

BETWEEN:

LBL HOLDINGS LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on February 7 and 21, 2018 at Ottawa, Ontario

Before: The Honourable Justice David E. Graham

Appearances:

Counsel for the Appellant: David Douglas Robertson
Jonathan Ip

Counsel for the Respondent: André LeBlanc
Craig Maw

ORDER

This Court orders that:

1. the Respondent's nominee for discovery, William Brown:
 - a) shall reattend examinations for discovery;
 - b) shall answer Questions 1, 4, 8, 10, 15, 18, 20, 21, 22, 27, 29, 32, 35, 36, 44, 45, 46, 49 and 57 set out in the Appellant's notice of motion;
 - c) shall answer Questions 9, 28, 30, 43, 48, 51 and 53, subject to the limitations set out in respect of those questions in the attached Reasons for Order;
 - d) shall answer any proper questions arising from the answers given, subject to the limitations set out in the attached Reasons for Order;

- e) need not respond to Questions 2, 7, 11, 12, 16, 17, 34, 38, 39, 40, 41, 56 and 58 and the second part of Question 33 on the basis that these questions have now been answered;
 - f) need not respond to the first part of Question 33 on the basis that the Appellant no longer seeks an answer to that question; and
 - g) need not respond to Questions 3, 5, 6, 13, 14, 19, 23, 24, 25, 26, 31, 37, 42, 47, 59, 62 and 63 for the reasons set out in the attached Reasons for Order;
2. the Respondent shall, within 14 days of the date of this Order, provide LBL with copies of the pages referred to in the analysis of Questions 60 and 61 in the attached Reasons for Order, with the appropriate adjustments to the redactions on those pages;
3. the Respondent shall, within 14 days of the date of this Order, provide the Court with sealed copies of:
- a) the RCMP report described in Question 52, with the Respondent's suggested redactions and reasons for redaction described therein; and
 - b) non-redacted versions of the documents described in Questions 50, 54 and 55; and
4. costs of the motion and the continued discovery shall be in the cause.

Signed at Ottawa, Canada, this 27th day of March 2018.

“David E. Graham”

Graham J.

Citation: 2018 TCC 63
Date: 20180327
Docket: 2012-4371(GST)G

BETWEEN:

LBL HOLDINGS LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Graham J.

[1] LBL Holdings Limited has brought a motion pursuant to sections 107 and 110 of the *Tax Court of Canada Rules (General Procedure)* seeking a direction that the Respondent's nominee for discovery, William Brown:

- a) reattend examinations for discovery at the Respondent's expense;
- b) answer various questions that he refused to answer or did not fully answer at discovery; and
- c) answer any proper questions arising from the answers given.

Background

[2] I described the background of the underlying appeal in detail in my 2015 Reasons for Order concerning LBL's motion to strike portions of the reply.¹ In simple terms, LBL is a wholesaler of, among other things, tobacco products. The Minister of National Revenue believed that LBL participated in a scheme that gave the false appearance that certain tobacco products were sold to status Indians on the Six Nations of Grand River Territory reserve and were thus exempt from GST when those products were, in fact, being sold by LBL to third parties who were not

¹ 2015 TCC 115.

status Indians. As a result, the Minister determined that LBL had failed to collect GST on those sales. The status Indians in question are Roberta MacNaughton and members of her family. Ms. MacNaughton operated a store on the reserve called Grandview Variety. LBL takes the position that the MacNaughtons purchased the tobacco products from LBL and then subsequently sold those tobacco products to various third parties. Since the MacNaughtons were status Indians and the sales from LBL to the MacNaughtons occurred on a reserve, LBL submits that no GST was collectible.

General Principles

[3] The principles governing discovery were clearly summarized by Chief Justice Rossiter in *Canadian Imperial Bank of Commerce v. The Queen*.² The principles regarding follow-up questions arising from questions that a nominee had previously refused to answer but that the Court has now ordered must be answered were summarized in detail by Justice Hogan in *Superior Plus Corp. v. The Queen*.³ There is no need to repeat either of their analyses here.

Questions

[4] The questions in dispute can be grouped into eight broad topics:

- a) questions relating to an investigation of LBL performed by the Special Investigations Division of the Canada Revenue Agency;
- b) questions relating to an audit of an unrelated taxpayer conducted by the same auditor who audited LBL;
- c) questions relating to a joint task force investigation of alleged fraudulent transactions involving tobacco products and the Six Nations reserve;
- d) questions relating to an RCMP investigation chronology;
- e) questions relating to alternative facts;

² 2015 TCC 280.

