Federal Court  Cour fédérale

**Date: 20181105**

**Docket: T-1850-17**

**Citation: 2018 FC 1086**

**Ottawa, Ontario, November 5, 2018**

**PRESENT: The Honourable Mr. Justice Southcott**

**BETWEEN:**

**THE MINISTER OF NATIONAL REVENUE**

**Applicant**

**and**

**ATLAS TUBE CANADA ULC**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] This decision relates to an application by the Minister of National Revenue [the Minister], brought pursuant to section 231.7 of the *Income Tax Act*, RSC, 1985, c 1 (5th Supp) [the Act], seeking an order requiring the Respondent, Atlas Tube Canada ULC [Atlas], to provide a particular document to the Minister. The document is a draft due diligence report [the Report], prepared by Ernst & Young LLP (Canada) [EYC] in connection with a transaction

involving Atlas, that the Canada Revenue Agency [CRA] has requested in the course of an audit of Atlas.

[2] Atlas has refused to provide the Report, taking the position that the Minister has not established its relevance and that the Report is protected by solicitor-client privilege. Atlas also argues that the Report is not compellable under the Act, because compelling its production would impose on Atlas an obligation to self-audit, and that the Court should exercise its discretion to decline to order provision of the Report, because such provision would be prejudicial to Atlas.

[3] As explained in greater detail below, I am allowing this application, because I have found that that the Minister has met the low threshold for relevance applicable to an application under s 237.1 of the Act and that Atlas has not met the burden upon it of establishing that the Report is protected by solicitor-client privilege. I have also found that the jurisprudence, which precludes the imposition on taxpayers of an obligation to self-audit, does not apply to the circumstances of this case, and that Atlas has not established a basis for the Court to decline to order the production of the Report.

## II. **Background**

[4] Atlas is a private company, incorporated under the laws of Alberta, and is in the business of manufacturing and selling tubing. Atlas is a subsidiary of Zekelman Industries Inc. [Zekelman], a private US company, which was named JMC Steel Group Inc. [JMC] at the time of the transaction giving rise to this application.

[5] On March 30, 2012, JMC acquired the shares of a public Ontario corporation, Lakeside Steel Inc. [LSI] for a price of $148 million. At the time of this acquisition, LSI was a holding company, which owned two subsidiary corporations: Lakeside Steel Corporation [LSC], an Ontario operating company, and Lakeside Steel Holdings USA Inc. [Lakeside US], a US holding company with US operating subsidiaries. The acquisition occurred by way of a Plan of Arrangement, which was approved by an order of the Ontario Superior Court of Justice on March 29, 2012.

[6] This transaction included a number of pre-acquisition steps, including the amalgamation of LSI and LSC, and a number of post-acquisition steps, including:

A. another amalgamation involving LSI to form a new LSI;

B. transfer by the new LSI of the Lakeside US shares to JMC for a stated value of $57 million;

C. transfer by JMC of the new LSI shares and debt of $32 million to 6582125 Canada Inc. [658], resulting in a $90 million debt owing by 658 to JMC; and

D. transfer by 658 of the new LSI shares and debt of $32 million to Atlas, resulting in a $90 million debt owing by Atlas to 658.

[7] The sequence of events surrounding this transaction is reviewed in greater detail later in these Reasons. Those events included a due diligence process conducted by JMC in connection with the proposed acquisition, which included preparation by EYC of the Report which is the subject of the present application. The overall due diligence process was led by Michael

McNamara, JMC's Executive Vice President, Corporate Secretary and General Counsel. In his affidavit sworn in support of Atlas' position in this application, Mr. McNamara describes the Report as follows:

> 21. The Draft Due Diligence Report describes and explains, *inter alia*, (i) the tax profile and tax attributes of LSC and LSI including the availability of non-capital losses, (ii) LSC's material tax exposures resulting from its Canadian tax filings for the previous 4 taxation years, including an assessment of the probability that the filing positions leading to the tax exposures would be sustained if they were challenged by the Canada Revenue Agency (the "CRA"), and an evaluation of whether appropriate reserves had been taken by LSI or LSC in respect of such exposures.

[8] Mr. McNamara's evidence, provided in cross-examination on his affidavit, is that EYC were engaged to conduct the Canadian tax diligence upon the recommendation of JMC's Canadian legal counsel, Stikeman Elliott [Stikeman], and that the Report, or at least information contained the Report, was subsequently provided to Stikeman.

[9] CRA is conducting an audit of Atlas for its taxation year ended April 21, 2012. As part of this audit, CRA is reviewing the steps in the transaction described above, including in particular: (a) whether the $57 million stated value of the Lakeside US shares is fair market value; and (b) the reasonableness of the rate employed in Atlas' interest expense deduction taken on the debt owed to 658. Among other documents, the CRA requested a copy of the Report to assist with its review of the valuation and interest issues. It appears uncontested that Atlas has provided CRA with the documentation it has requested, with the exception of the Report.

## III. **Issues**

[10] Having considered the parties' written and oral arguments, I would characterize the issues to be decided by the Court as follows:

A. Should the Court review a copy of the Report?

B. Has the Minister established the relevance of the Report?

C. Is the Report protected by solicitor-client privilege?

D. Would compelling Atlas to provide the Report offend the principle that a taxpayer is not required to self-audit?

E. Should the Court otherwise exercise its discretion to decline to compel Atlas to provide the Report?

## IV. **Analysis**

### A. *Should the Court review a copy of the Report?*

[11] At the hearing of this application, Atlas' counsel filed with the Court a sealed copy of the Report, which has not been reviewed by the Minister's counsel, and I directed that this document be treated as confidential pursuant to Rule 151 of the *Federal Courts Rules*, SOR/98-106. For the sake of good order, my Judgment in this application provides for the confidential treatment of the document.

[12] Addressing whether the Court should review the Report in deciding this application, Atlas' counsel referred the Court to Justice Mosley's explanation at paragraph 12 of *Canada (Minister of National Revenue – M.N.R.) v Revcon Oilfield Constructors Inc.*, 2015 FC 524:

> [12] The Court has the power to receive documents for which solicitor-client privilege is asserted in a sealed envelope and review them so as to determine whether a proper claim of privilege has been made out. In *Canada (Privacy Commissioner) v Blood Tribe Department Of Health*, 2008 SCC 44 at para 17 [*Blood Tribe*], Justice Binnie explained that this power ought to be used sparingly: "Even courts will decline to review solicitor–client documents to adjudicate the existence of privilege unless evidence or argument establishes the necessity of doing so to fairly decide the issue…"

[13] I understand both parties to be in agreement with this explanation of the principle guiding my decision whether to review the Report. In my view, the record before the Court provides sufficient evidence surrounding the circumstances under which the Report was requested and generated, and sufficient evidence as to the nature of the information in the Report, that the Court can fairly decide the issues raised in this application without the necessity to review the Report. The Report will accordingly remain sealed in the Court file.

