary modifications.
>
> 100(1). At the hearing, a party may read into evidence as part of that party's own case, after that party has adduced all of that party's other evidence in chief, any part of the evidence given on the examination for discovery of
>
> (*a*) the adverse party, or
>
> (*b*) a person examined for discovery on behalf of or in place of, or in addition to the adverse party, unless the judge directs otherwise,
>
> if the evidence is otherwise admissible, whether the party or person has already given evidence or not.
>
> (1.1) The judge may, on request, allow the part of evidence referred to in subsection (1) to be read into evidence at a time other than that specified in that subsection.
>
> (2) Subject to the provisions of the *Canada Evidence Act*, the evidence given on an examination for discovery may be used for the purpose of impeaching the testimony

of the deponent as a witness in the same manner as any previous inconsistent statement by that witness.

(3) Where only part of the evidence given on an examination for discovery is read into or used in evidence, at the request of an adverse party the judge may direct the introduction of any other part of the evidence that qualifies or explains the part first introduced.

(3.1) A party who seeks to read into evidence under subsection (1) or who requests the judge to direct the introduction of evidence under subsection (3) may, with leave of the judge, instead of reading into evidence, file with the Court a photocopy or other copy of the relevant extracts from the transcripts of the examination for discovery, and when the copy is filed such extracts shall form part of the record.

(4) A party who reads into evidence as part of that party's own case evidence given on an examination for discovery of an adverse party, or a person examined for discovery on behalf of or in place of or in addition to an adverse party, may rebut that evidence by introducing any other admissible evidence.

(5) The evidence given on the examination for discovery of a party under disability may be read into or used in evidence at the hearing only with leave of the judge.

(6) Where a person examined for discovery,

(*a*) has died,

(*b*) is unable to testify because of infirmity or illness,

(*c*) for any other sufficient reason cannot be compelled to attend at the hearing, or

(*d*) refuses to take an oath or make an affirmation or to answer any proper question,

any party may, with leave of the judge, read into evidence all or part of the evidence given on the examination for discovery as the evidence of the person examined, to the extent that it would be admissible if the person were testifying in Court.

(7) In deciding whether to grant leave under subsection (6), the judge shall consider,

(*a*) the extent to which the person was cross-examined on the examination for discovery,

(*b*) the importance of the evidence in the proceeding,

(*c*) the general principle that evidence should be presented orally in Court, and

(*d*) any other relevant factor.

(8) Where an appeal has been discontinued or dismissed and another appeal involving the same subject matter is subsequently brought between the same parties or their representatives or successors in interest, the evidence given on an examination for discovery taken in the former appeal may be read into or used in evidence at the hearing of the subsequent appeal as if it had been taken in the subsequent appeal.

[44] Neither *Rule* 75 nor *Rule* 100 allows a party to read its discovery examination into evidence at the hearing of a motion and have that testimony accepted. The Appellant was not cross-examined for credibility at the examination for discovery[17]. The Appellant could not be cross-examined on the affidavit filed with this motion as it was not her affidavit[18]. The discovery transcript cannot be used at this motion by the Appellant to establish that she had no knowledge of the third parties referred to in the Minister's pleadings.

[45] The decision of whether the onus of proof should be shifted to the Minister for certain of the assumptions of fact is a decision that should be made by the trial judge. The following portions from *Mungovan v. The Queen*[19] are relevant to this motion:

> [10] Assumptions are not quite like pleadings in an ordinary lawsuit. They are more in the nature of particulars of the facts on which the Minister acted in assessing. It is essential that they be complete and truthful. The conventional wisdom is they cast an onus upon an appellant and as Mr. Mungovan observes with some considerable justification they may force him to endeavour to disprove facts that are not within his knowledge. Superficially this may be true, but this is a matter that can be explored on discovery. The trial judge is in a far better position than a judge hearing a preliminary motion to consider what effect should be given to these assumptions. The trial judge may consider them irrelevant. He or she might also decide to cast upon the respondent the onus of proving them. The rule in *M.N.R. v. Pillsbury Holdings Ltd.*, 64 DTC 5184, is a rule of general application but it is not engraved in stone.
>
> [12] It is entirely possible, as Mr. Mungovan points out, that some of the impugned assumptions are irrelevant. This is a matter for the trial judge to determine after the evidence has been presented. It is not a matter that can or should be determined on a preliminary motion to strike. It may well be that the paragraphs contain allegations that lie exclusively within the respondent's knowledge. It is a matter for the trial judge to determine whether the onus should be cast upon the respondent to establish them.

> [14] The trial judge may well decide that the Crown has some onus that goes beyond the mere recitation of a bald assumption. The weight to be put on these paragraphs is a matter for the trial judge, as is the onus of proof. This is not, however, a reason for striking the paragraphs before trial.

