Docket: 2008-1945(GST)G

BETWEEN:

9005-6342 QUÉBEC INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Motion heard on May 20, 2010, at Montréal, Quebec.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the Appellant:	Serge Fournier
Counsel for the Respondent:	Benoît Denis **Gérald Danis**

AMENDED ORDER

This amended order and these amended reasons for order are issued in replacement of the order and reasons for order signed on September 29, 2010.

The Appellant has filed a motion for an order requiring the Respondent to disclose the information indicated below. The Court allows the motion and orders the Respondent to disclose the following to the Appellant, insofar as they are available:

(a) all files of audits conducted by Revenu Québec, as agent of the Respondent, involving Construction Pro-Dal (9114-0566 Québec Inc.), Les Constructions Vimont Inc., Construction P. Bourget Inc. and Construction Nikita (9125-9853 Québec Inc.);

(b) the last known contact information for the aforementioned companies and their shareholders, directors and employees, as well as the records of employment issued by the companies to their employees during the relevant period.

Signed at Ottawa, Canada, this 12th day of October 2010.

"Robert J. Hogan"

Hogan J.

Translation certified true
on this 22nd day of December 2010.

François Brunet, Revisor

Citation: 2010 TCC 463
Date: 20101012
Docket: 2008-1945(GST)G

BETWEEN:

9005-6342 QUÉBEC INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

AMENDED REASONS FOR ORDER

Hogan J.

[1] The Appellant has filed a motion for an order requiring the Respondent to disclose the following:

(a) all files of audits conducted by Revenu Québec involving Construction Pro-Dal (9114-0566 Québec Inc.), Les Constructions Vimont Inc., Construction P. Bourget Inc. and Construction Nikita (9125-9853 Québec Inc.) (the subcontractors);[1]

(b) the last known contact information for the subcontractors and their shareholders, directors and employees, as well as the records of employment issued by the subcontractors to their employees during the relevant period .[2]

[2] In its notice of motion and in its submissions, the Appellant submits that the Respondent relies on, in support of the assessments under appeal, the audit files of Revenu Québec regarding the four subcontractors.[3] The Respondent confirmed in her

[1] Notice of Motion, paragraph 2(*d*).
[2] Notice of Motion, paragraphs 2(*a*) to (*c*) and 2(*e*).
[3] Notice of Motion, paragraphs 3(*g*) and (*h*).

oral submissions that the auditor who prepared the Appellant's audit report indicated that he drew on a colleague's audit of three subcontractors.[4]

[3] The Respondent is asking the Court to dismiss the motion. Although the Respondent has made such a request, she mentioned on three occasions in her submissions that the Court could order that the audit files on the subcontractors be submitted to the Appellant and that the non-pertinent parts be stricken out.[5]

Analysis

[4] The following tables contain the relevant provisions of the *Excise Tax Act* (ETA*)* in English and in French as well as the sister provisions in the *Income Tax Act* (ITA). I have included the provisions of both acts as, on the one hand, the Appellant's motion concerns the information gathered by the Respondent under the two acts and, on the other, the provisions are all similar and case law relevant to both provisions is available.

Excise Tax Act	*Income Tax Act*
295(2) Provision of information − Except as authorized under this section, no official or other representative of a government entity shall knowingly	**241(1) Provision of information** − Except as authorized by this section, no official or other representative of a government entity shall
(a) provide, or allow to be provided, to any person any confidential information;	*(a)* knowingly provide, or knowingly allow to be provided, to any person any taxpayer information;
(b) allow any person to have access to any confidential information; or	*(b)* knowingly allow any person to have access to any taxpayer information; or
(c) use any confidential information other than in the course of the administration or enforcement of this Part.	*(c)* knowingly use any taxpayer information otherwise than in the course of the administration or enforcement of this Act, the *Canada Pension Plan*, the *Unemployment Insurance Act* or the *Employment Insurance Act* or for the purpose for which it was provided under this section.

[4] See pages 33 and 52 of the transcript.
[5] See pages 52, 62, 66 and 76 of the transcript.

(3) Evidence relating to confidential information − Despite any other Act of Parliament or other law, no official or other representative of a government entity shall be required, in connection with any legal proceedings, to give or produce evidence relating to any confidential information.

(4) Communications where proceedings have been commenced − Subsections (2) and (3) do not apply in respect of

(a) criminal proceedings, either by indictment or on summary conviction, that have been commenced by the laying of an information or the preferring of an indictment, under an Act of Parliament; or

(b) any legal proceedings relating to the administration or enforcement of this Act, the *Canada Pension Plan*, the *Employment Insurance Act*, the *Unemployment Insurance Act* or any other Act of Parliament or law of a province that provides for the imposition of a tax or duty.

. . .

(5) Disclosure of personal information − An official may

(a) provide such confidential information to any person as may reasonably be regarded as necessary for the purpose of the administration or enforcement of this Act, solely for that purpose;

(b) provide to a person confidential information that can reasonably be regarded as necessary for the purposes of determining any liability or obligation of the person or any refund, rebate or input tax credit to which the person is or may

(2) Evidence relating to taxpayer information − Notwithstanding any other Act of Parliament or other law, no official or other representative of a government entity shall be required, in connection with any legal proceedings, to give or produce evidence relating to any taxpayer information.

