Docket: 2013-1136(IT)G

BETWEEN:

THOR CHOPTIANY,

Appellant,

and

HIS MAJESTY THE KING,

Respondent;

Dockets: 2013-4459(IT)G
2016-1259(IT)G

AND BETWEEN:

SANDRA MCPHERSON,

Appellant,

and

HIS MAJESTY THE KING,

Respondent;

Dockets: 2014-4245(IT)G
2016-2630(IT)G

AND BETWEEN:

WAYNE RICHTER,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Motion heard on March 29, 2022 at Toronto, Ontario and
April 7, 2022, at Ottawa, Canada

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant:	Jeff Pniowsky Matthew Dallo
Counsel for the Respondent:	Natasha W. Tso Annette Evans

ORDER

UPON hearing the motion brought by the Appellants;

AND UPON hearing what was alleged by the parties;

The motion is allowed in accordance with the attached written reasons, and these appeals are allowed, with costs.

Signed at Montréal, Canada, this 5th day of October 2022.

"Patrick Boyle"

Boyle J.

Citation: 2022 TCC 112
Date: 20221005
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Respondent.

REASONS FOR ORDER

Boyle J.

I. Precis

[1] The Appellants have brought a motion to have their appeals allowed as a result of the Respondent's repeated failures to comply with

1. The rules of discovery, by failing to have a knowledgeable and informed official answer proper relevant questions, failing to produce relevant documents requested, and failing to correct or incomplete answers, and
2. Two orders of this Court specifically ordering the Respondent to do so.

This is the third motion dealing with essentially the same defaults and non-compliance by the Respondent, there have been three examinations for discovery of the Respondent to date, and the Respondent remains in default. In these particular circumstances, for the reasons given below, I am allowing these five appeals as there is no less drastic remedy than allowing the appeals that can reasonably be expected to remedy the Respondent's pattern of non-compliance with this Court's rules and orders, and to provide procedural fairness to these Appellants and allow their appeals proceed to be decided on the merits. Accordingly these appeals are being allowed, even though these Appellants are contesting penalties assessed for having participated in tax schemes that resemble in many respects the de-taxation practices of sovereign citizens, though with less of the non-fiscal cultish aspects - schemes for which at least one promoter has been convicted and sentenced to a jail term. Such a result is the fault of the Respondent alone.

[2] These three Appellants have brought a motion to have their appeals allowed in full, with solicitor-client costs. It is their position that this motion is the third or fourth time that they have had to return to court to have the Respondent produce information that should have properly been provided at the discovery stage, as this Court has already specifically ruled.

[3] This motion was filed on June 3, 2021, and the Appellants' written submissions were filed June 30, 2021. The Appellants requested that their motion be heard by videoconference. Given that the relief requested would, if granted, finally dispose of these appeals, the Court recommended to the parties that it should be heard in person and they agreed. The hearing dates for this motion were set at

a Case Management Conference in November 2021 convened for that purpose. The Respondent's written submissions were filed March 15, 2022. The motion was argued in Toronto for the full day of March 29, 2022. It was continued virtually on April 7, 2022.

[4] The substantive issues in these appeals all relate to the Appellants' participation in Fiscal Arbitrators and/or the related DeMara Consulting tax schemes. These appeals are only disputing the imposition of the so-called gross negligence penalties in subsection 163(2) of the *Income Tax Act* (the "Act"). The Court has been case managing the Fiscal Arbitrators and DeMara Consulting tax appeals for many years as a large group appeal and for the last number of years I have been Case Management Judge[1]. These three appeals were agreed by the parties to be lead appeals with respect to a larger number of Fiscal Arbitrators/DeMara appellants represented by the Appellants' counsel and their firm. However, the outcome of this motion only affects the appeals of the three moving Appellants in their five specific appeals. More recently, and for unrelated reasons, a new Case Management Judge has been appointed to manage the remaining group of appeals pending before the Court, with the exception of this particular motion. It will be up to the other appellants, their counsel, Respondent's counsel and the Case Management Judge (and/or a trial judge) to determine how,

[1] The management of group appeals by the Court comes with its challenges. A significant one is that the Respondent's CRA and Justice are defining who is in the group before the Court using CRA's confirmation power at the Notice of Objection stage. This allows the Respondent to confirm those taxpayers they want before our Court in which the issue or issues will be decided. They do not confirm the whole similarly situated group of taxpayers objecting to the same CRA assessment initiative or project. This raises questions involving procedural fairness for those taxpayers who are confirmed and must proceed to Court expected to select lead cases without knowing who is in the same group but left behind at CRA Appeals. This approach also raises access to justice questions for those taxpayers left behind by virtue of not being confirmed and in the group before the Court, and who may not be presumed to be aware that they have a right to unilaterally bring their dispute to the Court and join the group if CRA have not responded to their objection within 90 days. While these questions do not, given the circumstances, have to be considered and addressed in these five particular appeals, identifying these challenging questions here may preclude the Court having to address them in the future.

if at all, the decision in this motion affects the appeals of others in the group in abeyance pending the outcome of these appeals as they move forward.

II. Relevant Chronology of These Proceedings

[5] The notices of appeals and replies in these Appellants' appeals were filed between 2012 and 2017.

[6] These appeals were set down for trial for five days starting March 25, 2019 (the "2019 Set Down Week"). An adjournment request was made by the Appellants on March 15, 2019, and granted to the Appellants on March 21, 2019 (the "First Adjournment").

[7] These appeals were set back down again for the week of January 27, 2020 (the "2020 Set Down Week").

[8] The Appellants brought a motion in October 2019 for further disclosure by the Respondent prior to the January 2020 trial. That motion was heard and decided by me in October 2019 in favour of the Appellants (the "October 2019 Motion").

[9] In January 2020, prior to the opening of the scheduled January 27 hearing week, the Appellants brought a further motion asking to compel full compliance by the Respondent with my disclosure order in the October 2019 Motion (the "January 2020 Motion"). This motion was returnable on January 27, the day the weeklong trial was to begin. The trial judge wisely determined that the January 2020 motion should be heard and decided by me and not by her, as it only concerned an allegation by the Respondent that my order on the October 2019 motion was ambiguous (the "Second Adjournment").

[10] The January 2020 motion was heard by me in November 2020. The January 2020 motion was decided by me in favour of the Appellants in November 2020. Further oral discovery of the Respondent's CRA criminal investigator Mr. Matheson was ordered, which occurred in May 2021, but only following a March 2021 Case Management Conference.

[11] As noted above, this motion was filed by the Appellants in June 2021.

III. The First Adjournment

[12] The Appellants requested the first adjournment ten days before the appeals' 2019 Set Down Week. Their principal grounds were:

1. That they had been advised by the Respondent the week before that its only witness was to be one of CRA's lead criminal investigations officers, Mr. David Matheson, responsible for the DeMara Consulting investigation;

2. The Respondent's nominee at the initial discovery was the CRA appeals officer responsible, Mr. Sean Irwin. Mr. Irwin was unaware of any criminal investigation and had not informed himself about Criminal Investigations' involvement prior to being examined for discovery in January 2018 (the "First Discovery");

3. Respondent's counsel did not have the Criminal Investigations' file from CRA at the time of the First Discovery;

4. The Respondent provided an additional 250 pages of documents relating to the criminal investigator's planned testimony about the same time and these documents included references to the Appellants; and

5. The Appellants requested the adjournment to allow time to review the documents and to bring the needed motions, including one to produce a knowledgeable and informed deponent for further examination for discovery. I granted the adjournment request, recognizing typical attempts at trial by ambush, most notably by non-compliance with the cardinal rule (Rule 95) of discovery, that the person a party chooses as their nominee to be discovered must be knowledgeable, and have made all reasonable inquiries regarding the matter in issue of all of that party's officers, employees and agents, past or present. I required the parties to select a new set down week from those upcoming and available in Vancouver in the fall of 2019, and winter of 2020.

IV. The October 2019 Motion

[13] Following the granting of the First Adjournment, the Appellants brought the October 2019 Motion requesting an order granting leave to conduct further examination for discovery of the Respondent, and naming David Matheson, CRA's lead criminal investigator as the representative to be examined.

[14] I granted the Appellants the relief requested at the hearing of the motion. The reasons included:

1. The Crown had failed at the first examination for discovery to provide a knowledgeable and informed representative as required—see Rules 93(3) and 95(2). There was no evidence that the appeals officer, Mr. Irwin, had made any efforts to inform himself as required. His selection effectively prevented the Appellants from getting Criminal Investigations' reports and files or answers to questions about Criminal Investigations' involvement with these Appellants;

2. The Crown had, as a result, also failed at the first examination to comply with Rule 95(1), as the answers given to proper and relevant questions were given by an uninformed deponent who said he was not aware of Investigations' role and did not work in Investigations;

3. The Crown had failed to comply with its continuing obligation following the examinations for discovery to correct answers given to forthwith inform the Appellants that answers were incorrect or were no longer correct upon becoming aware of Investigations' role and file information once Respondent's counsel received the Criminal Investigations' file following the first examination for discovery—see Rule 98. The answer given at the discovery that the Respondent was unaware of Investigations' role was clearly incorrect to the knowledge of Respondent's counsel at the latest, once counsel began considering the lead investigator as a witness, much less its only witness. It is the party's awareness of the incorrect response, that is His Majesty the King's not the deponent's, that triggers Rule 98(1) and upon whom the Rule 98(1) obligations are clearly imposed. It is clearly not a defense to Rule 98(1) that the deponent's answer was believed to be truthful when given;

4. The Crown did not disclose any of the Criminal Investigations file in its Rule 81 partial disclosure list of documents either when prepared or, as required by Rule 87, when the Crown became aware the initial list was incomplete. Rule 81 partial disclosure differs from Rule 82 full disclosure primarily in that full disclosure requires all documents relevant to any matter in question in the appeal, whereas Rule 81 partial disclosure only requires a party to identify documents that might be used in evidence to help that party who is preparing their list to establish the facts it pleaded or rebut the facts pleaded by the other party. In other words, Rule 81 partial disclosure only requires a party to list documents that might be helpful to it, and not those that might be helpful to the other party as required with full disclosure. When Crown counsel sent the documents to the Appellants shortly before the 2019 Set Down Week, they said these documents were being used by their only witness to prepare for his evidence at trial. It follows, without reading the documents, that when the list of documents was prepared these Investigations materials "might be used in evidence" to help the Crown meet its evidentiary burden. The French version of Rule 81 similarly uses the verb may or might, « pouvoir », so it is not limited to those the party has decided it intends to use—that documents might be used for this purpose is sufficient.