For these reasons, the motion to shift the onus of proof to the Minister is dismissed.

2. Refusal Motion

[46] This portion of the Appellant's motion is for an order that the Respondent provide answers to certain undertakings and questions refused to be answered at the examination for discovery of the Respondent's nominee. The grounds relied on by the Appellant are as follows:

> 1. An examination for discovery is intended to render the trial process more fair and efficient by allowing each party to fully inform itself of the precise nature of the opposing party's position and evidence.
>
> 2. The scope of questioning on discovery ought to be liberal; any error which unduly restricts the scope of discovery may lead to serious prejudice to the examining party.
>
> 3. The Respondent's answers to undertakings include failures to answer, incomplete, non-responsive and otherwise ambiguous answers and improper refusals.
>
> 4. The Appellant was denied a full and fair examination for discovery of the Respondent.
>
> 5. *Rules* 93, 95, 107, 108, and 110 of the *General Procedure Rules*.

Appellant's Position

[47] The Appellant provided written points of argument in support of her motion. The salient points are:

> 1. The Federal Court of Appeal in *Basserman v. Canada* (1994), 114 D.L.R. (4th) 104 (FCA) has recognized the distinction between documents which are relevant to matters in issue and documents which relate to any matter in question. The latter entails the widest possible scope:

It is not necessary that they be relevant to any issue to be resolved in the litigation, only that they relate to a matter in question. The appellant's submissions to us as to their potential relevance are simply not to the point at this stage.

2. While the words “relating to” necessarily impart an element of relevance, relevance in discovery is a low threshold, unlike relevance at trial.

Owen Holdings Ltd. v. Canada, 97 D.T.C. 5401 (FCA)

3. Relevance on discovery is to be liberally construed and a motions judge ought not to second guess the discretion of counsel by minutely examining each question or requiring a party to explain the relevance, unless the question is patently irrelevant or abusive.

Baxter v. Canada, 2004 D.T.C. 3497 (TCC)

4. Questions clarifying the party’s legal position are proper as are questions about the facts which underlie a particular allegation in a pleading.

Sandia Mountain Holdings Inc. v. Canada, 2005 D.T.C. 206 (TCC)

Respondent’s Position

[48] In the Appellant’s motion under Schedule “B” (which is attached to these reasons) the refusals are listed in two categories: “non-responsive, incomplete, vague and ambiguous answers” and “improper refusals”. In his opening statement counsel for the Respondent stated that it was not until the hearing of this motion that he knew the exact grounds for the Appellant’s motion with respect to the improper refusals. He was not aware that the Appellant was challenging his claim to litigation privilege, solicitor client privilege, taxpayer confidentiality and informant privilege. He stated that if he had known of this particular complaint, he would have submitted sealed evidence for my review.

[49] The Respondent categorized the questions that are in issue as:

(a) questions the Respondent has already answered;
(b) questions concerning litigation privilege;
  (i) questions on how the Respondent’s list of documents was prepared;
  (ii) questions on whether the Respondent should be obliged to allocate documents to a particular assumption;
  (iii) questions concerning the facts that the Respondent relies on in support of a particular assumption;
  (iv) questions on the source or author of documents that were acquired after litigation began;
(c) questions of law;
(d) questions concerning the Canada Revenue Agency.

[50] He relied on the decision in *Baxter v. Canada*[20] where Chief Justice Bowman summarized the principles concerning relevancy of questions in an examination for discovery as:

> (a) Relevancy on discovery must be broadly and liberally construed and wide latitude should be given;
>
> (b) A motions judge should not second guess the discretion of counsel by examining minutely each question or asking counsel for the party being examined to justify each question or explain its relevancy;
>
> (c) The motions judge should not seek to impose his or her views of relevancy on the judge who hears the case by excluding questions that he or she may consider irrelevant but which, in the context of the evidence as a whole, the trial judge may consider relevant;
>
> (d) Patently irrelevant or abusive questions or questions designed to embarrass or harass the witness or delay the case should not be permitted.

[51] Respondent's counsel cited the decision in *Blank v. Canada (Minister of Justice)*[21] for the definition of litigation privilege. The relevant passages are below.

> 27 Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.
>
> 32 Unlike the solicitor-client privilege, the litigation privilege arises and operates even in the absence of a solicitor-client relationship, and it applies indiscriminately to all litigants, whether or not they are represented by counsel: see Alberta (Treasury Branches) v. Ghermezian (1999), 242 A.R. 326, 1999 ABQB 407. A self-represented litigant is no less in need of, and therefore entitled to, a "zone" or "chamber" of privacy. Another important distinction leads to the same conclusion. Confidentiality, the sine qua non of the solicitor-client privilege, is not an essential component of the litigation privilege. In preparing for trial, lawyers as a matter of course obtain information from third parties who have no need nor any expectation of confidentiality; yet the litigation privilege attaches nonetheless.
>
> 34 The purpose of the litigation privilege, I repeat, is to create a <u>"zone of privacy" in relation to pending or apprehended litigation</u>. (Emphasis added.)