(3) Communication where proceedings have been commenced -- Subsections (1) and (2) do not apply in respect of

(a) criminal proceedings, either by indictment or on summary conviction, that have been commenced by the laying of an information or the preferring of an indictment, under an Act of Parliament; or

(b) any legal proceedings relating to the administration or enforcement of this Act, the *Canada Pension Plan*, the *Unemployment Insurance Act* or the *Employment Insurance Act* or any other Act of Parliament or law of a province that provides for the imposition or collection of a tax or duty.

. . .

(4) Where taxpayer information may be disclosed − An official may

(a) provide to any person taxpayer information that can reasonably be regarded as necessary for the purposes of the administration or enforcement of this Act, the *Canada Pension Plan*, the *Unemployment Insurance Act* or the *Employment Insurance Act*, solely for that purpose;

(b) provide to any person taxpayer information that can reasonably be regarded as necessary for the purposes of determining any tax, interest, penalty or other amount that is or may become payable by the person, or any refund or

become entitled under this Act;

. . .

295(1)

Definitions – In this section,

. . .

"confidential information" means information of any kind and in any form that relates to one or more persons and that is

(a) obtained by or on behalf of the Minister for the purposes of this Part, or

(b) prepared from information referred to in paragraph *(a)*,

but does not include information that does not directly or indirectly reveal the identity of the person to whom it relates and, for the purposes of applying subsections (3), (6) and (7) to a representative of a government entity who is not an official, includes only the information described in paragraph (5)*(j)*;

tax credit to which the person is or may become entitled, under this Act or any other amount that is relevant for the purposes of that determination;

. . .

241(10)

Definitions – In this section,

. . .

"taxpayer information" means information of any kind and in any form relating to one or more taxpayers that is

(a) obtained by or on behalf of the Minister for the purposes of this Act, or

(b) prepared from information referred to in paragraph *(a)*,

but does not include information that does not directly or indirectly reveal the identity of the taxpayer to whom it relates and, for the purposes of applying subsections (2), (5) and (6) to a representative of a government entity that is not an official, taxpayer information includes only the information referred to in paragraph (4)*(l)*;

Loi sur la taxe d'accise

295(2) Communication de renseignements − Sauf autorisation prévue au présent article, il est interdit à un fonctionnaire ou autre représentant d'une entité gouvernementale :

a) de fournir sciemment à quiconque un renseignement confidentiel ou d'en permettre sciemment la fourniture;

b) de permettre sciemment à quiconque d'avoir accès à un renseignement confidentiel;

Loi de l'impôt sur le revenu

241(1) Communication de renseignements − Sauf autorisation prévue au présent article, il est interdit à un fonctionnaire ou autre représentant d'une entité gouvernementale :

a) de fournir sciemment à quiconque un renseignement confidentiel ou d'en permettre sciemment la prestation;

b) de permettre sciemment à quiconque d'avoir accès à un renseignement confidentiel;

c) d'utiliser sciemment un renseignement confidentiel en dehors du cadre de l'application ou de l'exécution de la présente partie.

(3) Communication de renseignements dans le cadre d'une procédure judiciaire − Malgré toute autre loi fédérale et toute règle de droit, nul fonctionnaire ou autre représentant d'une entité gouvernementale ne peut être requis, dans le cadre d'une procédure judiciaire, de témoigner, ou de produire quoi que ce soit, relativement à un renseignement confidentiel.

(4) Communication de renseignements en cours de procédures − Les paragraphes (2) et (3) ne s'appliquent :

a) ni aux poursuites criminelles, sur déclaration de culpabilité par procédure sommaire ou sur acte d'accusation, engagées par le dépôt d'une dénonciation ou d'un acte d'accusation, en vertu d'une loi fédérale;

b) ni aux procédures judiciaires ayant trait à l'application ou à l'exécution de la présente loi, du *Régime de pensions du Canada*, de la *Loi sur l'assurance-emploi*, de la *Loi sur l'assurance-chômage* ou de toute loi fédérale ou provinciale qui prévoit l'imposition ou la perception d'un impôt, d'une taxe ou d'un droit.

. . .

(5) Divulgation d'un renseignement confidentiel − Un fonctionnaire peut :

a) fournir à une personne un renseignement confidentiel qu'il est raisonnable de considérer comme nécessaire à l'application

c) d'utiliser sciemment un renseignement confidentiel en dehors du cadre de l'application ou de l'exécution de la présente loi, du *Régime de pensions du Canada*, de la *Loi sur l'assurance-chômage* ou de la *Loi sur l'assurance-emploi*, ou à une autre fin que celle pour laquelle il a été fourni en application du présent article.

(2) Communication de renseignements dans le cadre d'une procédure judiciaire − Malgré toute autre loi ou règle de droit, nul fonctionnaire ou autre représentant d'une entité gouvernementale ne peut être requis, dans le cadre d'une procédure judiciaire, de témoigner, ou de produire quoi que ce soit, relativement à un renseignement confidentiel.

(3) Communication de renseignements en cours de procédures − Les paragraphes (1) et (2) ne s'appliquent :

a) ni aux poursuites criminelles, sur déclaration de culpabilité par procédure sommaire ou sur acte d'accusation, engagées par le dépôt d'une dénonciation ou d'un acte d'accusation, en vertu d'une loi fédérale;

b) ni aux procédures judiciaires ayant trait à l'application ou à l'exécution de la présente loi, du *Régime de pensions du Canada*, de la *Loi sur l'assurance-chômage* ou de la *Loi sur l'assurance-emploi* ou de toute autre loi fédérale ou provinciale qui prévoit l'imposition ou la perception d'un impôt, d'une taxe ou d'un droit.

