Docket: 2004-3776(IT)G

BETWEEN:

JOHN FLUEVOG BOOTS & SHOES LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on common evidence with the
Motion of John Fluevog (2004-3778(IT)G) on May 25, 2009 at
Vancouver, British Columbia

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant:	Timothy W. Clarke
Counsel for the Respondent:	Stacey Michael Repas

ORDER

Upon Motion made by counsel for the Appellant compelling the Respondent to provide written responses to a number of questions in a written examination for discovery which the Respondent has refused to answer and for the production of documents which the Respondent had refused to produce;

And upon hearing submissions by the parties;

It is ordered that the Respondent answer the questions which the Court has directed the Respondent to answer in the within Reasons for Order and to produce

those documents which the Court has directed the Respondent to produce for the Appellant.

Signed at Ottawa, Canada, this 25th day of June 2009.

"Diane Campbell"

Campbell J.

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Appellant,

and

HER MAJESTY THE QUEEN,

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And upon hearing submissions by the parties;

It is ordered that the Respondent answer the questions which the Court has directed the Respondent to answer in the within Reasons for Order and to produce

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Signed at Ottawa, Canada, this 25th day of June 2009.

"Diane Campbell"

Campbell J.

Citation: 2009 TCC 345
Date: 20090625
Dockets: 2004-3776(IT)G
2004-3778(IT)G

BETWEEN:

JOHN FLUEVOG BOOTS & SHOES LTD.,
JOHN FLUEVOG,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Campbell J.

[1] The Appellant is seeking an Order compelling the Respondent to provide written responses to a number of questions in a written examination for discovery which the Respondent has refused to answer. In addition, the Appellants' Motion requests that the Respondent produce documents which the Respondent had refused to produce on the written examination.

[2] By way of background, the Appellant, John Fluevog, is the shareholder and directing mind of the Appellant Corporation, John Fluevog Boots & Shoes Ltd. His children are competitive swimmers and belong to a B.C. swim club. The Appellant Corporation donated money to Swim Canada, a Registered Canadian Amateur Athletic Association ("RCAAA"), for which Swim Canada issued a charitable donation receipt. Swim Canada forwarded this donation to Swim B.C., which retained 5% and then sent the balance of the money to the local Swim Vancouver club where the Appellant's children participated in swim training. That club used

the money to administer its competitive swimming programs. The Appellant Corporation's donation, as in all other donations, was then credited against the swimming costs associated with the children related to the shareholder. These two appeals are the test case in respect to a number of other similar contributions.

[3] The Appellant Corporation reported the amounts paid to Swim Canada as being a charitable gift pursuant to section 110.1 of the *Income Tax Act* (the "*Act*") and claimed a deduction (which would now be referred to as a tax credit pursuant to changes in the *Act*). The Minister of National Revenue (the "Minister") denied a deduction for the payments to Swim Canada and added the amounts to John Fluevog's income on the basis that the Appellant Corporation did not make gifts of payments to Swim Canada but instead had been directed by John Fluevog to make these payments for the benefit of paying swimming expenses for his children.

[4] The key issue in these appeals revolves around the meaning of "gift" for the purposes of section 110.1 of the *Act*. This issue by its very nature will involve an analysis of what may constitute consideration for the purposes of a gift. This is apparent from the framing of the relevant issues in both the Amended Notices of Appeal and the Amended Replies to the Notices of Appeal. The Amended Notice of Appeal for John Fluevog Boots & Shoes Ltd. states the issue as follows:

> 5. The issues are whether:
>
> (a) all or a portion of the payments made by the Appellant to Swim Canada were gifts within the meaning of section 110.1 of the Act,

[5] The Amended Notice of Appeal for John Fluevog states that the issues are:

> 7. The issues are whether:
>
> (a) all or a portion of the payments made by the Appellant and the Company to Swim Canada were gifts within the meaning of sections 110.1 and 118.1 of the Act,
>
> (b) the Company made a payment or transferred property for the benefit of the Appellant to any person pursuant to the direction of, or with the concurrence of the Appellant or as a benefit that the Appellant desired to have conferred on that other person within the meaning of subsection 56(2) of the Act,
>
> (c) whether the payments made by the Company would have been included in the Appellant's income pursuant to subsection 15(1) had they been made directly to the Appellant …