[52] With respect to whether it was appropriate for the Appellant to ask what facts the Respondent relied on to prove the allegations in the pleadings, the Respondent relied on Justice Campbell Miller's decision in *Sandia Mountain Holdings Inc. v. The Queen*[22] where he stated:

> 19(iii) Facts relied on to prove or disprove allegations: Justice Campbell in Six Nations confirms that these types of questions are common place in Ontario, notwithstanding the views of the Alberta Court of Appeal in Can-Air. Different rules. Justice Hugessen made a distinction in Montana between improperly asking what evidence a witness has to support an allegation, and properly asking what facts were within the witness's knowledge to underlie a particular allegation. This is a fine distinction. One approach goes to getting the witness to determine what proof is required, which would not be proper. The other approach of asking for facts underlying an allegation is limited solely to fact-gathering and is proper. Semantics may play too significant a role in making this distinction, yet the distinction is real: questions aimed at getting a witness to confirm that certain facts are proof of certain allegations are out; questions arrived at getting the witness to divulge relevant facts in connection with an allegation are in.

[53] With respect to questions of law, the Respondent stated that it is proper to ask what the Respondent's legal position is[23] but it is not proper to ask a question that seeks an opinion on what the law is[24].

[54] Respondent's counsel stated that the Minister's mental process[25] in raising a reassessment is not an issue in an appeal nor are the actions of the CRA officers[26] relevant in an appeal.

Analysis

[55] The main provisions of the *Rules* which relate to pre-trial document disclosure and examination for discovery read as follows:

> LIST OF DOCUMENTS (FULL DISCLOSURE)
>
> 82. (1) The parties may agree or, in the absence of agreement, either party may apply to the Court for a judgment directing that each party shall file and serve on each other party a list of all the documents which are or have been in that party's possession, control or power relating to any matter in question between or among them in the appeal.
>
> **EXAMINATION FOR DISCOVERY**
>
> 92. An examination for discovery may take the form of an oral examination or, at the option of the examining party, an examination by written questions and answers,

but the examining party is not entitled to subject a person to both forms of examination except with leave of the Court.

SCOPE OF EXAMINATION

95. (1) A person examined for discovery shall answer, to the best of that person's knowledge, information and belief, any proper question relating to any matter in issue in the proceeding

[56] The application of the *Rules* to the motion depends on the meaning of the phrases "relating to any matter in question…in the appeal" and "relating to any matter in issue in the proceeding".

[57] The test for documentary discovery was stated by Justice Rip, as he then was, in *Owen Holdings Ltd. v. The Queen*[27] as follows:

> The party demanding a document must demonstrate that the information in the document may advance his own case or damage his or her adversary's case.

[58] According to *Rule* 95(1) a question is proper if it relates to any matter in issue. This has been interpreted as meaning that the question must be relevant to the issues in the action as defined by the pleadings.[28] Likewise, whether a document is relevant to any matter in question in the appeal also depends upon the pleadings.[29]

[59] The issues raised by the Reply in this appeal are:

a) whether the Minister correctly reassessed the Appellant's tax liability for her 2000, 2001 and 2002 taxation years on the basis that alleged donation amounts of $50,000, $60,000 and $50,000, respectively were not gifts within the meaning of subsection 118.1(1);

b) whether the alleged loans to the Appellant by Talisker were shams; and

c) whether the general anti-avoidance rule is applicable in the circumstances.

[60] A summary of the general principles from the caselaw is as follows:

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

2. The threshold test for relevancy on discovery is very low but it does not allow for a "fishing expedition": *Lubrizol Corp. v. Imperial Oil Ltd*.[30]

3. It is proper to ask for the facts underlying an allegation as that is limited to fact-gathering. However, it is not proper to ask a witness the evidence that he has to support an allegation: *Sandia Mountain Holdings Inc. v. The Queen.* [31]

4. It is not proper to ask a question which would require counsel to segregate documents and then identify those documents which relate to a particular issue. Such a question seeks the work product of counsel: *SmithKline Beecham Animal Health Inc. v. The Queen.* [32]

5. A party is not entitled to an expression of the opinion of counsel for the opposing party regarding the use to be made of documents: *SmithKline Beecham Animal Health Inc. v. The Queen*. [33]

6. A party is entitled to have full disclosure of all documents relied on by the Minister in making his assessment: *Amp of Canada v. Canada*. [34]

