Docket: 2019-3753(IT)G

BETWEEN:

SÉBASTIEN GAUDREAU,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Motion heard on March 9, 2023, at Montréal, Quebec.

Before: The Honourable Justice Gabrielle St-Hilaire

Appearances:

Counsel for the Appellant:	Dominic C. Belley Jonathan Lafrance
Counsel for the Respondent:	Marie-France Camiré Dany Leduc

ORDER

Upon motion by the Respondent seeking, under sections 92 *et seq* of the *Tax Court of Canada Rules (General Procedure)*, an order requiring the Appellant to:

(a) provide a copy of the memorandum prepared by Raymond Chabot Grant Thornton, the existence of which was disclosed in the answer to undertaking 5, given at his examination for discovery;

(b) provide a copy of all correspondence in his possession in connection with that memorandum; and

(c) pay the costs of this motion;

Upon reading the affidavits and the written representations and upon hearing the parties' oral submissions;

In accordance with the attached Reasons for Order, the motion is granted and the Court orders as follows:

(a) the Appellant is to provide a copy of the memorandum prepared by Raymond Chabot Grant Thornton, the existence of which was disclosed in the answer to undertaking 5, given at his examination for discovery;

(b) the Appellant is to provide a copy of all correspondence in his possession in connection with that memorandum; and

(c) the costs will be in the cause.

Signed at Ottawa, Canada, this 2nd day of August 2023.

"Gabrielle St-Hilaire"

St-Hilaire J.

Translation certified true
on this 15th day of April 2025.

Melissa Paquette, Senior Jurilinguist

Citation: 2023 TCC 115
Date: 20230802
Docket: 2019-3753(IT)G

BETWEEN:

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and

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Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR ORDER

St-Hilaire J.

I. Introduction

[1] The appeal of Sébastien Gaudreau (Appellant) relates to the tax consequences of a series of transactions by which individuals, including the Appellant, disposed of their interest in the insurance company Rochefort, Perron, Billette et Associés Inc (RPB) in favour of Univesta Insurance and Financial Services Inc (Univesta).

[2] The parties agreed to carry out a hybrid sale, that is, a sale of assets and a sale of shares, which enabled the Appellant to claim the capital gain deduction and thus receive the fair market value, tax-free, of a portion of the insurance portfolio sold to Univesta.

[3] The main issue on the merits in this appeal is whether the Minister of National Revenue (Minister) was justified in applying subsection 84(2) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (Act) to the transactions in issue, thus including a deemed dividend rather than a taxable capital gain in the Appellant's income.

II. Respondent's motion

[4] At an examination for discovery held in June 2021, the Appellant gave the following undertaking (undertaking 5, Affidavit of Llyodie Arboite at paras 9–10, Exhibit P-3; Affidavit of the Appellant at paras 6–7):

> [TRANSLATION]
>
> i Check whether there is an explanatory document or tax-planning document involving the possibility of a hybrid or other transaction, whether it be a memorandum, an exchange of emails or letters, or any other type whatsoever, and provide it, if so (subject to the nature of the document);
>
> ii Also provide discussions between the sellers and the planners who did the tax planning, gave the figures, whether in the form of discussions, letters, emails, or any other type whatsoever.

[5] In his answer to undertaking 5, the Appellant disclosed the existence of a document in connection with the hybrid sale prepared by Raymond Chabot Grant Thornton (Memorandum) for Univesta, but opposed disclosure of the document.

[6] The parties agree that the Memorandum is not covered by solicitor-client privilege (Written Representations of the Respondent at para 11; Affidavit of Llyodie Arboite at para 12, Exhibit P-5).

[7] In his answer to the undertakings (Exhibit P-3, *supra*), the Appellant relied on the following argument in support of his objection to disclosure of the Memorandum:

> [TRANSLATION]
>
> That said, the Respondent is hereby informed that Sébastien Gaudreau (hereinafter the "taxpayer") objects to the disclosure of any tax-planning document and any reorganization work plan, whatever its nature and whatever its title, on the grounds that such documents contain no objective information that the other documents disclosed and the other answers given in connection with this matter do not already contain and that they might disclose subjective opinions that the taxpayer has no obligation to disclose. The taxpayer's position is consistent with the Federal Court of Appeal's teachings in *BP Canada Energy Company v. Canada*, 2017 FCA 61.

[8] The purpose of the Respondent's motion is to obtain, under sections 92 *et seq* of the *Tax Court of Canada Rules (General Procedure)* (Rules), an order requiring that the Appellant:

(a) provide a copy of the memorandum prepared by Raymond Chabot Grant Thornton, the existence of which was disclosed in the answer to undertaking 5, which was given at his examination for discovery;

(b) provide a copy of all correspondence in his possession in connection with that memorandum; and

(c) pay the costs of this motion.

[9] By order dated January 18, 2022, following a case management conference concerning this motion, the Court ordered that the Appellant file an affidavit and the documents to which he referred by placing a copy of the Memorandum in a sealed envelope and that it not be accessible to the Court or its staff or to the Respondent and his counsel.

