

Federal Court



Cour fédérale

Date: 20220208

Docket: T-865-21

Citation: 2022 FC 157

Ottawa, Ontario, February 8, 2022

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

MINISTER OF NATIONAL REVENUE

Applicant

and

BMO NESBITT BURNS INC.

Respondent

ORDER AND REASONS

[1] The Applicant, the Minister of National Revenue [the Applicant or the Minister], brings this summary application pursuant to section 231.7 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [the Act]. The Minister seeks an order requiring the Respondent, BMO Nesbitt Burns Inc. [BMONB] to comply with the Minister's Request for Information made on July 4, 2019, pursuant to section 231.1 of the Act. The Minister more specifically requests that BMONB provide an unredacted copy of a document referred to as the Master Summary Pricing Model

[MSPM] or Spreadsheet. The Minister seeks the MSPM in the context of its audit of the Respondent for the 2016 taxation year.

[2] The Respondent provided a redacted copy of the MSPM and claims solicitor-client privilege over the redacted portions. The Respondent alternatively submits that if the MSPM is not protected by solicitor-client privilege, the Court should still not order its production for other reasons, including that the audit for 2016 has concluded, that the MSPM constitutes tax accrual working papers (TAWPs) and that production would undermine the discovery process in related proceedings in the Tax Court of Canada.

[3] The parties provided written and oral submissions and affidavit evidence in support of their respective positions. The Respondent provided the Court with an unredacted copy of a representative sample page of the MSPM under seal. The Court heard oral arguments on December 14, 2021. At the hearing, the Court requested further submissions with respect to whether the Court could receive the legal advice (under seal) which the Respondent claims would be revealed by the unredacted MSPM in order to determine the claim of solicitor-client privilege or whether the Court should rely only on its review of the MSPM, the affidavit evidence, and the original submissions. Further submissions were received on January 4, 2022.

[4] The Respondent's position is that the Court may consider the legal opinions (which are also subject to solicitor-client privilege) in determining the claim of privilege over the MSPM. The Applicant's position is that the Court should decline to consider the legal opinions.

[5] The Court cannot make the determination on the basis of the review of the unredacted MSPM or the vague but carefully worded affidavit evidence asserting that the MSPM translates legal advice into computations and would reveal that legal advice. Therefore, the Court received and reviewed the legal advice that underlies the redactions in the MSPM.

[6] The Court finds that the Respondent has not met its burden to establish that the redactions in the MSPM reveal the legal advice or are otherwise solicitor-client communications. It is not at all apparent how the redacted part of the MSPM, which sets out calculations, would convey the legal advice. The MSPM is not protected by solicitor-client privilege.

[7] In addition, the Court finds that there are no other impediments to ordering the production of the MSPM.

[8] Contrary to the Respondent's position, the Minister is not precluded from relying on the authority to seek information pursuant to section 231.1 or to pursue the application pursuant to section 231.7 due to the status of the 2016 audit.

[9] Although the MSPM may constitute, to some extent, tax accrual working papers, the MSPM is not sought for any purpose other than as stated in the Minister's Request for Information with respect to the 2016 audit; it was not sought for the purpose of future audits or to identify "soft spots" or to compel the Respondent to self-audit.

[10] Finally, the Respondent has not established that the Minister seeks the MSPM for any improper purpose. Moreover, the jurisprudence does not support the Respondent's proposition that the Court cannot order production of the MSPM because this would undermine the discovery process in the Tax Court of Canada with respect to the appeals regarding the 2012 taxation year.

[11] The summary application is allowed.

I. Background

[12] Nesbitt Burns Inc. [NBI] is a full-service investment firm and is an indirect wholly owned subsidiary of BMO. NBI is a corporation governed by the *Canada Business Corporations Act*, RSC 1985, c C-44. The Canada Revenue Agency [CRA] conducts annual audits of NBI in order to verify if it complies with its duties and obligations under the *Income Tax Act*.

[13] The CRA identifies particular audit issues for the annual reviews. The particular audit issues identified for 2016 are explained in the affidavit of Ms. Sharon Brar, Large File Tax Auditor with the CRA and a member of the audit team for the audit of NBI for the 2016 taxation year, as follows:

The CRA seeks to verify whether NBI, in claiming the dividend deductions, was in compliance with its duties and obligations under the ITA regarding dividend rental arrangements (DRA) as defined in section 248 of the ITA.

The CRA also seeks to determine whether the general anti-avoidance rule as provided for by section 245 of the ITA (GAAR) applies to NBI's claimed dividend deductions in NBI's 2016 taxation year.

[14] On July 4, 2019, the Minister issued the Request for Information (or “query”) pursuant to section 231.1 of the Act regarding NBI’s share repurchase agreements and related transactions during the 2015 and 2016 taxation years. Ms. Brar explained the request for information as follows:

The Query was with respect to NBI’s decision to enter into certain share repurchase agreements and related transactions during the 2015 and 2016 taxation years (termed the “Strategy”) that resulted in deemed dividends.