[15] The French version of Rule 81 differs from the English in that the phrase "might be used in evidence" in the French version is might be presented as evidence. I do not need to resolve this distinction. Even though the Crown decided to only use the Investigations material to refresh its witness's memory before testifying, that does not change the fact that when the Crown prepared its list of documents these were materials that might be used by entering into evidence, if only to corroborate their witness's testimony or if their witness needed to refresh their memory using their file when they were being questioned in chief or in cross-examination.

[16] The Respondent is simply not correct that this interpretation of use has the effect of equating Rule 81 partial disclosure with Rule 82 full disclosure. Partial disclosure remains limited to documents that help the party and not documents that would hurt its case.

[17] Even if I was to assume that Respondent's counsel was unaware of Criminal Investigations having had a role with Fiscal Arbitrators/DeMara participants such as the Appellants, which I cannot in these circumstances, Rule 87 required the Crown's list of documents to be updated at the latest once they became aware of them and realized that the Investigations files of Fiscal Arbitrators/DeMara included documents involving these Appellants. One of these documents was said to be a criminal Information to Obtain a Search Warrant ("ITO") that names one of these Appellants more than fifty times and appended their tax filings including information slips.

[18] The First Discovery left at least two of these Appellants uncertain whether CRA Criminal Investigations' involvement with Fiscal Arbitrators and DeMara involved them. Had the information and materials been corrected and provided earlier than shortly before the trial week, the Appellants would also have had the chance to ask further questions for discovery regarding the new information and material, including asking for a copy of the full Criminal Investigations file relating to these Appellants. The Crown's disregard precluded this.

[19] It is very hard to believe that subparagraphs 1 to 4 above could have occurred without both CRA overall, and at the Appeals and Investigations divisions, and Respondent's counsel, at some level within the group handling the Fiscal Arbitrators and DeMara group of appeals, having been aware, if only by wilful blindness.[2] At discovery, the Respondent disavowed knowledge of Investigations' activities, but by trial time it hoped to make its case, a penalty case in which it has the onus, on the strength solely, of the lead investigator who had been obtaining, reviewing and/or authoring these very materials.

[20] The Appellants had a very good reason for raising the Crown's unsatisfactory answers at the First Discovery a year later and shortly before the trial. They had only just been told by the Respondent's counsel that one of the lead investigators was to be the sole witness and would be using the Investigations' file materials to refresh his memory, when at discovery their answer was they were unaware of Investigations' activities against these Appellants.

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[2] Counsel appearing on these matters has changed from time to time. The reader should not make any assumptions about individual counsel.

[21] Given these exceptional circumstances, at the conclusion of the hearing I ordered limited additional examination for discovery and production of documents, and that the investigator, Mr. Matheson, would be the person to be further examined. On the limited scope of this additional discovery my words were:

> The scope is intentionally to be restricted narrowly to discovery on the role of Investigations and to documents relating to investigations of these three Appellants and that limitation applies to both the discovery questions and to documents, and in both cases, the rights extend to questions or further documents on relevant issues arising from the first.
>
> So I am not intending to give the Appellants scope to be asking questions relating to Investigations' investigation into [the promoters] or anybody else except to the extent of any other person's investigation involves one of these three taxpayers, Richter, McPherson and Choptiany.
>
> Any questions about my order?

[22] There were no questions by either party.

[23] Earlier in the hearing, I had described this as "additional discovery to be limited to the role of Investigations and its documents relating to investigations that… are limited only to the extent that they involve these three Appellants along with … relevant issues arising therefrom or from answers", and "limiting it to investigations not of the three Appellants, but involving these three Appellants…", and "can't go asking anything about [the promoters] beyond aspects that involve one of these three Appellants…", and I "don't think it appropriate for Mr. Pniowsky… to have it wide open vis-a-vis [the promoters] and … that they should be limited to things in those investigations of others that involve their three taxpayer Appellants… that these three Appellants may not have been the subject of the investigation but they are involved in it in the investigator's mind, notes or documents". It should have been very clear to the parties that I was using the word "involving" in a broad manner comparable to the words "relating to", "with reference to", "in connection with", "in relation to" and "in respect of" discussed in *Nowegijick* v. *Canada*, [1983] 1 SCR 29 and in *Canada* v. *Basserman*, (1994) 169 N.R. 109 (FCA).

[24] I have previously written "Let me be very clear. I begin from the premise that if CRA thought something involving the taxpayer in the taxation year under

appeal was worth recording and decided that the obvious place to file it was in the taxpayer's file for the very year under dispute, that document *prima facie* meets the relevance threshold applicable to pre-trial discoveries" see *Concepts Plastics Ltd.*, 2009 TCC 79 at paragraph 5.

[25] Similarly, I begin from the premise that if CRA is investigating another person, entity or scheme that names an appellant, in anything other than a schedule of participants or investors or a similar manner, in respect of a matter that appellant taxpayer has appealed to this Court, that document *prima facie* meets the relevance threshold applicable to pre-trial discoveries. That is not to say the Appellant can take the document on an unrestricted fishing expedition about the broader investigation. If the document is asked for in discovery, its existence or its production, that would *prima facie* be a proper question as would any other questions about the investigation's involvement of or with the Appellant.[3]

[26] On October 17, 2019, two days after the hearing, the written Order was issued. It read:

> 1. The Appellants may conduct and complete further examination for discovery, answers, and follow up questions and answers, within 60 days of the date of the motion to the extent only of any involvement of any of the Appellants in the investigation, any documents relating to the investigation involving any of the Appellants, and any relevant issues arising therefrom.
>
> [Emphasis added.]

V. The Second Adjournment

[27] On January 20, 2020 the Appellants filed their Notice of Motion for the January 2020 Motion, and made it returnable on January 27, 2020, the opening trial day for the hearing set for their appeals.

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[3] A more thorough discussion of *prima facie* relevance at the discovery stage is found in Justice Owen's decision in *Coopers Real Estate Development Corporation v. HMQ*, 2022 TCC 82 at paragraphs 14 to 30 and 60.

[28] The Appellants grounded this motion in alleged non-compliance by the Respondent with my Order in the October 2019 Motion: that the Respondent continued to refuse to produce the ordered disclosure and chose to read restrictive wording into my October 2019 Order that I did not say or write, and that the Respondent's deponent Mr. Matheson was not prepared and informed and/or was unwilling to answer questions within the scope of that Order at the further oral discovery (the "Second Discovery").

[29] The supporting Affidavit included as an exhibit a November 15, 2019 letter written by Respondent's counsel which opens with the paragraph "We have now had an opportunity to review the entirety of the documents that we believe form part of Justice Boyle's Order. The five binders of documents enclosed with this letter are limited to 'documents relating to the investigation [of LaValley and Stancer] involving any of the Appellants…'."

[30] The Second Discovery had taken place on December 10, 2019 and some of the Appellants' questions to Mr. Matheson were not answered. After the filing of the January 2020 Motion, the Respondent sent answers to undertakings to the Appellants at 11:00 p.m. on the Wednesday before the start of their hearing on Monday, January 27, 2020.

[31] Appellants' counsel notified the Court that Dr. Choptiany had made an assignment in bankruptcy and confirmed in writing on January 20, 2020 that the trustee had given instructions to proceed with the appeal.

[32] The relief the Appellants requested was that their appeals be allowed, with costs on a solicitor-client basis.

[33] At the opening of the hearing on January 27, 2020, Justice Lyons declined to hear the motion as it was principally concerned with the interpretation of my order on the October 2019 Motion, and adjourned the hearing of the trial to allow me to hear and decide the January 2020 Motion. The Respondent argued strongly against the adjournment and strongly maintained this trial should proceed as discovery was properly conducted.

VI. The January 2020 Motion

[34] The January 2020 Motion asked that the appeals be allowed with costs. The grounds put forward by the Appellants were:

1. The Respondent's written position that they believed my October 2019 Order was limited to investigations of the two named promoters, LaValley and Stancer, even though that is not what I wrote or said, thus precluding any disclosure or discovery of investigations of others that involved the Appellants, or investigations of the Appellants themselves;

2. The Appellants were aware that there had been an actual investigation by CRA Criminal Investigations into Dr. Choptiany that was pursued to the point of witness interviews and later closed without further action, and these Investigations documents should have been disclosed and Mr. Matheson should have answered their questions as the investigation would meet the relevance at discovery threshold for their appeals of civil penalties, and they were already covered by my October 2019 Order. The Respondent's written answer was that the investigation into Dr. Choptiany was not covered by the October 2019 Order because it was not a "full scale investigation" of him, even though his audit was carried out entirely by investigators in Investigations not Audit. The words full scale are not in my Order or used at the hearing nor were any words of similar import. The words full scale were not used in the questions asked of Mr. Matheson to which he responded that he was unaware of any investigations into any of the Appellants;

3. The Appellants were also aware that Mr. Richter was named more than sixty-two times in the Investigations report of one of the two named promoters, including in the ITO, and this was also covered specifically in my October 2019 Order, yet the Appellants could not obtain answers about that investigation to their questions in search of exculpatory facts for the penalty assessments in dispute involving Mr. Richter;

4. The Respondent had not disclosed any additional documents to the Appellants following my October 2019 Order that contained any internal CRA Investigations notes, memos or emails relating to the Appellants;

5. The Respondent refused to provide any documents relating to the decision making, drafting and dissemination of the ITO involving Mr. Richter;

6. The Respondent refused to answer questions relating to Fiscal Arbitrators, counsel maintaining incorrectly that these appeals were DeMara lead cases—even though Dr. Choptiany's appeal involves Fiscal Arbitrators and one of Ms. McPherson's appeals only involves Fiscal Arbitrators;

7. The Respondent's reading down of my October 2019 Order precluded Appellants' counsel and the Appellant, McPherson herself, from finding out if CRA conducted a criminal investigation and witness interviews into her as well;

8. The Respondent's answers to undertakings received two business days before the trial had been scheduled to start in January, 2020 were not sufficiently responsive;

9. The Respondent should not have read down my October 2019 Order by reading in the words "of LaValley and Stancer" or "full scale", but should have brought any genuine concern about the scope of my Order back to me for clarification. The failure by the Respondent to seek such clarifications has been upheld by the Federal Court of Appeal in *Canada v. Basserman*, 114 DLR (4th) 104 as potentially fatal and warrants the appeals being allowed; and

10. The Respondent remained in breach of its obligation to provide a knowledgeable and informed nominee for examination (Rules 93(3) and 95(2)), to answer relevant questions (Rule 95(1)), and to correct the record upon learning of any incorrect or incomplete answer (Rule 87).