³ 2016 TCC 217.

- f) questions relating to specific CRA employees;
- g) questions allegedly answered; and
- h) questions relating to other persons.

[5] I will deal with each of those categories separately.

Question relating to CRA Special Investigations

[6] On two separate occasions, a referral was made to CRA Special Investigations requesting Special Investigations to investigate LBL for tax evasion. On both occasions Special Investigations declined to accept the referral. In Question 2, LBL seeks a copy of the Special Investigations file. On the first day of the hearing of this motion, the Respondent conceded that a copy of the file should be provided. However, when the hearing continued two weeks later, the Respondent advised that a copy could not be located as it appears that relevant files were destroyed years ago. I therefore consider this question to have been answered.

Questions relating to a prior audit performed by the same auditor

[7] The Respondent selected the auditor, Mr. Brown, as her nominee at discovery. Prior to commencing his audit of LBL, Mr. Brown had audited a company called Allind Distributors. Allind operated a wholesale tobacco business known as Harper's Wholesale. Mr. Brown's audit concluded that Allind had been selling tobacco products through a status Indian from the Six Nations reserve named Herman Styres in non-compliance with the *Excise Tax Act*.

[8] Sometime after the transactions that gave rise to the Allind audit, LBL acquired Allind's assets and offered employment to several members of Allind's senior management. This connection between Allind and LBL caused the CRA to believe that LBL may also have been selling tobacco products in non-compliance with the Act. As a result, the CRA commenced an audit of LBL.

[9] LBL would like Mr. Brown to answer a number of different questions about, and provide a number of documents relating to, his audit of Allind. Before turning to the individual questions, I will first deal with an argument raised by the

Respondent regarding the confidentiality of taxpayer information and then discuss in general terms the relevancy of information relating to the Allind audit.

[10] The Respondent submits that subsections 295(2) and (3) of the *Excise Tax Act* prevent the Minister from disclosing confidential information about a taxpayer to a third party. I agree. However, paragraph 295(4)(b) relieves the Minister from that restriction in respect of legal proceedings relating to the administration or enforcement of the Act.

[11] Section 241 of the *Income Tax Act* is the income tax equivalent of section 295, with paragraph 241(3)(b) being the equivalent of paragraph 295(4)(b). In *Dominion Nickel Investments Ltd. v. The Queen*,⁴ Justice Jorré considered section 241. He held that, while section 241 is designed to protect taxpayer privacy, paragraph 241(3)(b) clearly allows the Minister to produce otherwise private taxpayer information if that information is relevant. Justice Jorré went on to explain that any clearly irrelevant private information should be redacted from any documents being produced pursuant to that provision.

[12] The Respondent argued that the fact that LBL purchased Allind's assets should not in any way suggest that information from Allind's file was entitled to less protection from disclosure to LBL than information in any other taxpayer's file would be. I agree. The test is relevancy. Any proximity that LBL has to Allind by virtue of the asset purchase has no effect on my decisions on this motion. It neither weakens the privacy of Allind's information nor makes the information more relevant on discovery.

[13] In summary, so long as the Allind information that LBL is seeking is relevant, the Respondent must provide it, subject to redaction of any clearly irrelevant information contained within the relevant information. LBL submits that the information it is seeking is relevant and that only limited redaction is necessary. The Respondent takes the opposite view.

[14] At discovery, Mr. Brown described his understanding of a sales system by which tobacco products went from Allind, through the Six Nations reserve, to individuals with vehicles known as "jobbers" or "runners", to convenience stores, and ultimately to consumers. I will refer to this system as the "Allind sales system"

⁴ 2015 TCC 14.

and to any system by which tobacco products moved from a wholesaler, through the Six Nations reserve, to a convenience store as a “sales system”.

[15] It was appropriate that Mr. Brown provided a description of the Allind sales system at discovery. His understanding of the Allind sales system informed his audit of LBL.

[16] In the Allind audit, Mr. Brown had information about the entire Allind sales system. By contrast, in the LBL audit, Mr. Brown had almost no information about what happened to the tobacco products after LBL delivered them to the reserve. My understanding is that the Minister believes that jobbers took the LBL tobacco products from the reserve to various off-reserve convenience stores. Mr. Brown identified one jobber who was connected with LBL tobacco products, but did not identify any convenience stores or any other jobbers connected with those products. With such little information, Mr. Brown must have relied on some other source of information to form his understanding of what happened to LBL’s tobacco products after they were delivered to the reserve. The Allind audit was the only audit involving tobacco products and the Six Nations reserve that Mr. Brown had done prior to his audit of LBL. Accordingly, Mr. Brown’s conclusions about what must have happened after the tobacco products left Ms. MacNaughton’s possession must have been significantly shaped by his experience with his audit of Allind.