The purpose of the Query was to obtain specified books, records, and documents in order to review NBI’s compliance with the ITA as described above. The books, records and documents would be reviewed in determining whether the share repurchase agreements and related transactions formed part of DRAs as described above, among other audit issues including application of the GAAR.

[15] The query required NBI to produce copies of a range of documents, including presentations, briefing papers, emails, and financial analyses connected with the share repurchase agreements. In the event that NBI claimed any privilege over the documents requested, the Minister’s query required that NBI provide details of the nature of the privilege being asserted and other particulars, including the title of the document, its date, author and recipients, attachments and whether any copies had been made.

[16] In response to the query, BMONB claimed solicitor-client privilege on parts of the documents requested, including the MSPM dated July 18, 2016. BMONB provided a redacted MSPM to the Minister. BMONB advised that the redacted column reflected legal advice provided to NBI in two legal opinions in 2012 and 2013.

[17] In subsequent correspondence, the Minister requested further particulars of the solicitor-client privilege claim. BMONB again advised that providing the unredacted MSPM would reveal legal advice. On May 28, 2021, the Minister brought this summary application to seek the unredacted copy of the MSPM.

[18] On September 16, 2021, NBI served the Minister with a notice of objection to the Minister's 2016 reassessment, which was issued on June 18, 2021, with respect to the share repurchase transactions for NBI's 2016 taxation year.

[19] In addition, BMO and NBI have each appealed the Minister's assessments of the 2012 taxation year to the Tax Court of Canada.

[20] BMONB notes that the Minister has been auditing its share repurchase transactions since the 2012 taxation year. BMONB states that the Minister's position has consistently been that the share repurchase transactions are part of a dividend rental agreement [DRA] and/or that the anti-avoidance rule applies.

[21] BMONB also notes that this application relates to a single spreadsheet that NBI produced to the Minister with redactions. The Court understands that the MSPM produced to the Court under seal is a representative sample of the same redactions included in the full MSPM.

II. The Applicant's Submissions

[22] The Minister notes the broad powers in the Act to request documents for the purpose of the enforcement and administration of the Act. The Minister argues that the criteria for the Court to issue the compliance order, as set out in subsection 231.7(1) of the Act, have been met. The Minister submits that the unredacted MSPM is not protected by solicitor-client privilege. The Minister further submits that there is no other impediment to ordering production.

[23] The Minister notes that by issuing the query pursuant to section 231.1, the Minister required NBI to provide the documents specified and, if any privilege claim were asserted, to provide the particulars. The Minister notes that NBI identified the MSPM in response to the query but failed to provide an unredacted MSPM or to provide the particulars to permit the Minister to assess the validity of NBI's claim of solicitor-client privilege.

[24] The Minister notes that the query was issued in the context of its audit for the 2016 taxation year for the stated purpose of verifying whether NBI's use of DRAs complied with NBI's duties and obligations under the Act. The Minister adds that the MSPM may also be relevant to the amounts payable by NBI arising from the transactions to which the MSPM relates.

[25] The Minister further submits that examination of the redacted part of the MSPM is required in order to determine how the MSPM should factor into the determination of NBI's tax liability for 2016 or subsequent taxation years, including 2017, for which a similar query was

issued to NBI. The Minister adds that it is not possible to determine the relevance of a document to any particular assessment without examining that document. The Minister adds that the threshold to establish relevance is low.

A. *Solicitor-client privilege does not apply*

[26] The Minister submits that in determining whether the unredacted MSPM is protected by solicitor-client privilege, the issue is whether its disclosure would undermine the purpose of the privilege, which is to protect the free exchange of communications between a lawyer and their client that fall within the giving of legal advice.

[27] The Minister submits that the redacted part of the MSPM is not a communication that entails the seeking or giving of legal advice. The MSPM does not reveal legal advice provided to NBI or whether it was accepted or rejected. The Minister notes that the legal advice was provided several years before the MSPM at issue.

[28] The Minister submits that BMONB's reliance on the bald assertions of their affiants, Mr. Gianni Carlo Mitrano and Mr. Olaf Sheik, does not meet their onus to establish that solicitor-client privilege applies. The Minister submits that the evidence supports finding that the MSPM is a pricing model or financial analysis; it is an "operational document," which reflects the outcome or the stage at which NBI began to act on or implement the legal advice to conduct business.

[29] The Minister argues that in order to fall within the scope of solicitor-client privilege, the MSPM must disclose the “very legal advice given by counsel” (*Canada (Public Safety and Emergency Preparedness) v Canada (Information Commissioner)*, 2013 FCA 104 at para 31 [*Information Commissioner*]). The Minister submits that the MSPM, as the end product or operational impact of the advice, does not disclose the “very legal advice” provided.

[30] The Minister further submits that communications where a lawyer provides business or policy advice do not fall along the continuum of privileged communications (*Information Commissioner* at para 28).