. . .

(4) Divulgation d'un renseignement confidentiel − Un fonctionnaire peut :

a) fournir à une personne un renseignement confidentiel qu'il est

ou à l'exécution de la présente loi, mais uniquement à cette fin;

b) fournir à une personne un renseignement confidentiel qu'il est raisonnable de considérer comme nécessaire à la détermination de tout montant dont la personne est redevable ou du remboursement ou du crédit de taxe sur les intrants auquel elle a droit, ou pourrait avoir droit, en vertu de la présente loi;

raisonnable de considérer comme nécessaire à l'application ou à l'exécution de la présente loi, du *Régime de pensions du Canada*, de la *Loi sur l'assurance-chômage* ou de la *Loi sur l'assurance-emploi*, mais uniquement à cette fin;

b) fournir à une personne un renseignement confidentiel qu'il est raisonnable de considérer comme nécessaire à la détermination de quelque impôt, intérêt, pénalité ou autre montant payable par la personne, ou pouvant le devenir, ou de quelque crédit d'impôt ou remboursement auquel elle a droit, ou pourrait avoir droit, en vertu de la présente loi, ou de tout autre montant à prendre en compte dans une telle détermination;

. . .

. . .

295(1) Définitions – Les définitions qui suivent s'appliquent au présent article :

241(10) Définitions – Les définitions qui suivent s'appliquent au présent article :

. . .

. . .

« renseignement confidentiel »
Renseignement de toute nature et sous toute forme concernant une ou plusieurs personnes et qui, selon le cas :

a) est obtenu par le ministre ou en son nom pour l'application de la présente partie;

b) est tiré d'un renseignement visé à l'alinéa *a)*.

« renseignement confidentiel »
Renseignement de toute nature et sous toute forme concernant un ou plusieurs contribuables et qui, selon le cas :

a) est obtenu par le ministre ou en son nom pour l'application de la présente loi;

b) est tiré d'un renseignement visé à l'alinéa *a)*.

N'est pas un renseignement confidentiel le renseignement qui ne révèle pas, même indirectement, l'identité de la personne en cause. Par ailleurs, pour l'application des paragraphes (3), (6) et (7) au représentant d'une entité gouvernementale qui n'est pas un fonctionnaire, le terme ne vise que les renseignements mentionnés à l'alinéa (5)*j*).

N'est pas un renseignement confidentiel le renseignement qui ne révèle pas, même indirectement, l'identité du contribuable en cause. Par ailleurs, pour l'application des paragraphes (2), (5) et (6) au représentant d'une entité gouvernementale qui n'est pas un fonctionnaire, le terme ne vise que les renseignements mentionnés à l'alinéa (4)*l*).

[5] The *Privacy Act*, R.S.C. 1985, c. P-21, provides as follows:

> 8**(1)** Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.
>
> **Where personal information may be disclosed**
>
> **(2)** Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed
>
> . . .
>
> (*c*) for the purpose of complying with a subpoena or warrant issued or order made by a court, person or body with jurisdiction to compel the production of information or for the purpose of complying with rules of court relating to the production of information;
>
> (*d*) to the Attorney General of Canada for use in legal proceedings involving the Crown in right of Canada or the Government of Canada;

[6] In *Scott Slipp Nissan Ltd. v. Canada*[6] (*Scott Slipp*), Phelan J. of the Federal Court also considered decisions pertaining to the application and interpretation of section 241 of the ITA to rule on the application and interpretation of section 295 of the ETA.

[7] The Appellant in *Scott Slipp* brought an application for judicial review before the Federal Court as to its rights under section 295 of the ETA to the disclosure of a complete audit file for an assessment. The Canada Revenue Agency (CRA) released a redacted portion of the file but refused to release the balance of the file on the basis that it contained third party information.[7]

[8] The judge confirmed that the information requested was confidential information within the meaning of section 295 of the ETA.[8] He quashed the decision of the CRA on the basis of paragraphs 295(5) and (6). He did not address subsection 295(4), as "proceedings had yet to be commenced." The judge concluded that although there is no absolute duty on the Minister to disclose confidential information within the meaning of subsections 295(5) and (6), the Minister failed to

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[6] 2005 FC 1477, [2005] F.C.R. No. 1813, at paragraphs 23 and 33.
[7] *Ibid.*, at paragraphs 1 and 3.
[8] *Ibid.*, at paragraph 10.

properly exercise the discretion to refuse to do so.[9] As the judge observed, "the Applicant is entitled to the disclosure of information relevant to the assessment - information considered by CRA in making this assessment."[10]

[9] The judge stated that "[t] he purpose of the disclosure [of the information requested] is to allow for the proper administration of the Act, which includes the Notice of Objection process. . . . The disclosure is solely for that purpose. As such, it falls squarely within paragraph 295(5)(*a*) of the Act."[11] In his view, "[t]he disclosure is also necessary for the determination of the liability or obligation of the taxpayer, as contemplated by paragraph 295(5)(*b*). . . . The disclosure requested is to permit the Applicant to better know and potentially reduce or eliminate his alleged tax liability."[12] The judge also stated, in reference to subsection 295(6) of the ETA, that the Minister can give to the Applicant information relating to the Applicant, regardless of whether that information was provided by the Applicant or by a third party.[13]