[17] If Mr. Brown had not conducted any previous Six Nations reserve tobacco product audits, he would presumably have spoken to another auditor who had done so in order to understand what happened to the products after they arrived on the reserve. Any information that Mr. Brown learned from such an auditor would have been subject to production.⁵ The fact that Mr. Brown learned the information from himself instead of another auditor does not make the information less relevant for discovery purposes.

[18] To be clear, I am not saying that anytime an auditor has prior experience auditing a certain type of transaction or a certain industry all of his or her prior audits are fair game on discovery. That would most definitely not be the case. I am saying information gleaned from previous audits is only subject to discovery when it significantly shaped the current audit.

⁵ *Paletta v. The Queen*, 2017 TCC 233.

[19] Based on all of the foregoing, I find that questions about the Allind audit that relate to the Allind sales system are relevant but other questions about the Allind audit are not.

[20] The following is an analysis of the specific questions in issue:

- a) Questions 45 and 46: LBL has asked for specific information about the details of the Allind sales system. I find these to be proper questions.
- b) Question 15: LBL has asked when Mr. Brown commenced his audit of Allind. LBL argues that if the audit of Allind started after LBL acquired Allind's assets, then the Minister could have started her audit of LBL sooner. My understanding is that LBL intends to use this information to argue that the otherwise statute barred reporting periods in question should not be opened. Therefore this information is relevant and this is a proper question.
- c) Questions 5 and 13: LBL has asked Mr. Brown why he spoke to an official at the Ontario Ministry of Finance as part of his audit of Allind, what information that official had provided to him and, in particular, whether the official had provided Mr. Brown with the volumes of cigarettes that had been sold. I find that it was appropriate for Mr. Brown to refuse to answer these questions. I am allowing access to information related to the Allind audit for the purpose of helping LBL to understand the Allind sales system. The broad request for any information that the official provided appears to be a fishing expedition. The volume of cigarettes sold by Allind reveals nothing about the mechanics of the Allind sales system or the assessment of LBL.
- d) Questions 35 and 44: LBL has asked whether Mr. Brown's audit of Allind also covered the sale of cigarettes from Allind to Ms. MacNaughton. LBL's belief that the audit covered sales by Allind to Ms. MacNaughton is based on RCMP information provided to Mr. Brown. I find that these are proper questions. I have concluded that the Allind sales system is a relevant area of inquiry. That conclusion is based on my understanding that Allind was working with Mr.

Styres. The relevance of questions regarding the Allind sales system only increases if Allind was also working with Ms. MacNaughton.

e) Questions 9 and 48: LBL has asked Mr. Brown whether he determined the names of any of the jobbers in the Allind file. My view of these questions depends on whether the jobbers were involved with the MacNaughtons:

i. Jobbers involved with the MacNaughtons: I find that these are proper questions to the extent that the questions relate to jobbers involved with the MacNaughtons. Any jobbers related to transactions involving the MacNaughtons may have been the same as the unnamed jobbers in LBL's transactions. The Respondent's view of relevance is clouded by her view of the case. The Respondent believes that the convenience stores in the LBL transactions were LBL's customers, not Ms. MacNaughton's customers, and thus would not be the same as the convenience stores in Allind's audit. Because the Respondent understands that the jobbers work for the convenience stores, her view is that it is unlikely that the jobbers in Allind's case would be the same as the jobbers in LBL's case. However, I cannot determine relevance solely on the basis of the Respondent's view of the case. LBL's view of the case is that the convenience stores were Ms. MacNaughton's customers, not LBL's customers. If that is the case, then any stores and jobbers that the MacNaughtons were dealing with in the Allind audit may well be the unidentified stores and jobbers in LBL's case. The identity of those unknown stores and jobbers is clearly relevant. The obvious follow-up question to these questions will be to ask Mr. Brown to provide the names and contact information of any jobbers identified in the Allind audit who were involved with the MacNaughtons. I want to make the parties aware that I consider that question to be appropriate. I also want to make the parties aware that I consider similar questions relating to convenience stores that were involved with the MacNaughtons to be appropriate.