[31] The Minister notes that Mr. Mitrano stated that the objective of the amendment to the MSPM was to “translate the Legal Advice into computations using BMO Financial Group data.” The Minister submits that Mr. Mitrano focussed on the confidentiality needed to avoid competition in business, not on confidentiality to protect legal advice.

[32] The Minister also argues that the disclosure of the MSPM would not undercut the purpose underlying the privilege, which is the “need for solicitors and their clients to freely and candidly exchange information and advice so that clients can know their true rights and obligations and act upon them” (*Information Commissioner* at para 28).

[33] The Minister notes the evidence relied on by BMONB is only a few paragraphs in the affidavits of Mr. Mitrano and Mr. Sheikh, who simply assert that the redacted MSPM reflects legal advice without any explanation about how it does so.

[34] The Minister submits that Mr. Mitrano's and Mr. Sheikh's answers on cross-examination were non-responsive and that neither appeared to have the requisite information or knowledge.

B. *The Court should not exercise its discretion to consider the legal opinions*

[35] The Minister submits that the Court should not review the legal opinions upon which BMONB claims the redacted MSPM is based in order to determine whether BMONB has met its onus to establish that the MSPM is protected by solicitor-client privilege. The Minister acknowledges that the Court has the discretion to do so to evaluate the validity of a solicitor-client privilege claim, but submits that this discretion should be exercised sparingly and only where the necessity to do so has been established (*Canada (National Revenue) v Revcon Oilfield Constructors Incorporated*, 2015 FC 524 at para 12 [*Revcon*]; *Keefer Laundry Ltd v Pellerin Milnor Corp*, 2006 BCSC 1180 at para 75, *aff'd* 2009 BCCA 273).

[36] The Minister argues that if the Court cannot discern the “very legal advice given by counsel” (*Information Commissioner* at para 31) from the unredacted MSPM, then the MSPM does not reveal the legal advice.

C. *There is no other reason to refuse the application—the Respondent's alternative arguments do not support refusing to grant the compliance order*

(1) Overview

[37] The Minister disputes BMONB's argument that if the MSPM is not protected by solicitor-client privilege, BMONB should still not be required to produce it. The Minister

submits that the 2016 audit is not closed; moreover, there is no time limit on requests pursuant to section 231.1 or applications for compliance pursuant to section 231.7. The Minister submits that even if the MSPM constitutes a TAWP, it should be produced now. The Minister submits that there is no reason to wait for the discovery process in the Tax Court proceedings.

[38] The Minister notes the broad wording and powers granted to the Minister pursuant to sections 231.1 to 231.7 to investigate and audit taxpayers, given that taxpayers are otherwise required to self-report (*R v McKinlay Transport*, [1990] 1 SCR 627 at 648, 68 DLR (4th) 568; *Canada (National Revenue) v Cameco Corporation*, 2019 FCA 67 at para 42 [*Cameco FCA*]).

(2) The 2016 audit has not concluded

[39] The Minister disputes BMONB's submission that there is no open audit or inquiry for the 2016 taxation year for which the section 231.1 Request for Information relates because a reassessment for the 2016 taxation year was ordered. The Minister reiterates that the Court may issue the compliance order pursuant to section 231.7 at any time, as there is no statutory time limit to do so, as long as a valid inquiry is issued pursuant to section 231.1.

[40] The Minister notes that the Request for Information pursuant to section 231.1 was issued in July 2019 with respect to the 2016 taxation year and, more specifically, with respect to the share repurchase transactions.

[41] The Minister notes that the same issue is being audited in 2017 and an identical request was sent.

[42] The Minister acknowledges that for the 2012 taxation year, BMO and NBI each appealed to the Tax Court of Canada, which puts the correct taxation of the share repurchase transactions in issue.

[43] The Minister disputes BMONB's contention that the Minister "reopened" the 2016 audit for improper purposes.

[44] The Minister submits that BMONB's notice of objection to the 2016 reassessment challenges the Minister's position; the assessment remains a live issue, the audit remains open and the Request for Information issued in 2019 remains valid. The Minister further submits that restricting a Request for Information to the pre-assessment period would serve to promote non-compliance and is bad public policy.

[45] The Minister submits that there are no statutory time limits with respect to a request for information made pursuant to sections 231.1 or 231.2 (*Canada (National Revenue) v Kitsch*, 2003 FCA 307 at para 32 [*Kitsch*]; *Canada (National Revenue) v Lin*, 2019 FC 646 at para 25).

[46] The Minister submits that *BP Canada Energy Company v Canada (National Revenue)*, 2017 FCA 61 [*BP*], does not support BMONB's position that production of documents cannot be ordered without an open audit or inquiry. The Minister submits that the Court of Appeal did not refuse to order compliance with the request for information because there was no open audit, but because the TAWPs requested were sought for a different purpose than the audit and the legitimate concerns arising from the tax years under audit had already been addressed.