[6] The Reply to Amended Notice of Appeal for John Fluevog Boots & Shoes Ltd. states that the issue is:

> 9. The issues are:
>
> a) whether the payments made by the Appellant to Swim Canada and deducted as a donation in its 1994 and 1995 taxation years were gifts within the meaning of the Act, and consequently, whether the Appellant was entitled to the eligible donation carry-forward claimed in its 1996 and 1997 taxation years; …

[7] The Reply to Amended Notice of Appeal for John Fluevog states the issues as follows:

> 10. The issues are:
>
> a) Whether the amounts the Appellant paid to Swim Canada were gifts within the meaning of sections 118.1 and 110.1, respectively of the Act;
>
> b) Whether the Appellant directed the Company to make the payments to Swim Canada for his benefit;

[8] The Respondent objected generally to the questions asked on the basis that none were relevant. I believe therefore that it is important to be clear on what the issues are in these appeals because one of the well established principles that must guide my conclusions is that relevancy will be established by the pleadings. The words of Bowman, A.C.J. in *Baxter v. The Queen*, 2004 DTC 3497, come to mind in this context where he states at paragraph 14:

> … I asked counsel for the appellant why, if the questions are as irrelevant as he contends, he does not simply let his witness answer. The objection gives to the question the appearance of importance that it might not otherwise have.

[9] The series of questions relates to Information Circular ("IC") 75-23.

3. Paragraphs 3 and 4 of IC 75-23 provide as follows:

> Religious Schools
>
> 3. If such a school teaches exclusively religion and thereby operates solely for the advancement of religion, payments for students attending that school are not considered to be tuition fees but will be considered as valid donations and, providing the school is a registered Canadian charitable organization, official receipts for charitable donations may be issued for such payments.
>
> Secular Schools
>
> 4. The provisions of the *Income Tax Act* do not permit a deduction, as a charitable donation, of an amount paid to a school for academic tuition, whether the amount was paid for set fees or was a voluntary contribution. A gift, to be allowable within the concept of paragraph 110(1)(*a*) of the Act, must be a voluntary transference of property without consideration. The consideration here is the academic training received by the children attending the school. On the other hand religious training is not viewed as consideration for purposes of the definition of a gift.

According to the Notice of Motion, the Respondent had objected to or refused to answer the following questions:

(a) It is the appellants' contentions in these appeals that the Payments constitute gifts therefore they were transfers of money to Swim Canada without consideration (and in the amended notice of appeal, at least without full consideration). In the above excerpts from IC 75-23 it is apparent that the respondent does not view religious training as consideration (or views it as "nominal" consideration) for the purposes of the definition of gift. Does the respondent agree that the swim training does not constitute "consideration" (or at least represents "nominal" consideration) to the Company or Mr. Fluevog for the purposes of the definition of a gift?

(b) If not, what is the difference (in terms of consideration) between the religious training referred to in IC 75-23 and the swimming training that is the subject matter of the present case?

(c) What is the difference, in terms of "consideration", between the (secular) academic training (referred to in paragraph 4 of IC 75-23) and the religious training?

(d) Does the respondent consider secular academic training to have value in the marketplace whereas religious training does not (or at least has only "nominal" consideration)?

(e) [there is no question 3(e)]

(f) If so, why or why not?

(g) Paragraph 10 of IT-110R3 describes the policy on religious training set out in IC 75-23 as an "exception to the general rule" regarding the meaning of "gift" as described in paragraph 3 of IT-110R3. Why does the respondent consider the policy on religious training to be an exception to the general rule?

(h) If the policy (that is, where the donor receives no consideration or less than fair market value consideration for the donation) is not an exception to the general rule, does the respondent apply that policy only to religious private schools or to all taxpayers?

(i) Please produce any notes, memoranda or other documents of any kind whatsoever relating to the policies regarding consideration, benefits or expectations of return set out in IC 75-23 or IT-110R3.