[10] In his affidavit, at paragraphs 14 to 22, the Appellant described the memorandum as follows:

> [TRANSLATION]
>
> 14. The memorandum contains six pages in total.
>
> 15. Each page of the memorandum is marked "draft".
>
> 16. More than five of these pages consist of a mere reiteration of the transactions described both in audit reports found in the Appellants' Joint Book of Documents and at paragraphs 5 to 33 of the Notice of Appeal. I attach a copy of the three audit reports, in a bundle, as **Exhibit 4**.
>
> 17. Those transactions also appear in the Respondent's assumptions of fact at paragraph 29 of the Reply to the Notice of Appeal, as set out in the Court's record.
>
> 18. The transactions that appear in the memorandum are all admitted by the parties, as set out in the Court's record.
>
> 19. However, part of the memorandum contains subjective opinions about the application of the *Income Tax Act*.
>
> 20. These are legal statements or conclusions regarding the application of the law.
>
> 21. The statements and subjective opinions in the memorandum do not deal with subsection 84(2) of the *Income Tax Act*.

> 22. Nowhere in the memorandum is there any reference to subsection 84(2) of the *Income Tax Act*.

[11] In his affidavit, the Appellant states that he is neither the author nor the addressee of the Memorandum, which was prepared by accountants for the buyer, Univesta (see also the Transcript of the Hearing at page 28 [Transcript]).

III. Issues

[12] After reviewing the written and oral representations of the parties, I would state the issues that the Court has to decide as follows:

i. Can the Court review the sealed Memorandum in order to determine whether the Appellant must disclose it to the Respondent, without the Respondent also being able to consult it for the purposes of this motion? and

ii. Has the Respondent established the requisite relevance for the purposes of the examination for discovery, thereby justifying an order requiring the Appellant to provide him with a copy of the Memorandum?

IV. Positions of the parties

Issue concerning the sealed Memorandum

[13] Regarding the first issue, the Respondent objects to the Court examining the Memorandum without allowing him to have access to it also. He submits that the result would be a breach of the principle of *audi alteram partem* and a violation of his rights, namely the right to know the case against him and to respond to it.

[14] The Appellant submits that the Respondent's position would essentially amount to disclosing the Memorandum in order for the Court to assess its relevance and determine whether it must be disclosed, thereby rendering his objection moot. According to the Appellant, the approach proposed, namely that the Court alone examine the Memorandum, has been repeatedly adopted by the courts.

Issue concerning the disclosure of the Memorandum

[15] Regarding the second issue, the Respondent submits that the Memorandum must be disclosed to him. He submits that the Memorandum is relevant since it was prepared in connection with the sale of the business at the heart of this case and could help in identifying the underlying reasons for each of the transactions in issue. In the

Respondent's opinion, the notion of relevance must be broadly and liberally construed.

[16] The Appellant submits that the Respondent is not entitled to see the Memorandum because it is not relevant to the case. According to the Appellant, the issue on the merits of this appeal is limited to whether subsection 84(2) of the Act applies to the disposition of certain shares, and since the Memorandum makes no mention of subsection 84(2) and does not discuss the other provisions referred to at paragraph 32 of the Reply to the Notice of Appeal, it is not relevant. Relying heavily on *BP Canada Energy Company v Canada*, 2017 FCA 61 [*BP Energy*], the Appellant submits that an examination for discovery cannot be used to go on a fishing expedition. He also asserts that it is imperative that accountants be able to inform taxpayers of the tax risks they run, without the risk of disclosure to tax authorities deterring the preparation and communication of their analysis.

V. Analysis

Issue concerning the sealed Memorandum

[17] As noted above, the Respondent submits that the Court cannot review the Memorandum unless he too is able to consult it, as this would result in a violation of the principles of natural justice, namely, a breach of the *audi alteram partem* rule. The Respondent submits that [TRANSLATION] "this rule requires that a party have an opportunity to know the opposing party's case so that they may address evidence prejudicial to their case and bring evidence to prove their position" (Written Representations of the Respondent at para 26 and note 30, citing *Ruby v Canada (Solicitor General)*, 2002 SCC 75 at para 40 and *SITBA v Consolidated Bathurst Packaging Ltd*, [1990] 1 SCR 282).

[18] In support of his position, the Respondent relies on *Weinberg c Ernst & Young*, 2010 QCCA 1727 [*Weinberg*]. In that case, the Quebec Court of Appeal refused to review a settlement agreement without one of the parties having knowledge of it in order to determine its relevance, because this would have meant violating the *audi alteram partem* rule. In the opinion of Justice Forget, writing for the Court, the appeal might have been allowed without the party in question having an opportunity to present their allegations since they had not reviewed the text of the agreement (*Weinberg* at para 33). The Respondent acknowledges that the courts have held that there are certain exceptions to the *audi alteram partem* rule, such as in cases where solicitor-client privilege or informer privilege is asserted, but submits that none of these exceptions is applicable in this case (Transcript at page 20).

[19] The Appellant submits that sealing documents in the context of a debate concerning objections to disclosure of the documents is the rule and not the exception, citing numerous examples in support (see Written Representations of the Appellant at para 38). As I mentioned earlier, the Appellant submits that the Respondent's position—that he be allowed to consult the Memorandum for the purposes of the motion—would render his objection moot.