- (3) The MSPM is not a TAWP; but even if it is, it should be produced

[47] The Minister disputes BMONB's position that the MSPM constitutes TAWPs. The Minister submits that there is no evidence that the document was created for such purposes. The Minister further submits that the MSPM was not requested to identify a "soft spot" or to provide a "road map," but for the specific audit issues identified regarding compliance with DRA and GAAR.

[48] The Minister argues that even if the MSPM constitutes TAWPs, it should still be ordered to be produced. The Minister submits that *BP* does not support the broad proposition that TAWPs cannot be ordered to be produced. The Minister notes that, unlike the facts in *BP*, the Minister is not on a "fishing expedition" and does not seek the MSPM for prospective purposes, but rather for the specific audit issues as identified.

- (4) The production of the MSPM will not undermine the discovery process in the Tax Court of Canada

[49] The Minister argues that it is not reasonable to await the outcome of the Tax Court proceedings to obtain the MSPM.

[50] The Minister submits that they will not obtain more information via the production of the MSPM in response to the Request for Information than they would in the context of discovery in the Tax Court proceedings. The Minister adds that BMONB will not suffer any prejudice by producing the MSPM now.

[51] The Minister submits that *Cameco FCA* does not support BMONB's position that the discovery rules in the Tax Court should prevail or that BMONB would be prejudiced.

III. The Respondent's Submissions

A. *Overview*

[52] To provide context, BMONB explains that in the 2016 taxation year, NBI engaged in share repurchase transactions with certain Canadian issuers; NBI sold equities to the issuers of those same equities.

[53] BMONB explains that before legal advice was sought and provided in 2012 and 2013, a spreadsheet was maintained with one worksheet per issuer of certain Canadian equities. The spreadsheet previously consisted generally of the information now in the unredacted column. BMONB notes that two legal opinions were received in 2012 and 2013. While communications with counsel were ongoing, the spreadsheet was amended to "translate" the legal advice into the computations.

[54] BMONB explains that the 2016 MSPM is an updated version from the amended spreadsheet prepared in the course of seeking legal advice in 2012 and 2013. BMONB explains that the MSPM was prepared to compute amounts related to Canadian equities held or sold by BMO Financial Group, including NBI (i.e., accounting reserves). BMONB notes that Mr. Sheikh explained that the tax portion is determined before anyone turns their mind to the accounting reserves.

[55] BMONB notes that the Minister has been auditing its share repurchase transactions since the 2012 taxation year. BMO disagrees with the Minister's adjustments respecting the share repurchase transactions and filed notices of objection, including the notice of objection for the 2016 taxation year. BMONB also notes that both BMO and NBI appealed to the Tax Court of Canada with respect to the 2012 taxation year, which puts the correct taxation of the share repurchase transactions in issue.

[56] BMONB submits that an unredacted version of the MSPM cannot be compelled for production because it is protected by solicitor-client privilege. BMONB submits that the legal advice is apparent and would be revealed in the unredacted MSPM.

[57] Alternatively, BMONB submits that if the redacted MSPM is not privileged, the Court should still not order its production and the summary application should be dismissed.

[58] BMONB suggests that the Minister is attempting to use the audit power for an improper purpose. BMONB alleges that the Minister is "reopening" the 2016 audit (which has concluded) to get secret information for future audits and to obtain an advantage in the matter before the Tax Court regarding the 2012 taxation year.

B. *Solicitor-client privilege applies*

[59] BMONB submits that although the legal advice was provided in 2012 and 2013, its continued validity was verified with counsel for the purpose of the 2016 taxation year. BMONB

submits that the legal advice on which the MSPM is based was developed by external counsel and in-house counsel and was kept confidential.

[60] BMONB points to the evidence of Mr. Mitrano, Managing Director and Head of Cross Asset Solutions for BMONB, who attests that in 2012–2013 BMO Financial Group sought and received legal advice from McCarthy Tetrault (November 2012) and from Torys LLP (July 2013). Mr. Mitrano explains that he participated in communications with counsel.

[61] BMONB argues that the legal advice would be apparent if an unredacted MSPM were produced and would intrude on the solicitor-client relationship and disclose privileged communications.

[62] BMONB notes that Mr. Mitrano also explained that the Spreadsheet was amended while communications with counsel were in progress, with the objective to “translate” the legal advice into computations using BMO Financial Group data. Mr. Mitrano attests that “[t]he Legal Advice is revealed by what is being computed, how the computation is done, and associated text in the redacted column.”

[63] BMONB points to *Susan Hosiery Ltd v Canada (Minister of National Revenue)*, [1969] CTC 353, 1969 CarswellNat 296 (WL), which establishes that privilege may attach to materials incidental to the obtaining and giving of legal advice if the production of the material would tend to reveal the advice.

[64] BMONB disputes any suggestion by the Minister that the advice provided was business advice and not legal advice.

[65] With respect to the Minister's allegation that the BMONB affiants were uninformed and vague, BMONB notes that Mr. Mitrano has extensive experience and was involved in the MSPM. BMONB notes that Mr. Sheikh is a chartered professional accountant and head of tax for BMO, responsible for tax accounting and TAWPs, which is not a one-person job. BMONB notes that Mr. Sheikh distinguished the information in his personal knowledge from that provided to him by others.