[10] Paragraphs 3 and 10 of IT-110R3 which are the provisions that are relevant to this Motion state:

3. A gift, for purposes of sections 110.1 and 118.1, is a voluntary transfer of property without valuable consideration. Generally a gift is made if all three of the conditions listed below are satisfied:

(a) some property – usually cash – is transferred by a donor to a registered charity;

(b) the transfer is voluntary; and

(c) the transfer is made without expectation of return. No benefit of any kind may be provided to the donor or to anyone designated by the donor, except where the benefit is of nominal value …

[…]

10. Other exceptions to the general rule in 3 above are discussed in separate publications. For example, see the current versions of IT-111, *Annuities Purchased from Charitable Organizations*, IT-244, *Gifts by Individuals of Life Insurance Policies as Charitable Donations* and Information Circular 75-23, *Tuition Fees and Charitable Donations Paid to Privately Supported Secular and Religious Schools*.

[11] The Respondent's response to questions 3(a) to (i) was the following:

Q: 3.(a) to (i)

> R. We object to and refuse to answer these questions on the basis that these matters are not pled in the pleadings, thus they do not lead to a line of inquiry and are therefore irrelevant to the appeals of both the Company and Mr. Fluevog. Secondly, IC 75-23 deals specifically with the Agency's policy with respect to religious and secular schools and does not relate to the Minister's policy with respect to donations to a Registered Canadian Amateur Athletic Association. There was no factual basis established by the Appellants on discovery to lead to questions about this policy. Finally, how the Minister of National Revenue assesses other taxpayers is not a relevant issue in a tax appeal, and therefore has no relevance in a discovery on a tax appeal.
>
> (Motion Record, Tab B, page 3)

[12] At the commencement of the hearing the Respondent provided a written response to question 3(a) which was summarized by Appellant counsel as follows:

> "First, the respondent says that IT-110R3 is the relevant document, not IC 75-23. Second, the answer to the question posed is no."
>
> which means that they do consider the swim training to be consideration for the purposes of "gift".
>
> "And further, the benefit received from the payment made to SwimCanada exceeded nominal consideration with reference to IT-110R3."
>
> (Transcript page 23)

So I am now left with questions 3(b) to (i) which are in issue.

Appellant's Position:

[13] The Notice of Motion contained the following:

> 2. The Respondent's theory of the case is that John Fluevog Boots & Shoes Ltd.'s payments to Swim Canada were not gifts because it received consideration for those payments, namely, swim training for the children of John Fluevog. It will be the Appellant's contention that the donor received no or nominal consideration when it made those payments to Swim Canada therefore the payments were gifts and because Swim Canada was an RCAAA (which entitled it to issue charitable tax receipts) the company was entitled to claim the charitable tax credits in question.
>
> 3. The Minister of National Revenue's published policies on the meaning of gift are set out in IT 110R3 (in particular paragraphs 3 through 15) and IC 75-23 (in

> particular paragraphs 3 and 4). The policies set out in IT 110R3 apply to taxpayers claiming charitable tax credits for gifts made to RCAAA's or other registered charities such as private schools under ITA sections 110.1 and 118.1. Of interest to these appeals is when the CRA considers whether consideration flowing back to the donor constitutes "nominal consideration". The policies set out in IC 75-23 deal with whether tuition payments made to private schools (which may be registered charities) constitute charitable gifts but those policies do not purport to apply outside the legislative framework set out in ITA sections 110.1 and 118.1. As such the interpretations regarding the meaning of gift and consideration (and in particular whether consideration is "nominal") set out in IC 75-23 are relevant to this case.

Respondent's Position:

[14] In the submissions, the Respondent argued that these questions were not given responses because they were not relevant to the issue which will be before the Court. Since the information circulars and bulletins in issue deal with policy concerning religious and secular schools and not donations to RCAAA's in the context of swimming, it is the equivalent of comparing apples and oranges. (Transcript pages 80 and 81). The Respondent submits that it is also an attempt to examine taxpayers other than the Appellants. In addition, there is nothing to be gained in providing those responses or producing the documents because they would not be relevant and therefore will neither assist the Appellants' appeals nor disadvantage the Respondent's case. At pages 90 and 91 of the Transcript the Respondent stated:

> …The appellants are seeking to use information bulletins and circulars to characterize the legislation and they're attempting to take these two separate policies and fuse them together to create some type of administrative ambiguity when itself, the law which we're dealing with, is clear. This is contrary to the purpose of the court giving consideration to interpretation of bulletins or circulars, and in considering that, if we're looking at the actual bulletins and circulars not being of assistance to the court, because there is no ambiguity with the Section, what would flow from that, in my submission, would be that the notes, memorandum or other documents again would not be of assistance to the court in here, because where there is no ambiguity, we shouldn't create one to try to undo it.