7. Informant privilege prevents the disclosure of information which might identify an informer who has assisted in the enforcement of the law by furnishing assessing information on a confidential basis. The rule applies to civil proceedings as well as criminal proceedings: *Webster v. The Queen.* [35]

8. Under the *Rules* a party is not required to provide to the opposing party a list of witnesses[36]. As a result a party is not required to provide a summary of the evidence of its witnesses or possible witnesses: *Loewen v. the Queen.*[37]

9. It is proper to ask questions to ascertain the opposing party's legal position: *Six Nations of the Grand River Band v. Canada.*[38]

10. It is not proper to ask questions that go to the mental process of the Minister or his officials in raising the assessments: *Webster v. The Queen.*[39]

[61] Prior to making my decision on the propriety of the questions, I wish to address counsel for the Respondent's concern regarding those instances where he has objected to a question on the basis of litigation privilege, solicitor client privilege, informant privilege and taxpayer confidentiality.

[62] The Notice of Motion and the Motion Record were not specific regarding the Appellant's complaint with respect to the instances she stated were "failures to

answer, incomplete, non-responsive and otherwise ambiguous answers and improper refusals". The Appellant did not rely on *Rule* 88 as a ground for this portion of the motion nor has she brought any evidence to show that the claim of privilege was improperly made. Unless there is some basis on the face of the material before me to suggest that the Respondent's objections are improper, I will allow his objections to stand.[40]

[63] The questions that are in issue are attached hereto as Schedule "B". However, in my decision that follows I will refer to the questions as they were listed in the chart provided by Appellant's counsel at the hearing of this motion. I have referred to the question by its number in the discovery transcript and page in the motion record.

A. Question about the CRA's treatment, taxation and review of other parties in the alleged scheme

	Motion Page	**Question Number**	**Decision**
1.	244-247	3647-3652	The question is proper and it must be answered
2.	308-310	4646-4648	The question is proper and it must be answered
3.	252-253	3845	The Respondent has claimed litigation privilege for all documents listed in Schedule "B" to the affidavit of documents. Based on my prior statements, the Respondent's claim of litigation privilege stands.
4.	254-256	3873	Same as 3.
5.		3874	Same as 3.

B. Questions about the Productions

	Motion Page	**Question Number**	**Decision**
6.	194-195	2696	The Respondent has answered this question. See motion record at page 562.
7.	370-371	6551	The Respondent has claimed privilege to a portion of the covering letter that was with the documents at tab 6551. The Respondent is to state the type of privilege claimed.
8.	425-426	8819	The question has been answered.
9.	148-150	1479-1483	The Respondent has stated that the media articles are located at tabs 1479 – 1483. The question has been answered. The Respondent does not have to allocate the documents to the specific assumptions.
10.	154-156	1568	This question consisted of 21 parts. 1. Question was answered. See page 536 of the motion

			record. 2. Question was answered. See page 537 of the motion record. 3. Question was answered. See page 538 of the motion record. 4. Question was answered. See page 538 of the motion record. 5. Question was answered. See page 539 of the motion record. 6. Question was answered. See page 539 of the motion record. 7. Question was answered. See page 539 of the motion record. 8. Question was answered. See page 540 of the motion record. 9. to 21. The only material placed before me with respect to these questions was a table of the exhibits that Mr. Tringali had at his examination for discovery. From my review of this material, the refusal to answer was proper. All documents in exhibit 5 were documents contained in the Appellant's List. It is not apparent from this table or the exchange between counsel at pages 154-156 that Mr. Tringali and his team ever received the documents at exhibit 5 or that the documents were in the Respondent's List of Documents.
11.	227-228	3324	The question was answered at page 558-559 of the motion record. The undertaking was given on January 23 and the answer given satisfied that undertaking.
12.	154-156	1568	These are the same questions that appeared at line10.
13.	175-178	1992-1995	The request as stated by the Appellant in her chart is not the exact request that appears at line 1992. The request made by Mr. Yoker was "if there is any document **we are going to refer to**, we are asking for a best efforts undertaking to identify the exact date the document was received by the CRA." It is a very important difference. Prior to the request Mr. Tringali was asked if he knew when a particular document was received by his team. He answered that he did not know the specific date but that he knew it was prior to the proposal letter being issued. The question was answered. It is sufficient that the Respondent disclose if a document was received prior to the reassessment or after the reassessment. See page 558 of the motion record where at question 3324 the Respondent listed the documents not obtained by the audit team prior to the proposal letter or prior to reassessment. The request as framed in the Appellant's chart and as it appeared at page 545 of the motion record is overbroad.