[10] The judge also noted the following concerning the nature of the information requested by distinguishing between information relating solely to a third party, that relating to the taxpayer in the case, and that relating to both:

> In exercising the discretion to disclose confidential information, the Minister would have to have regard for the nature of the information. There is a qualitative difference between information held by CRA that relates solely to the tax affairs and business of the third party and information supplied by the third party, especially supplied under compulsion, that relates to the other taxpayer's (in this instance, the Applicant's) tax affairs and business. Some information seems to blur this difference, having a dual character in that it discloses information about a third party and about the taxpayer/Applicant. A contract between the third party and the Applicant, for example, discloses information about both.[14]

[11] The Supreme Court had an opportunity to rule on the scope of section 241 of the ITA in *Slattery* (*Trustee of*) *v. Slattery*.[15] Although that case pertains to the application of section 241 of the ITA in a bankruptcy case, the Court's comments on the purpose of section 241 may guide the Court as to the application of sections 241 of the ITA and 295 of the ETA in tax disputes. Iacobucci J., writing for the majority of the Court, stated as follows:

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[9] *Ibid.*, at paragraph 71.
[10] *Ibid.*, at paragraph 65.
[11] *Ibid.*, at paragraph 52.
[12] *Ibid.*, at paragraph 53.
[13] *Ibid.*, at paragraph 57.
[14] *Ibid.*, at paragraph 59.
[15] [1993] 3 S.C.R. 430.

> . . . [S]ection 241 involves a balancing of competing interests: the privacy interest of the taxpayer with respect to his or her financial information, and the interest of the Minister in being allowed to disclose taxpayer information to the extent necessary for the effective administration and enforcement of the *Income Tax Act* and other federal statutes referred to in s. 241(4).
>
> Section 241 reflects the importance of ensuring respect for a taxpayer's privacy interests, particularly as that interest relates to a taxpayer's finances. Therefore, access to financial and related information about taxpayers is to be taken seriously, and such information can only be disclosed in prescribed situations. Only in those exceptional situations does the privacy interest give way to the interest of the state.
>
> As alluded to already, Parliament recognized that to maintain the confidentiality of income tax returns and other obtained information is to encourage the voluntary tax reporting upon which our tax system is based. Taxpayers are responsible for reporting their incomes and expenses and for calculating the tax owed to Revenue Canada. By instilling confidence in taxpayers that the personal information they disclose will not be communicated in other contexts, Parliament encourages voluntary disclosure of this information. The opposite is also true: if taxpayers lack this confidence, they may be reluctant to disclose voluntarily all of the required information (Edwin C. Harris, *Canadian Income Taxation* (4th ed. 1986), at pp. 26-27).
>
> Parliament has also recognized, however, that if personal information obtained cannot be used to assist in tax collection when required, including tax collection by way of judicial enforcement, the possession of such information will be useless. Disclosure of information obtained through tax returns or collected in the course of tax investigations may be necessary during litigation in order to ensure that all relevant information is before the court, and thereby to assist in the correct disposition of litigation. But this necessity is sanctioned by Parliament in a very limited number of situations. Disclosure is authorized in criminal proceedings and other proceedings as set out in s. 241(3). Certain other situations are specified in s. 241(4), which have been described by the Ontario Court of Appeal as being "largely of an administrative nature" (*Glover v. Glover (No. 1)*, *supra*, at p. 397).[16]

[12] In *Huron Steel Fabricators (London) Ltd. v. Canada*[17] (*Huron Steel*), Heald J. of the Federal Court was called to examine the Minister's refusal to disclose to the applicants other taxpayers' income tax returns, returns which the Minister relied on in assessing the applicants. According to the Minister, the applicants and other taxpayers' entered into fraudulent agreements which minimized the applicants' tax burden.[18] The applicants requested access to such documents in order to prepare their

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[16] *Ibid.*, at pages 443 to 445.
[17] [1972] F.C. 1007 (FC), aff'd by [1973] F.C. 808 (FCA).
[18] *Ibid*., at page 1009.

appeals. The Minister denied access by invoking section 41 (now repealed) of the *Federal Courts Act* (*FCA*). The section provided as follows:

> 41(1) Subject to the provisions of any other Act and to subsection (2), when a Minister of the Crown certifies to any court by affidavit that a document belongs to a class or contains information which on grounds of a public interest specified in the affidavit should be withheld from production and discovery, the court may examine the document and order its production and discovery to the parties, subject to such restrictions or conditions as it deems appropriate, if it concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the public interest specified in the affidavit.

[13] The Court based its decision on the interpretation of that section. As for section 241 of the ITA, the judge stated that "[s]ection 241 has no application to the situation here because subsection (3) thereof exempts the provisions of subsections (1) and (2) from income tax proceedings such as this. Subsections (1) and (2) are the provisions dealing with confidentiality."[19] Therefore, according to the judge, it was clear that the applicants were entitled to the information under subsection 241(3) of the ITA.