C. *The Court's discretion to receive the legal opinions*

[66] BMONB submits that the Court may review any privileged document needed to determine a claim of privilege over a document at issue if the evidence or argument establishes the necessity to do so (*Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 17). BMONB notes that this Court has previously directed taxpayers to file privileged documents under seal for the Court's review, in order to determine a privilege claim asserted during a tax audit (*Revcon*).

[67] BMONB points to *Walsh Construction Company Canada v Toronto Transit Commission*, 2020 ONSC 3688, where the Ontario Superior Court of Justice allowed the Toronto Transit Commission to submit a document subject to solicitor-client privilege under seal in support of its claim of litigation privilege over some documents ordered to be produced on discovery. BMONB submits that the approach followed in *Walsh* may be followed by this Court, with any needed

adaptation, as it is consistent with the rules and principles applicable in this Court, including in the context of tax audits (e.g., Rules 4, 151 and 152).

[68] More generally, BMONB submits that to protect valid privilege claims and to respect solicitor-client privilege as a principle of fundamental justice, the Court should have access to materials required to adjudicate the claim.

D. *Alternatively, if solicitor-client privilege does not apply, the MSPM should still not be ordered to be produced*

(1) There is no open inquiry; the 2016 audit has concluded

[69] BMONB submits that the Minister cannot compel production of information requested pursuant to section 231.1 after an audit has ended. BMONB submits that there is no open audit or inquiry for the 2016 taxation year regarding NBI's share repurchase transactions and that the Minister's attempt to reopen the audit for improper purposes should fail.

[70] BMONB submits that the Minister has the authority to request information only at the audit stage and, if not provided, to seek an order for compliance under section 231.7. BMONB argues that the Minister's audit of the share repurchase transactions for 2016 has ended.

BMONB submits that a reassessment by the Minister or a notice of objection to the reassessment (as was filed by NBI) leads to an impartial review by the CRA Appeals Division, which is a separate process with different information-gathering powers. BMONB submits that it is not "normal" for the Minister to request information pursuant to section 231.1 at this stage because the audit has ended.

[71] BMONB submits that the Minister relies on the audit provisions of the Act (sections 231.1, 231.2, 231.7) to make its requests for information, which only apply during the audit. BMONB submits that in *BP*, the Court of Appeal refused to order production of the documents requested where the audit had concluded.

[72] BMONB further submits that the Minister already has the information required to verify NBI's self-reporting; NBI provided information about the relevant share repurchase transactions concluded in the 2016 fiscal year and the computations used for the tax return. BMONB submits that the information in the unredacted part of the MSPM reflects NBI's reporting.

[73] BMONB adds that the Minister has maintained a consistent position on the share repurchase transactions based on prior audits conducted since 2012.

[74] BMONB also argues that pursuant to paragraph 231.8(b), the period of time for the Minister to assess or reassess a taxpayer is suspended during the compliance order proceeding (i.e., this proceeding) regardless of whether the Minister's request for information was issued under section 231.1 or 231.2.

[75] With respect to the Minister's contention that the MSPM may also be relevant to verifying NBI's tax liability for 2017 and subsequent years, BMONB submits that this summary application relates only to NBI's 2016 taxation year and the specific audit inquiry. A separate proceeding would be required for a compliance order for an audit query for 2017. BMONB adds

that the Minister's suggestion—that production of the MSPM might make future audits more efficient—was rejected in *BP* (at paras 75–76).

(2) TAWPs should not be routinely ordered to be produced

[76] BMONB argues that the redacted information in the MSPM relates to TAWPs as it is accounting for uncertain tax positions. BMONB adds that even if the MSPM is not protected by solicitor-client privilege, as a TAWP, it should not be produced. BMONB refers to the International Financial Reporting Standard [IFRS], which requires that uncertain tax positions be measured in specific ways for accounting purposes. BMONB submits that the working papers associated with accounting for uncertain tax positions under the IFRS are sometimes called TAWPs.

[77] BMONB relies on *BP*, at paras 82–83, where the Federal Court of Appeal held that the Minister cannot routinely request TAWPs, referring to this as an unwritten rule. BMONB notes that the Court held that the Minister's audit powers do not extend to requiring a taxpayer to self-audit by disclosing “soft spots” on issues that are open to debate.

[78] BMONB notes that TAWPs are by their very nature about uncertain tax positions or “soft spots.” BMONB further submits that the issue of the correct tax treatment of NBI's share repurchase transactions during the 2016 taxation year is reasonably open to debate given that BMONB set out its position in its corporate tax return, the supporting computations are contained in the unredacted part of the MSPM, and the Minister has disagreed and issued a

notice of reassessment. BMONB argues that production of the unredacted MSPM is, therefore, not appropriate in these circumstances.