- ii. Jobbers not involved with the MacNaughtons: I find that questions regarding jobbers in the Allind audit who were not involved with the MacNaughtons to be improper questions in the nature of a fishing expedition. The names of jobbers involved with Mr. Styres or any individual on the Six Nations reserve other than the MacNaughtons are not relevant. There is no reason for me to believe that the jobbers involved with any other person on the reserve would be the same as the jobbers involved with the MacNaughtons. The same is true for convenience stores.

- f) Question 36: LBL asks whether Mr. Brown knew, prior to the commencement of his audit of LBL, about sales of cigarettes to Ms. MacNaughton. This is a proper question. However, I want to caution LBL regarding any follow-up questions. To the extent that such sales were from Allind or Harper's Wholesale, any questions about these sales aimed at understanding the Allind sales system would be appropriate. However, if these sales were from other wholesalers, no follow-up questions would be appropriate. The relationships that other wholesalers may have had with Ms. MacNaughton are not relevant as they would not have shaped Mr. Brown's view of the LBL audit.

- g) Question 43: LBL wants to know what discussions Ms. MacNaughton may have had with the CRA regarding Allind. This question is too broad. Mr. Brown may restrict his response to discussions that Ms. MacNaughton had with the CRA regarding the Allind sales system.

- h) Question 47: LBL has asked whether Allind was assessed. This is not a proper question. The manner in which, or the reasons why, the Minister did or did not assess another taxpayer are not relevant even if that taxpayer was engaged in a similar transaction to the one in issue. I also want to be clear that, while I am giving LBL latitude in asking follow-up questions regarding the Allind sales system, those questions are not to stray into why the Minister assessed Allind in a certain manner or why the Minister assessed LBL in a similar or different manner. Questions in that vein are irrelevant. Allind's transactions are not in issue. Whether the Minister correctly or incorrectly assessed

Allind is irrelevant. Whether the Minister followed a consistent approach in assessing Allind and LBL is also irrelevant.

- i) Question 53: LBL has asked the Respondent to produce a copy of the Allind audit file. I will not require production of the entire audit file. It is appropriate for the Respondent to produce a copy of the Allind audit report. The audit report would have been prepared contemporaneously with the audit and would serve as a good confirmation of Mr. Brown's recollection of the Allind sales system. It is also appropriate for the Respondent to produce any of Mr. Brown's audit working papers which describe the Allind sales system. The Respondent may redact the audit report and working papers to remove the names of any jobbers (other than jobbers who were involved with the MacNaughtons), any convenience stores (other than convenience stores that were involved with the MacNaughtons), any wholesalers of tobacco products (other than LBL, Allind, Harper's Wholesale and Lumsden Brothers), any person resident on the Six Nations reserve (other than the MacNaughtons or Mr. Styres), any stores on the reserve (other than Grandview Variety, Middleport Plaza, Sour Springs Road, Tobacconist 1, Tobacconist 2, and Nickel and Dime⁶), and any employees of Allind (other than those employees who later accepted employment with LBL). Such names should be replaced by identifiable descriptors such as "Jobber #1" and "Jobber #2" that allow LBL to easily follow the nature of the transactions. Any contact information relating to such redacted names may also be redacted. Any names of CRA employees, Ontario Ministry of Finance officials and RCMP officers should not be redacted. Any information regarding Allind's revenue, expenses or income may be redacted unless it provides an understanding of the nature of the Allind sales system. For example, information that indicates the pricing, markup, expenses, GST charged, or input tax credits claimed relating to the sales system should not be redacted, but

⁶ My understanding is that these stores were operated by various members of the MacNaughton family.

information that indicates Allind's total revenues, total expenses, total income, or net tax for a given period should be redacted.⁷

- j) Question 8: LBL has asked Mr. Brown how the sales and order process used by Allind differed from the sales and order process used by LBL. This question assists LBL in understanding the Allind sales system and is therefore appropriate.
- k) Question 52: LBL has asked the Respondent to provide a copy of an RCMP file which was provided to Mr. Brown as part of his audit of Allind. I find that it is appropriate that the file be produced. It was clearly information that Mr. Brown had available to him when he audited Allind and therefore information that shaped his view of the LBL sales system. The Respondent shall provide me with a copy of the file indicating the sections, if any, that the Respondent proposes to redact and the reasons for those redactions. I will review the file and issue a subsequent decision regarding the redactions.
- l) Question 51: LBL has asked that the Respondent provide a copy of a witness statement obtained by the RCMP and given to Mr. Brown in the course of his audit of Allind. My understanding is that this witness statement was made by a nephew who informed the RCMP that his uncle, a convenience store operator, was buying cigarettes through the Six Nations reserve for cash, selling them to the public, charging GST on the sale, and neither remitting the GST nor reporting the profits from the sales. I find that the witness statement should be disclosed to LBL. The report informed Mr. Brown's understanding of the Allind sales system and thus informed his audit of LBL. The report may be redacted in the same manner described above in respect of the audit report. In addition, the name and contact information of the nephew may be redacted. Finally, the name and contact information of the uncle and the convenience store may be redacted unless the uncle is a person who was involved with the MacNaughtons or the convenience store was a store that was dealing with the MacNaughtons. In making redactions, the Respondent shall identify the uncle's name and the