[35] The Respondent filed written submissions in the January 2020 Motion. They did not provide any sound explanation for why they chose to read words into my October 2019 Order to address their past failings in discovery in these three appeals.

[36] The evidence on this motion supported the Appellants' version of the facts upon which they grounded their motion.

[37] However, I did not grant them the relief requested. I found that the Respondent's position relying upon inserting words into my Order when CRA was informing itself of, and locating, the documents and knowledge required pursuant to the terms of my October 2019 Order was unreasonable and intentional, but I did not find them in contempt, or yet at the stage where the Appellants' requested relief was appropriate. While the Respondent may plausibly have only neglectfully inserted these words restricting the scope of my order when they sent their November letter, I could not accept that could still have been the case on Monday January 27th when the Respondent strongly resisted an adjournment at a time when they had certainly reviewed the issues raised by the Appellants' counsel. If I can't accept that as of January 27th, it causes me to doubt whether it was the case in November when it occurred[4]. I instead ordered further oral discovery (the "Third Discovery") by a properly informed Mr. Matheson (or other person the parties might agree on), after disclosing all of the documents described in my October 2019 Order. I expressly left it open for the Appellants to return after that was complete with a motion to allow the appeals and for solicitor client or substantial indemnity costs throughout the proceeding if they believed the Respondent was not turning over documents they were ordered to or were not properly informed when answering relevant questions at the Third Discovery. I was only prepared to deal with costs on the January 2020 Motion before me and the related October 2019 Motion, to be payable forthwith by the Respondent.

[38] After I pronounced my decision at the end of the lengthy hearing, Respondent's counsel asked if I would clarify specific questions about the scope of my decision and my October 2019 Order "just so we have no more missteps on behalf of the Respondent". Respondent's counsel was permitted to do so and both Respondent counsel had questions that I answered to their acknowledged satisfaction.

[39] No written order was issued as the parties asked for and were given ten days to try to agree on costs for this motion and on a draft order, failing which they were to provide me with the last draft orders they exchanged so I could focus my

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[4] At the hearings of the June 2021 Motion, the Respondent described its restricted interpretation of My October 2019 Order as neither reasonable or justifiable. Surely between their November 15, 2019 letter and the January 27, 2020 return of the Appellants January 2020 Motion and Adjournment request, the Respondent would have focussed its efforts on reasonably justifying the words it inserted into my order.

attention on the issues lacking agreement in preparing my Order, along with costs submissions for a fixed amount of costs.

[40] No draft order was received but the parties did proceed with scheduling the Third Discovery and providing further disclosure within the time frames set out in my decision at the hearing, although this was only accomplished with a further Case Management Conference.

[41] My decision that a third examination for discovery was required, following further disclosure of documents relating to investigations involving Fiscal Arbitrators or DeMara promoters, or of others, that involve any of the Appellants, or of the Appellants themselves, was based upon the following obvious breaches of my October 2019 Order:

1. The Respondent had inappropriately restricted the scope of CRA's search for ordered documents by wrongly, unreasonably and intentionally inserting restrictive words in what they had CRA look for, that were attributed to me. This was not inattention or inadvertence; the Respondent's use of the words "that believe from part of Justice Boyle's Order" and inserting "[at LaValley and Stancer]" where they are quoting me make this clear. This had the effect of excluding from compliance with my Order any investigations of persons other than the two DeMara promoters, or of any of the Appellants themselves;

2. The Respondent wrongly, inappropriately and intentionally did not disclose an actual investigation by CRA Criminal Investigations into one of the Appellants, Dr. Choptiany, by choosing to interpret a reference to any investigation as a reference only to "full scale investigations". It appears the Respondent's explanation that it was not a full scale investigation was something it came up with after it decided not to disclose and Mr. Matheson answered that he was not aware of any investigation into any of the Appellants. There was no attempt to justify that by reference to anything I said at the October 2019 Motion, my decision at that hearing or my October 2019 Order. Nor was there any attempt by the Respondent to justify it by reference to how the question at the Second Discovery was phrased. I inferred from this and point 1 above, that there was some other

reason motivating the Respondent's failures to comply with my October 2019 Order that they did not wish to share with me;

3. The Respondent failed to disclose any further Investigations records involving Mr. Richter subsequent to my October 2019 Order that were specifically addressed at the October 2019 Motion;

4. The Respondent's Mr. Matheson, who was the lead investigator in the DeMara files but not the Fiscal Arbitrator files, did not even inform himself for the Second Discovery whether any investigation was undertaken of any of these three Appellants themselves. When asked directly at the Second Discovery he simply said no;

   The exchanges went as follows:

   Q: Are you aware of any investigations in relation to any of the specific named Appellants in this case?

   A: No.

   Q: Did you make inquiries with respect to whether there would be – were there investigations involving the specific Appellants in this case?

   A: Did I make specific inquiries with respect to whether there were investigations carried out?

   Q: Yes.

   A: No.

   …

   Q: There was a criminal investigation regarding Fiscal Arbitrators as well, correct?

   A: I don't know.

   …

   Q: It is my understanding that there were active investigations involving one or more of the named Appellants in this discovery.

A: Oh.

Q: And you are not aware of that?

A: No.

Q: So there's no point in me asking anymore questions about that?

A: Yeah. I have no knowledge.

5. The Respondent did not disclose its Investigations records into Dr. Choptiany as ordered, even when asked again by the Appellants. There is no doubt that CRA Criminal Investigations conducted an investigation into Dr. Choptiany;

6. Mr. Matheson's answer to an uncertain question that CRA had a policy of focusing the investigations on promoters, was evasive and non-responsive to the issue of whether these three Appellants were investigated. Instead, it suggested the negative response, but documents before the Court show that there was clearly an investigation into Dr. Choptiany by CRA Criminal Investigations, and a preliminary investigation into Ms. McPherson;

7. The Respondent clarified one of Mr. Matheson's answers to state that the investigation of Dr. Choptiany did not extend to investigative interviews. That is completely untrue from even a cursory review of Criminal Investigations' notes of their investigation of him. The Respondent has never corrected that;

8. At the Second Discovery Mr. Matheson said he did not know that there was a criminal investigation regarding Fiscal Arbitrators. This was a clear acknowledgement that he was thoroughly unprepared, uncooperative, or untruthful. The Respondent wrongly maintained that my October 2019 Order only covered investigations of DeMara related investigations and not Fiscal Arbitrators related investigations. Given that, of these three Appellants, one (Richter) is appealing in respect of DeMara, one (Choptiany) is appealing in respect of Fiscal Arbitrators, and one (McPherson) is appealing in respect of both tax schemes, this unsupportable position precluded proper disclosure and discovery in accordance with my October 2019 Order for these Appellants. It is worth noting that Appellants'

counsel explained this to Respondent's counsel very clearly. Respondent's counsel's response was to maintain the refusal. Combined with Mr. Matheson's professed ignorance, this precluded proper questioning at the Second Discovery;

9. The Respondent was wrong to delay its release of those Fiscal Arbitrators documents it did release days before the second Set Down Week due to Dr. Choptiany's bankruptcy until his trustee confirmed it would be proceeding. Ms. McPherson was one of the Appellants and her appeal relates to her participation in Fiscal Arbitrators. This appears to have been a deliberate step in the Respondent's litigation strategy and it used the bankruptcy as a pretense to not comply with its clear obligations. This appears to have left Ms. McPherson still not knowing if she was the subject of an investigation, which would be relevant to her appeal at the discovery stage. The bankruptcy of one Appellant and bankruptcy legislation did not have the effect of changing my October 2019 Order. Had the Respondent had *bona fide* concerns with the impact, if any, it had on the Court Order, they should have contacted me – see *Basserman* above. The Respondent has contacted the Court for case management issues on the larger group of Fiscal Arbitrators (including DeMara) appeals countless times;

10. Respondent's counsel maintained at the hearing in 2020 that they believed these three cases (and presumably the other cases in abeyance for which these were lead cases) only involved DeMara. Not only is it clear from the pleadings that this is not the case, at the First Discovery of Mr. Irwin, the examination included this exchange at the opening:

    Q: And you're aware of underlying project that generated these files, correct?

    A: Yes.

    Q: And they're, I'll call them project files, but I think you know what I'm talking about. We're talking about those who participated in the project, the Fiscal Arbitrators we'll call it tax filing method, and the DeMara tax filing method?

    A: Yes. Those are the two projects that are at issue.[5]

[5] I also understand that the transcript of the Respondent's examination of Dr. Choptiany refers to Fiscal Arbitrators close to twenty times.

11. The Respondent's answers to undertakings were not sufficiently responsive;

12. The Respondent's refusal to undertake, when asked of Mr. Matheson at the Second Discovery, to provide CRA documents in which there is a deliberation, discussion or decision whether or not to criminally investigate the participants in the DeMara or Fiscal Arbitrators projects was wrong. It was clear in context that Appellants' counsel was limiting his request to documents that named any of these three Appellants. Respondent's counsel's answer was "I am not going to give you an undertaking… with respect to any participants". Other answers by Respondent's counsel to similar requests were non-responsive;

13. The Respondent was wrong to provide just the excerpt from the first page of Investigations' investigation referral or lead, claiming it was provided as a courtesy, i.e. claiming it was outside the scope of my October 2019 Order. Respondent counsel's argument that, when they wrote that it was provided as a courtesy, they did not mean it was not required by my Order was given very short shrift; and

14. These appeals had not yet been set down for hearing again following the Second Adjournment and there was no evident prejudice to the Appellants that could not be compensated with costs if further disclosure and discovery was again ordered on the same terms, though now fully thrashed out, as my October 2019 Order.

[42] During the November 2020 hearing in which this January 2020 Motion was decided, the following aspects of what was addressed should be noted.