[79] BMONB also argues that the Minister's own policy goes against ordering it to produce the unredacted MSPM. BMONB notes that following the decision in *BP*, the Minister issued a communiqué regarding requests for TAWPs during an audit. The communiqué identifies two grounds to permit a request for a TAWP: first, where it is relevant to a specific item under audit and, second, to identify audit issues in the context of an ongoing audit. BMONB argues that neither ground applies, again submitting that the audit for 2016 has concluded.

- (3) Ordering production would circumvent the discovery process in the Tax Court proceedings

[80] BMONB submits that if any relevant taxation year is appealed to the Tax Court of Canada, the Minister's audit powers in subsequent years should not be used to circumvent or undermine the discovery process set out in the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a. BMONB adds that there is a significant distinction between audits and discovery. The same protection of confidentiality does not apply to information and documents obtained on an audit as on discovery.

[81] BMONB argues that issuing the compliance order (to produce the unredacted MSPM) would undermine the discovery process and circumvent the discovery rules in the Tax Court with respect to the appeals by BMO and NBI for the 2012 taxation year and would cause them prejudice.

[82] BMONB submits that the Federal Court addressed this issue in *Canada (National Revenue) v Cameco Corporation*, 2017 FC 763 [*Cameco FC*], and refused to order production of the information requested. BMONB suggests that the Federal Court of Appeal, in dismissing the appeal, left the issue open (*Cameco FCA*).

IV. The Issues

[83] The overarching issue is whether the criteria for the Court to issue the order pursuant to section 231.7 have been met. In the present case, this requires consideration of the following issues:

- Whether solicitor-client privilege applies to the redacted information;
 - Whether the Court should review the underlying legal opinions in order to determine if the MSPM constitutes communications protected by solicitor-client privilege.
- Alternatively, whether the MSPM should not be ordered to be produced because:
 - The audit for NBI's 2016 taxation year has concluded and there is no remaining open inquiry about the share repurchase transactions;
 - The redacted MSPM constitutes TAWPs; and/or
 - Ordering production of the MSPM would improperly undermine the discovery process or circumvent the discovery rules in the Tax Court of Canada regarding BMO and NBI's appeals related to the 2012 taxation year.

[84] The relevant provisions of the *Income Tax Act* (sections 231.1, 231.2, 231.7, 231.8, and 152(4)) are set out in Annex 1.

V. Is the MSPM Protected by Solicitor-Client Privilege?

[85] The parties do not dispute the importance of solicitor-client privilege to the legal system, the principles governing solicitor-client privilege, or the test to determine whether solicitor-client

privilege applies (*Solosky v The Queen*, [1980] 1 SCR 821 at 836–37; *R v McClure*, 2001 SCC 14 at paras 2, 31–33; *Canada (National Revenue) v Thompson*, 2016 SCC 21 at paras 17–19 [*Thompson*]). The issue is whether the particular document—the MSPM—is a communication protected by solicitor-client privilege. At its most simple formulation, to be protected, the document must be a communication between a solicitor and client that entails the seeking or giving of legal advice and which was intended by the parties to be confidential.

A. *The jurisprudence regarding solicitor-client privilege*

[86] In *Revcon*, the Court summarized the relevant principles from the jurisprudence at paras 17–22, which apply in the present case:

[17] Solicitor-client privilege attaches to all interactions between a client and his or her lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer, as opposed to acting as a business counsellor or in some other non-legal capacity: *Blood Tribe*, above, at para 10.

[18] In order to uphold a claim of solicitor-client privilege, a court must determine (1) that legal advice has been sought from a professional legal adviser in her capacity as such, (2) that the communications relate to that purpose and (3) that the communications were made in confidence by the client and the solicitor. See *Descôteaux et al v Mierzwinski*, [1982] 1 SCR 860 at 892-893:

In summary, a lawyer’s client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality.

[Emphasis added]

[19] The onus to establish that the Retained Documents fall within the scope of solicitor-client privilege is on the Respondent. In *Belgravia Investments Limited v Canada*, 2002 FCT 649 [*Belgravia*], Justice Heneghan wrote at paras 47-48:

The party asserting privilege carries the evidentiary burden. The Applicants must show, on a balance of probabilities, that the documents in question are a communication between a solicitor and a client that involves the seeking or giving of legal advice, and that the parties intend to be confidential. [...]

The party claiming the privilege must do more than baldly assert the privilege.

[20] Tax planning communications are not privileged. Also, facts that exist independently of a communication are not privileged: *Belgravia*, above, at paras 44-45.

[21] In *Canada (National Revenue) v Kitsch*, 2003 FCA 307 at paras 35-47, the Federal Court of Appeal affirmed that there is no such thing as “accountant-client privilege”. Advice given by an accountant (or, I would add, by a lawyer for accounting or tax planning purposes) does not fall within the scope of solicitor-client privilege: *Canada (National Revenue) v Grant Thornton*, 2012 FC 1313 at para 22.