⁷ It goes without saying that any information subject to solicitor-client privilege may be redacted in any document disclosed pursuant to these Reasons for Order.

name of his convenience store in a manner that will distinguish them from the redacted names of other convenience stores and convenience store owners (e.g. “Uncle” and “Uncle’s Store”).

- m) Question 31: LBL has asked whether the witness statement was provided to Mr. Brown for the purpose of undertaking an audit of the uncle. This is not an appropriate question. It amounts to asking whether the CRA audited the uncle. The answer to that question is not relevant.
- n) Questions 28 and 30: These questions ask the name of the uncle. As set out above, these questions need only be answered if the uncle was a person who was involved with the MacNaughtons.
- o) Question 29: LBL has asked whether Mr. Brown spoke to the uncle. This is an appropriate question. However, I will limit follow-up questions to information that Mr. Brown learned regarding the MacNaughtons, the Allind sales system or the LBL sales system.
- p) Questions 10 and 49: LBL has asked whether the uncle was buying cigarettes that originated with Allind. These are appropriate questions. However, I will limit follow-up questions to information regarding the Allind sales system.
- q) Question 32: LBL has asked whether Ms. MacNaughton was the person from the Six Nations reserve involved in the transactions with the uncle. This is a proper question.

Questions relating to the joint task force investigation

[21] The RCMP, the Special Investigations Division of the CRA, and the Ontario Ministry of Finance had a joint task force that was investigating the sale of tobacco products through the Six Nations reserve.

[22] The following is an analysis of LBL’s questions relating to the joint task force:

- a) Questions 4 and 18: LBL has asked whether the CRA was involved in a joint investigation with the RCMP and the province of Ontario regarding the sale of tobacco products on the Six Nations reserve between 1995 and 2005. These are appropriate questions.
- b) Question 59: This question goes further than Questions 4 and 18. It asks the Respondent to produce any information with respect to such investigation. This request is too broad, in particular because it would encompass information that Mr. Brown was not aware of in the course of his audit. LBL may rephrase its question, subject to the restrictions on follow-up questions set out below.
- c) Question 11: LBL has asked whether the joint task force ever investigated sales by LBL to the MacNaughtons. The Respondent has now answered this question. The answer is no.
- d) Question 57: LBL has asked whether the joint task force was investigating sales of tobacco products involving Grandview Variety between December 1995 and December 1996. LBL was selling tobacco products to Grandview Variety during that period of time and there is information which indicates that such an investigation occurred. I am prepared to allow this question for the purpose of establishing context. That said, the limitations on follow-up questions set out below will significantly limit if not eliminate follow-up questions on this topic.
- e) Question 3: It appears that the joint task force conducted some surveillance on the Six Nations reserve. LBL has asked which of the three bodies involved in the joint task force conducted the surveillance. I cannot see the relevance of the question.
- f) Question 17: LBL has asked whether Mr. Brown's manager, Mr. Ferrier, was involved with the joint task force. The Respondent has now answered this question so I do not have to determine whether I would have ordered it to be answered.
- g) Question 16: LBL has asked whether a specific individual from the Ontario Ministry of Finance was involved in the joint task force

investigation and whether that is how Mr. Brown knows him. The Respondent has now answered this question so I do not have to determine whether I would have ordered it to be answered.

[23] I have serious concerns about the direction that LBL may be intending to take in follow-up questions regarding the joint task force. It is clear that LBL wants to turn follow-up questions into a massive fishing expedition. I am not going to allow that to happen. I accept that LBL should be entitled to see joint task force information about itself. I accept that LBL should be entitled to see relevant joint task force information that Mr. Brown was aware of when he audited Allind or LBL. I accept that LBL should be entitled to see joint task force information that helps LBL to understand the missing information about the second half of the LBL sales system (i.e. what happened to the tobacco products after the MacNaughtons took possession of them). However, I am not prepared to allow open-ended questioning and I am not prepared to require the Respondent to seek information from other joint task force members. Accordingly, follow-up questions in respect of the joint task force will be limited to information that falls into at least one of the following categories:

- a) joint task force information in the CRA's possession specifically relating to LBL;⁸
- b) relevant joint task force information in the CRA's possession that Mr. Brown was aware of when he audited LBL or Allind;⁹ and
- c) joint task force information in the CRA's possession that relates to sales systems whereby tobacco products originating from a wholesaler off the Six Nations reserve were delivered to the MacNaughtons on the reserve and then ended up at convenience stores off the reserve during the period from January 1, 1998 to February 2, 2001.¹⁰

⁸ *Burlington Resources Finance Company v. The Queen*, 2015 TCC 71 and *HSBC Bank Canada v. The Queen*, 2010 TCC 228.

⁹ In *Paletta*, Justice D'Arcy concluded that CRA information that was provided to the auditor in the course of the audit is relevant whether the auditor found it relevant or not.

¹⁰ This period encompasses one year to either side of that portion of the reporting periods in issue during which LBL was dealing with the MacNaughtons. LBL stopped dealing with the MacNaughtons prior to the end of the reporting periods in question. I am willing to

[24] Any information provided from the joint task force may be redacted to remove the names of any wholesalers of tobacco products (other than LBL, Allind, Harper's Wholesale and Lumsden Brothers), any person resident on the Six Nations reserve (other than the MacNaughtons or Mr. Styres), any stores on the reserve (other than Grandview Variety, Middleport Plaza, Sour Springs Road, Tobacconist 1, Tobacconist 2, and Nickel and Dime), any employees of Allind (other than those employees who later accepted employment with LBL), any jobbers (other than those involved with LBL-sourced tobacco products or the MacNaughtons), and convenience stores (other than those involved with LBL-sourced tobacco products or the MacNaughtons). Such names should be replaced by identifiable descriptors that allow LBL to easily follow the nature of the transactions. Any contact information relating to such redacted names may also be redacted. Any names of CRA employees, Ontario Ministry of Finance officials and RCMP officers should not be redacted. Any information regarding Allind's revenue, expenses or income may be redacted unless it provides an understanding of the nature of the Allind sales system. Any information regarding the MacNaughtons' revenue, expenses or income may be redacted unless it provides an understanding of the nature of the sales systems that they were involved with.

Questions relating to the RCMP investigation chronology

[25] The Respondent has produced an RCMP investigation chronology. The following is an analysis of the questions relating to this chronology:

- a) Question 7: LBL has asked whether the investigation arose out of the joint task force investigation. This question has now been answered so I do not need to consider whether I would have ordered it to be answered.
- b) Question 34: LBL has asked whether the RCMP officer who conducted this investigation did so as part of the joint task force. This question has now been answered so I do not need to consider whether I would have ordered it to be answered.

accept that the MacNaughtons' business practices immediately before and after the reporting periods in question may have been similar to their business practices during the reporting periods in question.

- c) Questions 60 and 61: The Respondent has previously provided LBL with a redacted copy of the investigation chronology. LBL has concerns whether the redactions were appropriate. LBL takes the view that all information in LBL's audit file must be produced even if it is clearly irrelevant. I disagree. As set out above, clearly irrelevant confidential information contained in an otherwise relevant document may be redacted (*Dominion Nickel*). An example of such clearly irrelevant information would be the social insurance number or birthdate of a third party taxpayer. The Respondent provided me with a clean copy of the investigation chronology. I have reviewed the document and, with the exception of the following, I am satisfied that the Respondent's existing redactions are appropriate. The redaction of the names "Harper's" and "Herman Styres" in the entry at 9:55 on page 14 shall be removed. The redaction of the entry at 8:46 on page 29 shall be adjusted so that the first three sentences and the fourth-last, third-last and second-last sentences are no longer redacted. The redaction of the entry at 13:00 on page 49 shall be adjusted to remove all redactions from the first sentence. The Respondent shall provide LBL with new copies of the relevant pages. Since the Respondent conceded at the hearing that she would no longer be relying on paragraph 12(j) of the Reply, there is no need for me to consider the redactions in the entry at 9:10 on pages 58 and 59.

Questions relating to alternative facts

[26] Questions 14, 62 and 63 ask Mr. Brown's view of how his conclusions might have been different had he been aware of certain pieces of information. These questions call for speculation and for legal conclusions to be drawn and are not proper questions on discovery.¹¹ The Respondent has provided LBL with her legal position on the relevant issues. The fact that LBL disagrees with that position is not a reason for further questions.