14.	364-366	6521-6523	The request was to produce all the exhibits listed in exhibit 9, tab 419. The Respondent stated that the exhibits are found at tabs 6522-23. See page 604-605 of the motion record. In its response the Respondent stated that exhibits 10 and 11 will not be produced. He based his objection on relevance and taxpayer confidentiality. There was no material before me to show what documents were in exhibits 10 and 11. The respondent's objection stands.
15.	252-253	3845	Same as question 3.
16.	253	3873	Same as question 3.
17.		3874	Same as question 3.
18.		4601	The Respondent is not required to answer this question. It involves the work product of counsel.
19.	375	6614	The question is not relevant.

C. Questions about the Rule 82 affidavit.

	Motion Page	**Question Number**	**Decision**
20.	427	8824	The question has been answered.
21.	427	8825	The Respondent stated at the hearing of the motion that they have discovered additional documents that were not disclosed in preparing the Rule 82 affidavit. It was not a deliberate attempt to not disclose. Different counsel has worked on this file. The documents will be provided.

D. Questions about alleged informant privilege

	Motion Page	**Question Number**	**Decision**
22.	258	3891	The questions to which the Respondent has objected on the basis of informant privilege need not be answered.
23.	261-263	3906-3913	Same decision as in line 22.
24.	263	3914	Same decision as in line 22.

E. Questions tending to shorten litigation.

	Motion Page	**Question Number**	**Decision**
25.	264	3945	The Respondent does not have to give the Appellant a list of the witnesses she intends to call at the trial. See Rule 95(4). The party is only entitled to obtain disclosure of the names of persons who might reasonably be expected to have knowledge of the transactions in issue.
26.	264	3948	This question is improper and need not be answered.
27.	416	8433	The question was answered at page 415 of the motion record, line 8430.

28.	382-386	6724 to 6730	The question was answered. See page 606 of the motion record.
29.	236-237	3557	The question does not have to be answered. Appellant's counsel stated that the document was a written proposal. It appears that the document speaks for itself.
30.	250-251	3837-3840	The refusal to answer this question was based on solicitor-client privilege. The refusal was proper.
31.	268	4368	The question was answered at page 269 of the motion record, line 4372.
32.	366-369	6527	This is a proper question and if the Respondent has the answer it is to provide it.

F. Questions about the audit and audit process

	Motion Page	**Question Number**	**Decision**
33.	433-434	9037	The question is not relevant and does not have to be answered. At the hearing Appellant's counsel stated that this question was an attempt to find out if CRA had a protocol as to how these types of files were handled. That may have been the intent but the question does not address her intent.
34.	434	9040	The question is neither proper nor relevant and does not have to be answered.
35.	193	2680-2682	The interview notes were produced. See page 580 of the motion record.
36.	109-110	580-584	The answer to this undertaking appears at pages 583- 584 of the motion record. Any redactions based on relevance are to be disclosed. The redactions and exclusions based on solicitor-client privilege and taxpayer confidentiality do not have to be disclosed.
37.	111-112	600	The answer to this undertaking appears at pages 585-590 of the motion record. Redactions based on relevance are to be disclosed. Redactions and exclusions based on solicitor-client privilege, taxpayer confidentiality and informant privilege do not have to be disclosed.
38.	113	603-605	The question is too broad and as worded it represents a "fishing expedition".
39.	166-167	1801, 1803	This question does not have to be answered. Any complaints that were made are not relevant. This is not an issue that is raised in the pleadings.
40.	167	1804-1814	This question is overly broad and represents a "fishing expedition".
41.		1831-1833	This question does not have to be answered. Any complaints that were made are not relevant. This is not an issue that is raised in the pleadings.

42.	170-171	1849-1850	The question has been answered.
43.	175-176	1992-1995	This question was answered at number 13 above. This question was asked on January 19, 2007 and the undertaking was satisfied on April 17, 2007.
44.	162-164	1795	This question does not have to be answered. Any complaints that were made are not relevant. This is not an issue that is raised in the pleadings.
45.	173	1861	This question is not relevant and does not have be answered.
46.	225-226	3212	The question was answered at page 225 line 3208 of the motion record. To ask the Respondent's nominee to go to his notes to see where else the assumption is recorded is a fishing expedition.
47.	238-239	3571	The question was answered. See the motion record page 591 and the answer for question 3567.
48.	238-239	3579	If this document has not already been produced, it must be produced subject to taxpayer confidentiality.
49.	242-243	3586	If there is a document, it must be produced. If there is no document then the Respondent is to answer how the CRA became aware that the Appellant was a donor to Ideas Canada. Exact dates need only be given if they are readily available.
50.	368-369	6538	Mr. Tringali said that he is almost certain he did not make notes. The question has been answered.
51.	224	3158	The answer given was that the assumption was made in the course of reassessing. In my opinion the answer is sufficient.
52.	219	3052-3054	Same as number 51.
53.	188	2189	This question does not have to be answered. To ask the Respondent's nominee to go through his notes to point out each time there is a reference to a particular assumption is onerous and constitutes a fishing expedition. There is nothing to be learned from this exercise.