[20] I note that in a number of decisions, the Court has examined sealed documents without allowing the party seeking their disclosure to consult them for the purposes of the motion. This was the case in *Superior Plus Corp v R*, 2015 TCC 132 [*Superior Plus*], *Alain E Roch Ès Qualité de Fiduciaire de Jonction Trust et Chaudière Trust c MRN*, 2018 CF 340, and *Total Energy Services Inc v R*, 2019 TCC 112. It should be noted that in all these cases, the Court did not address whether the parties had agreed to that approach. This suggests that there was no debate on that issue, because the parties had agreed that the Court examine the documents without allowing the party seeking their disclosure to review them also. The decision in *Canada v Atlas Tube Canada ULC*, 2018 FC 1086 [*Atlas Tube*] differs from the decisions referred to above in that the Federal Court decided not to review the document that was the subject of the motion since the record submitted to the Court contained sufficient information about the document for the motion to be decided fairly.

[21] In this case, the Appellant proposes an approach under which the Court would examine the document in order to decide this motion, that is, to determine whether the Memorandum must be disclosed to the Respondent. The Respondent rejects that approach. I note that the Respondent was not able to cite any case law from this Court or the Federal Court of Appeal in support of his position that the Court cannot review the Memorandum unless he is also able to consult it, nor did he cite any decisions relating to debate on the issue of whether the Court can review a document that a party refuses to provide without the other party having knowledge of it.

[22] In *Weinberg*, *supra*, at paragraph 67, Justice Forget stated the following:

> [TRANSLATION]
>
> Moreover, I am aware of the harm the appellants might suffer if, after an adversarial debate, the judge concluded that the paragraphs in issue do not have a semblance of relevance. I am well aware that counsel for the respondent and the intervener would be unable to erase from their memories the information thus obtained, to which they were not entitled. The situation is not entirely different from when a judge reviews evidence under reserve before allowing the objection, or from when

> jurors are asked to disregard evidence because it was not admissible. The administration of justice is often a matter of balancing competing interests.

[23] Like Justice Forget, I am aware of the harm that the Appellant might suffer if, after a debate, I conclude that the Memorandum is not relevant. The Respondent's representatives would be unable to erase the information in the Memorandum from their memories. That being said, unlike Justice Forget, and with respect, I do not agree that this is similar to when a judge examines evidence and then decides that he or she will not consider it because it is not admissible. The judge is not a party to the case and can more easily ignore evidence found to be inadmissible after reviewing it. As well, as the case management judge deciding this motion, I will not be presiding at the hearing of the appeal, unless the parties consent to it (Rules, subsection 126(6)). As a result, the trial judge would not be faced with the obligation to disregard the Memorandum if it were found that it is not relevant and that the Appellant does not have to provide it to the Respondent.

[24] In this case, the parties agree that a possible approach is that I could decide the issue of whether the Appellant must disclose the Memorandum to the Respondent without examining it (Transcript at pages 14, 29 and 49–50). Given that both parties agree to that approach, it is the approach I am going to adopt. In my opinion, the record submitted to the Court in connection with this motion contains sufficient evidence as to the nature of the information in the Memorandum for me to fairly decide whether it must be disclosed without it being necessary for me to review it (see *Atlas Tube* at paras 11–13). Accordingly, the envelope containing the Memorandum will remain sealed. I would add that as regards the nature of the information in the Memorandum, I refer to paragraphs 14 to 22 of the Appellant's affidavit and to the additional information provided by the Appellant on cross-examination at the hearing. It should be noted that the Appellant confirmed that the Memorandum is dated April 3, 2015, and was signed by Luc Lacombe, an accountant at Raymond Chabot Grant Thornton (see paras 10 and 11 above and the Transcript at pages 93–98).

Issue concerning the disclosure of the Memorandum

A. General principles applicable to examinations for discovery

[25] Subsection 95(1) of the Rules provides that a person examined shall answer *any proper question relevant to any matter in issue in the proceeding*, and reads as follows:

> 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.
>
> [Emphasis added.]

[26] There is abundant case law on the general principles applicable to examinations for discovery. As acknowledged by the courts, those principles do not lay down a "magic formula", and it is important to take into account the factual context in which the Court must apply the principles (see, for example, *Canada v Lehigh Cement Corporation*, 2011 FCA 120 at para 24 [*Lehigh*]). In this case, this Court must consider the fact that the debate regarding the correctness of the assessment relates to the application of subsection 84(2) of the Act, which will be examined later.

[27] In *Lehigh*, *supra*, at paragraph 30, the Federal Court of Appeal stated the following concerning the general purpose of examinations for discovery:

> [30] First, I believe that the general purpose of oral discovery has not changed. Justice Hugessen described that purpose in the following terms in *Montana Band v. Canada*, [2000] 1 F.C. 267 (T.D.) at paragraph 5:
>
> > The general purpose of examination for discovery is to render the trial process fairer and more efficient by allowing each party to inform itself fully prior to trial of the precise nature of all other parties' positions so as to define fully the issues between them. It is in the interest of justice that each party should be as well informed as possible about the positions of the other parties and should not be put at a disadvantage by being taken by surprise at trial. 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.