[43] I described the Respondent's insertion of square-bracketed words when quoting my Order as clearly suggestive that I had earlier referred to these named persons in my statement but in the quoted portion used a pronoun like them, him, her or it. That the Respondent prefaced the quote by saying they believed that is what I said does not change that.

[44] I variously described this as "outrageously misleading and inappropriate", "this might be contemptuous", "that's not fair", "playing advocate with what should just be a clarification, not an arguable position", "I don't believe it is

reasonable/arguable", "deeply, deeply disturbed", "highly inappropriate" and "I don't think you were reasonably mistaken".

[45] Respondent's counsel acknowledged at that hearing that inserting words into mine "has caused some confusion". They said that they were mistaken in the way they interpreted my order.

[46] I said "I don't believe these taxpayers got the discovery and disclosure that I ordered. It was frustrated on November 15".

[47] I said of the failure of Mr. Matheson to inform himself whether there were investigations into these three Appellants that "this might be contemptuous", that it was "shocking", that I could not believe he was not directed by Justice to make those inquiries as part of his preparation, that it appears to taint his whole discovery and how can any of his answers be considered satisfactory, and that these appeals are now wholly jeopardised by how the Respondent chose to interpret my Order.

[48] I said that the combined effect of restricting my disclosure Order and Mr. Matheson not informing himself properly, whether there were even investigations into the Appellants themselves ,was that the additional discovery and disclosure opportunity I granted in my October 2019 Order had been frustrated, and that "this is seriously poor behaviour".

[49] With respect to costs, I made it clear that I thought it might be best to wait and see how well the Respondent complied with my decision in the January 2020 Motion before I was asked to fix costs if the parties could not agree on an amount. I referred the Respondent to what I said in paragraph 20 of the *Jolly Farmer* costs decision. I referred to my published practice being to award enhanced costs if asked and appropriate as a percentage of reasonable actual costs. I told the parties that the Respondent's unreasonable and unacceptable behaviour did not yet rise to the threshold level for solicitor-client costs, but that there was an accumulating aspect which is why I would leave costs until after the next round if one was needed.

[50] In outlining my decision at the end of the hearing, I said "the officer to be put forward is either to a named officer we agree on today, or I fix today, and to be fully informed with respect to any investigation of any sort of any of these three named taxpayers" and "if CRA thought to put their names in the file, or to link

their names to the file, it's in, and that is going to be expressly without prejudice to the taxpayers' rights to bring a further motion if needed at the conclusion of that discovery or when that discovery is believed by the taxpayers to have been frustrated again".

[51] I said "if what you are doing with respect to Al Capone involved the Appellants, if there was any mention of their names, if you thought it was relevant to write their names in, it was wide open as of October 15".

[52] I further clarified that if there were investigations not targeting a named individual, but a project file or a master file, that involved or named any of these three Appellants, it was within the scope of my order. I clarified the Respondent only need disclose those pages dealing with matters that concerned these Appellants but when questioned on those pages that might lead to a request for further documents, and I reminded the Respondent that the threshold for relevance on discovery is low. I specified that it only need be those pages that had to be produced right away.

[53] I said that I thought my decision should be without prejudice to the Appellants' right to bring a similar motion grounded in abuse or contempt to allow these appeals if the Respondent still did not comply.

[54] In short, the Respondent left in November 2020 with no doubt about my concerns regarding what they had done and not done following my October 2019 Order, and with no doubts or unanswered questions about its meaning or scope, what was expected of them, and what the consequences might be should they again fail to comply.

[55] Several of these same concerns of mine were restated at the March 2021 Case Management Conference. That Case Management Conference call was held on March 9, 2021 at the request of the parties as they had been unable to agree on a draft order or on a fixed amount of costs following the November 6, 2020 hearing and decision of the January 2020 Motion. I agreed to address timetable issues for the still remaining Third Discovery ordered, but would not hear the substantive aspects of fixing costs at that time. The hearing was to be limited to case management and was not to be a continuation of the January 2020 costs portion of the Appellants' January 2020 Motion. I did allow the parties to share their concerns

about possible approaches to a costs award for the January 2020 Motion, so as to allow them to continue their discussions trying to settle on a fixed amount to hopefully succeed, and obviating the need to continue the costs motion at all. The case management decision was that the previously ordered documents would be disclosed by April 16 and the Third Discovery would be completed by May 31. The parties were also ordered to consult with the Hearings Coordinator and agree to a third new set down week for these appeals to be heard in Toronto. Finally, the case management order was that each party would advise the Court by June 30, 2021 of any further anticipated motions and barring any further motions after that without leave from me or a trial judge.

[56] Thereafter, the parties filed their written submissions on costs for the January 2020 Motion to be decided on the basis of written submissions. That had not been decided when the current June 2021 Motion was filed by the Appellant on June 3. The newest June 2021 Motion asked that the appeals be allowed and that solicitor-client costs be awarded throughout. Costs for the January 2020 Motion will now be determined contemporaneously with deciding the June 2021 Motion.

VII. This June 2021 Motion

[57] The Appellants' motion currently before the Court is asking that their appeals be allowed in full, with costs on a solicitor client basis.

[58] The Appellants' grounds in support of this motion are that:

1. The Respondent is in breach of my Order delivered at the November 6, 2020 hearing of their January 2020 Motion (the "November 2020 Order"), which arose out of the Respondent's breach of the October 2019 Order, which in turn arose out of the Respondent's failure to comply with its obligations for documentary disclosure and oral discovery;

2. At the May 31, 2021 Third Discovery of the Respondent required by the November 2020 Order, and fixed at the March 2021 Case Management

Conference, the Respondent's deponent either refrained from sufficiently informing himself thereby again precluding meaningful discovery, or did inform himself but deliberately refrained from providing proper answers;

3. The Respondent failed to answer proper questions, and improperly took questions under advisement, and generally obfuscated to provide as little information as possible, including:

    a. Refusing to acknowledge or otherwise claiming no knowledge with respect to investigators' roles in the matter, notwithstanding that those investigators appear as signatories in various reports pertaining to the Appellant(s);

    b. Refusing to acknowledge the plainly written words in the Respondent's own latest disclosure;

    c. Refusing to admit that notes obviously written by one of the investigators were in fact written by an investigator;

    d. Claiming no knowledge of the authorship of documents in its own disclosure;

    e. Claiming to have no knowledge of relevant matters or otherwise refusing to answer proper questions without the Appellants first proving they possess proof of the basis of the questions by pointing to specific documents;

4. Documents disclosed by the Respondent since the November 2020 Order did not include documents known to exist, such as letters from the Appellants and/or their counsel;

5. The Investigation Abort Report for the investigation of Dr. Choptiany had been cleansed of a description of the circumstances of the investigation and why it was abandoned. The second page of the three-page report had not been disclosed, nor was its absence acknowledged when disclosed, although it turns out the Respondent and Respondent's counsel were aware it was not included;

6. The continuing breaches of the Respondent's obligation make a mockery of the rules of discovery, show a pattern of intentional or reckless disregard for the rules and orders of this Court, have wasted the Court's resources and the Appellants' time and money for repeated wasteful litigation steps in the Respondent's years-long litigation strategy, and will bring the administration of justice into dispute if the Court does not impose appropriate sanctions at this stage.

[59] This motion was argued for two days, and had close to a thousand pages in evidence including:

1. The full 100-page transcript of the Third Discovery; and
2. An Affidavit of Mr. Matheson regarding his further efforts to locate the ordered documents for disclosure in my November 2020 Order, which attached copies of his correspondence in conducting the further search, as well as copies of all 550 pages of documents located within CRA Criminal Investigations Divisions resulting from his efforts.

[60] Both parties filed written submissions addressing the substantive issues on this motion. Both parties were content to largely rely on their earlier written submissions on costs that had been filed following the preceding January 2020 Motion.

[61] At the hearing of this motion, the Respondent acknowledged multiple times that its insertion of the phrase "[of LaValley and Stancer]" into its quote from my October 2019 Order was neither reasonable nor justifiable. At the January 2020 Motion, the Respondent would only admit to it being a mistake. This does not mean it was intentional, it could simply be that it was a decision made without the minimum attention required. However, if it was not intentional, it also did not get the minimum level attention required when the Respondent nonetheless argued strongly to Justice Lyons against the Second Adjournment and maintained that it was appropriate for this trial to proceed in front of her nonetheless. This does lean towards a deliberate litigation strategy driving this, adopted at what level and how broadly I cannot guess.

[62] As of the hearing of this motion, the Respondent had not amended its list of documents or further corrected its earlier answer given at the Second Discovery

that it was not aware of any investigations of the Appellants, as already "clarified" once by the Respondent to say Mr. Matheson was unaware of any "full scale" investigation. As noted below, documents released by the Respondent following my November 2020 Order actually used the term "full scale" to describe the scope of the investigation carried on by Criminal Investigations of Dr. Choptiany. Since the documents the Respondent has disclosed reveal the incompleteness and incorrectness of their already once amended answer and their list of documents, the Respondent's attempts in argument to downplay these breaches of its obligations under the *Rules* are simply unacceptable at this stage and in these circumstances. The Court may not be able to force parties to be cooperative at the discovery stage, but it can and will enforce its rules and orders, and otherwise ensure that both parties' rights to a fair process are respected.

[63] It is clear there was also an investigation of Ms. McPherson, at least what CRA described as a "preliminary investigation" in its Criminal Investigation records that was not further pursued. That aspect of Mr. Matheson's incorrect answer has yet to be corrected whatsoever.

[64] The Respondent's contention is that it was corrected by a written clarification sent to Appellants' counsel that said "My original answer was in regard to whether I had knowledge of a full scale investigation into the Appellants." The Respondent writes that as though that is what Mr. Matheson was asked—it was not. The greater problem is his "clarification" ends with "there is … no witness interviews and no documents that would indicate a full scale investigation took place." So, not only is this attempt to spin an incorrect answer by saying my answer was not to the question asked but to some other question, and would be correct if you asked a different question, it ends with two new incorrect answers. Criminal Investigations did interviews and described what they did as a full scale investigation of Dr. Choptiany. I cannot understand how the Respondent continues to maintain no further clarification was or is required. The first clarification appears to have begun by being carefully crafted to be misleading. Its reference to no witness interviews and no other documents is simply incorrect on both points upon review of the Criminal Investigations file records available to the Respondent.