Questions relating to specific CRA employees

[27] LBL has asked a number of questions relating to various employees of the CRA. The following is an analysis of these questions:

¹¹ *HSBC Bank Canada v. The Queen*, 2010 TCC 462 at para. 33.

- a) Questions 1 and 27: LBL has asked whether a CRA employee named Mr. Gilbert was involved in gathering data with respect to CRA audits of tobacco wholesalers and sales of tobacco products to status Indians and whether Mr. Gilbert was involved in providing research or assistance with respect to similar audits between 1995 and 2005. While these questions are relevant, I am concerned about related follow-up questions. The Respondent has already provided LBL with copies of all correspondence between Mr. Gilbert and Mr. Brown relating to the LBL audit. I will permit follow-up questions relating to information that Mr. Gilbert provided with respect to the Allind audit, subject to the restrictions set out above in respect of the audit report for that audit.¹² I will also permit follow-up questions relating to any information that Mr. Gilbert has relating to LBL. Finally, I will permit follow-up questions relating to the MacNaughtons, subject to the limitations set out in respect of joint task force information regarding the MacNaughtons. I will not permit follow-up questions relating to other taxpayers or to general information that Mr. Gilbert gathered about the sale of tobacco products through the Six Nations reserve that was not shared with Mr. Brown.
- b) Questions 6, 24 and 37: LBL has asked questions about a retired CRA officer whose name appears in Justice Favreau's decision in *893134 Ontario Inc. v. The Queen*.¹³ That appeal involved the sale of cigarettes to a business on the Six Nations reserve operated by Zelda MacNaughton and named Zee's Restaurant and Tobacconist Warehouse. The officer is described in that case as being part of a surveillance team that was watching employees of 893134 Ontario Inc. The surveillance team observed cigarettes being delivered by those employees to various convenience stores. The officer was also part of the team that was auditing 893134 Ontario Inc. The key issue in the appeal was whether the cigarettes in question had been delivered to the reserve. I do not see the relevance of LBL's questions regarding this officer. It appears that LBL is on a fishing expedition. The officer was involved in an audit of a different taxpayer that was using a different sales system

¹² See analysis of Question 53.

¹³ 2010 TCC 357.

concerning an issue that is not present in LBL's case. The involvement of the taxpayer in that case with Zelda MacNaughton is too tenuous a connection for me to find the questions to be relevant.

- c) Questions 38, 39, 40 and 41: LBL has asked other questions about another CRA officer, whose name also appears in Justice Favreau's decision. Those questions have now been answered so I do not need to consider whether I would have ordered them to be answered.
- d) Questions 19, 23, 25 and 26: LBL has asked to be provided with contact information for five current and former CRA employees. The broad net that LBL has cast in asking for this information strongly suggests a fishing expedition. It appears that LBL is simply asking for the contact information of anyone who had any connection with the case, no matter how remote, in the hope that it can find some beneficial piece of information. The employees in question are the person who supervised the person who managed the person who was auditing LBL, the team leader of the special investigations unit that rejected the special investigations referral, a special investigations officer who helped Mr. Brown through the procedural steps required in order to obtain information from the RCMP, an auditor who helped Mr. Brown find contact information for people at the Ontario Ministry of Finance, and a large income tax file auditor who helped Mr. Brown sort through records at Lumsden's but did no further work on the audit. Subsection 95(4) of the Rules does not entitle taxpayers to the contact information of every person who had any connection with their file no matter how remote. Instead, the person must "reasonably be expected to have knowledge of transactions or occurrences in issue". In the circumstances, I am not satisfied that these individuals had this knowledge. It strikes me as far more likely that LBL is seeking to contact at least some of these individuals in the hope that they may be able to provide LBL with information that I am otherwise preventing LBL from obtaining through the discovery process.
- e) Question 20: LBL has asked to be provided with contact information for the large case file manager for LBL's parent company, Sobeys. LBL takes the position that this individual had discussions with various Sobeys employees in respect of sales by a different Sobeys

subsidiary onto a different reserve and that, in the course of those conversations, he provided advice as to the types of transactions on a reserve that would be acceptable. In the circumstances, I am prepared to allow this question to be answered. I can see its potential relevance to a due diligence defence to the opening of a statute barred reporting period.

- f) Questions 21 and 22: LBL has asked to be provided with contact information for two current or former CRA electronic commerce audit section auditors. My understanding is that these two employees were involved in taking electronic data from Sobeys, extracting the relevant information and giving the resulting data to Mr. Brown. My understanding is also that LBL no longer has this data and that Mr. Brown takes the position that some of it was never provided to him. Thus LBL wishes to contact these individuals to see if they recall what data was provided to them. This is appropriate.