[22] This understanding of the scope of the privilege was reiterated by Justice Binnie in *Blood Tribe*, above, at para 10:

While the solicitor-client privilege may have started life as a rule of evidence, it is now unquestionably a rule of substance applicable to all interactions between a client and his or her lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer rather than as a business counsellor or in some other non-legal capacity...

[Emphasis added]

[87] In *Samson Indian Nation and Band v Canada*, 1995 CarswellNat 675 at para 8, [1995] 2

FC 762 (FCA), the Court of Appeal explained that solicitor-client privilege is to be given a broad

scope and that there is a continuum of communications to which solicitor-client privilege applies:

The legal advice privilege protects all communications, written or oral, between a solicitor and a client that are directly related to the seeking, formulating or giving of legal advice; it is not necessary that the communication specifically request or offer advice, as long as it can be placed within the continuum of communication in which the solicitor tenders advice; it is not confined to telling the client the law and it includes advice as to what should be done in the relevant legal context.

[88] In *Information Commissioner*, the Court of Appeal also addressed the notion of the continuum, at paras 26–27:

[26] All communications between a solicitor and a client directly related to the seeking, formulating or giving of legal advice are privileged, along with communications within the continuum in which the solicitor tenders advice. See *Samson Indian Nation and Band v. Canada*, [1995] 2 F.C. 762 at paragraph 8.

[27] Part of the continuum protected by privilege includes “matters great and small at various stages...includ[ing] advice as to what should prudently and sensibly be done in the relevant legal context” and other matters “directly related to the performance by the solicitor of his professional duty as legal advisor to the client.” See *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at page 1046 *per* Taylor L.J.; *Three Rivers District Council v. Governor and Company of the Bank of England*, [2004] UKHL 48 at paragraph 111.

[89] At para 28, the Court noted that to determine where the continuum ends, the question is “does the disclosure of the communication have the potential to undercut the purpose behind the privilege – namely, the need for solicitors and their clients to freely and candidly exchange information and advice so that clients can know their true rights and obligations and act upon them?”

[90] The Court provided examples, including instructions based on legal advice that would impede the free exchange of information (para 29) and other “end products” such as policy documents that are shaped by legal advice but are operational in nature (para 30). The Court noted at para 31:

[31] Similarly, an organization might receive plenty of legal advice about how to draft a policy against sexual harassment in the workplace. But the operational implementation of that advice – the policy and its circulation to personnel within the organization for the purpose of ensuring the organization functions in an acceptable, professional and business-like manner – is not privileged, except to the extent that the policy communicates the very legal advice given by counsel.

[Emphasis added]

[91] In *Thompson* at para 19, the Supreme Court of Canada confirmed that solicitor-client privilege extends to facts connected to the advice:

While it is true that not everything that happens in a solicitor-client relationship will be a privileged communication, facts connected with that relationship (such as the bills of account at issue in *Maranda*) must be presumed to be privileged absent evidence to the contrary (*Maranda*, at paras. 33-34; see also *Foster Wheeler*, at para. 42). This rule applies regardless of the context in which it is invoked (*Foster Wheeler*, at para. 34; *R. v. Gruenke*, [1991] 3 S.C.R. 263, at p. 289).

B. *Is the MSPM protected by solicitor-client privilege?*

[92] BMONB bears the onus to establish that the MPSM is a solicitor-client communication and protected by the privilege.

[93] The evidence upon which BMONB relies includes the vague, but carefully worded, assertions by Mr. Mitrano and Mr. Sheikh.

[94] Mr. Mitrano attests that he was “involved,” along with others, in seeking the legal advice in 2012 and 2013, “participated” in communications with counsel concerning the legal advice, and was “included” in communications with counsel regarding the continued validity of the legal advice for the 2016 taxation year. However, the extent of his involvement and participation is not known.

[95] Mr. Mitrano explained that “while communications with counsel were underway in respect of the Legal Advice, [he] worked with colleagues in the Capital Markets business to amend the spreadsheet.” He states that the MSPM computes various amounts relating to Canadian equities held by or sold by BMO Financial Group, including NBI. He adds that the objective of the amendment was to “translate the Legal Advice into computations using BMO Financial Group data” and that the redacted portion of the Spreadsheet (MSPM) reflects the amendment.

[96] Mr. Mitrano attests that “[t]he Legal Advice is revealed by what is being computed, how the computation is done, and associated text in the redacted column.” However, his evidence is that the amendment, which resulted in the redacted column being added to the spreadsheet, was made “while” discussions were underway with counsel, not that BMONB awaited the outcome of the legal advice before amending the MSPM.

[97] On cross-examination, Mr. Mitrano was asked to provide further details of the share repurchase transactions and to explain how the information in the MSPM includes the legal advice. Mr. Mitrano's responses focussed on the impact on BMONB of the disclosure of confidential information to potential business competitors.

[98] Mr. Sheikh also attests that legal advice was sought and provided in 2012 and 2013 and that he participated in communications with counsel regarding that advice.