[15] Finally the Respondent contends that the pleadings in these appeals contain no facts referencing religious training or secular training and therefore seeking the Minister's opinion concerning "consideration" and "gift" in respect to these types of training is irrelevant to pleadings that involve swim training and donations to RCAAA's.

[16] The *Tax Court of Canada Rules (General Procedure)* that governs the scope of examinations for discovery states:

> 95.(1) A person examined for discovery shall answer, to the best of that person's knowledge, information and belief, any proper question relevant to any matter in issue in the proceeding or to any matter made discoverable by subsection (3) and no question may be objected to on the ground that
>
> (*a*) the information sought is evidence or hearsay,
>
> (*b*) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness, or
>
> (*c*) the question constitutes cross-examination on the affidavit of documents of the party being examined.

[17] The Rule that governs pre-hearing document disclosure states:

> *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 an order directing that each party shall file and serve on each other party a list of all the documents that are or have been in that party's possession, control or power relevant to any matter in question between or among them in the appeal.

General Principles of Discovery:

[18] Generally on a motion such as this, I would intervene to prevent counsel from pursuing questions only if they were: (1) clearly abusive; (2) clearly a delaying tactic; or (3) clearly irrelevant. There is no contention in this Motion that these questions are abusive or delay tactics. Although relevancy is established by the pleadings, there is the widest possible latitude given counsel in conducting an examination for discovery since one of the purposes of discovery is inquire of all matters that may have some bearing on the issues at trial. In *Kossow v. The Queen*, 2008 DTC 4408 (at paragraph 50), V.A. Miller J. summed it up nicely stating that: "Relevancy on discovery must be broadly and liberally construed and wide latitude should be given". As I stated in *General Motors of Canada Ltd. v. The Queen*, 2006 TCC 184:

> The scope of these objectives has resulted in the tendency by Courts "not to circumscribe the avenues of discovery but to widen them" (*Henderson v. Mercantile Trust Co*. (1922), 52 O.L.R. 198. in *Violette v. Wandlyn Inns Ltd.*).

> However it is also clear that discoveries should never become general fishing expeditions.

In *Harris v. The Queen*, 2001 DTC 5322, the Court stated that:

> The term "fishing expedition" has been generally used to describe an indiscriminate request for production, in the hope of uncovering helpful information.
>
> (Paragraph 45)

This will not be permitted where counsel is simply pursuing a question in the hope of it leading to a train of inquiry.

[19] It must be remembered that in deciding the issue of relevancy of these questions I am doing so without the benefit of all of the evidence which the trial Judge will have before him/her. As the motions judge, I have heard only several hours of submissions from counsel for each party relating to the questions in issue. Consequently, I believe that questions will be relevant if they are reasonable and can be said to relate to the issues. In *Baxter*, Bowman, A.C.J. stated at paragraph 13(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.

Nor should a motions judge:

> …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; (paragraph 13(c) of *Baxter)*.

[20] The comments of Hugesson, J. in *Montana Band v. Canada (T.D.)*, [2000] 1 F.C. 267, at paragraph 5, are appropriate and should be kept in mind on a Motion such as this:

> … **It is sound policy** for the Court to adopt a liberal approach to the scope of questioning on discovery since any error on the side of allowing questions may always be corrected by the trial judge who retains the ultimate mastery over all matters relating to admissibility of evidence; on the other hand any error which unduly restricts the scope of discovery may lead to serious problems or even injustice at trial.

(emphasis added)

Therefore counsel should not be prevented from asking questions that "… may, standing alone, seem irrelevant" (paragraph 12 of *Baxter*). Questions, however, would not be proper if they are inquiring into the "mental process of the Minister or his officials in raising the assessments" (paragraph 60(10) of *Kossow*).