[65] At the Third Discovery:

1. The Respondent had not yet provided Mr. Matheson's email exchanges with the five or so other divisions of Criminal Investigations across Canada potentially involved with these Appellants requesting that they search for, locate and send him any Investigations' records of anyone involving any of these Appellants. Mr. Matheson confirmed that these had all gone to CRA Investigations and none of those documents included legal advice. The Respondent took this request under advisement. This precluded and frustrated questioning at the discovery as to the actual scope of the search. As described below, there remains concerns with this issue now that this correspondence has been produced. Mr. Matheson's request was limited to investigations of Fiscal Arbitrators, its promoters, and these Appellants. Again, that is not what my February 2019 Order said, even though his email begins with "By Order of the Tax Court of Canada", which at least one recipient mistook to be the Order.

2. The Respondent's counsel wrongly refused to let Mr. Matheson answer questions on one of the handwritten investigator's notes, maintaining that all of it was not legible, that they could not read every single word. When asked at the Third Discovery what they could not read, it was taken under advisement. Mr. Matheson did not say he had any difficulty reading it, just Respondent's counsel. Mr. Matheson had agreed it said what Appellants' counsel had read out. At the hearing of the motion, I found it to be wholly legible and in easier-to-read penmanship than most—well-spaced block capital letters. The only thing Respondent's counsel could suggest at the hearing was unclear was the time of the investigator's meeting could have been 12:45 or 14:45 as he had written over the second digit. It appeared clear from the copy of the document that the 4 was much darker than the 2, suggesting it was the correct digit and that the investigator had at first made a common mistake for those converting time to 24-hour time. I note that perhaps one could also question whether the 2010 in the date was clear—not that it would be significant nor was it raised by the Respondent. These few numbers in the irrelevant time and date are digits—all of the words were legible, and Respondent's counsel has now acknowledged that.

3. Undertakings are allowed and acceptable when a knowledgeable and informed witness does not know the answers to a relevant question asked. Undertakings and under advisements are not to be used to put forward a

deponent whose knowledge of issues, that the party is aware are relevant and expect to be questioned on, is limited to what one would know from reading the disclosed documents. They are not to be used to preclude the examining party's counsel from pursuing a train of inquiry in their questioning. Deponents should be prepared for such a course of inquiry on relevant topics. It is clear that Mr. Matheson was not.

4. There is still no evidence that Mr. Matheson, in preparing for the Third Discovery, even tried to discuss anything to do with the files with the Assistant Director, Ms. Callis, who had signed the Investigation Abort Report, the Penalty Report and the Audit Report, and had received the Appellants' section 241 letter as well as Public Prosecution Services' acknowledgement of that letter, or either of the two investigators, the lead Investigator Mr. Hartman and his Team Leader, Mr. Tataryn, who also signed the Penalty and Audit Reports. Had Mr. Matheson done this, he would not have been able to limit his answers at the Third Discovery, being his second, to confirming what the file documents written by others said, or reading from them to answer proper relevant questions asked. Only after the Third Discovery and the filing of this motion did the Respondent confirm that the lead investigator readily acknowledged the handwritten notes were all his. I understand that both the Assistant Director, Team Leader, and lead investigator on the Choptiany investigation are alive and living in Canada throughout the period of these discoveries. At the second or third examination for discovery, with a Court-defined limited scope of further inquiry, once the examining party's counsel has established a significant overall lack of knowledge of the deponent, or their failure to have informed themselves on the topics already defined, the Respondent's position that all questions should have been asked and undertakings accepted is not acceptable.

5. When asked about the section 241 letter involving Dr. Choptiany's investigation, its absence from the documents disclosed and the absence of any CRA notes, memos or correspondence discussing or addressing it, Appellants' counsel got an "under advisement" to provide all such documents. The Respondent's written response was from someone in the relevant Criminal Investigations division whose answer opened by saying these requested documents "would have already been provided as part of

her previous disclosure of documents" in this proceeding for the Fiscal Arbitrators investigation. If she provided them to Mr. Matheson, they never found their way to the Appellants. Also concerning is that she ended by saying that Public Prosecution Service ("PPS") would have handled this "on behalf of the CRA" and that documents that may have been generated pursuant to the section 241 complaint would have been done by them.

6. Neither Mr. Matheson nor Respondent's counsel ever followed up with PPS even though the CRA official in the relevant Criminal Investigations office said PPS would have been handling this on CRA's behalf. The Respondent's position that it had no obligation to go beyond the CRA is untenable in the circumstances and at this stage of this discovery by these Appellants. Rule 95(3) specifically imposes an obligation on parties to make reasonable inquiries of their agents. A party cannot contract out of its disclosure obligations. Further, the Respondent party is His Majesty the King. CRA and PPS are both parts of that federal Crown.

[66] The following should be noted with respect to the further productions made by the Respondent in response to its undertakings, under advisements and refusals at the Third Discovery and following the filing of this motion:

1. Hundreds of pages of further productions did not include a letter sent by Appellants' counsel to CRA and the PPS in 2010 regarding alleged breaches by Investigations of section 241 and taxpayer confidentiality with respect to Dr. Choptiany's investigation. This letter was sent to Assistant Director Gail Callis of CRA's Enforcement Division. PPS acknowledged that letter and copied Ms. Callis. Ms. Callis left a voice message with Appellants' counsel who transcribed that voice message. The further productions relating to Dr. Choptiany's investigation include correspondence from the Minister's office that found its way into Criminal Investigations' file, as well as correspondence with the CRA Ombudsperson. Yet the disclosed Criminal Investigations records have no correspondence or notes whatsoever to or from the Assistant Director or the two investigators about the Appellants' allegations that Investigations was breaching section 241. It can be noted that CRA is rightly well known for taking its section 241 obligations seriously.

2. Since there was nothing on this topic in the disclosed Criminal Investigations records, Mr. Matheson was entirely unfamiliar with it at the Second Discovery. As there is no evidence that he prepared for the Third Discovery, it is not clear it would have made much difference had there been pages disclosed. Mr. Matheson did answer that he could not expect that nothing would have been done by the Assistant Director and the investigators upon receipt of such a letter. That answer has never been updated or clarified even after Mr. Matheson spoke with Mr. Hartman about his notes.

3. The Investigation Abort Report was a 3-page report. When disclosed, Respondent and its counsel were aware it was missing the second page, the only full page and the page that must have explained the results of the investigation into Dr. Choptiany and the reasons for abandoning the investigation. The first page ends with Dr. Choptiany having been told he was under criminal investigation, and the third page begins with the recommendation to discontinue the "prosecution action". The two pages were sent over as is, amidst hundreds of other pages, without alerting Appellants' counsel to the missing page even though CRA tried again before disclosing it to locate the missing page and concluded that it may have been on the back of page one when scanned and that it may now no longer exist. Mr. Matheson did not try to contact the authors of the Investigation Abort Report to determine if they recalled what the second page would have recorded, or to learn what they recalled about their thoughts, findings and reasoning. Given the significance of *mens rea* to a criminal charge and the similar significance of misstating intentionally, including by wilful blindness, to the civil gross negligence penalty in dispute in this proceeding, this would be a relevant area for questioning on discovery. Regardless of the reason for page two not having been disclosed by the Respondent, whether it was done intentionally at some level by not searching hard enough, or by negligence in CRA's copying and/or record-keeping, the absence of this page in this report leaves questions of procedural fairness. The Respondent's explanation that they did not point out that page two was missing because they did not understand why the Appellants wanted to see this document makes no sense whatsoever, especially given it was acknowledged to be a document I had ordered to be disclosed, and was being disclosed albeit very late.

4. In this case the Respondent's position that there is no specific obligation to point out missing pages in documents that are required to be disclosed is shocking. Courts do not consider discovery to be a game, and it is particularly disappointing when the Crown is the offending party. In these particular circumstances, involving this page of this document that they knew was missing, it lends support to the Appellants' supposition that the Respondent is hiding something from them, from the Court and from Canadians about how these investigations have been conducted and these Appellants pursued[6].

5. It appears at best questionable for the Respondent to have relied on section 241 to redact only some witness names from what they told Investigations about the Appellant Dr. Choptiany. If the Respondent believed my order was at odds with section 241 notwithstanding paragraph 241(4)(a), they should have returned to me or appealed my order. These documents formed part of an investigation that involved an Appellant.

6. Mr. Hartman's notes record threats to Dr. Choptiany that he will speak to others, namely family and colleagues. He also records having spoken with the head of the provincial professional regulatory body and arranged for them to confirm that they had told the Appellant they had spoken with him. These three categories of persons were not Dr. Choptiany's sources of the revenue which he claimed were received as agent under these schemes.

7. The incomplete Investigation Abort Report disclosed makes it clear that, after being "confirmed … to be a target for investigation" and following a "preliminary investigation", "investigator notified Mr. Choptiany that he was under criminal investigation", and that "prosecution action" continued until it was discontinued. The letter informing Mr. Choptiany of this was sent from the Assistant Director Ms. Callis and refers to the lead criminal investigator. Assistant Director Ms. Callis overseeing the investigation into Dr. Choptiany personally signed the letter advising the Appellant he was the subject of "an ongoing criminal investigation". Other disclosed emails among the two investigators and their Assistant Director used the terms, "criminal investigation", "under investigation", and "very important to continue this investigation on this individual". The referral to the

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[6] I do not have to decide this issue.

Enforcement Division concludes at the bottom "Decision: accepted for preliminary investigation" which acceptance is signed by someone in Criminal Investigations. The proposed assessment letter to Dr. Choptiany was from the Assistant Director of Enforcement Division and concludes with "this proposal does not halt nor end the ongoing criminal investigation that you are a subject of".

8. The Auditor's Report is signed by the lead investigator and his team leader. The Extent of Audit box is filled in "full scale criminal investigation" and the report described the audit as the "investigation".

9. The one-and-a-half page Penalty Report signed by the two investigators and the Assistant Director describe his participation in "Fiscal Arbitrators" and his payment to Fiscal Arbitrators. It uses the term Fiscal Arbitrators six times in three paragraphs, and refers to the "investigation" and to "investigators". It is signed by the lead investigator, his Team Leader and the Assistant Director. These documents demonstrate just how unprepared and uninformed, or uncooperative and misleading, the Respondent's nominee was at both the Second Discovery and the Third Discovery. Mr. Matheson was the lead investigator on the DeMara investigation, the DeMara tax scheme was a subset of the Fiscal Arbitrators scheme, and Criminal Investigations did a parallel investigation of Fiscal Arbitrators leading to at least one of its promotors being jailed.