B. *Has the Minister established the relevance of the Report?*

[14] Atlas argues that the Minister has not established that the Report may be relevant to the determination of Atlas' tax liability and that the Minister has therefore not met the requirements for issuance of an order under s 231.7 of the Act.

[15] The relevant subsections of ss 231.1 and 231.7 of the Act, upon which this application is based, state as follows:

| **Inspections** | **Enquêtes** |
| --- | --- |
| **231.1 (1**) An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Act, | **231.1** (1) Une personne autorisée peut, à tout moment raisonnable, pour l'application et l'exécution de la présente loi, à la fois : |
| **(a)** inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by the taxpayer under this Act, and | **a)** inspecter, vérifier ou examiner les livres et registres d'un contribuable ainsi que tous documents du contribuable ou d'une autre personne qui se rapportent ou peuvent se rapporter soit aux renseignements qui figurent dans les livres ou registres du contribuable ou qui devraient y figurer, soit à tout montant payable par le contribuable en vertu de la présente loi; |
| **(b)** examine property in an inventory of a taxpayer and any property or process of, or matter relating to, the taxpayer or any other person, an examination of which may assist the authorized person in determining the accuracy of the inventory of the taxpayer or in ascertaining the information that is or should be in the books or records of the | **b)** examiner les biens à porter à l'inventaire d'un contribuable, ainsi que tout bien ou tout procédé du contribuable ou d'une autre personne ou toute matière concernant l'un ou l'autre dont l'examen peut aider la personne autorisée à établir l'exactitude de l'inventaire du contribuable ou à contrôler soit les renseignements qui figurent dans les livres ou registres du |

taxpayer or any amount payable by the taxpayer under this Act,

contribuable ou qui devraient y figurer, soit tout montant payable par le contribuable en vertu de la présente loi;

and for those purposes the authorized person may

à ces fins, la personne autorisée peut :

**(c)** subject to subsection 231.1(2), enter into any premises or place where any business is carried on, any property is kept, anything is done in connection with any business or any books or records are or should be kept, and

**c)** sous réserve du paragraphe (2), pénétrer dans un lieu où est exploitée une entreprise, est gardé un bien, est faite une chose en rapport avec une entreprise ou sont tenus ou devraient l'être des livres ou registres;

**(d)** require the owner or manager of the property or business and any other person on the premises or place to give the authorized person all reasonable assistance and to answer all proper questions relating to the administration or enforcement of this Act and, for that purpose, require the owner or manager to attend at the premises or place with the authorized person.

**d)** requérir le propriétaire, ou la personne ayant la gestion, du bien ou de l'entreprise ainsi que toute autre personne présente sur les lieux de lui fournir toute l'aide raisonnable et de répondre à toutes les questions pertinentes à l'application et l'exécution de la présente loi et, à cette fin, requérir le propriétaire, ou la personne ayant la gestion, de l'accompagner sur les lieux.

**Compliance order**

**Ordonnance**

**231.7 (1)** On summary application by the Minister, a judge may, notwithstanding subsection 238(2), order a

**231.7 (1)** Sur demande sommaire du ministre, un juge peut, malgré le paragraphe 238(2), ordonner à une

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|---|---|
| person to provide any access, assistance, information or document sought by the Minister under section 231.1 or 231.2 if the judge is satisfied that | personne de fournir l'accès, l'aide, les renseignements ou les documents que le ministre cherche à obtenir en vertu des articles 231.1 ou 231.2 s'il est convaincu de ce qui suit : |
| **(a)** the person was required under section 231.1 or 231.2 to provide the access, assistance, information or document and did not do so; and | **a)** la personne n'a pas fourni l'accès, l'aide, les renseignements ou les documents bien qu'elle en soit tenue par les articles 231.1 ou 231.2; |
| **(b)** in the case of information or a document, the information or document is not protected from disclosure by solicitor-client privilege (within the meaning of subsection 232(1)). | **b)** s'agissant de renseignements ou de documents, le privilège des communications entre client et avocat, au sens du paragraphe 232(1), ne peut être invoqué à leur égard. |

[16] The present issue relates to whether Atlas was required under s 231.1 to provide the Minister with access to the Report following the Minister's requests therefor. The Minister submits that the threshold to establish relevance of the requested material is low, noting that s 231.1(a), upon which the Minister relies, applies to "any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by the taxpayer under this Act." [Emphasis added]

[17] The Minister refers the Court to authorities interpreting s 231.1, as well as ss 231.2 and 231.6, which also impose requirements on taxpayers to provide documentation and information

to the Minister, and predecessor provisions. In *R v McKinlay Transport Ltd.*, [1990] 1 SCR 627 [*McKinlay*], the Supreme Court of Canada considered whether s 231(3) of the *Income Tax Act*, RSC 1952, c 148 violated the prohibition against unreasonable search and seizure in s 8 of the *Canadian Charter of Rights and Freedoms*. At paragraph 35, the Court held as follows:

> 35 In my opinion, s. 231(3) provides the least intrusive means by which effective monitoring of compliance with the Income Tax Act can be effected. It involves no invasion of a taxpayer's home or business premises. It simply calls for the production [page 650] of records which may be relevant to the filing of an income tax return. A taxpayer's privacy interest with regard to these documents vis-à-vis the Minister is relatively low. The Minister has no way of knowing whether certain records are relevant until he has had an opportunity to examine them. At the same time, the taxpayer's privacy interest is protected as much as possible since s. 241 of the Act protects the taxpayer from disclosure of his records or the information contained therein to other persons or agencies.
>
> [Emphasis added]

[18] In *Saipem Luxembourg S.A. v Canada (Customs and Revenue Agency)*, 2005 FCA 218 [*Saipem*], the Federal Court of Appeal considered the application of s 231.6 of the Act, which applies to information or documentation that is available or located outside Canada and that "may be relevant" to the administration or enforcement of the Act. At paragraph 26, the Court adopted jurisprudence under s 231.2 as applying to s 231.6, concluding that seeking to obtain information relevant to the tax liability of a person whose liability to tax is under investigation is a purpose related to the administration or enforcement of the Act, even if much of the information requested turns out to be irrelevant. The Court also adopted, at paragraph 33, CRA's position that the taxpayer's books and records were relevant to an audit, even if some of them only serve to verify, after being examined, that they had no impact on its Canadian tax liability, and confirmed at paragraph 36 that it is CRA's prerogative as to whether it will conduct an audit

and what form the audit will take. The Federal Court relied on these paragraphs of *Saipem* in its decision under s 231.1 (the section at issue in the present matter) in *Canada (Minister of National Revenue – M.N.R.) v Amdocs Canadian Managed Services Inc.*, 2015 FC 1234 at paragraph 68.