[21] In summary, Christie, A.C.J. (as he was then) in *Shell Canada Limited v. The Queen*, 97 DTC 247, at page 249, had this to say:

> In *569437 Ontario Inc. v. The Queen*, 94 DTC 1922 (T.C.C.) this is said at page 1923:
>
> Subsection 95(1) of the *Tax Court of Canada Rule (General Procedure)* ("the General Rules") requires that 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 proceedings. Reference is also made to *Sydney Steel Corp. v. Ship Omisalj et al*., [1992] 52 F.T.R. 144, wherein Mr. Justice MacKay of the Federal Court-Trial Division said at page 147:
>
> > Counsel for the parties are essentially agreed that the standard for propriety of a question asked in discovery is less strict than the test for admissibility of evidence at trial and the appropriate standard is whether the information solicited by a question may be relevant to the matters which at the discovery stage are in issue on the basis of pleadings filed by the parties. As noted by the defendants the test is as set out by Norris, D.J.A., in *McKeen & Wilson Ltd. v. Gulf of Georgia Towing Co. Ltd. et al.*, [1965] 2 Ex. C.R. 480, at p. 482:
> >
> > > ... the questions objected to may raise matters which are relevant to issues raised on the pleadings. This is all that the defendants are required to show. …
>
> […]
>
> … First, there is a broader standard of relevance regarding questions asked at the discovery stage of proceedings than at trial. Second, questions asked on examination for discovery may be proper bearing in mind that issues of admissibility and weight to be assigned to evidence at trial are for the trial judge to determine.
>
> See also Holmested & Watson, *Ontario Civil Procedure*, under the heading "SCOPE OF EXAMINATION: GENERAL, Rule 31.06(1)" at 31-48:
>
> > What is relevant to the matters in issue, as defined by the pleadings, is extremely broad. The examining party is entitled to discover for the purpose of supporting her own case and to put that case to the opponent to obtain admissions and to limit the issues. She is entitled to interrogate to destroy the

> adversary's case or to find out the case she has to meet and the facts (and now the evidence) that are relied upon by the adversary in support of his case.

[22] I will now deal with questions 3(b) to (h).

[23] 3(b) If not, what is the difference (in terms of consideration) between the religious training referred to in IC 75-23 and the swimming training that is the subject matter of the present case?

This question is clearly relevant and must be answered in light of the response provided to 3(a). This question follows as a corollary to 3(a). I do not agree with the Respondent that it is comparing apples and oranges. If religious training is not "consideration" for the purpose of a gift then the Appellant is entitled to ask how this differs from swim training for the purposes of the meaning of consideration pursuant to the definition of gift.

[24] 3(c) What is the difference, in terms of "consideration", between the (secular) academic training (referred to in paragraph 4 of IC 75-23) and the religious training?

Same response as I gave in 3(b). Consideration as it relates to and determines "gift" as it is used in this provision is central to the issues in these appeals. Both 3(b) and 3(c) meet the general principles of relevancy which I have previously outlined.

[25] 3(d) Does the Respondent consider secular academic training to have value in the marketplace whereas religious training does not (or at least has only "nominal" consideration)?

This is not an appropriate question because I do not see the relevancy of establishing whether the value is in the marketplace or with the taxpayer. More importantly this question has at least the appearance of delving into the mental processes of the Minister in raising the assessment.

[26] 3(e) No question.

[27] 3(f) If so, why or why not?

Because this question is tied to 3(d) the Appellant will not be permitted to ask 3(f).

[28] 3(g) Paragraph 10 of IT-110R3 describes the policy on religious training set out in IC 75-23 as an "exception to the general rule" regarding the meaning of "gift"

as described in paragraph 3 of IT-110R3. Why does the Respondent consider the policy on religious training to be an exception to the general rule?

This question is not clear cut and I considered rejecting it on the basis that it was bordering on a fishing expedition. However, I am going to permit this question to be asked of the Respondent because it falls within the wide latitude afforded to questions that may touch on the issues.

[29] 3(h) If the policy (that is, where the donor receives no consideration or less than fair market value consideration for the donation) is not an exception to the general rule, does the Respondent apply that policy only to religious private schools or to all taxpayers?

This question cannot be asked because underlying the question is an attempt to get at the assessing position of other taxpayers, which is clearly not permitted in discoveries.