10. The mostly recently disclosed documents record that Criminal Investigations had Ms. McPherson's tax records when Appeals was looking for the them for the relevant period, and that an Assistant Director of the Enforcement Division records in Investigations' file documents that they evaluated the available information and "decided not to continue with this investigation at this time", and that they could not justify "conducting a full scale investigation". The related records included "Recommendation: I recommend we decline this case due to a lack of evidence/*mens rea*".

11. The lead investigator in Dr. Choptiany's investigation wrote notes that include "I said he was upsetting me" and "I would <u>not</u> interact with his lawyer & <u>he</u> is not directing the investigation" (underlined in original). Another included "I told him I had no faith in [named lawyer] as I found him to be deceitful and placed no faith in him and I would not deal with

people like that" and "I relate to Dr. that I have job to do and would prefer to preserve his dignity & privacy" followed by "I again told him that to refute his agent's statement I would speak with neighbours, friends, relatives, etc.". It was telling that the investigator does not even include the persons paying Dr. Choptiany's income/revenue which would be most telling about Dr. Choptiany's agent's relationship with himself. It is very difficult to see anything helpful to the real issue coming from neighbours and friends.

12. Among the very first persons the investigator interviewed was the Chief Provincial Psychiatrist of Manitoba Health, notwithstanding that Dr. Choptiany had no revenue from that source. The investigator obtained and recorded the name of the Registrar at the College of Physicians and Surgeons of Manitoba from him. He asked the Chief Provincial Psychiatrist to let Dr. Choptiany know they had this discussion, and later noted the message left for him that this had been done.

13. The investigator also appears to have met with an official at the Canadian Psychiatric Association in Ottawa.

14. The records similarly describe the "tax sought to be evaded".

[67] In short, it is clear there was significant investigation of Dr. Choptiany, that it included significant interviews of significant outside parties, all well and clearly documented in the investigator's documents that I had clearly ordered disclosed in my October 2019 Order. It is also clear from the now disclosed documents that Criminal Investigations conducted an investigation of Ms. McPherson. It has also been clear since the documents disclosed ahead of the 2019 Set Down Week, which led to the First Adjournment and the October 2019 Motion, that Mr. Richter was significantly involved in CRA's DeMara criminal investigation. As described above, Mr. Matheson was the lead investigator with the DeMara investigation and said he was unaware of the McPherson and Choptiany investigations at that time.

[68] The fact that Mr. Matheson remained unaware of the McPherson, and uninformed of the Choptiany, investigations at the time of the Third Discovery, his second, is only consistent with him having failed to inform himself, be

knowledgeable, and contact others with knowledge as specified in the *Rules*. This had the effect of significantly frustrating the discovery rights of the Appellants and, in addition to being a breach of the Rules, left the Respondent in breach of my October 2019 Order and my November 2020 Order.[7]

[69] When Mr. Matheson wrote to the several Criminal Investigations divisions to try to locate the additional documents disclosed most recently, he only asked about documents created and obtained in the course of any investigation into the Appellants, or into Fiscal Arbitrators and its promoters as it relates to the three Appellants. That is, he now was not referring to investigations into any other persons and entities or project files and master files which were all required in accordance with the October 2019 Order and the November 2020 Order. Two persons responding to his queries make it clear that they did not believe his request even extended to DeMara Consulting when they first read it.

[70] It should also be noted that the Respondent was aware that its affidavit on this motion was missing one of the exhibits. They provided a copy to the Appellants upon finding that out. However, the Respondent inexplicably did not update the copy they had filed with the Court. Mistakes happen and are often of little concern if identified and addressed. However, in this case the Respondent then tried unsuccessfully to deny the Appellants the right to make very brief written submissions on the exhibit after the hearing on the ground they had provided it to them before trial—notwithstanding that I did not have it before me at the hearing and did not receive it until I had the Court write the Respondent asking for it while I was writing my reasons.

VIII. Law

[71] Canadian Superior courts, including this court, have the inherent jurisdiction to deal appropriately with parties abusing their processes.

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[7] The fault cannot be necessarily attributed to the deponent personally as the disclosed records of his correspondence to the various Criminal Investigations divisions following my November 2020 decision included exchanges with Respondent's counsel which was redacted.

[72] A number of this Court's rules have been engaged in the several motions to date in this proceeding. The rules applicable to sanction for default most relevant in this June 2021 Motion are the following:

> 110 Where a person fails to attend at the time and place fixed for an examination in the notice to attend or subpoena, or at the time and place agreed on by the parties, or refuses to take an oath or make an affirmation, to answer any proper question, to produce a document or thing that that person is required to produce or to comply with a direction under section 108, the Court may,
>
> (a) where an objection to a question is held to be improper, direct or permit the person being examined to reattend at that person's own expense and answer the question, in which case the person shall also answer any proper questions arising from the answer,
>
> (b) where the person is a party or, on an examination for discovery, a person examined on behalf of or in place of a party, dismiss the appeal or allow the appeal as the case may be,
>
> (c) strike out all or part of the person's evidence, including any affidavit made by the person, and
>
> (d) direct any party or any other person to pay personally and forthwith costs of the motion, any costs thrown away and the costs of any continuation of the examination.
>
> …
>
> 116 (1) Where the examining party is not satisfied with an answer or where an answer suggests a new line of questioning, the examining party may, within fifteen days after receiving the answer, serve a further list of written questions which shall be answered within thirty days after service.
>
> (4) Where a person refuses or fails to answer a proper question on a written examination or to produce a document which that person is required to produce, the Court may, in addition to imposing the sanctions provided in subsections (2) and (3),

> (a) if the person is a party or a person examined on behalf of or in place of a party, dismiss the appeal or allow the appeal as the case may be,
>
> …
>
> 126 (1) The Chief Justice may, on his or her own initiative or at the request of a party, at any time order that an appeal or a group of appeals be subject to case management and may designate one or more judges to act as the case management judge.
>
> (3) The case management judge may deal with all issues that arise prior to the hearing of the appeal, including by
>
> (e) making any order or giving any direction that the case management judge considers appropriate.
>
> (4) If a party fails to comply with the time requirements set out in a timetable established under this section or with any requirement of these rules, or fails to attend any case management conference, the case management judge may
>
> (a) strike out any document or portion of a document filed by that party;
>
> (b) dismiss the appeal or give judgment in favour of the appellant;
>
> (c) amend the timetable in order to allow the party to comply with it;
>
> (d) order the party to pay costs, either in a fixed amount or in an amount to be taxed; or
>
> (e) make any other order that the case management judge considers just in the circumstances.

[73] These Rules are relevant to dismissing or allowing an appeal, and are relevant to understanding the jurisprudence on the need for the least extreme appropriate sanction to be chosen first.

[74] The jurisprudence on dealing with non-cooperative parties at the pre-trial discovery stage in this Court is not lacking and is very clear and consistent in the considerations and approach to be taken.

[75] In *MacIver* v. *HMQ,* 2009 FCA 89, the Federal Court of Appeal wrote:

> [1] The Tax Court of Canada Rules (General Procedure), SOR/90-688a (the Rules) provide for summary disposals of appeals when a party fails to cooperate at the discovery stage of the proceedings. Although this rule may seem drastic, there are circumstances where an appeal may be either dismissed or granted to sanction one of the parties' repeated breaches of the Rules or an apparent intent to delay and abuse the process.
>
> …
>
> [3] [T]he Motions Judge found that the appellant "clearly intended to avoid" or simply refused to answer "pertinent and relevant questions" related to "entire subject areas." The appellant's "deliberate obstructive behavior" …
>
> [4] The Motions Judge also found that some of the appellant's answers were antagonistic, abusive and scandalous, in that they suggested impropriety on the part of [others].
>
> [5] The appellant's defiant misconduct was compounded by the fact that, although a self-represented litigant, he is an experienced lawyer ….

[76] In upholding Justice Campbell's dismissal of Mr. MacIver's appeal, the FCA concluded that "Ultimately the importance of protecting the integrity of the judicial process outweigh all of the Appellant's submissions", that her dismissal power "should only be exercised when the violation of the rules are multiple, egregious and intentional", and specifically noting "the Appellant's lack of efforts in answering questions or fulfilling undertakings".

[77] In closing its reasons, the Court wrote it was satisfied "that the gravity of dismissing the Appellant's appeal were duly considered by the motion judge who finally concluded that the Appellant's deliberate pattern of conduct intended to frustrate the discovery process was likely to continue". The Court went on to note

"this pattern continued before this Court. The Appellant is blatantly disregarding an Order of this Court …".

[78] In deciding the MacIver motion (2007 TCC 554) in the Tax Court, Justice Campbell wrote the following passages relevant to the Appellants' June 2021 Motion before me:

> [5] The Federal Court of Appeal recognized the critical importance of discovery proceedings in an oft-cited passage from paragraph 13 of Yacyshyn v. The Queen, [1999] F.C.J. No. 196:
>
> > [13] Indeed, the days of trial by ambush or surprise are fortunately gone and a party to proceedings is subject to disclosure of its case and, in return, entitled to discovery of the other party's case. This sound rule of practice and procedure aims at ensuring both the fairness and the expeditiousness of the proceedings.
>
> [9] …Generally, this Court leans toward first ordering an appellant to produce the withheld documents or restricting an appellant's right to adduce evidence, rather than dismissing an appeal. It will impose the strongest sanction of dismissing an appeal only where there are repeated breaches, or where the refusal respecting documents is in combination with breaches of other Rules, or where there is an apparent intent to delay and abuse the process (Rusnak v. The Queen, [2000] T.C.J. No. 247, and Lichman v. The Queen, [2004] T.C.J. No. 166).
>
> [10] The Federal Court of Appeal recognized the Court's ability to protect its processes in Yacyshyn at paragraphs 12 and 18:
>
> > [12] …the Tax Court has the inherent jurisdiction to prevent an abuse of its process…
> >
> > [18] It is trite law that an abuse of process can, in appropriate circumstances, lead to the dismissal or the stay of proceedings.
>
> [11] It is clear that this Court has the discretion to choose the appropriate consequence for the breach. However, when the ultimate and most drastic sanction of dismissal is imposed, that discretion must be exercised reasonably, by giving sufficient weight to all the relevant circumstances involved in the appeal… I do not believe this is a case where the Appellant should have a "last chance" to comply with the rules and processes of this Court, nor do I believe that if I were to order strict and clear instructions to the Appellant with tight deadlines that it would force this Appellant to comply. In fact, all that an order of that nature

would accomplish is to force the Respondent to file another similar motion in the future because I am convinced that this Appellant will continue with a blatant and flagrant contempt for court orders as well as a calculated repeat of the obstructive conduct exhibited to date in these proceedings. An admonishment by myself and an order that he complies, would be meaningless here. Even if the Appellant were not an experienced lawyer, I believe I would have reached the same conclusion. The fact that he is a lawyer, who knows full well the consequences of repeated breaches of the rules, simply reinforces my decision to impose the harshest of sanctions.