[19] In *AGT Ltd. v Canada (Attorney General)*, [1996] 3 FC 505 [*AGT*] (affirmed [1997] 2 FC 878), Justice Rothstein (then of the Federal Court) considered an argument by a taxpayer that much of the information sought by the Minister under s 231.2 of the Act was irrelevant and that the Minister's deponent had made admissions to that effect in cross-examination. The Court considered jurisprudence, including *McKinlay*, and held as follows at paragraph 20:

> [20] As the Minister had been conducting an extensive audit of AGT, this is the case of a genuine inquiry into the income tax liability of AGT. There is no doubt that the subject-matter of the documents which the Minister sought pertains to AGT's tax liability. The Minister is entitled to business records, which these are, whether relevant or irrelevant to any specific issue. The fact that the documents may not have been prepared for purposes of the Income Tax Act is of no consequence. [Emphasis added]

[20] Similarly, in *Fraser Milner Casgrain LLP v Canada (Minister of National Revenue – M.N.R.)*, 2002 FCT 912 [*Fraser Milner*] at paras 27-28, Justice Dawson (then of the Federal Court) relied on *AGT* and confirmed that relevance under s 231.2 is tested by determining whether the particular record requested may be relevant in the determination of a taxpayer's tax liability and not whether the record is relevant with respect to a particular issue under audit.

[21] While some of the above authorities relied upon by the Minister relate to provisions of the Act other than s 231.1, I do not understand Atlas to be arguing that these authorities are

inapplicable on this basis. Rather, Atlas refers to authorities (including authorities relied on by the Minister) that Atlas describes as demonstrating the court determining that there was a link between the documents required to be produced and the issues that were being reviewed by the Minister (see *Tower v Canada (Minister of National Revenue – M.N.R.)*, 2003 FCA 307 at para 29; *Saipem* at para 32; *Fraser Milner* at paras 29-32; *Soft-Moc Inc. v Canada (Minister of National Revenue – M.N.R.)*, 2013 FC 291 at paras 75-80, affirmed 2014 FCA 10; *Minister of National Revenue v Carriero*, 2016 FC 1296 at paras 14-19; and *Canada (Minister of National Revenue) v Newport Pacific Financial Group SA*, 2007 ABQB 115 [*Newport*] at paras 39-47 and 59-61).

[22] I appreciate that the authorities cited by Atlas demonstrate the court reaching a conclusion on the relevance of the documents sought by the Minister in each particular case. However, in my view, this does not detract from the principles derived from the authorities cited by the Minister, particularly as the cases cited by Atlas include *Saipem* and *Fraser Milner*, upon which the Minister relies. The only case cited by Atlas which I read as potentially inconsistent with the other authorities is the decision of the Alberta Court of Queen's Bench in *Newport*, which appears to apply a higher threshold of relevance than the other authorities. As argued by the Minister, that is perhaps a function of the fact that *Newport* was issued in an unusual context, in which the Minister was seeking an order under s 490(15) of the *Criminal Code*, RSC 1985, c C-46 permitting examination of documents that had been seized by the RCMP pursuant to a search warrant.

[23] Notwithstanding the substantial efforts by both parties to canvass jurisprudence intended to support their respective positions on this issue, there appears to be little divergence between their positions on the applicable law. Both parties acknowledge that there is a low threshold of relevance to be met by the Minister, such that the Minister does not have to establish that the requested documentation is relevant, only that it may be relevant. Where the parties diverge is whether the Minister has met this threshold in the present case.

[24] The Minister emphasizes that Atlas is being audited in connection with its taxation year ending in April 2012 and that the audit relates to the transaction surrounding JMC's March 2012 acquisition of LSI, including the post-acquisition steps involving Atlas. It is undisputed that the Report was prepared for the purpose of this transaction and, as deposed in Mr. McNamara's affidavit, explains the tax profile and tax attributes of LSC and LSI and LSC's material tax exposures. The law does not require the Minister to demonstrate that the Report is relevant to a particular issue under audit. The Minister argues that it is clear that the invocation of s 231.1 and therefore s 231.7 is for a purpose related to the administration or enforcement of the Act and that the low threshold, that the Report may be relevant to an amount payable by the taxpayer under the Act, has been met.

[25] In response, Atlas relies on the evidence of Robin Margerison, the CRA auditor responsible for the aggressive tax planning portion of the audit of Atlas. Ms. Margerison swore the affidavit supporting the present application by the Minister and was subsequently cross-examined by Atlas' counsel. In the course of the cross examination, Ms. Margerison testified that CRA initially requested the Report because it was a document that resulted from JMC

commissioning the accounting firm Ernst & Young to perform certain services related to the acquisition, such that it was considered a tax planning document of the sort that CRA routinely requested. Atlas's counsel then questioned Ms. Margerison on when she formed the view that the Report could be relevant specifically to the share valuation issue that was under audit, and Ms. Margerison responded, as follows:

> 88. Q. When did it become apparent that the draft due diligence report, in your view, could be relevant to the valuation issue?
>
> A. The scope of services, when we obtained the information from the taxpayer that identified the scope of services, then included in that scope of services there was an amount, a fee that was charged for US tax diligence, and then there was also indications in that scope of services that certain - the valuation of the Canadian side of Lakeside was also a component or could be a component of the due diligence which would impact the US side. If the Canadian side - if the value is, you know, as I said, a whole $148 million, then if it's determined that the Canadian side for certain reasons isn't worth as much, then that means the US side is worth more, or there was certain indications that the Canadian side may be closing or shutting down certain lines which would impact their value and possibly the US value as a result of that.