Discovery Principles Applicable to CRA Materials:

[30] Similar to the principles governing the relevancy of questions asked, the relevancy respecting a request for documents is likewise governed by the pleadings. Rip J. (as he was then) in *Owen Holdings Limited*, [1997] 3 C.T.C. 2286, at paragraph 29, relied on *Compagnie Financière du Pacifique v. Peruvian Guano Co.*, (1882), 11 Q.B.D. 55 (C.A.), to state the test for documentary relevance 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. (emphasis added)

[31] The Federal Court of Appeal in *Owen Holdings Limited v. The Queen*, 97 DTC 5401, upheld J. Rip's decision in part but concluded that certain documents, such as advance rulings, are not required to be produced because they are too remote to be relevant to the appeals of other taxpayers. The majority of the Court drew a distinction between documents, such as advance rulings or notes and memoranda pertaining to the enactment of the legislation, which would not be relevant and other documents, such as technical interpretations, which would be relevant because they focus on specific problems of interpretation respecting a provision of the *Act*. At page 5404 of that decision, the Federal Court states:

> … It is certainly not as binding precedents that the appellant may use any of these documents. It is well established that they have no binding legal effect, as this Court had occasion to repeat recently in *Minister of National Revenue v. Ford Motor Company of Canada, Limited.* What the appellant may do with these documents is establish a certain inconsistency in the Minister's interpretation and application of the provision. Perhaps this can be accomplished using the technical interpretations which are relatively simple and to the point; by comparison, however, it appears to me that this could be almost impossible to do using advance rulings, given the difficulties in establishing similarities between different and complex factual situations.

This clearly indicates the purpose for which discovery of the Minister's published technical interpretations will be permitted and that is to establish inconsistencies in the Minister's interpretation as set out in those published policies and how they may have been applied to the provision as it relates to the facts of a particular appeal. I believe that information circulars and interpretation bulletins which are published and held out to the general public as representative of the Minister's general policy respecting a provision of the *Act*, would similarly fall under this category and therefore be discoverable by counsel to establish inconsistencies as referred to by the Federal Court of Appeal in *Owen Holdings*.

[32] Similarly, Christie J. in *Shell Canada* states that a question is proper if it asks about administrative or ministerial practice, policy or interpretation because employees of the Minister are expected to adhere to those without specific direction. Further, technical interpretations and other similar documents are published by the Minister with the intention of assisting taxpayers generally and thus would be relevant in an inquiry as they represent a broad statement of policy. At page 257 of this decision, it states:

> To my mind the phrase "administrative practice", in the context referred to and in relation to the proceedings at hand, must be taken to mean a practice promulgated by someone at National Revenue authorized to do so and which employees thereof are generally expected to follow and apply in the administration and enforcement of that portion or portions of the Act with which the practice is concerned. It does not include *ad hoc* decisions pertaining to particular cases. …

[33] The Supreme Court of Canada in *Harel v. Deputy Minister of Revenue of the Province of Quebec*, [1978] 1 S.C.R. 851, at page 859, which was quoted at length in *Shell Canada*, stated the following:

> Once again, I am not saying that the administrative interpretation could contradict a clear legislative text; but in a situation such as I have just outlined, this interpretation has real weight and, in case of doubt about the meaning of the legislation, becomes

> an important factor. In order not to unduly lengthen these reasons, I will refer only to the following authorities: *The Commissioners for special purposes of the Income Tax v. Pemsel*, [1891] A.C. 531, in particular at p. 591; *Protestant Old Ladies' Home v. Provincial Treasurer of Prince Edward Island*, [1941] 2 D.L.R. 534, in particular at p. 540; Kernochan - *Statutory Interpretation: An Outline of Method* (1976), 3 Dal. L.J. 333, in particular at p. 359.

[34] I will now address question 3(i).

[35] 3(i) Please produce any notes, memoranda or other documents of any kind whatsoever relating to the policies regarding consideration, benefits or expectations of return set out in IC 75-23 or IT-110R3.

The manner in which the Appellant stated this question is entirely too broad. The phrase, “documents of any kind whatsoever” contained in the question, has far reaching implications if I were to simply permit the question. I believe the caselaw is clear that:

1. relevancy in production of documents is established by the pleadings;

2. a party seeking production of a document must demonstrate that the document may advance its own appeal or damage its opponents case;

3. documents too remotely connected, such as advance rulings and notes, memoranda or other inter-office communication pertaining to the enactment of the legislation, will not be relevant;

4. technical interpretations focusing on specific problems of interpretation respecting a provision in the *Act* will be relevant;

5. in addition to technical interpretations I believe information circulars and interpretation bulletins fall within the classification of documents that may be relevant because they could assist the Court in dealing with problems of interpretation respecting a provision; and

6. the purpose of discovery of such documents is to establish inconsistencies in respect to how the Minister may have applied the provision in the past contrary to the Minister’s present application.