[14] The Minister justified his refusal to disclose the income tax returns on the ground of the public interest. The judge did not accept that argument. According to him, "in the present case, the public interest in the proper administration of justice far outweighs in importance any public interest that might be protected by upholding the claim for privilege for the whole class."[20]

[15] Finally, Heald J. ordered that the income tax returns be disclosed to the applicants, noting that:

> In income tax appeals, the onus is on the taxpayer to demolish the Minister's assessments. In order to do this, he must demolish the assumptions of fact upon which the Minister's assessments are based. And yet, in this case, the Minister refuses to produce documents upon which some of his assumptions are admittedly based.[21]

[16] The Federal Court of Appeal (FCA) dismissed the Minister's appeal in *Huron Steel*. Thurlow J.A. did not accept the argument that the public interest justified the Minister's refusal to disclose the documents.[22]

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[19] *Ibid.*, at page 1014.
[20] *Ibid.*, at pages 1014 and 1015.
[21] *Ibid.*, at page 1015.
[22] *Supra*, at page 811.

[17] In *Bassermann v. Canada*,[23] the Respondent taxpayer, a lawyer, appealed from a notice of reassessment that demanded the payment of "Unemployment Insurance premiums, penalties and interest in respect of the employment of persons engaged by him from time to time through a secretarial service."[24] In his appeal to the Tax Court of Canada (TCC), the taxpayer applied for discovery. Couture C.J. of the TCC made an order

> . . . which allowed him to examine an officer of the Department of National Revenue under oath and also required that the officer, on behalf of the Minister,
>
> > make discovery on oath of all books, accounts, invoices, contracts, letters, statements, records, **returns**, bills, vouchers, and copies of the same, in the Respondent's possession or under its control relating to the matter within the scope of this proceeding.[25] [Emphasis added.]

[18] After the order, the taxpayer demanded production of the personal income tax returns of five of the individuals supplied by the secretarial service. Three of them did not consent to the Minister producing their returns and the Minister therefore refused to produce them. The taxpayer therefore moved that the appeal be allowed by reason of the Minster's failure to comply with the Order. The TCC granted the motion and the Minister applied to the FCA to set aside that decision.[26]

[19] The FCA dismissed the Minister's application. Mahoney J.A., who wrote the decision of the FCA, noted the following with respect to the application of section 241 of the ITA:

> Since the Order was made, substantial amendments to section 241 of the *Income Tax Act* have come into force. They would not have prevented what has happened here. The prohibition of subsection (2) against disclosure of an income tax return "in connection with any legal proceeding" is subject to the exception of paragraph (3)(b) as to proceedings relating to the administration or enforcement of, among others, the *Unemployment Insurance Act*. By subsection (6), notice to "interested parties" is required only if a party to the proceeding chooses to appeal the order to disclose. The Order made here can still be made without a taxpayer knowing that his or her return is required to be disclosed in its entirety to a business connection.[27]

[20] The judge also noted that the Minister did not appeal from the Order of the TCC. In his view,

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[23] [1994] F.C.J. No. 498 (FCA).
[24] *Ibid.*, at paragraph 2.
[25] *Ibid.*, who cites the order rendered on January 8, 1991, by the Tax Court of Canada.
[26] *Ibid.*, at paragraph 3.
[27] *Ibid.*, at paragraph 9.

> [p]ublic policy arguments we heard from the Applicant might have been very persuasive in obtaining a different order but, as with the relevance arguments, they are not pertinent at this stage. They provide no excuse for failure or refusal to obey the Order and no basis for a finding of error by the learned Tax Court judge.[28]

[21] The words of the judge confirm that the Court can dismiss a motion seeking information disclosure in accordance with sections 241(3) of the ITA and 295(4) of the ETA for reasons of public policy and relevance.

[22] The Appellant in *General Motors Acceptance Corp. of Canada v. Canada*[29] (General Motors) brought a motion seeking an order pursuant to sections 88 and 110 of the Rules requiring the Respondent to disclose to it documents which, in its view, were used to assess it.[30] The documents sought were as follows: an agreement between among the Appellant's competitors, a departmental memorandum respecting the validity of the agreement, a document entitled "Revenue Reporting Practices Employed in Respect of the Cost of Low-cost Financing Programs in the Automotive Industry," and all other documents mentioned in the latter.[31]

[23] Bell J. denied the order on the ground that "the Respondent's reliance upon the documents sought by the Appellant for purposes of assessing the Appellant has little, if any, foundation"[32] and that the documents sought by it were not relevant in the determination of its appeal.[33] Furthermore, according to the judge, "the information with respect thereto cannot within the meaning of paragraph 241(4)(*b*) of the Act reasonably be regarded as necessary for the purposes of determining any tax, interest, penalty or other amount that is or may become payable by the Appellant."[34]

[24] Bell J. also an opportunity to consider *Page v. The Queen*,[35] in which the disclosure of documents involving third parties who were not parties in the case was sought. He summarized the substance of the decision as follows:

> In that case, three of five directors of a company which failed to deduct or withhold and remit amounts to the Receiver General for Canada were assessed in respect of directors' liability. The other two were not so assessed. This Court ordered that documents [not including income tax returns] to the extent that they related to the other two taxpayers, which may have contained inaccurate information and may

[28] *Ibid.*, at paragraph 11.
[29] [1999] T.C.J. No. 228 (General Procedure).
[30] *Ibid.*, at paragraph 7.
[31] *Ibid.*
[32] *Ibid.*, at paragraph 10.
[33] *Ibid.*, at paragraph 19.
[34] *Ibid.*
[35] [1995] T.C.J. No. 1510 (General Procedure).