[26] Atlas' counsel then referred Ms. Margerison to the Ernst & Young scope of services document about which she had been speaking, and Ms. Margerison identified the references to a planned shutdown and a fee charged for the US tax diligence. Atlas now challenges Ms. Margerison's reasoning, as the evidence indicates that the matters she identified, as suggesting the Report may be relevant to the valuation issue, all relate to aspects of the transactional due diligence that do not form part of the Report.

[27] Factually, I agree with Atlas' analysis. The scope of services document referenced by Ms. Margerison is a Statement of Work [SOW] dated December 26, 2011, entered into between JMC

and Ernst & Young LLP based in New York [EY], pursuant to which EY would perform due diligence in several areas in connection with the proposed transaction. The Canadian tax diligence, which Mr. McNamara's evidence indicates was performed by EYC and is the subject of the Report, was only one of these areas. I agree with Atlas's position that the particular elements of the scope of services identified by Ms. Margerison in cross-examination fall outside the scope performed by EYC and therefore would not be the subject of the Report.

[28] However, I do not regard this analysis as undermining the Minister's ability to satisfy the low threshold of relevance applicable under s 231.1. As argued by the Minister, it is clear that the Report was prepared for purposes of the transaction that is under audit. As previously explained, the Minister need not demonstrate that the requested document is relevant to a specific issue under audit. Ms. Margerison stated in response to re-examination by the Minister's counsel that, without seeing the Report, she cannot know whether the information in it is relevant to the audit. This observation is consistent with the authorities cited above.

[29] Moreover, I find the broader reasoning identified in the excerpt from Ms. Margerison's cross-examination quoted above to be sound. She identified the possibility that the valuation of the Canadian side of the acquisition would impact the US side. As I understand it, the valuation issue under review in the audit involves at least in part the question whether the post-acquisition transfer by LSI to JMC of the Lakeside US shares for a stated value of $57 million represented fair market value for those shares. The overall acquisition for $148 million involved assets, both tangible and intangible, in Canada and the US. It follows logically that information relevant to the value of the Canadian assets may be relevant to the value of the US assets and therefore

whether the $57 million ascribed to the US assets through the post-acquisition non-arm's length share transfer represents a reasonable valuation. Therefore, if the information in the Report may be relevant to the value of the Canadian assets, it may be relevant to the valuation of the US shares that CRA is reviewing. As previously noted, Mr. McNamara describes the Report as including an explanation of the tax attributes of LSC, as well as LSC's material tax exposures. He explained in cross-examination that the term "tax attributes" refers to assets and liabilities. I therefore have little difficulty in concluding that the low threshold for relevance is met in this case.

[30] In conclusion on this issue, I find that the Minister's purpose in seeking the Report relates to the administration or enforcement of the Act and that the information in the Report may be relevant to an amount payable by the taxpayer under the Act.

C. *Is the Report protected by solicitor-client privilege?*

[31] As with the relevance issue, the parties' arguments surrounding the issue of whether the Report is protected by solicitor-client privilege demonstrate little divergence in their positions as to the applicable law. Rather, the divergence arises in the application of the law to the facts of this case.

[32] Section 231.7(1)(b) provides that, to order the provision of a document to the Minister under that section, the Court must be satisfied that the document is not protected from disclosure by solicitor-client privilege. In *Redhead Equipment Ltd. v Canada (Attorney General)*, 2016 SKCA 115 [*Redhead*], a case relied upon by both parties in this matter, the Saskatchewan Court

of Appeal described as follows, at paragraph 31, the criteria to establish solicitor-client privilege and the applicable burden of proof:

> [31] I turn now to an examination of the jurisprudence. The criteria to establish solicitor-client privilege are described by the Supreme Court in *Solosky v Canada*, [1980] 1 SCR 821 at 837:
>
> (i) a communication between solicitor and client;
>
> (ii) which entails the seeking or giving of legal advice; and
>
> (iii) which is intended to be confidential by the parties.
>
> The party asserting the privilege carries the burden of proof.

[33] Clearly the Report does not represent a direct communication between solicitor and client, as it was prepared by an accounting firm. However, *Redhead* provides an analysis of the circumstances in which solicitor-client privilege can apply to a document generated by a third party and, in particular, an accountant. After canvassing jurisprudence providing guidance on the application of privilege, the Court stated as follows, at paragraphs 41 and 45:

> [41] Based on the foregoing, the privilege extends to all situations in which the third party functions as an interpreter of information provided by the client for the solicitor or serves as a conduit of advice from the solicitor to the client or a conduit of instructions from the client to the solicitor, or employs expertise in assembling information provided by the client and in explaining it to the solicitor.
>
> ….
>
> [45] From the foregoing jurisprudence, some principles regarding communications with and of third parties such as accountants can be extracted:
>
> (a) communications of accountants are not in themselves privileged;

> (b) facts and figures are not in themselves privileged but may be if they are part of a communication which is privileged;
>
> (c) whether a communication is privileged depends on the function served by the third party in relation to the communication;
>
> (d) the privilege extends only to communications in furtherance of a function essential to the solicitor-client relationship or the continuum of legal advice provided by the solicitor, for example:
>
> (i) a channel of communication between solicitor and client;
>
> (ii) a messenger, translator or transcriber of communications to or from the third party by the solicitor or client;
>
> (iii) employing expertise to assemble information provided by the client and explaining the information to the solicitor; and
>
> (e) no privilege attaches to a communication to an accountant who must consider it and provide his or her own accounting opinion.

[34] The Minister also refers the Court to the decision of the Ontario Superior Court of Justice in *L'Abbé v Allen-Vanguard Corp.*, 2011 ONSC 7575 [*L'Abbé*], which dealt specifically with claims of privilege over documents generated in the course of due diligence conducted as part of a decision whether to make a share purchase. After reviewing the nature of a due diligence process in the context of a contemplated transaction, the Court explained as follows at paragraph 46:

> [46] It is important to remember that the ultimate objective of these inquiries is a business decision – whether or not to proceed with the purchase or whether or not to lend money to fund the

> acquisition. In that sense the ultimate outcome is not a legal opinion but business advice. Most of the inquiries made in support of the due diligence processes are not legal inquiries and they are not gathered for the purpose of giving legal advice.