G. Questions about the Minister's assertion that the appellant "knew" or was deemed to know through a power of attorney and agency given to deliver a cheque and deal with collateral security on a loan that was not part of the amounts disallowed by the minister.

	Motion Page	**Question Number**	**Decision**
54.	100-101	133-134	The Appellant is entitled to ask the Respondent's nominee what CRA's legal position is with respect to the pledges. It is improper for the Appellant to ask what CRA's opinion is of the law as it relates to the pledges in issue in this appeal. The question as framed is seeking CRA's opinion of the law. I find that the question is improper and it does not have to be answered.
55.	106-107	350-351	The question has been answered. See page 533 of the motion record.
56.	136-138	1207-1223	The question has been answered. See page 535 of the motion record.

57.	139-144	1242-1247	The question has been answered. See page 535 of the motion record.
58.	145-146	1358-1361	The question was answered at page 146 of the motion record.
59.	153	1514-1516	The question was answered at page 536 of the motion record. The Appellant is seeking to ask a follow up question to the answer she received. The Appellant is not permitted to ask a follow up question. At some point in time there must be an end of the discovery process to allow the parties to prepare for the hearing of the appeal.
60.	208	3016	The question was answered in the chart provided by the Respondent at page 498 of the motion record.
61.	208-212	3017	The question has been answered. See pages 498-505 of the motion record.

H. Questions about the Respondent's position about matters other than the Appellant's alleged knowledge

	Motion Page	**Question Number**	**Decision**
62.	117-118	917	The question requires a legal opinion from the nominee and as such it is improper.
63.	229	3360	This question does not arise from the pleadings and as such it is improper.
64.	231-232	3389	The Appellant is seeking a legal opinion and not a conclusion of law. The question is improper.
65.	359-360	5961	This question seeks a legal analysis from the Respondent and is improper.
66.	376	6649	Same decision as was made at number 65.
67.	393-394	6996	The question as framed on page 393 of the motion record asks for the relevancy of the assumption. My decision is the same as was made at number 65.
68.	401	7334	Same decision as was made at number 65.
69.	402-403	7450	The question as framed requires a legal analysis and is improper.
70.	404	7613	At the hearing Respondent's counsel stated that this question was answered at question 7471 of the transcript. I cannot make a decision on this question as the material was not before me.
71.	411	8242	At page 411 and 412 of the motion record the Respondent's counsel stated that this question as it applied to the assumptions of fact in paragraphs 41 and 43 were already answered. I accept that. The question at 8242 relates only to paragraph 58 in the "Grounds Relied on and Relief Sought". This question calls for a legal analysis and is improper.
72.	416-417	8433	The question was answered at page 415 question 8430 of the motion record.
73.	415-417	8481	The question was answered at page 610 of the motion record.
74.	420	8552	This question requires legal argument from the Respondent and is

			improper.
75.		8569	The question has been answered according to the answer supplied in the Appellant's chart.

I. Questions about the basis of the assessment

	Motion Page	**Question Number**	**Decision**
76.	123	1093-1095	The question has been answered.
77.	225	1133	The question has been answered.
78.	129	1134	The question has been answered.
79.	129-130	1135-1138,1140-1144	The questions have been answered.
80.	134-135	1200	The answer to this question requires the work product of counsel and as such the question is improper.
81.	148-150	1479,1483	Same decision as number 9 herein.
82.	178-179	1996-2005	Same decision as number 51 herein.
83.	180-181	2035-2036	The Appellant admitted that the answer given was satisfactory.
84.	184-185	2156-2157	Same as number 83 herein.
85.	187	2172	Same as number 83 herein.
86.	189-190	2645	The answer to this question requires the work product of counsel and as such the question is improper.
87.	191-192	2675	The answer to this question requires the work product of counsel and as such the question is improper.
88.	196	2705	My decision is the same as that at number 87 herein.
89.	197-199	2885	The question has been answered.
90.	203-204	2948	The answer to this question requires the work product of counsel and as such the question is improper.
91.	199-202	2888-2992	The answer to this question requires the work product of counsel and as such the question is improper.
92.	220	3089	The Appellant is seeking proof of a legal position and as such the question is improper.
93.	220-221	3099	The question has been answered.
94.		3125-3137	The answer to this question requires the work product of counsel.
95.	231-232	3391-3395	The question has been answered.
96.	265	4222	The Appellant is seeking proof of the Respondent's legal position. The question is improper. It was noted at the hearing that counsel for the Appellant rephrased this question (See the question at 4223) and this new question was answered. See Tab F of Sabrina Esty's affidavit.
97.	268	4368	See line 31 herein.
98.	301-303	4539-4546	The document speaks for itself. There is no need for the Respondent's nominee to answer this question.
99.	305-306	4582	Same decision as line 98.