[No emphasis in original [but emphasis in *Lehigh*].]

[28] In the oft-cited decision in *Baxter v R*, 2004 TCC 636, Associate Chief Justice Bowman, as he then was, summarized the applicable principles as follows at paragraph 13:

> (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.

[29] In *MP Western Properties Inc*, 2017 TCC 82 [*MP Western*], aff'd 2019 FCA 19 [*MP Western FCA*], Justice Miller also summarized the general principles that apply to examinations for discovery, including the principles applicable when the examination takes place as part of an appeal relating to the general anti-avoidance rule. For the purposes of this appeal, it is useful to quote her remarks at paragraphs 19 to 22:

> [19] There is considerable jurisprudence with respect to the principles applicable to an examination for discovery: *Kossow v R*, 2008 TCC 422 at paragraph 60; *HSBC Bank Canada v R*, 2010 TCC 228 at paragraph 13; *Teelucksingh v R*, 2010 TCC 94 at paragraph 15.
>
> [20] While these principles serve as guidelines, the analysis does not simply end with the application of a general principle. There is "no magic formula". Whether, as here, a particular document ought to be produced at discovery is largely a fact-based inquiry that must be assessed on a case-by-case basis: *R v Lehigh Cement Limited*, 2011 FCA 120 at paragraphs 24 and 25.
>
> [21] The Appellants' request for disclosure is supported by the following general principles:

a) Relevancy on discovery ought to be "broadly and liberally construed and wide latitude should be given": *Baxter v Canada*, 2004 TCC 636 at paragraph 13.

b) Relevancy at discovery is a lower threshold than that at trial: *4145356 Canada Ltd v R*, 2010 TCC 613. In fact, Rule 90 of the *Rules* expressly provides that the production of a document at discovery is not an admission of its relevance or admissibility.

c) All documents relied on or reviewed by the Minister in making his assessment must be disclosed to the taxpayer: *Amp of Canada v R*, 1987 CanLII 9569 (FC), [1987] 1 CTC 256 (FCTD).

d) Documents that lead to an assessment are relevant: *HSBC v The Queen, (supra)* at paragraph 15.

e) Documents in CRA files on a taxpayer are *prima facie* relevant, and a request for those documents is itself not a broad or vague request: *HSBC (supra)* at paragraph 15.

f) The examining party is entitled to have any information, and production of any documents, that may fairly lead to a train of inquiry that may directly or indirectly advance his case, or damage that of the opposing party: *Lloyd M. Teelucksingh v The Queen*, 2010 TCC 94 at paragraph 15.

[22] Whereas, the Respondent's refusal to disclose the documents is supported by the following general principles:

a) An indiscriminate request for the production of documents in the hope of uncovering helpful information or the hope of it leading to a train of inquiry is not permitted: *Harris v The Queen*, 2001 DTC 5322 (FCA) at paragraph 45; *Fluevog (supra)* at paragraph 18.

b) Earlier drafts of a final position paper do not have to be disclosed. The mental process of the Minister or his officials in raising the assessments is not relevant: *Rezek (supra)* at paragraph 16.

c) A party is entitled to know the position of the other party with respect to an issue of law, but it is not entitled to have access to either the legal research or the reasoning by which that position is arrived at: *Teelucksingh (supra)* at paragraph 15.

d) Even where relevance is established, the Court has a residual discretion to disallow the production of documents. This principle was described in *Lehigh (supra)* at paragraph 35 as follows:

> The exercise of this discretion requires a weighing of the potential value of the answer against the risk that a party is abusing the discovery process. See *Bristol-Myers Squibb Co. v. Apotex Inc.* at paragraph 34. The Court might disallow a relevant question where responding to it would place undue hardship on the answering party, where there are other means of obtaining the information sought, or where "the question forms part of a 'fishing expedition' of vague and far-reaching scope": *Merck & Co. v. Apotex Inc.*, 2003 FCA 438, 312 N.R. 273 at paragraph 10; *Apotex Inc. v. Wellcome Foundation Ltd.*, 2008 FCA 131, 166 A.C.W.S. (3d) 850 at paragraph 3.

[30] In affirming the decision of Justice Miller in *MP Western*, *supra*, the Federal Court of Appeal expressly held that paragraphs 21 and 22, quoted above, were accurate (*MP Western FCA*, *supra* at para 25).

[31] I reiterate the recognized principles holding that relevance at discovery must be broadly and liberally construed and that at that stage, relevance is a lower threshold than at trial.

[32] In *Smithkline Beecham Animal Health Inc v R*, 2002 FCA 229 at paragraph 24, the Federal Court of Appeal quoted, with approval, Lord Justice Brett in *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Company* (1882), 11 QBD 55 (CA), where he held that a document relates to the matters in question when it is one "which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary" or "if it is a document which may fairly lead him to a train of inquiry". This "train of inquiry" test was reiterated by the Federal Court of Appeal in *Lehigh*, *supra* at paragraph 34 and in *MP Western*, *supra* at paragraph 21.