[35] However, Atlas points out that the Court in *L'Abbé* did not rule out the possibility that some documentation generated in the course of a due diligence process could be subject to a legitimate privilege claim (see paragraphs 51-52). At paragraph 53, the Court emphasized the requirement to assess the principal purpose for which a document is created:

> [53] For all of these reasons, I conclude that the due diligence documents are not inherently privileged. Any claims of privilege over specific components of the due diligence will have to be shown to be exceptions. That would require that they be either legal advice or documents created for the principal purpose of obtaining such advice and that also survive any deemed waiver of privilege created by these pleadings.

[36] Atlas also emphasizes the importance of focusing not upon the purpose for which the overall due diligence was conducted, but rather upon the principal or dominant purpose behind the creation of the particular document for which privilege is claimed. I agree that this position is supported by the jurisprudence canvassed above and is the correct analysis for the Court to undertake.

[37] The parties take different positions as to the principal purpose for retention of EYC and generation of the Report. The Minister argues that its purpose was to inform JMC's business decision whether to proceed with the acquisition of LSI and that any subsequent use by JMC's counsel, Stikeman, does not serve to cloak the document in privilege. Atlas argues that the Report minimally informed the business decision to proceed with the acquisition and that its

principal purpose was to provide information to Stikeman to inform their provision of legal advice as to how to structure the LSI acquisition. Adjudicating this question, the principal purpose for generating the Report, and the broader question whether the Report falls within the circumstances contemplated by the jurisprudence in which a document produced by a third party accountant may be privileged, requires examination of the evidence as to the events surrounding this transaction.

[38] The relevant evidence can be derived principally from the affidavit of Mr. McNamara and his answers on cross-examination. While Atlas has also filed an affidavit of Angela Miu, Zekelman's Vice President of Tax, Ms. Miu explains that she entered the employ of Zekelman (and previously JMC) in January 2014. Ms. Miu had direct involvement in the interactions with CRA, as the audit appears to have commenced shortly after she joined JMC. However, she has no firsthand knowledge of the events surrounding the transaction in late 2011 and early 2012, and in any event her evidence adds little to that of Mr. McNamara.

[39] I turn first to the timeline of events in the transaction. Mr. McNamara explained that, in early December 2011, LSI initiated the process of attempting to sell its shares. JMC reviewed the initial marketing material that LSI assembled to promote the sale and, on December 16, 2011, JMC issued a letter of intent, which was signed by LSI on December 20, 2011 and contemplated JMC performing due diligence investigations by January 9, 2012.

[40] After entering into the letter of intent, Mr. McNamara hired professionals to assist with the due diligence and to assist with structuring the potential transaction. He explained that he

engaged Stikeman to assist with the structure and, because JMC had received information that LSI or LSC had a significant Canadian tax loss carry-forward and this could be an attractive feature for JMC, he asked Stikeman about tax due diligence. Stikeman advised Mr. McNamara, who is an American mergers and acquisitions attorney, that in Canada it was typical to hire an accounting firm to perform Canadian tax due diligence and recommended that JMC engage EYC to perform that work.

[41] JMC already had a Master Service Agreement dated October 11, 2011 in place with EY to govern its services. JMC and EY entered into a SOW dated December 26, 2011 to apply specifically to the due diligence services to be provided in relation to the proposed acquisition of LSI. The SOW identified areas of due diligence consisting of financial and accounting, Canadian tax diligence, US tax diligence, and pensions, OPEBs and equity plans.

[42] The Canadian tax diligence work was performed by EYC, which issued the Report related to its work on January 6, 2012. It will be recalled that the Report was a draft. Mr. McNamara explained that the Report was never issued in final form and that it is a common practice for him not to incur the expense associated with the preparation of a final report. The Report related solely to the Canadian tax diligence work, and Mr. McNamara's evidence is that no written reports were prepared in relation to any of the other areas of due diligence work.

[43] On January 10, 2012, JMC and LSI agreed to amend the letter of intent to extend the deadline for completion of due diligence investigations to January 19, 2012, although JMC acknowledged in the amending letter that the due diligence investigation was materially

complete. Between January 10 and 25, 2012, JMC and LSI engaged in negotiations, which resulted in agreement on a share price and the execution of an Arrangement Agreement dated January 25, 2012 to govern the share purchase transaction. The Arrangement Agreement contemplated the acquisition of the shares in LSI being implemented through a Plan of Arrangement under s 182 of *Ontario Business Corporations Act*, RSO 1990, c B 16. The Plan of Arrangement was approved by an order of the Ontario Superior Court of Justice on March 29, 2012, the acquisition was closed on March 30, 2012, and the post-acquisition steps then ensued.

[44] Turning to the role of the Report in the transaction, Mr. McNamara's affidavit describes the purpose of JMC's engagement of EY and the Canadian tax review as follows:

> 13. JMC engaged EY to provide due diligence services (including the limited scope Canadian tax review) in respect of the Lakeside Acquisition because of the expertise required to: (i) review and assemble the Canadian tax information relating to LSC and LSI that was made available to JMC and its representatives by LSI pursuant to the Letter of Intent, and (ii) explain such information to Stikeman Elliott LLP ("Stikeman"), JMC's external legal counsel, in order for Stikeman to provide legal advice to JMC in respect of the Lakeside Acquisition.
>
> ….
>
> 16. As JMC's objective was to structure the Lakeside Acquisition in the most tax–efficient manner and JMC would be required to assume the risk relating to the historical tax exposure of LSI (and the other entities within the LSI group) if it were to acquire LSI, the purpose of the limited scope Canadian tax review was to describe and explain the tax profile and tax attributes (such as non-capital losses) of LSC and LSI (including their quantum) that could be impacted by or potentially utilized in the structuring of the proposed Lakeside Acquisition, and to determine whether LSC or LSI had any material tax exposures (including contingent tax liabilities) resulting from their Canadian tax filings for the 4 taxation years ended before the acquisition.

[45] LSI had advised JMC, before execution of the letter of intent on December 16, 2011, that LSI or LSC had a significant Canadian tax loss carry-forward. However, Mr. McNamara stated in cross-examination that he became aware of the details of the tax loss through the January 6, 2012 Report and that, more importantly, Stikeman became aware of the details, as he did not have sufficient knowledge of Canadian tax law for the details to be useful to him.