100.	244-247	4646-4648	I have dealt with this question at line 1 herein.
101.	311-312	4777	The question has been answered. See page 312, question 4779 in the motion record.
102.	322-323	5216	The Respondent has stated that it will answer this question as it is phrased at question 5214.
103.	347-348	5827	The Respondent has stated that it will answer this question.
104.	362-363	6244	The question has been answered. To require Mr. Tringali to have to do a further review of his review is onerous and not necessary. He answered counsel's question.
105.	367-369	6527	See my decision at number 32 herein.
106.	406-408	7686	M. Tringali was prepared to answer this question at the discovery. Appellant's counsel wanted an undertaking. Respondent's counsel refused to give an undertaking on the basis that the answer could be given at that time. It is my opinion that Appellant's counsel has missed the opportunity to have the question answered.
107.	422-424	8589	This question relates to paragraph 58 which is in the section of the Reply titled "Grounds Relied on Relief Sought". As such the question seeks a legal analysis and is improper.

J. Takes the position that the minister can raise alternate allegations to those on which the minister based the assessment and not disclose the basis on which the respondent makes those allegations.

	Motion Page	**Question Number**	**Decision**
108.	215-217	3037	The answer to this question would require the work product of counsel. The question is improper.
109.	220-221	3089	The Appellant has withdrawn its request to have this question answered.
110.	313-314	4957	My decision is the same as that in number 108.
111.	316-317	5169	My decision is the same as that in number 108.
112.	318-319	5177	Mr. Tringali answered the questions with respect to this allegation and the documents relied on at the time of the audit. Question 5177 as framed requires the work product of the Respondent and litigation privilege was properly claimed.
113.	324	5224	The question as framed requires the work product of counsel. It is an improper question.
114.	325	5255	Same decision as 113.
115.	326-327	5281	Same decision as 113.
116.	328-329	5329	Same decision as 113.
117.	333	5487	Same decision as 113.
118.	334	5500	Same as decision 113.
119.	335	5525	Same as decision 113.
120.	336	5575	Same as decision 113.
121.	337	5582	Same as decision 113.
122.	338	5622	Same as decision 113.

123.	339	5624	Same as decision 113.
124.	344-345	5800	Same as decision 113.
125.	346	5808	Same as decision 113.
126.	349-350	5836	Same as decision 113.
127.	351-352	5856	Same as decision 113.
128.	353	5874	The question that appears at 5874 is not the same question which the Appellant has listed in her chart. The question at 5874 on page 353 of the motion record would require the work product of counsel for the Respondent. It is an improper question,
129.	354	5882	Same as decision 113.
130.	355	5884	Same as decision113.
131.	357	5926	Same as decision 113.
132.	373	6563	The question at 6563 in the motion record is not the same question as appears on the Appellant's chart. The Respondent refused to allocate documents to the assumption at 39(kk). It is a proper refusal. The Respondent stated that Mr. Tringali could answer the question as to the facts, information and belief that relates to this assumption.
133.	376	6647	The Respondent refused to allocate documents to the assumption at 39(ll). It is a proper refusal. Mr. Tringali did answer the question with respect to the facts, information and belief.
134.	379	6679	The question as it appears at 6679 of the motion record was answered at page 606 of the motion record.
135.	381	6713	Same as decision 113.
136.	387	6746	The situation and decision is the same as that at 133 except that it is with respect to assumption 39(oo).
137.	389	6755	Same as decision 113.
138.	390	6846	Same as decision 113.
139.	391	6909	Same as decision 113.
140.	392	6960	Same as decision 113.
141.	395	7049	Same as decision 113.
142.	397	7094	Same as decision 113.
143.	400	7192	Same as decision 113.
144.	409	7802	Same as decision 113.
145.	410	8129	The question as framed requires a legal analysis and thus the work product of counsel. It is an improper question.

[64] The Appellant has also requested that the Respondent be directed to file a further affidavit of documents pursuant to *Rule* 82 and that the Respondent's nominee reattend for a continuation of the discovery.

[65] Both of these requests are refused. There has been extensive discovery in this appeal. The Respondent's nominee has been examined for ten days. As well the Respondent has answered interrogatories in an attempt to expedite matters. I note that there was never a

court order pursuant to *Rule* 92 that entitled the Appellant to both oral and written discovery.

[66] At some point in time, discoveries must end so that the parties can get ready for the trial in this matter. That time has arrived.