> have influenced the decision of Revenue Canada respecting the liability of directors, be produced. In that case the five directors were united in a common endeavour. It was the Court's opinion that such documents were reasonably regarded as necessary for the purpose of determining any tax, interest or penalty payable under the Act. [36]
>
> [Emphasis added.]

[25] In *Heinig v. Canada*,[37] Webb J. of the TCC dealt with an application by the Appellant for an order requiring the Minister to produce a certain number of documents. In dispute was the amount of certain payments that one Heather Mailow had made to the Appellant. The Respondent provided the documents sought, but had redacted the income of Ms. Mailow and her social insurance number as well as the social insurance number of other individuals. The Appellant was seeking the redacted information. The Appellant was also seeking a number of other documents the Respondent refused to provide her with under the pretext that they were confidential.

[26] Webb J. noted that "[s]ection 241 of the *ITA* and section 295 of the *ETA* provide restrictions on the release of taxpayer information. Each statute contains an exception in respect of any legal proceedings related to the administration or enforcement of that particular Act."[38]

[27] The judge observed that, in *Huron Steel*, "[t]he Federal Court of Appeal . . . confirmed that the tax returns of a third party that had been relied upon by the Minister in assessing the taxpayer in that case were to be disclosed to the taxpayer."[39] He also cited the words of Associate Chief Justice Jerome (as he then was) of the Federal Court Trial Division in *Oro Del Norte, S.A. v. The Queen*,[40] who dealt with a request for the production of documents and information in relation to third parties. According to Jerome J.:

> **A taxpayer must therefore be permitted access to all documents which are relevant to or relied upon by the Minister of National Revenue in reassessing a return.** Counsel for the defendant concedes that the broad test of relevancy expounded by McEachern, C.J. in *Boxer and Boxer Holdings Ltd.* v. *Reesor et al.* (1983), 43 B.C.L.R. 352, 35 C.P.C. 68, and adopted by Urie, J. in *Everest & Jennings Canadian Ltd.* v. *Invacare Corporation*, [1984] F.C.J. No. 67, [1984] 1 F.C. 856 (F.C.A.) applies:

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[36] *Supra*, at paragraph 16.
[37] 2009 TCC 47 (General Procedure).
[38] *Ibid.*, at paragraph 8.
[39] *Ibid.*, at paragraph 9.
[40] 90 DTC 6373, [1990] 2 C.T.C. 67, No. T-1947-86, May 9, 1990 (F.C.T.D.).

> It seems to me that the clear right of the plaintiffs to have access to documents which may fairly lead them to a train of inquiry which may directly or indirectly advance their case or damage the defendant's case particularly on the crucial question of one party's version of the agreement being more probably correct than the other, entitles the plaintiffs to succeed on some parts of this application.
>
> In order to determine whether the plaintiff has satisfied this relevancy test regard must be had to the essence of its appeal from the defendant's reassessment of the income tax return.[41]
>
> (emphasis added)

[28] Webb J. refused to order that the redacted information be provided to the Appellant as the social insurance numbers of Heather Mailow and other individuals were not relevant in relation to the determination of the amounts that Heather Mailow paid to the Appellant.[42] He expressed the view that to have a right "to all documents does not necessarily mean that an entire document should be disclosed to an appellant if only part of that document is relevant to the appeal and another part contains confidential third party information that is not relevant to the appeal."[43] In his opinion,

> . . . it would not be appropriate for the entire document to be disclosed if these parts could be severed. Only the relevant part will be required to be disclosed if the relevant part can be severed from the irrelevant part without rendering the relevant part incomprehensible. If the irrelevant part that contains confidential third party information cannot be severed from the relevant part without rendering the relevant part incomprehensible, then the entire document would have to be disclosed.[44]
>
> [Emphasis added.]

[29] The judge stated that the income of Heather Mailow was relevant to determine whether the Appellant had received payments from that person and that the income should not have therefore been redacted in the documents provided by the Respondent.[45] The judge noted that the Respondent had obscured the income of Heather Mailow in one of the documents sought, but not in the other. He therefore found that it was not necessary to order that the Respondent provide the first document that was not redacted, as the Appellant had been informed of the income of Heather Mailow in the other.[46]

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[41] *Ibid.*, at paragraph 8, cited in *Heinig* at paragraph 9.
[42] *Supra*, at paragraph 11.
[43] *Ibid.*, at paragraph 10.
[44] *Ibid.*
[45] *Ibid.*, at paragraph 12.
[46] *Ibid.*

[30] The Respondent did not provide the judge with the documents that, according to her, were confidential. Webb J. was unable to determine their nature and grant, if necessary, a disclosure order.[47] The judge ordered cross-examination on the affidavit of documents, noting that the Appellant would be entitled to make a motion to the Court after such cross-examination if in her opinion the Respondent still had documents containing relevant information.[48]

Obligation of disclosure and relevance

[31] In April, Campbell J. Miller J. discussed the scope of examination for discovery in *HSBC Bank Canada v. The Queen.*[49] Although in that case the application of section 241 of the ITA or section 295 of the ETA was not in issue, it is nonetheless interesting as the Court discussed the criterion of relevance in the case of a request for disclosure of documents. The Appellant in that case brought a motion under sections 92 and 110 of the Rules asking that the Minister answer 53 disclosure requests.[50]

[32] The judge derived from the case law a list of principles governing the determination of information that must be revealed at an examination for discovery. He then stated that, while the principles drawn from the case law were useful, they could not be applied in a formulaic fashion. In his view:

> Rather, it must always be borne in mind what the Parties and the Court are trying to achieve with examinations for discovery; that is, a level of disclosure so that each side can proceed efficiently, effectively and expeditiously towards a fair hearing, knowing exactly the case each has to meet. Presumably that is why there is an attitude from the Courts of, as former Chief Justice Bowman put it, providing wide latitude. . . . Counsel should be well aware that at one end of the spectrum fishing expeditions are discouraged and at the other end of the spectrum very little relevance need be shown to render a question answerable.[51]

[33] Campbell J. Miller J. noted the principles that defnie the scope of discovery:

> [13] . . . Justice Valerie Miller recently summarized some of the principles in the case of *Kossow v. R*:

[47] *Ibid.*, at paragraph 19.
[48] *Ibid.*, at paragraph 20.
[49] 2010 TCC 228 (General Procedure), 2010 DTC 1159.
[50] *Ibid.*, at paragraph 1.
[51] *Ibid.*, at paragraph 16.

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

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

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

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

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

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

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

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

> 8. Under the *Rules* a party is not required to provide to the opposing party a list of witnesses. As a result a party is not required to provide a summary of the evidence of its witnesses or possible witnesses: *Loewen v. R*.
>
> 9. It is proper to ask questions to ascertain the opposing party's legal position: *Six Nations of the Grand River Band v. Canada*.
>
> 10. It is not proper to ask questions that go to the mental process of the Minister or his officials in raising the assessments: *Webster v. The Queen*.

[14] The following additional principles can be gleaned from some other recent Tax Court of Canada case authority:

> 1. The examining party is entitled to "any information, and production of any documents, that may fairly lead to a train of inquiry that may directly or indirectly advance his case, or damage that of the opposing party": *Teelucksingh v. The Queen*.
>
> 2. The court should preclude only questions that are "(1) clearly abusive; (2) clearly a delaying tactic; or (3) clearly irrelevant": *John Fluevog Boots & Shoes Ltd. v. The Queen*.

[15] Finally in the recent decision of *4145356 Canada Limited v. The Queen* I concluded:

> (a) Documents that lead to an assessment are relevant;
>
> (b) Documents in CRA files on a taxpayer are *prima facie* relevant, and a request for those documents is itself not a broad or vague request;
>
> (c) Files reviewed by a person to prepare for an examination for discovery are *prima facie* relevant; and
>
> (d) The fact that a party has not agreed to full disclosure under section 82 of the Rules does not prevent a request for documents that may seem like a one-way full disclosure.[52]

[34] The Respondent provided me with a copy of *Her Majesty The Queen v. Charles Commanda*[53] (*Commanda*) of the Quebec Court of Appeal. *Commanda* pertained to a motion for the disclosure of documents in the penal and not fiscal

[52] *Ibid.*, at paragraphs 13 to 15.
[53] 2007 QCCA 947, leave to appeal denied [2007] S.C.C.A. No. 476.

context. The accused in the case sought from the Attorney General the disclosure of evidence, notably "evidence tending to confirm or disprove the status of each of the [defendants] as Aboriginal" and "to confirm or disprove [their] Aboriginal right."[54] According to the Attorney General, the evidence the defendants were seeking to obtain fell "outside the scope of the obligation to disclose."[55]

[35] The Court of Appeal ruled that the Attorney General was not required to disclose the evidence sought. According to the Court, "[t]he Crown, however, is not obliged to respond to requests for information that are speculative, fanciful, disruptive, unmeritorious, obstructive, and time-consuming (*R. v. Chaplin*, *supra* at para. 32)."[56] The Court also stated as follows:

> The Crown's obligation to disclose is limited to documents in its possession in the context of the criminal prosecution it has undertaken. By its very nature and purpose, the information the defendants request is not part of the Crown's case. At least, not yet. It is external to the elements of the offences with which the defendants are charged. It consists essentially of information and reports that may be (or probably are) available to the government but that, at the present stage of the proceedings, the Crown has not needed to identify or assess for the purposes of the trial. Therefore, in my view, the request goes beyond the obligation to disclose.[57]

[36] According to the case law pertaining to subsections 295(4) and (5), the taxpayer must have access to documents and information the Minister relies on to make an assessment or which are relevant to the assessment. The case law has accepted that the following information involving a third party must be disclosed to the taxpayer contesting an assessment, insofar as the information has been taken into account by the CRA or could have influenced the CRA in making an assessment:

(a) income tax returns (*Huron Steel*; *Bassermann v. Canada*);

(b) the amount of a third party's income (*Heinig v. Canada*);

(c) information exchanged between the Minister and the directors of a company who were not the subject of an assessment involving other directors of the same company, written records of other communications between the Minister and his directors, as well as related memoranda (*Page v. The Queen*).

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[54] *Ibid.*, at paragraph 27.
[55] *Ibid.*, at paragraph 73.
[56] *Ibid.*, at paragraph 88.
[57] *Ibid.*, at paragraph 99.

[37] The case law shows that Courts will not order the disclosure of information concerning third parties when the Minister had virtually no reason to use the information to make an assessment. In *Budget Propane Corp. v. Canada*,[58] it was the personal and corporate income tax returns of an intervenor; in *General Motors*, it was an agreement between the applicant's competitors, a related departmental memorandum and reviews by the Agency; in *Heinig v. Canada*, it was the social insurance numbers of third parties.