[33] On the other hand, I note that the Federal Court of Appeal has also held that an indiscriminate request for the production of documents in the hope of uncovering helpful information is not allowed any more than a fishing expedition, nor is a party entitled to have access to either the legal research or the reasoning by which the other party arrived at their position (*Lehigh*, *supra* at para 35; *MP Western*, *supra* at para 22).

B. General principles applicable to subsection 84(2) of the Act

[34] As noted above, it is important to take into account the factual context in which the Court must consider the general principles applicable to examinations for discovery. In the circumstances, and given that the Court is not asked to decide the

case on the merits, I will limit myself to painting a general picture of the conditions in which subsection 84(2) of the Act apply.

[35] The general purpose of subsection 84(2), which has been described by the courts as one of the oldest anti-avoidance measures, is to tax as a dividend any distribution of the property of a corporation resident in Canada to or for the benefit of its shareholders, on the winding-up, discontinuance or reorganization of its business, except where the distribution represents a refund of paid-up capital (see *Foix v Canada*, 2023 FCA 38 at para 53 [*Foix FCA*]; see also *Foix v R*, 2021 TCC 52 at para 52 [*Foix TCC*], citing *Merritt v MNR*, 1941 CR 175, aff'd [1942] SCR 269).

[36] Subsection 84(2) reads as follows:

84(2) Distribution on winding-up, etc.	**84(2) Distribution lors de liquidation, etc.**
(2) Where funds or property of a corporation resident in Canada have at any time after March 31, 1977 been distributed or otherwise appropriated in any manner whatever to or for the benefit of the shareholders of any class of shares in its capital stock, on the winding-up, discontinuance or reorganization of its business, the corporation shall be deemed to have paid at that time a dividend on the shares of that class equal to the amount, if any, by which	(2) Lorsque des fonds ou des biens d'une société résidant au Canada ont, à un moment donné après le 31 mars 1977, été distribués ou autrement attribués, de quelque façon que ce soit, aux actionnaires ou au profit des actionnaires de tout catégorie d'actions de son capital-actions, lors de la liquidation, de la cessation de l'exploitation ou de la réorganisation de son entreprise, la société est réputée avoir versé au moment donné un dividende sur les actions de cette catégorie, égal à l'excédent éventuel du montant ou de la valeur visés à l'alinéa a) sur le montant visé à l'alinéa b):
(a) the amount or value of the funds or property distributed or appropriated, as the case may be,	a) le montant ou la valeur des fonds ou des biens distribués ou attribués, selon le cas;
exceeds	
(b) the amount, if any, by which the paid-up capital in respect of the shares of that class is reduced on the	b) le montant éventuel de la réduction, lors de la distribution ou de

distribution or appropriation, as the case may be,	l'attribution, selon le cas, du capital versé relatif aux actions de cette catégorie;
and a dividend shall be deemed to have been received at that time by each person who held any of the issued shares at that time equal to that proportion of the amount of the excess that the number of the shares of that class held by the person immediately before that time is of the number of the issued shares of that class outstanding immediately before that time.	chacune des personnes qui détenaient au moment donné une ou plusieurs des actions émises est réputée avoir reçu à ce moment un dividende égal à la fraction de l'excédent représentée par le rapport existant entre le nombre d'actions de cette catégorie qu'elle détenait immédiatement avant ce moment et le nombre d'actions émises de cette catégorie qui étaient en circulation immédiatement avant ce moment.

[37] In *Canada v MacDonald*, 2013 FCA 110 at paragraph 17 [*MacDonald*], the Federal Court of Appeal held, regarding the requirements of subsection 84(2), that the following four elements are necessary for its application:

1. a Canadian resident corporation that is
2. winding up, discontinuing or reorganizing;
3. a distribution or appropriation of the corporation's funds or property in any manner whatever;
4. to or for the benefit of its shareholders.

[38] In *Foix FCA*, *supra*, after acknowledging that there are two conflicting lines of cases regarding the interpretation of subsection 84(2), the Federal Court of Appeal rejected a strict and narrow reading in favour of the broad interpretation recognized by the line of cases that culminated in *MacDonald*, *supra*. That approach calls for an examination of the circumstances of the transactions that led to the winding-up or discontinuance of the business (*MacDonald*, *supra* at para. 24). In the opinion of the Federal Court of Appeal, an overly literal reading would defeat the anti-avoidance mission of subsection 84(2). To summarize the broad interpretation to be favoured, the Federal Court of Appeal stated the following, at paragraph 21 of *MacDonald*, *supra*:

> In my view, a textual, contextual and purposive analysis of subsection 84(2) leads the Court to look to: (i) who initiated the winding-up, discontinuance or reorganization of the business; (ii) who received the funds or property of the corporation at the end of that winding-up, discontinuance or reorganization; and (iii) the circumstances in which the purported distributions took place.
>
> [Emphasis added.]

[39] In *Foix FCA*, *supra* at paragraph 67, the Federal Court of Appeal, citing *MacDonald*, *supra* at paragraph 28, pointed to that passage, stating that "transactions leading to an alleged distribution or appropriation of funds or property are to be considered as a whole in a way that is temporally flexible". It should be noted that in both *MacDonald* and *Foix*, there had been a sale of shares involving the participation of a third-party facilitator.