Questions allegedly answered

[28] The Respondent submits that the following questions have already been answered:

- a) Questions 12 and 56: LBL now accepts that these questions have been answered.
- b) Questions 50, 54 and 55: LBL has asked for various documents to be produced. The Respondent has produced those documents, subject to redaction. The Respondent shall provide me with a non-redacted copy of the documents. I will review the documents and issue a subsequent decision regarding the redactions.
- c) Question 58: I am satisfied that this question has been answered. The question relates to discussions that the CRA may have had with individuals at the Ontario Ministry of Finance. It appears to me that LBL intends to continue to try to conduct a fishing expedition in respect of this type of information. I have no reason to believe that the Ontario Ministry of Finance has any relevant information that is not already part of the joint task force information. Accordingly, I will not

permit any follow-up questions in respect of the Ontario Ministry of Finance.

Questions relating to other persons

[29] LBL has asked two questions relating to other persons. The following is an analysis of those questions:

- a) Question 33: LBL has asked whether any criminal charges were brought against the one jobber involved with LBL tobacco products that was identified and whether that jobber was assessed. During the course of the hearing, LBL withdrew the first part of the question. The Respondent has now answered the second part of the question so I do not need to consider whether I would have ordered it to be answered.
- b) Question 42: LBL has asked whether Mr. Brown was aware that a different wholesaler was selling tobacco products to status Indians on the Six Nations reserve. This appears to be either the beginning of a fishing expedition or the beginning of an attempt to ask irrelevant questions concerning the treatment of that wholesaler. I will not allow the question.

Summary

[30] In summary, Mr. Brown:

- a) shall reattend examinations for discovery;
- b) shall answer Questions 1, 4, 8, 10, 15, 18, 20, 21, 22, 27, 29, 32, 35, 36, 44, 45, 46, 49 and 57;
- c) shall answer Questions 9, 28, 30, 43, 48, 51 and 53, subject to the limitations set out in respect of those questions above;
- d) shall answer any proper questions arising from the answers given, subject to the limitations set out above;

- e) need not respond to Questions 2, 7, 11, 12, 16, 17, 34, 38, 39, 40, 41, 56 and 58 and the second part of Question 33 on the basis that these questions have now been answered;
- f) need not respond to the first part of Question 33 on the basis that LBL no longer seeks an answer to that question; and
- g) need not respond to Questions 3, 5, 6, 13, 14, 19, 23, 24, 25, 26, 31, 37, 42, 47, 59, 62 and 63 for the reasons set out above.

[31] The Respondent shall, within 14 days of the date of the Order, provide LBL with copies of the pages referred to in Questions 60 and 61, with the appropriate adjustments to the redactions on those pages.

[32] The Respondent shall, within 14 days of the date of the Order, provide me with sealed copies of:

- a) the RCMP report described in Question 52, with the Respondent's suggested redactions and reasons for redaction described therein; and
- b) non-redacted versions of the documents described in Questions 50, 54 and 55.

Costs

[33] The parties have had mixed success on the motion. Costs shall be in the cause.

[34] LBL has asked that the expense of the continued discovery be borne by the Respondent. I am not prepared to make that order. In my view, both parties are to blame for the need for the continued discovery. If LBL had not been intent on conducting a fishing expedition, Mr. Brown might have been less cautious in his responses. Similarly, if the Respondent had not taken such a narrow view of the relevance of the Allind audit and such an overly conservative view of taxpayer confidentiality, LBL would not have so many unanswered questions.

Signed at Ottawa, Canada, this 27th day of March 2018.

“David E. Graham”

Graham J.

CITATION: 2018 TCC 63

COURT FILE NO.: 2012-4371(GST)G

STYLE OF CAUSE: LBL HOLDINGS LIMITED v. THE QUEEN

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: February 7 and 21, 2018

REASONS FOR ORDER BY: The Honourable Justice David E. Graham

DATE OF ORDER: March 27, 2018

APPEARANCES:

Counsel for the Appellant: David Douglas Robertson
Jonathan Ip

Counsel for the Respondent: André LeBlanc
Craig Maw

COUNSEL OF RECORD:

For the Appellant:

Name: David Douglas Robertson
Jonathan Ip

Firm: EY Law LLP
Calgary, Alberta

For the Respondent:

Nathalie G. Drouin
Deputy Attorney General of Canada
Ottawa, Canada