[46] The evidence surrounding the communication of the Report, or the information in it, to Stikeman is not particularly clear. Indeed, it is not clear that the Report itself was ever provided to Stikeman. Mr. McNamara's affidavit states that EY provided the Report to him and to Russ Compton, JMC's Director of Tax, and that they shared it internally with senior executives of JMC. When asked about this on cross examination, Mr. McNamara stated that he did not remember when the Report was provided to Stikeman but that he and Mr. Compton had conversations with Stikeman about the tax attributes of Lakeside starting in mid to late January 2012. Mr. McNamara's affidavit attaches an email dated January 12, 2012 that he received from Mr. Compton, in which Mr. Compton refers to having discussed the plan of arrangement with Stikeman, notes that there are some questions regarding tax loss utilization that Stikeman is looking into, and identifies the need to provide Stikeman with due diligence information when available.

[47] Mr. McNamara also states in his affidavit that, given the technical nature of the information in the Report, JMC instructed Stikeman to discuss with EY and EYC certain tax issues related to the LSI acquisition. Mr. McNamara further states that he has been informed by the associate partner at EYC who was responsible for the Canadian tax review that he spoke with

Stikeman in early March 2012 and provided Stikeman with information regarding the tax profile and tax attributes of LSI and LSC that were described in the Report. Ms. Miu testified in cross-examination as to her understanding that Stikeman used the findings in the Report to prepare the tax structuring strategy for the transaction.

[48] Atlas acknowledges that the findings in the Report related to the Canadian tax due diligence factored into the decision whether to proceed with the purchase of LSI, but its position is that such influence was minimal, while its influence on the structuring of the transaction by Stikeman was significant. Atlas refers to Mr. McNamara's evidence in cross-examination that, on some level, like any asset of the company to be acquired, the information in the Report was taken into account by JMC in making the decision to proceed with the acquisition, but that it was not a material piece of the decision and was not a consideration in negotiating the purchase price of the LSI shares. In contrast, Mr. McNamara described the tax component as impacting more significantly how the transaction was structured. Atlas emphasizes the following extract from Mr. McNamara's evidence in cross-examination which includes this description:

> 337. Q. And then, if I understood your answer earlier, the tax information that you talked about was just a piece of all that.
>
> A. Just a piece of all that. That's with respect to, you know, whether we purchase or not, right? Now, the tax component becomes much more impactful as to how you structure it.
>
> Q. So the decision to purchase is made first.
>
> A. Yes, considering the potential benefits of any structuring.
>
> Q. So that's also a factor that goes into making the decision to purchase?
>
> A. Sure.

> Q. To acquire. And just so that I have it in my mind, you look at the assets and one of the assets that would be included is tax information.
>
> A. Correct.
>
> Q. And I think later on you call it …
>
> A. It could be a liability, right, but, yes, you look at the collective of the business, the assets and the liabilities.
>
> Q. And later on you call it tax attributes.
>
> A. That's fair, because attributes denotes both assets and liabilities.

[49] Mr. McNamara also explained in cross-examination the overall process by which JMC made the decision to proceed with the transaction and agreed upon the share price. In early January 2012, it became clear to JMC that LSI was distressed and that it had not achieved a lot of what it purported to achieve. JMC identified operational issues and financial issues and made the decision that, from its perspective, the equity of the business was actually worthless. JMC remained interested in the purchase, because LSI had been rebranding itself as an oil country tubular business, a market segment that JMC wish to enter, and JMC believed that the purchase would accelerate its entry into that business. However, it was no longer willing to pay the purchase price that had been agreed in the December 16, 2011 letter of intent.

[50] Therefore, following issuance of the amending letter dated January 10, 2012, JMC negotiated with LSI in an effort to reach agreement on as low as possible a purchase price. Mr. McNamara explained that this price was not derived mathematically based on the value of the business, but rather represented the lowest price to which LSI would agree. Also, after JMC

concluded that the equity in LSI had no value, such that the results of the due diligence were no longer relevant to the share price, its due diligence consisted of looking for large potential liabilities, referred to by Mr. McNamara as “giant red flags” or “nuclear bombs,” which could potentially result in the decision not to proceed with the transaction. No such concerns were identified, and by January 25, 2012, an agreement had been reached on the share price, for which the transaction was subsequently completed in March 2012.

[51] Analysing the evidence, I agree with Atlas’ characterization of the decision to retain EYC to conduct the Canadian tax diligence and the subsequent generation of the Report as having dual purposes. JMC wished to obtain information as to the tax attributes of LSI and LSC with a view to informing both the business decision, whether to proceed with the transaction and at what price, and the decision about how to structure the transaction. I also accept that both purposes were engaged as of the time EYC was retained and generated the Report, particularly given Mr. McNamara’s evidence that the potential benefits of the structure of the transaction can influence the decision whether to purchase.

[52] However, I disagree with Atlas’ position that the dominant purpose was the provision of tax information to Stikeman to inform the structuring of the transaction. I accept that this perhaps became the dominant purpose as the due diligence and negotiation proceeded, because JMC reached the conclusion that the equity in the target company had no value. The assets or liabilities represented by the Canadian tax attributes therefore ended up having no effect on the share purchase price. With respect to the decision that JMC made to proceed with the transaction, the tax-related assets were a consideration, but no more so than other non-material

assets, and the effect of tax-related liabilities was similarly limited, as JMC identified no "nuclear bombs" associated with tax attributes or other aspects of the transaction. However, this outcome was not known at the time the Report was commissioned. Nor does the evidence establish that this outcome was known when the Report came into existence, which is the relevant time at which to analyse its purpose (see *Jordan v Towns Marine Electronics Ltd.*, (1996) 110 F.T.R. 22 (FCTD) at paras 30-32).

[53] At the time EYC was retained on December 26, 2011 to perform the relevant work, the Canadian tax diligence was one of several categories of due diligence that JMC was undertaking with the assistance of third parties. Mr. McNamara confirmed that he arranged assistance with the Canadian tax diligence, because JMC had been advised by LSI that there was a Canadian tax loss carry-forward, the value of which could be an attractive feature for JMC. He also explained that tax efficiencies associated with the structure of a transaction may affect the value of the transaction, even though that turned out not to be the case with this particular purchase. Mr. McNamara testified that, in early January 2012, it became clear to JMC that LSI was distressed. However, the evidence does not indicate with any precision when the results of the diligence process ceased to be relevant to the pricing of the transaction or the decision to proceed with the transaction, other than that the January 10, 2012 amending letter of intent indicated that the due diligence investigation was by then materially complete. By that date, the Report had been issued, on January 6, 2012, and the evidence does not establish that there had by January 6, 2012 been a change in the purpose for which the Report was commissioned.