[40] In *Foix TCC*, *supra*, Justice Boyle concluded that subsection 84(2) applied to a hybrid sale. After considering the intention of the parties as illustrated by the letter of interest, he concluded that the parties had acted with full knowledge of the facts (see paras 35, 60–61). In affirming the decision of Justice Boyle, the Federal Court of Appeal acknowledged the paramount importance, in analyzing the transactions in issue, of the objective of the method chosen by the parties (*Foix FCA*, *supra* at para 81).

[41] It should be noted that an application for leave to appeal to the Supreme Court of Canada has been filed in *Foix FCA*, *supra* (file number 40695).

C. Application of the principles to the Memorandum

[42] My task is to determine whether the Appellant must disclose the Memorandum to the Respondent, in light of the general principles applicable to examinations for discovery as set out above and having regard to the context of the appeal, which concerns the application of subsection 84(2) of the Act.

[43] As set out above, the Appellant objected in his answer to undertaking 5 to [TRANSLATION] "the disclosure of any tax-planning document and any reorganization work plan, whatever its nature and whatever its title, on the grounds that such documents contain no objective information that the other documents disclosed and the other answers given in connection with this matter do not already contain and that they might disclose subjective opinions that the taxpayer has no obligation to disclose" (Exhibit P-3, *supra*).

[44] In his written representations, the Appellant states that the Memorandum is not relevant to the case, stressing that it does not address, discuss or analyze subsection 84(2) of the Act. He further submits that the Respondent's request for disclosure of the Memorandum, a document of which he is neither the author nor the addressee, shows that the Respondent is seeking to establish a new basis for assessment. He submits that an examination for discovery may not be used to go on a fishing expedition.

[45] The Respondent acknowledges that the existence of the transactions is not in issue, but asserts that there is a debate regarding the circumstances surrounding the transactions (Transcript at page 125). The Respondent submits that the fact that he may already be in possession of the information in the Memorandum is not a justification for refusing to disclose it. In support of that argument, the Respondent cites section 82 of the Rules, which provides that relevance alone governs the full disclosure of documents (see also *Superior Plus*, *supra* at para 24, quoting *HSBC Canada v R*, 2010 TCC 228).

[46] For the reasons that follow, I agree with the Respondent's position that the fact that a document may contain information previously obtained does not justify refusing to disclose it at the examination for discovery stage. In *Sandia Mountain Holdings Inc v R*, 2005 TCC 65, Justice Miller took into account the remarks by the Court in *Andres Wines Ltd v TG Bright & Co*, [1978] FCJ No 903, where the Court stated:

> I do not interpret this to mean that because a CRA auditor has obtained information from the Appellants, it is now within the Respondent's "means of knowledge" and that the Respondent is precluded from asking for such information on discovery. That would place an unrealistic limitation on the Respondent to the point that little, if any, discovery of the Appellants would be available. If Ms. Kulla was able to provide information to an auditor, it should not be an onerous task to produce such information on discovery.

[47] I conclude that the fact that the Respondent may already have obtained information concerning the transactions at issue does not justify the Appellant's refusal to disclose the Memorandum on the ground that more than five of the six pages relate to those transactions. In fact, that aspect in itself supports a conclusion that the Memorandum could be relevant to the issues.

[48] The Respondent pointed out that the Memorandum, dated April 3, 2015, was prepared in response to the document entitled [TRANSLATION] "Agreement – Principal Terms and Conditions" dated February 15, 2015 (Exhibit I-1), which

relates to the sale of the business operated by RPB and which contains a tax-related clause that reads as follows:

> [TRANSLATION]
>
> The Buyer and the Sellers agree to work together in order to optimize the tax situation of the parties involved in this transaction. More specifically, the parties agree to assess the merits of a "hybrid" transaction.

[49] The Memorandum was provided to the Appellant's accountants, and although the Appellant testified that it was complicated for him to understand, he acknowledged that his accountant had explained the Memorandum to him. The Appellant stated the following (Transcript at pages 94–95):

> [TRANSLATION]
>
> SÉBASTIEN GAUDREAU: By my accountant. It was mechanics, in terms of how the transaction would be carried out. And where yes I obtained a copy, but it is – it was complicated for me to understand because it is, it's tax-related stuff that I'm not familiar with.
>
> DANY LEDUC: So your accountant had access to that memo before you?
>
> SÉBASTIEN GAUDREAU: Yes.
>
> DANY LEDUC: Okay. And you say that – essentially, what was the reason your accountant obtained it?
>
> SÉBASTIEN GAUDREAU: Well, it was because there had to – in the document – in the agreement, the two parties had to agree on a way to optimize taxes. They are – I was not at all involved in it myself.
>
> And at a certain point it ended up as that was how it was going to be.
>
> DANY LEDUC: Okay. And explain how, how you, you obtained that document?
>
> SÉBASTIEN GAUDREAU: It must have been at a meeting with our, our accountants, to tell us that:
>
> "There it is. There is what is going to be done, the way it is going to be done."
>
> DANY LEDUC: And the way it was going to be done, that is the way that was described in the planning memo?