[67] At the hearing of this motion counsel for the Respondent stated that there were documents that through inadvertence had not been given to the Appellant. He stated that these documents will be given to the Appellant. If the documents have not already been provided then I order that they be provided by August 1, 2008.

[68] The Respondent is to provide written answers to the refusals as indicated in these reasons. The answers are to be provided by August 8, 2008. Any questions arising from the additional documents are to be sent to the Respondent by August 15, 2008. They are to be answered by August 29, 2008.

[69] While the Appellant has achieved some success in this motion, it was very minor. The Respondent is to have its costs payable forthwith.

Signed at Ottawa, Canada, this 18th day of July 2008.

"V. A. Miller"

V.A. Miller, J.

Endnotes

1. [2001] T.C.J. No. 774, 2002 D.T.C. 1204.
2. See *Kulla v. The Queen,* 2005 TCC 136; *Foss v. The Queen*, [2007] 4 CTC 2024.
3. 2004 FC 851, at para. 60 [*Vogo*].
4. *Imperial Oil Ltd. v. The Queen*, 2003 TCC 46.
5. 2006 TCC 151.
6. *Vogo, supra* note 3.
7. *Supra* note 2.
8. *Johnston v. Canada (Minister of National Revenue)*, [1948] SCR 486.
9. William Innes and Hemamalini Moorthy, "Onus of Proof and Ministerial Assumptions: The Role and Evolution of Burden of Proof in Income Tax Appeals" (1998) 46 Can. Tax J. 1187 at 1209.
10. *Ibid*.
11. [2004] TCJ No. 317 [*Redash*].
12. 2002 DTC 5201 (FCA).
13. [2005] TCJ No. 403 [*Gould*].
14. *Hickman Motors Ltd. v. Canada,* [1997] 2 SCR 336 at para. 92.
15. *Stanfield v. Canada*, [2007] TCJ No. 160 paras. 42-45.
16. 2004 TCC 650 [*Tolley*].
17. See *Rule* 95(1)(b).
18. See *Lana International Ltd. v. Menasco Aerospace Ltd.* (2000), 50 OR (3d) 97 (C.A.) at para. 36: "… Parties to a motion who wish to use their own evidence must provide an affidavit and be subject to a full cross-examination."
19. 2001 TCC 568, 2001 DTC 691 [*Mungovan*].
20. [2005] 1 CTC 2001 (TCC) at para. 13 [*Baxter*].
21. 2006 SCC 39 [*Bank*].
22. [2005] 2 CTC 2297 [*Sandia Mountain Holdings*].
23. *Six Nations of the Grand River Band v. Canada (Attorney General)*, [2000] OJ No. 1431 at para. 14 [*Six Nations*].
24. *Sandia Mountain Holdings, supra* note 22, at para. 19.
25. *The Queen v. Riendeau*, [1991] 2 CTC 64 (FCA) at para. 4 [*Riendeau*].
26. *Main Rehabilitation Co. v. The Queen,* 2004 FCA 40, at para. 8.
27. [1997] 3 CTC 2286 [*Owen Holdings*].
28. *Andersen v. St. Jude Medical Inc.,* [2006] OJ No. 3659, 33 CPC (6^{th}) 159 (Ont. Sup. Ct. Just.).
29. *Baxter, supra* note 20 at para. 10; *SmithKline Beecham Animal Health Inc. v. the Queen,* [2002] 4 CTC 93 (FCA) at para. 29.
30. *Lubrizol Corp. v. Imperial Oil Ltd.,* [1997] 2 FC 3, at para. 19.
31. *Sandia Mountain Holdings, supra* note 22 at para. 19(iii).
32. *SmithKline Beecham Animal Health Inc. v. The Queen,* [2001] 2 CTC 2086 at para. 11.
33. *Ibid.*
34. *Amp of Canada, Ltd. v. Canada,* [1987] F.C.J. No. 149
35. *Webster v. The Queen*, 2003 DTC 211, at para. 14.
36. *Singh v. The Queen*, [2005] 4 CTC 2484 at para. 28.
37. *Loewen v. The Queen*, [2007] 1 CTC 2151 at para. 14.
38. *Six Nations, supra* note 23 and *Sandia Mountain Holdings, supra* note 22.
39. *Riendeau, supra* note 25.
40. *Privacy Commissioner of Canada v. Attorney General of Canada*, 2008 SCC 44 at para.17

CITATION:	2008TCC422
COURT FILE NO.:	2005-1974(IT)G
STYLE OF CAUSE:	KATHRYN KOSSOW AND
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 16-17, 2008
REASONS FOR ORDER BY:	The Honourable Justice Valerie Miller
DATE OF ORDER:	July 18, 2008

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