[54] Notwithstanding Atlas's efforts to characterize the Report as having been generated for a purpose different than that of the overall due diligence process, I find that its dominant purpose when commissioned and generated was to inform the decision whether to proceed with the transaction and at what price. As in *L'Abbé*, this was a business purpose and, to the extent the Report or the information in it also informed the giving of legal advice by Stikeman, I find this to have been ancillary to the business decision.

[55] These findings as to the principal or dominant purpose for the report are determinative of my conclusion that the Report is not subject to solicitor-client privilege. However, I also note that, independent of its purpose, the evidence provided by Mr. McNamara as to the contents of the Report also suggests that it does not fully meet the requirements for an accountant's work product to be a protected by solicitor-client privilege. Atlas argues that the Report represents the product of EYC employing its expertise to assemble information to be communicated to legal counsel, for the purpose of obtaining legal advice on the structuring of the transaction, consistent with the circumstances in which *Redhead* explains an accountant's work can be privileged. However, Mr. McNamara's affidavit describes the Report not only as explaining the tax profile and tax attributes of LSC and LSI but also as explaining material tax exposures resulting from the last four years of Canadian tax filings, including an assessment of the probability that the filing positions leading to the tax exposures would be sustained if challenged by CRA, and an evaluation of whether appropriate reserves had been taken in respect of such exposures. Such assessment and evaluation represent accounting opinions by EYC, which do not appear to me to be capable of being characterized as prepared for the purpose of obtaining legal advice on the structuring of the transaction.

[56] In conclusion on this issue, I find that Atlas has not satisfied the burden upon it of establishing that the Report is protected by solicitor-client privilege.

D. *Would compelling Atlas to provide the Report offend the principle that a taxpayer is not required to self-audit?*

[57] In raising this argument, Atlas relies on the decision in *BP Canada Energy Company v Minister of National Revenue*, 2017 FCA 61 [*BP*], in which the Federal Court of Appeal overturned a decision of the Federal Court allowing a application by the Minister under s 231.7 of the Act. The documents sought by the Minister in that case were internal accounting documents of the taxpayer, generally referred to as tax accrual working papers [TAWPs]. As explained in paragraph 2 of the decision, the information contained in TAWPs is highly sensitive as these papers typically reveal uncertain tax positions taken by public corporations in filing their tax returns, opinions as to the likely outcome in the event of a challenge by the Minister, and related reserves established to ensure sound and fair financial reporting.

[58] In concluding that the Minister was not entitled to compel provision of the taxpayer's TAWPs under s 231.1(1) of the Act, the Federal Court of Appeal held as follows at paragraph 99:

> [99] I therefore conclude that the Minister cannot invoke subsection 231.1(1) for the purpose of obtaining general and unrestricted access to those parts of BP Canada's Tax Reserve Papers which reveal its uncertain tax positions. In practical terms, this means that the Minister cannot enlist taxpayers who maintain TAWPs to perform the core aspect of audits conducted under the Act.

[59] The Court's concern about the Minister enlisting taxpayers to perform the core aspect of audits is explained as follows at paragraphs 81 to 83 of the decision:

> [81] An important part of the context surrounding subsection 231.1(1) is the notion of self-assessment which is at the root of the compliance system put in place under the Act. The system is one of self-assessment because the person who generates income is best positioned to identify, compute and report the amounts that are subject to tax under the Act.
>
> [82] However, this obligation to "self-assess" does not require taxpayers to tax themselves on amounts which they believe not to be taxable. Faced with an issue that is reasonably open to debate – I emphasize this point insisting on the fact that the case law is replete with decisions which illustrate the coexistence of arguable issues on both sides of the debate – taxpayers are entitled to file their tax return on the basis most favourable to them. This explains why auditors in conducting audits must engage in extensive poke-and-check exercises, and are essentially left to their own initiative in verifying the amounts reported by the taxpayer. To be clear, although auditors are entitled to be provided with "all reasonable assistance" in performing their audits (paragraph 231.1(1)(d) of the Act), they cannot compel taxpayers to reveal their "soft spots".
>
> [83] While this is an unwritten rule without clearly defined boundaries, it certainly stands against any construction of the Act that would allow the Minister to compel a taxpayer to self-audit on an ongoing basis.

[60] Returning to the present application, Atlas submits that the Report reveals LSI's and LSC's uncertain Canadian tax positions relating to taxation years that ended before JMC's acquisition of LSI. Atlas argues that these "soft spots" do not relate to the taxation year of Atlas that is under audit, and that, if Atlas is required to produce the Report, the Minister will effectively obtain a "roadmap" to uncertain tax issues that could be raised in respect of LSI's and LSC's prior taxation years and an analysis and assessment of whether the filing positions would

be sustained if challenged. Atlas' position is that this would impose upon it an obligation to self-audit contrary to the principles derived from *BP*.

[61] The Minister responds to this position with two arguments. First, the Minister submits that the Report cannot be properly characterized as TAWPs. Rather, the Minister argues that the Report is a source document prepared for due diligence purposes and that, while it may have been used subsequently to generate TAWPs, the Report itself is not the sort of document to which *BP* applies. Second, the Minister argues that the application of BP is limited to precluding general and unrestricted access to TAWPs on a prospective basis, outside the context of an audit of particular issues.

[62] I am not persuaded by the Minister's first argument. I do not regard the Report as a source document. While I appreciate that the Report may not represent JMC's own final list of uncertain tax positions, the Court in *BP* noted at paragraph 48 that TAWPs can be created internally by a taxpayer or externally by independent auditors. EYC was not performing the function of an independent auditor in preparing the Report. However, the Report represents the work of external accounting professionals which, according to the evidence before the Court, includes an assessment of the probability that past filing positions would be sustained if challenged by CRA and an evaluation of whether appropriate reserves had been taken in respect of such exposures. In my view, at least some of the information in the Report can be characterized as TAWPs.