> SÉBASTIEN GAUDREAU: Yes. It is a memo that was not addressed to us. It is a memo that – so it was not us who sent it or who were the addressees. It was, it was a draft. It was, it was, it was the way the, the, the accountants had, had informed their client, who was our buyer, of the procedure in terms of the transaction, how it had to be done.
>
> DANY LEDUC: But in that memo, there were steps that you had to complete on your end, is that not so?
>
> SÉBASTIEN GAUDREAU: Yes, there was a procedure to follow.
>
> DANY LEDUC: Okay. A procedure that the sellers had to carry out?
>
> SÉBASTIEN GAUDREAU: Listen, it is – I really do not have a good grasp of everything that was done, but it is a procedure, an accounting procedure. So I trusted the accountant. And it is – the accountants, everything seemed to be right, between the two, between our accountants and their accountants.

[50] The Respondent submits that the principles applicable to the interpretation and application of subsection 84(2) of the Act include the need to examine what initiated the winding-up and the circumstances surrounding the transactions in order to determine whether funds were distributed or otherwise appropriated "in any manner whatever". In addition, he asserts that the circumstances must be examined in order to determine whether a third-party facilitator was involved, a fact on which the parties do not agree. The Respondent submits that the Memorandum could shed light on these issues or point to an avenue of questioning that could help them in that search.

[51] The Appellant submits that the auditor reviewed the source documents (contracts, resolutions, rollover forms, etc.) and was therefore able to reconstruct the transactions that, in his mind, resulted in an assessment based on subsection 84(2) of the Act (Transcript at page 158). He asserts that the transactions that are the subject of this matter are set out in the Notice of Appeal and the Reply to the Notice of Appeal. He vigorously asserts that the Memorandum will not enlighten the Respondent [TRANSLATION] "in any way regarding the circumstances and negotiations of these transactions" and that there is nothing in the Memorandum [TRANSLATION] "that will shed light on an attempt to orchestrate extraction of surpluses or the presence of a third-party facilitator" (Transcript at pages 160–163). As well, in *Foix TCC*, *supra*, the Respondent [TRANSLATION] "was able to prove the existence of a third-party facilitator and to prove an attempt to extract" without a document like the Memorandum. That would mean that the Memorandum would be

of very limited help and minor importance in enabling the Respondent to make his case.

[52] Regarding the application of subsection 84(2), the Appellant submits that its interpretation does not require determining the intention of the parties beyond the contracts. As well, information concerning the intention of the parties would not be helpful since there is no suggestion that the intention of the parties was to conceal an actual transaction (Transcript at page 160). However, since the appeal does not involve a debate regarding the application of the general anti-avoidance rule set out at section 245, [TRANSLATION] "an attempt to explore the purpose of the transactions beyond what the instrument reveals" is not relevant (Transcript at page 187).

[53] The Appellant relies heavily on *BP Energy*, *supra*, to support his position that he is not required to reveal his soft spots, while the Respondent asserts that that decision does not apply in this case. In his submissions before the Court, the Appellant quoted the following excerpt in support of his allegations (Transcript at page 170, quoting *BP Energy*, *supra* at para 82):

> … taxpayers are entitled to file their tax return on the basis most favourable to them. This explains why auditors in conducting audits must engage in extensive poke-and-check exercises, and are essentially left to their own initiative in verifying the amounts reported by the taxpayer. To be clear, although auditors are entitled to be provided with "all reasonable assistance" in performing their audits (paragraph 231.1(1)(d) of the Act), they cannot compel taxpayers to reveal their "soft spots".

[54] It is important to note that in *BP Energy*, *supra*, the issue of the production of internal accounting documents arose in the context of the information-gathering powers under section 231.1 of the Act and not in the context of an examination for discovery. Moreover, the refusal to order disclosure of the documents was based on the fact that the audit had been completed and the assessment made, and so the subject of the request had ceased to exist. Since the Minister had clearly indicated wanting to obtain those documents for future audits, such a request for production could not have been granted (see also *MNR v BMO Nesbitt Burns Inc*, 2022 FC 157 [*BMO FC*], aff'd 2023 FCA 43 [*BMO FCA*]). On the other hand, the Court ordered disclosure of similar documents in *Atlas Tube*, *supra*, because the request for access to the document was made in the context of an active audit (see *Atlas Tube*, *supra* at para 66).

[55] I would stress that in *BP Energy*, *supra*, the Court refused to order disclosure of the documents at issue because the audit had been completed and because the Minister wanted to obtain the documents for a future audit, which does not match

the grounds on which the disclosure request was made in this case. Here, the issue is not the Minister's exercise of discretion under section 231.1 of the Act in the context of an audit; rather, it is the scope of section 95 of the Rules, which provides that a person examined for discovery shall answer ("*répond*" in the French version of section 95) any proper question relevant to any matter in issue. I conclude that *BP Energy*, *supra*, is of no help to the Appellant, since the context in which it was decided is different from the context here. I would add that the Federal Court of Appeal has underscored the distinction between the Minister's discretion under section 231.1 and the Rules (see *BMO FC*, *supra*, at para 160, discussing the decision of the Federal Court of Appeal in *Canada (National Revenue) v Cameco Corporation*, 2019 FCA 67).