[13] Where a party refuses to answer such [relevant and proper] questions, they are in breach of Rule 95(1). As with breaches relating to document production, this Court favours first ordering the Appellant to re-attend the examination to answer the questions or restricting the Appellant's right to produce evidence rather than dismissing the appeal.

[14] The Respondent argues that this Appellant is even more deserving of a harsh sanction because he is "an experienced practicing lawyer, and his conduct was not born out of misplaced ignorance, but out of knowing contempt;"…

[21] It is also evident from the Appellant's responses that he refused to provide undertakings or to make enquiries into matters relating to his own affairs.

[22] …. He is not an inexperienced Appellant. As an experienced lawyer, he knows better than to engage in such wilful, obstructive, and dishonest behaviour meant only to hinder and impede the administration of justice.

[26] In summary, this is not a case of the relevance of several questions put to an Appellant during an examination for discovery. In reviewing the transcript of the examination and other documentation, it is apparent that the Appellant made absolutely no effort to respond to proper questions put to him but instead has engaged in a deliberate pattern intended to frustrate the discovery processes of this Court. He has been intentionally uncooperative, obstructive, evasive and dishonest throughout his participation in the proceedings to date and unfortunately I do not see this behaviour changing in the future…. There is simply no point in providing this Appellant with another opportunity as I am convinced that he will only continue in a similar pattern of bad behaviour. In circumstances such as this, a strong message must be sent that this Court will not condone such unacceptable behaviour[8].

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[8] It can be noted with respect to the MacIver Decision that Appellants' counsel in the appeals before me, Mr. Pniowsky, was Respondent's counsel in MacIver before Justice Campbell

[79] In *Basserman*, a case where this Court allowed an appeal following the failure of the Respondent to comply with an Order of the Court at the discovery stage for the production of specific documents, the Federal Court of Appeal ("FCA") wrote:

> [12] The parties arrived before the Tax Court Judge on the Application to allow the appeal by reason of failure to comply with the Order. The Order had not been complied with and the Tax Court judge cannot be said to have erred in allowing the appeal because of that. The Minister is as obliged as any private party to obey the law of the Tax Court as long as they are outstanding. If the Minister disagrees, the Minister can appeal but cannot ignore. The Tax Court has the same discretion as any other Court to refuse to hear a party in contempt… The judge cannot be said to have erred in principle in exercising that discretion here.

[80] In *Yacyshyn* v. *HMQ*, A-416-98 1999 the FCA dismissed the Appellant's appeal to it from a decision of former Chief Justice Bowman of this Court striking parts of her Notice of Appeal after twice failing to attend discoveries as ordered by the Court and failure to answer undertakings. The FCA wrote:

> [12] Although the appellant's contentions may give rise to a nice theoretical debate as to the actual or intended scope of these Rules, there is, however, a simple practical answer to these contentions: the Tax Court has the inherent jurisdiction to prevent an abuse of its process.
>
> [13] Indeed, the days of trial by ambush or surprise are fortunately gone and a party to proceedings is subject to disclosure of its case and, in return, entitled to discovery of the other party's case. This sound rule of practice and procedure aims at ensuring both the fairness and the expeditiousness of the proceedings. No court can condone the unjustified failure of a party to submit to discovery which may either prejudice a party or unduly delay the proceedings and the ensuing justice. Justice delayed is justice denied, especially where it is unjustifiably delayed.
>
> [14] In the case at bar, there was ample evidence to support the judge's finding that both delay and prejudice resulted from the appellant's failure to comply in an orderly and timely manner with the order of the Court issued on October 10, 1997.

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in this Court, and Respondent's counsel in MacIver at the FCA hearing was his spouse, Tracey Pniowsky

> [15] Indeed, a week before the trial was due to start on July 8, 1998, the appellant had still not complied with her obligation to disclose As a result, the respondent was not in a position at the forthcoming of the hearing to adequately face and answer the appellant's contention with respect to the absence of tax liability of her husband.
>
> …
>
> [17] In our view, there was ample evidence before the Tax Court judge allowing him to conclude that the appellant was deliberately evading her obligations with respect to discovery and delaying the process.
>
> [18] It is trite law that an abuse of process can, in appropriate circumstances, lead to the dismissal or the stay of proceedings. The Tax Court Judge was obviously aware that the dismissal of an appeal is a drastic and somewhat ultimate remedy reserved for the egregious case or when no other alternative and less drastic remedy would be adequate.
>
> [19] In the present instance, we are satisfied that the Tax Court Judge carved out an appropriate remedy which ensures fairness to both parties and avoids the ultimate sanction against the one party in default. He properly exercised his discretion and we see absolutely no justification for interfering with it. If anything, he was generous with the appellant.

[81] In *Rezek* v. *Canada*, 2000 DTC 6029, the FCA allowed an appeal to it from an order of the Tax Court dismissing the Appellant's appeal on an initial motion involving refusals on discovery to produce certain documents requested and to answer certain questions. The FCA wrote:

> [4] The reasons of the Tax Court Judge for dismissing the nine appeals are identical in each case. They read in part:
>
> And upon reviewing the Notice of Motion in this matter dated the 15th day of September, 1999 that this appeal be dismissed, the affidavit of Richard Holt, and the file,
>
> It is ordered that this appeal is dismissed with costs in favour of the Respondent for the following two reasons:
>
> 1. The refusal of the Appellant "to provide all monthly brokerage statements relating to each hedge in issue from the time the hedge was commenced to the time that the hedge was closed." In my view, the position of the Crown

> requesting this information is based properly on the decision of the Federal Court of Appeal in Schultz. It is something on which the Appellant bears the onus of proof. It is something the Appellant must provide and it is within the Appellant's ability, knowledge and documents to provide.
>
> 2. The refusal of the Appellant to answer questions on examination for discovery as to the basis for claiming losses on income account and gains on capital account. To my mind that concept of "basis" is a concept of fact; what are the facts upon which you base your statement that one is income or the other is capital, as the case may be?
>
> Such a remedy can only be viewed as drastic. It remains, however, to consider whether the judgments should be interfered with considering that they were made in the exercise of judicial discretion. It will be seen that the respondent's allegation of delay on the part of each appellant did not figure in the judgments below.
>
> …
>
> [10] We are satisfied from the foregoing that the Tax Court Judge failed to give sufficient weight to all relevant considerations in exercising his discretion on September 28, 1999, the result of which is that the appellants in these matters will be deprived from having their appeals heard and disposed of on the merits. In our view, having regard to the circumstances, it is not in the interests of justice that the appellants should be deprived of that important right.

[82] In *Lichman* v. *Canada*, 2005 FCA 226, Justice Rothstein wrote reasons upholding the decision of Justice Campbell of this Court (2004 DTC 2547) to dismiss the Appellant's appeal for failure to answer questions and comply with the Court's rules. In her decision on the motion, Justice Campbell wrote:

> 25 Certainly if there had been any show of effort on the part of the appellant to comply, I might have more sympathy for his position; however, his behaviour smacks of a cavalier attitude that includes a complete disregard for this Court's procedure, its rules and forms, together with the legitimate requests of the respondent.
>
> 26 There is an onus on an appellant to move their appeal along at a reasonable pace and in a reasonable fashion. It has taken the respondent three years to get the little information and documentation that he has from the appellant. What has been received is vague and superficial. The respondent has taken every reasonable step to enable the appellant to comply with the discovery process. The appellant has consistently, throughout, failed or refused to clarify what documents he

> intends to rely upon in support of his claim for allowable business investment loss. His failure to provide proper lists is a procedural requirement which carries with it evidentiary consequences at the hearing…
>
> 27 …The appellant's pattern of inaction over the past three years has been consistent. If every appellant behaved in a similar manner and such behavior were permitted, it would take years and years before appeals wound their way through the system.
>
> 28 The remedy the respondent seeks here, dismissal of the appeal, is not one that can or should be given easily. Every case will turn on its own particular set of circumstances. While I am always hesitant to use my discretion to dismiss at this stage, there are those cases which warrant such an order. This is one of them.
>
> 29 After reviewing all of the documentation and hearing submissions of both the respondent and the appellant, I conclude that there are justifiable reasons to dismiss this appeal. The appellant has failed to provide answers to his undertakings. He clearly had the ability to respond to a number of those undertakings long before today, but simply did not bother to do so, and this was so, despite repeated and often detailed requests by the respondent. The lists he did provide were vague and incomplete and did not indicate what documents he intended to rely on to make his case.
>
> 30 In addition, he has failed to comply with the order of Justice Margeson of this Court. In the end, the appellant's conduct has been consistent with his intent, and that is to frustrate and delay the process.

[83] In *3488063 Canada Inc.* v. *HMQ*, 2016 FCA 233 Justice Webb confirms, at paragraph 57, that "any sanction, in my view, must relate to the particular appeal to which the misconduct relates. If there is failure to disclose documents related to one taxpayer for one taxation year that is under appeal, why would the appeal of that taxpayer for other years or the appeals of other taxpayers for other years be allowed, even though the appeals are consolidated?"