[63] However, I agree with the Minister's interpretation of the limited application of the decision in *BP*. As noted by the Court at paragraph 7 of that decision, the outcome of the appeal was determined by the particular events that led to the Minister's formal request for production of the TAWPs. CRA's initial request for production of the TAWPs arose in the context of audits of the appellant, BP Canada Energy Company [BP Canada]. By the time of the Minister's application under s 231.7 of the Act, the audits had concluded and CRA had already reassessed the relevant taxation years. The Minister was no longer seeking the TAWPs for the purpose of those audits but rather stated that the purpose was to audit subsequent years. As explained by the Court at paragraph 59, the Minister made clear that the purpose was to seek access to BP Canada's uncertain tax positions, so as to use these positions as a roadmap in order to facilitate future audits. The Court also noted at paragraph 76 that CRA's auditor continued to insist on production of the TAWPs after all the legitimate concerns arising in connection with the taxation years previously under audit had been addressed.

[64] In arriving at the decision that s 231.1(1), properly interpreted, did not entitle the Minister to compel production of the TAWPs, the Court held as follows at paragraphs 79 to 80:

> [79] The Federal Court judge's decision is the first one that authorizes the Minister to resort to the power under subsection 231.1(1) in order to obtain general access to TAWPs without advancing any particular justification for their production. Should it stand, BP Canada will be required to routinely turn over to the Minister its uncertain tax positions every year from this point on and the Minister will be authorized to place the same demand on all taxpayers who, by law, are required to maintain TAWPs. Indeed, the Minister would be hard-pressed not to do so, given the Federal Court judge's conclusion that his decision applies equally to all taxpayers who maintain TAWPs (Reasons, para. 46).
>
> [80] In my view, subsection 231.1(1), properly interpreted, does not make papers such as these compellable "without restriction". When one examines the context and purpose of subsection

> 231.1(1), it is clear that Parliament intended that the broad power set out in subsection 231.1(1) be used with restraint when dealing with TAWPs. It follows that the decision of the Federal Court judge must be set aside.

[65] Accordingly, I agree with the Minister's position that *BP* is to be read as precluding general and unrestricted access to TAWPs on a prospective basis, outside the context of an audit of particular issues. In contrast, at paragraph 67 of *BP*, the Court made the following observations as to the accessibility of TAWPs in the context of an audit:

> [67] The issue in this case is not whether the information revealed by BP Canada's Tax Reserve Papers could be accessible under the Act. After all, everyone is agreed that it is, if required, in order to respond to a specific inquiry made in the context of an audit. The disclosure of the redacted version of BP Canada's Tax Reserve Papers in response to the query made about the accounting entries attests to this (see paragraphs 11 and 12 above). The real issue is whether subsection 231.1(1) allows general and unrestricted access to this information, if this is indeed what was sought and authorized in this case. [Emphasis added]

[66] I note that Ms. Miu's affidavit states that she was advised by CRA in a January 25, 2018 call that CRA had made a determination in respect of the share valuation issue and intended to issue a reassessment proposal letter to Atlas. However, Ms. Margerison stated in cross-examination that she had not yet formalized any reassessing positions. Unlike in *BP*, the Minister's request for access to the Report in the present case is made in the context of an active audit of particular issues. I have previously concluded that the information in the Report sought by the Minister meets the applicable threshold of relevance in that context. I therefore find that compelling Atlas to provide the Report would not offend the principle described in *BP* that a taxpayer is not required to self-audit.

E. *Should the Court otherwise exercise its discretion to decline to compel Atlas to provide the Report?*

[67] Atlas submits that, in *BP*, the Federal Court of Appeal confirmed that, even if the requirements for issuing an order under s 231.7 of the Act were met, the Court retains the discretion not to grant the order. Atlas argues that the Court should exercise its discretion in this manner in this case, because neither the uncertain tax positions of LSI or LSC referenced in the Report, nor those companies' taxation years that ended prior to the LSI acquisition, are under review by the Minister. It is Atlas' position that it would therefore be unfair and prejudicial to require Atlas to provide information relating to these matters to the Minister.

[68] I find little merit to this argument. I have found the Report to meet the threshold of relevance to the current audit of Atlas' taxation year ending in 2012, and I have rejected Atlas' position that the principle described in *BP* applies to the present circumstances. Atlas has identified no additional basis that would, in my view, warrant an exercise of discretion to decline to order provision of the Report.

## V. **Conclusion**

[69] My conclusion, based on the above analyses of the issues raised by the parties, is that the Minister is entitled to the order sought under s 231.7(1) of the Act, compelling Atlas to provide the Report. My Judgment will order that relief, in the form proposed in the Minister's Notice of Application, referencing the requests made by the Minister under s 231.1(1) of the Act dated

March 9, 2015, December 9, 2015 and January 20, 2017. As proposed by the parties at the hearing of the application, the Judgment will afford Atlas 45 days to comply.

## VI. **Costs**

[70] Each of the parties seeks its costs in the event it is successful in this application. Having prevailed, the Minister is entitled to costs. My Judgment will afford the parties 30 days to reach agreement on quantification of costs or to make written submissions thereon.

**JUDGMENT IN T-1850-17**

**THIS COURT'S JUDGMENT is that:**

1. The material filed with the Court at the hearing of this application on September 27, 2018, in a sealed envelope marked "Sealed Court Copy of Draft Due Diligence Report", shall be treated as confidential, and the solicitor for the Applicant shall not be given access to this material, unless otherwise ordered by the Court.

2. This application is allowed and the Respondent is ordered, pursuant to s 231.7(1) of the *Income Tax Act*, RSC, 1985, c 1 (5th Supp) [the Act], to provide to the Applicant, within 45 days of the date of this Judgment, the draft due diligence report sought by the Applicant from the Respondent pursuant to requests made of the Respondent under s 231.1(1) of Act and dated March 9, 2015, December 9, 2015 and January 20, 2017.

3. The Applicant is awarded costs of this application.

4. The parties shall confer with each other on the quantification of costs in this application and, within 30 days of the date of this Judgment, shall

   a) advise the Court in writing if agreement has been reached on such quantification; or

   b) failing such agreement, provide the Court with brief written representations on such quantification.

"Richard F. Southcott"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1850-17 |
| **STYLE OF CAUSE:** | THE MINISTER OF NATIONAL REVENUE v ATLAS TUBE CANADA ULC |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | SEPTEMBER 27, 2018 |
| **JUDGMENT AND REASONS** | SOUTHCOTT, J. |
| **DATED:** | NOVEMBER 5, 2018 |

**APPEARANCES:**

| | |
|---|---|
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| Margaret Nixon | FOR THE RESPONDENT |

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