[56] In addition, the Appellant submits that the Memorandum is of no help in revealing his weaknesses in relation to the matter in issue because the Respondent's position is based on the application of subsection 84(2) to the transactions at issue and the Memorandum contains nothing [TRANSLATION] "about subsection 84(2)" (Transcript at pages 173–174). The Appellant also submits that disclosure of the Memorandum would mean [TRANSLATION] "that the soft spots identified by the buyer's accountant would be disclosed to the harm of the seller" (Transcript at page 175).

[57] In addition, the Appellant relies on *R v Aventis Pharma Inc*, 2008 FCA 316 [*Aventis*] in support of his assertion that the Respondent cannot use the examination for discovery to develop an alternative basis of assessment. I note that in this case, the trial judge ended the examination for discovery after describing the approach taken by the Respondent as a fishing expedition disguising a strategy whose goal was to identify a new basis of assessment. Unlike in *Aventis*, there is no debate in this appeal concerning facts on which the Minister relied to make the assessment, but that are denied or ignored by the Respondent in his Reply to the Notice of Appeal. Apart from the Appellant's concern that the Respondent may want to establish a new basis of assessment, there is no evidence before this Court that supports an argument that the Respondent is seeking to do that in this case.

[58] The Appellant also raised the fact that the Respondent might want to amend his Reply to the Notice of Appeal, after reconsidering his admissions of fact once he reviewed the Memorandum. Since pleadings have closed in this case, the parties may amend them only with the consent of the other party or with leave of the Court (Rules, section 54). It would therefore be up to the motions judge, if that were the case, to decide any issue concerning arguments as regards possible harm on an application to amend the Reply to the Notice of Appeal in this appeal.

[59] I will briefly address the Appellant's contention that it is imperative that accountants be able to inform taxpayers of the tax risks they run, without the risk of disclosure to tax authorities deterring the preparation and communication of their analysis. According to the Appellant, if that advice had to be systematically disclosed, the quality of communication between accountants and their clients and compliance with the Act would decline as a result (Transcript at pages 191–192). The courts have confirmed that there is no accountant-client privilege in respect of tax advice given by an accountant (see, for example, *Tower v MNR*, 2003 FCA 307). I note that the Appellant made no submissions relating to the privilege based on the circumstances of each case, regarding which the Supreme Court of Canada has held that the principles stated by Professor Wigmore provide a general analytical framework for determining whether or not a communication is privileged (see *Tower*, *supra* at paras 39 *et seq*). In the circumstances, I cannot conclude that disclosure of the Memorandum is protected by case-by-case privilege, and since there is no accountant-client privilege, this is not a ground that can justify denying disclosure in this case, even if in some cases disclosure of tax advice could, in the Appellant's opinion, deter the communication of advice by accountants to their clients.

[60] At this point in my reasons, I should note that the Appellant refused to disclose the Memorandum on the grounds that it contains no objective information that the other documents disclosed or answers given do not already contain and that they might reveal subjective opinions that the taxpayer has no obligation to reveal. According to the Appellant's affidavit, five of the six pages of the Memorandum contain a repetition of the transactions in issue in this case. In his written representations, the Appellant contends that the Memorandum is not relevant to the case and stresses the fact that it does not address subsection 84(2) of the Act.

[61] The principles applicable to discovery set out above in the circumstances of this appeal, taking into account the context, which is the applicability of subsection 84(2) of the Act, lead me to conclude that the Memorandum is relevant to the matters in issue in this case. I will refrain from reiterating the principles discussed above and I will limit my remarks to noting that a document relates to matters in question when it contains information that may directly or indirectly enable the party requesting the disclosure of the document to advance their own case or damage the case of their adversary, or lead them to a train of inquiry. The document concerned in this case, the Memorandum, relates in large part to the transactions in issue; it followed the agreement concerning the sale of RBP, which contained a clause regarding tax matters, and according to the Appellant's testimony, the parties followed what was set out in the Memorandum. The principles stated in

the case law, holding that the approach to be taken as regards the interpretation of subsection 84(2) relies on an examination of the circumstances surrounding the transactions at issue, should also be noted.

[62] Having regard to the principles holding that relevance on discovery must be broadly and liberally construed and that, at this stage, relevance is a lower threshold than at trial, and having regard to the principles applicable to the interpretation of subsection 84(2) supported by the case law of the Federal Court of Appeal, I must conclude that the Memorandum is relevant.

VI. Conclusion

[63] In light of the foregoing, the Respondent's motion is granted and:

(a) the Appellant is to provide a copy of the Memorandum prepared by Raymond Chabot Grant Thornton, the existence of which was disclosed in the answer to undertaking 5, given at his examination for discovery;

(b) the Appellant is to provide a copy of all correspondence in his possession in connection with that Memorandum; and

(c) costs shall be in the cause.

Signed at Ottawa, Canada, this 2nd day of August 2023.

"Gabrielle St-Hilaire"

St-Hilaire J.

Translation certified true
on this 15th day of April 2025.

Melissa Paquette, Senior Jurilinguist

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COURT FILE NO.:	2019-3753(IT)G
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