There is a great deal of caselaw concerning the meaning of “gift”. If information circulars or interpretation bulletins can assist with resolving any ambiguity in the

provision, they may be given weight. They may well be relevant because they are interpreting the same provision which is applicable to RCAAA's. Therefore, in response to this question, the Respondent shall produce all relevant technical interpretations, information circulars and interpretation bulletins but will be exempt from producing notes, memoranda or inter-office communications leading to the publication of these policies. The Appellant will also be permitted to ask further questions in respect to such documents in attempting to establish inconsistencies in application.

[36] Finally, in his Reply submissions Appellant counsel voiced the following concern:

> … We don't want to be confronted with the situation where the officer of the Crown simply says, "Well, here's what I think." We want that officer to consult, because this particular officer may not have any idea how those policies arose and what the particulars of those policies are, before answering those questions. If, in the course of answering these questions, they have occasion to review notes, memoranda, that sort of thing, we want to have a look at those to ensure that what they are saying is accurate.

(Transcript, pages 126-127)

[37] Rule 95(2) states:

> Prior to the examination for discovery, the person to be examined shall make all reasonable inquiries regarding the matters in issue from all of the party's officers, servants, agents and employees, past or present, either within or outside Canada and, if necessary, the person being examined for discovery may be required to become better informed and for that purpose the examination may be adjourned.

[38] In discussing Rule 95(2), Rip J. in *Owen Holdings*, at paragraphs 7 and 8, made the following comment:

> [7] Under Rule 95(2) every person to be examined for discovery has a duty to inform himself or herself of the matters in issue in the litigation. In so informing oneself, the person is obliged to make all reasonable inquiries of the officers, employees and agents of the party on behalf of whom that person is being discovered as to the personal knowledge acquired by them in their capacities as officers, employees or agents: see, for example, *Indalex Limited v. The Queen*, 84 DTC 6018 (F.C.T.D.).
>
> [8] If, during the examination for discovery, the opposing party believes the person being examined is not well informed, Rule 95(2) permits the examination

> to be adjourned so that the person may become better informed. If there is a dispute between the parties as to whether the person being examined is or is not well informed, the examining party may apply to the Court for an order compelling the person being examined to become better informed. The Rules do not contemplate the Court entertaining such an application before the discovery has even started. One must assume the parties are acting in good faith and that the person to be examined will make the reasonable inquiries required by Rule 95(2) before he or she attends at the examination. In *Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd.* (1973), 14 C.P.R. (2d) 264, Heald J., at page 266, stated that:
>
> > It seems to me that in the circumstances of these cases, Joyce Reid is clearly a proper person.
> >
> > The plaintiffs will not be prejudiced in the event it transpires on the resumption of the examination, that she does not have full knowledge of the relevant facts. She is being examined, not as an individual, but as an officer of these corporations and has a duty to inform herself. If she does not do so, the practice is clear that the examination should be further adjourned so that she may ascertain the necessary facts and give the answers of the resumption of the examination.

It is clear from this quote and from my reading of this Rule that the Appellants' concerns are without merit and that, if the Minister's officer cannot competently respond to the questions, the remedy of adjournment is available to the Appellants to provide time to the officer to gain the proper knowledge and background in order to provide responsive answers.

[39] In conclusion, I remind both counsel that these appeals have been on the back burner for a very long time and as V.A. Miller J. stated in *Kossow* at paragraph 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."

[40] Since success is divided, I am making no order as to costs.

Signed at Ottawa, Canada, this 25th day of June 2009.

"Diane Campbell"

Campbell J.

CITATION:	2009 TCC 345
COURT FILES NO.:	2004-3776(IT)G AND 2004-3778(IT)G
STYLE OF CAUSE:	John Fluevog Boots & Shoes Ltd. and John Fluevog and Her Majesty the Queen
PLACE OF HEARING:	Vancouver, British Columbia
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REASONS FOR ORDER BY:	The Honourable Justice Diane Campbell
DATE OF JUDGMENT:	June 25, 2009

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