[84] In the Tax Court of Canada in *Cameco* v. *HMQ*, 2014 TCC 367, Justice Pizzitelli denied the Appellant's motion for sanctions on the Respondent for its failure to abide by the rules for discovery. After referring to the FCA decisions in *MacIver* and *Yacyshyn*, he wrote:

> [30] In this matter I have found no violation of any Rule or Order here as earlier stated and find the questions were answered on discovery. Moreover, the

> Appellant seeks this severe remedy without having even asked any follow-up questions or requested further details, without having brought any motion to determine whether his question was proper or properly answered or refused as he alleges or otherwise under the Rules, yet seeks this drastic remedy. The Appellant has made no attempt to pursue less drastic steps under the Rules.
>
> [44] The Appellant has not satisfied me that it is entitled to an Order with respect to any of the relief requested in the motion. Frankly, I am of the view the Appellant had no reasonable grounds to justify seeking the relief sought and frankly failed to take proper steps under the Rules to first seek less dramatic relief than that sought…

[85] Similar to *Cameco*, in *Teelucksingh* v. *HMQ*, 2010 TCC 322, Justice Bowie of this Court wrote, on a motion to allow the appeals for failure at discovery and delay:

> [6] I shall deal first with the appellant's argument that the appeal should be allowed, along with the appeals of several hundred other individuals for whom this serves as a test case. Clearly this is the most drastic remedy that the Court could apply. To justify it, I would have to be satisfied that there has been deliberate and continuing delay by the respondent, or as Campbell J. put it in Lichman v. Canada, "… a consistent pattern of inaction …". There has certainly been significant delay. Some of it has arisen through events beyond the parties' control. On one occasion discovery of the respondent's nominee had to be proponed due to a death in the family of counsel. Some is attributable to the respondent's three gaffes, as Mr. Aitken characterized them. I accept his explanation that these were the result of inadvertence rather than the sort of obstructive conduct that caused Campbell J. to dismiss the appeal in MacIver v. The Queen. Some sanction may be called for, but it is certainly not an appropriate case in which to apply the most drastic remedy available.

[86] The constraints and considerations applicable to the exercise of discretion by motions judges to allow or dismiss appeals, or to strike pleadings or parts of pleadings that result in an issue no longer being before the Court on the merits, can be outlined as follows:

- The exercise of the motions judge's discretion must be exercised reasonably, including considering alternatives that are less drastic remedies for the party's failure to comply with the Court's rules and pre-trial orders.

- The motions judge should consider all relevant facts and circumstances, including the following as appropriate:
  - Allowing or dismissing an appeal is a drastic step given its finality and generally reserved for defaults that are multiple, egregious and intentional;
  - It may not be an inappropriate remedy for an initial default to answer questions, respond to undertakings or to disclose documents as required, though it has been held to be in egregious and intentional circumstances;
  - Generally this Court leans toward first ordering that the required questions or undertakings be answered, the party re-attend examination, or the required documents be provided, in order that there is procedural fairness and the appeal can be decided on its merits;
  - These drastic remedies may be considered appropriate where one or more of the following exist:
    - There have been repeated defaults to comply with the rules of discovery. A pattern of defiant non-compliance or lack of effort at the initial discovery can suffice if it was intended to frustrate the discovery process and is likely to continue;
    - A court order for specific disclosure has been obtained against the defaulting party who has chosen not to comply with it;
    - The defaults were intentional or deliberate;
    - There has been a failure to be prepared, knowledgeable, informed or make inquiries into matters relating to the parties' own affairs;
    - Obstructive, antagonistic, deceitful, disrespectful, evasive, dishonest, uncooperative, cavalier, complete disregard, and inaction may be indicators of defaults that may be expected to continue by the party;
- The prejudice to the moving party and the delays in the judicial process;
- Will giving the defaulting party another chance be expected to cure the default, change the party's pattern of behavior, and provide procedural fairness to the moving party?
- The defaulting party's pattern of conduct;

- The defaulting party's knowledge and experience with pre-trial discovery and the rules of the court;
- The complaining party's approach to the discovery process may be a relevant consideration; have they taken reasonable steps to obtain proper discovery?
- Is the defaulting party abusing the court's processes and procedures?
- The motions judge should consider the importance of protecting the integrity of the judicial process, and weigh the defaulting party's position against that important aspect of the rules of law which govern us all. Strong messages may need to be sent.

IX. CONCLUSION

[87] The Appellants have brought two prior motions before the Court in respect of the Respondent's defaults and non-compliance. This Court has been clear in fully explaining to the Respondent what it was required to do in these particular cases.

[88] The Respondent has repeatedly failed to comply with the requirements of the October 2019 Order and the related subsequent orders and directions. The Respondent remains not fully complying with what was ordered. No satisfactory explanation has been given. If the Respondent thought my Orders were unclear, they could have returned to me for clarification. If they thought my Orders were wrong, they could have appealed them. The Respondent chose to do neither.

[89] The Respondent has repeatedly failed to have its nominees at any of the three oral examinations be knowledgeable and prepared, including failing to inform themselves on matters that clearly were relevant on discovery and could have been expected to be the subject of questioning. The Respondent's nominee at the Second Discovery and the Third Discovery was also uncooperative, obstructive, obfuscatory and evasive. He provided incorrect answers to relevant questions asked and these have not been fully or properly corrected. Other answers were glib and cavalier. Others appear to be attempts to run out the clock. These breaches of this Court's Rules remain outstanding.

[90] The Respondent has not amended its List of Documents as required by the Rules.

[91] The Respondent is represented by the Department of Justice which is essentially Canada's largest national law firm and employs a large number of tax litigation lawyers who are wholly familiar with this Court's Rules and processes and the rules generally applicable to pre-trial discovery. CRA's Criminal Investigations Division is part of Canadian law enforcement.

[92] The Respondent has adopted and demonstrated a consistent pattern of non-compliance with this Court's Orders and Rules with respect to CRA's audits and investigations involving the Appellants. I find this to have been intentional and deliberate, and that it was undertaken to frustrate these Appellants' rights to pre-trial discovery on the subject of CRA's investigation involving them relevant to their appeals.

[93] I find the Respondent's egregious approach to pre-trial discovery in these appeals to prejudice all three Appellants who have been denied, after three examinations, the opportunity to have relevant questions answered through a train or course of inquiry of a knowledgeable and informed person, and to obtain and ask questions on relevant documents. These abuses of the discovery process by the Respondent have caused considerable delay and expense to these three Appellants in respect of their appeals. They have also led to an inefficient use of public resources financed by all Canadians.

[94] At the hearing of this motion the Respondent did not propose an alternative remedy should the Court find it remained in default in my Orders and the Rules regarding oral and documentary discovery to that sought by the Appellants. Rather the Respondent maintained that no remedy was warranted because all questions asked had been answered. When asked by me about possible less drastic remedies if I were to decide that one is needed, the Respondent would only say that perhaps a fourth discovery could be ordered to be conducted in Court in front of me or another judicial officer, or perhaps by way of written questions.

[95] I am left with no reason to think that ordering further discovery and disclosure, oral or written, before a judicial officer or not, on the same terms as previously ordered twice already could reasonably be expected to cause the

Respondent to properly and fully comply. It was clear to the Respondent from the October 2019 Motion and the January 2020 Motion what was expected and required. During the January 2020 Motion the Court sent a strong message to the Respondent that this Court was open to another motion to allow the appeals and the Respondent still did not comply with the Orders and the Rules.

[96] The Respondent has, without excuse or reason, continued to not comply with my repeated orders for the same disclosure. No party in such a position, appellant or respondent, should expect to simply be ordered again to comply with the Court's discovery rules and orders already made. To make such an order would conjure up memories of the Pythonesque skit of the British bobby of another era yelling at a scofflaw: "Stop! Stop!-Stop, or I'll yell stop again!".

[97] The Respondent's egregious history of defaults and non-compliance in these appeals, that there is no alternative available that could reasonably be expected to cause the Respondent to now comply, and that this has caused prejudice to the Appellants, are reason enough to allow these appeals. This disposition is also necessary to protect the integrity of the judicial process and the rules of law that apply to all parties.

[98] In these appeals the Respondent has the burden of proof on the issue of the Appellant's intent or neglect in making the nonsensical misstatements they did in their tax returns in claiming to be agent for themselves, and in deducting the amounts they reported. This Court and the FCA have demonstrated they can deal with cases similar to these, including some involving the same scheme. It is possible that, had the Respondent complied with the pre-trial discovery Orders and Rules, the Appellants would not have obtained any evidence that would be relevant to their possible success at the trial stage. However, it is not for the Respondent to short circuit the process because it believes its proposition will prevail at trial, if what it does denies Canadian taxpayers their right to be heard in a fair trial or, almost equally importantly, if that is in breach of specific court orders to them regarding discovery and disclosure.

[99] For the reasons set out above, these appeals are allowed, with costs.

X. COSTS

[100] Costs are awarded to the Appellants throughout, including on this motion, except with respect to the Second Adjournment itself which remain as fixed by Justice Lyons.

[101] As the proceedings to date in these appeals have been heard and moved forward together using a single counsel, the aggregate costs payable by the Respondent will be allocable and payable to each of the three Appellants in proportion to the amounts paid or remaining payable by each of them to their shared counsel.

[102] As noted above, I have already received both parties' written submissions on costs prior to the filing of this motion. I am providing the parties time to try to reach an agreement among themselves on the aggregate amount of costs payable by the Respondent to the Appellants. If the parties are unable to do so, they may both file supplementary written submissions, limited to ten pages each (not including attachments), within 60 days from the date of this Order. I will need to receive updated information from Appellants' counsel about the Appellants' costs incurred and time recorded since the preparation of the Notices of Appeal in their appeals. If I do not receive similar information from the Respondent about the time and inter-departmental charges recorded by its counsel, I may likely infer that the Respondent is not disputing the reasonableness of the time spent by Appellants' counsel.

Signed at Montréal, Canada, this 5th day of October 2022.

"Patrick Boyle"

Boyle J.

CITATION:	2022 TCC 112
COURT FILE NOS.:	2013-1136(IT)G 2013-4459(IT)G 2016-1259(IT)G 2014-4245(IT)G 2016-2630(IT)G
STYLES OF CAUSE:	THOR CHOPTIANY, SANDRA MCPHERSON AND WAYNE RICHTER v. HIS MAJESTY THE KING
PLACE OF HEARING:	Toronto, Ontario and Ottawa, Canada
DATE OF HEARING:	March 29, 2022 and April 7, 2022
REASONS FOR ORDER BY:	The Honourable Justice Patrick Boyle
DATE OF ORDER:	October 5th, 2022

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