[38] The case law does not address the fact that subsections 295(4) of the ETA and 241(3) of the ITA, contrary to subsections 295(5) of the ETA and 241(4) of the ITA, do not specify that the information that may be provided must be relevant to case. I am of the view, however, that the information being sought must be relevant, since relevance is an essential criterion for examination of discovery. In *Bassermann*, the Court of Appeal also noted that relevance and public policy are elements that may be taken into account in an application for a disclosure order.

[39] On the basis of my review of the above-mentioned case law, I conclude that although the Appellant has the right to have access to the files of audits conducted by the CRA, the Respondent or the Deputy Minister of Revenu Québec, in the case of the Deputy Minister of Revenu Québec, the Appellant only has a right of access to the information related to the excise tax audit report subject to Part IX of the ETA.

[40] As stated by Associate Chief Justice Jerome of the Federal Court in *Oro Del Norte, S.A. v. The Queen*, *supra*: "A taxpayer must therefore be permitted access to all documents which are relevant to or relied upon by the Minister of National Revenue in reassessing a return." In the Reply to the Notice of Appeal, the Respondent alleges that the subcontractors at issue did not have [Translation] "the staff or the equipment to provide the contracted services they undertook [according to the Appellant] to provide for the Appellant." It is reasonable at this stage, to conclude that, *prima facie*, the audit reports regarding the taxpayers may contain relevant information, such as income declared by the companies, number of employees, etc., that may be useful to either party's case.

[41] In this case, the Respondent confirmed that the auditor who drafted the Appellant's audit report drew on a colleague's audit of the three subcontractors. It appears to me that such confirmation is sufficient to warrant the conclusion that the Appellant should have access to the reports, as the information they contain is relevant to the assessment. Under the principles set out by Campbell J. Miller J., in

[58] [2000] T.C.J. No. 699.

HSBC Bank Canada v. The Queen, *supra*, the notion of relevance must be interpreted broadly.

[42] This leads us to the second issue, that is, whether the Court should order that the Respondent provide the last known contact information for the subcontractors, their shareholders, directors and employees, as well as the records of employment issued by the subcontractors to their employees over the course of the relevant period.

[43] To my knowledge, there is no decision relating to a taxpayer's request to have access to the contact information of third parties as well as their records of employment. That information, if in the Minister's possession, is confidential in accordance with subsection 295(1) of the ETA. In my opinion, the Court can order that the information be disclosed under subsections 295(4) and 295(5), if relevant to the case.

[44] According to the Appellant, the information is relevant as it will enable it to refute the Respondent's conclusion, in the Reply to the Notice of Appeal, according to which the subcontractors did not have [TRANSLATION] "the staff or the equipment to provide the contracted services they undertook to provide for the Appellant."[59]

[45] The Respondent accuses the Appellant of engaging in a fishing expedition and of using the Respondent as an information officer.[60] The Respondent advanced the public policy argument that it should not be permitted to make orders that systematically compel the CRA to provide information of that nature without any specifications or information the CRA does not have on hand. According to the Respondent, such an order would go against the examination for discovery rule, according to which a witness cannot create a document.[61] The Respondent also argues that the Appellant's motion is premature, as she has yet to question the auditor.[62]

[46] The Appellant should, according to the Respondent, know the contact information of its subcontractors under subsections 169(4) of the ETA and should make its own inquiries with the subcontractors to find the information sought.[63] Also, according to the Respondent, the records of employment of the employees'

[59] See the Reply to the Notice of Appeal, at paragraph 28(n), and the transcript, at page 11.
[60] See transcript, at pages 61 and 62.
[61] See transcript, at pages 55 and 56.
[62] See transcript, at pages 54, 55 and 65.
[63] See transcript, at pages 57 and 58.

subcontractors are not relevant as they do not prove that the employees performed worked under subcontracts for the Appellant.[64]

[47] I understand the arguments put forward by counsel for the Respondent, as I have just summarized them. Nevertheless, from my reading of the judgments of the Court and of the Federal Court of Appeal in *Amiante Spec Inc. v. Canada*[65] , I am of the view that that case stands for the proposition that all elements necessary for the deductibility of inputs for each subcontractor must be proven by the Appellant. The Appellant could subpoena its subcontractors' representatives to establish that evidence and confirm that the services were actually performed so as to avoid an unfavourable inference, as was the case in *Amiante Spec*. Despite research that on its face seems reasonable, the Appellant was unable to track down any of the subcontractors, directors or employees. Consequently, I don't think that it would be too great a burden in this case to ask the Respondent and the CRA to provide, insofar as they are available, the records of employment of the subcontractors' employees for the relevant period, on the sole basis of the subcontractors' income tax returns for the period in issue or for the two previous years, if they were filed with the CRA. For these reasons, the Respondent must produce the last known contact information for Construction Pro-Dal (9114-0566 Québec Inc.), Les Constructions Vimont Inc., Construction P. Bourget Inc. and Construction Nikita (9125-9853 Québec Inc.), and **their shareholders, directors and employees, as well as the records of employment issued by the companies to their employees during the relevant period.**

Signed at Ottawa, Canada, this 12th day of October 2010.

"Robert J. Hogan"

Hogan J.

Translation certified true
on this 22nd day of December 2010.

François Brunet, Revisor

[64] See transcript, at pages 52, 53 and 65.
[65] 2008 TCC 89, aff'd by 2009 FCA 139.

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