[99] Mr. Sheikh states that in the 2016 taxation year, NBI engaged in share repurchase transactions with certain Canadian issuers; NBI sold equities to issuers of those equities. He states that the tax reporting of the share repurchase transactions in NBI's 2016 corporate income tax return was determined using information set out in the unredacted column of the spreadsheet (the MSPM).

[100] Mr. Sheikh stated that, with respect to tax reporting, the purpose of the redacted part of the MSPM was to determine the applicability of an accounting reserve.

[101] Mr. Sheikh states that BMO Financial Group considered the legal advice provided in determining the accounting reserves for NBI's 2016 taxation year regarding the share repurchase agreements. He added, "[t]he redacted column in the Spreadsheet computes reserves, if any, in respect of share repurchase transactions in a manner consistent with the Legal Advice, and forms part of BMO Financial Group's TAWPs."

[102] Mr. Sheikh further states, using the same words as Mr. Mitrano, “[t]he Legal Advice is apparent from the redacted column. The Legal Advice is revealed by what is being computed, how the computation is done and associated text in the redacted column.”

[103] Mr. Sheikh adds that counsel was consulted and confirmed the continued validity of the legal advice prior to finalizing the accounting reserves for the 2016 taxation year.

[104] On cross-examination, Mr. Sheikh responded that he did not know who prepared the TAWPs or when they were prepared, as this was overseen by someone with responsibility for tax compliance matters.

[105] The evidence of Mr. Mitrano and Mr. Sheikh—including that they participated in or were included in discussions with counsel, that the MSPM was amended “while” those discussions were underway, and that the legal advice was “considered”—is not helpful or sufficient to establish that the MSPM reflects or reveals the legal advice provided or that the MSPM falls in the continuum of what is covered by solicitor-client privilege.

[106] The Court accepts that legal advice was requested by BMONB and was provided by BMONB’s lawyers in confidence. The legal opinions provided in 2012 and 2013 are clearly solicitor-client communications. However, the MSPM is a separate document. While solicitor-client privilege has a broad scope, I am not persuaded that the disclosure of the MSPM would “undercut” the need for lawyers and their clients to “freely and candidly exchange

information and advice so that clients can know their true rights and obligations and act upon them” (*Information Commissioner* at para 28).

[107] The Court has reviewed the redacted column of the MSPM (the representative or sample page without the redactions) and cannot determine, as BMONB claims, that it “translates” or reflects legal advice, or that the legal advice would be revealed by the computations or the associated text. This is not apparent to the Court. The redacted column is simply computations with minimal text adjacent to the computations.

[108] The MSPM reflects the operational implementation, outcome or end product of legal advice provided. However, it is not clear how it implements that advice, based on the vague evidence of Mr. Mitrano and Mr. Sheikh.

[109] As the Court found in *Information Commissioner*, not all end products of legal advice fall on the continuum of solicitor-client communications; an end product is not privileged “except to the extent that [it] communicates the very legal advice given by counsel” (at para 31).

C. *Should the Court review the legal opinions to make the determination?*

[110] As noted above, the Minister is of the view that the Court should determine whether the MSPM is protected by solicitor-client privilege without reviewing the legal advice or opinions, which BMONB claims would be revealed if the unredacted MSPM were disclosed. The Minister takes the position that if the MSPM does not disclose the “very legal advice,” the document is not covered by the privilege.

[111] The Minister's concern that the original legal opinions, if received by the Court, be unedited and unredacted has been addressed. BMONB provided the unredacted opinions to the Court, which are kept under seal. BMONB has identified specific paragraphs of legal advice in the two opinions, which it claims would be revealed if the redacted MSPM were ordered to be produced in unredacted form.

[112] I acknowledge a court should exercise the discretion to review solicitor-client communications "sparingly" and only where the necessity to do so is established. I find that it is necessary to do so. It is not possible to determine whether the redacted MSPM reflects the legal advice provided, as claimed by BMONB, based only on the review of the MSPM and the scant evidence to support that contention. To ensure that the determination is not made in the absence of thorough consideration and to ensure that confidential communications are protected if solicitor-client privilege applies, I have considered the two legal opinions provided to BMONB in 2012–2013.

[113] The legal opinions set out in detail the facts and assumptions and the questions or issues for which BMONB sought advice.

[114] The identified, sidebarred paragraphs in the 2012 opinion represent approximately five short paragraphs or subparagraphs in the 26-page opinion. The sidebarred paragraphs in the 2013 opinion represent five short paragraphs in the 17-page opinion.

[115] As noted, while the 2012 and 2013 opinions provided legal advice and are clearly solicitor-client communications, the MSPM does not readily disclose or “translate” the advice provided, which included general references to accepted principles, the provisions of the Act and relevant jurisprudence.

[116] The Court’s review of the legal opinions does not serve to establish that the MSPM falls on the continuum of solicitor-client communications. The Court remains of the view that BMONB has not established that the MSPM, which is a set of computations with some associated text, is other than the operational outcome or end product of legal advice, to some extent. BMONB has not established that the MSPM would disclose the legal advice provided.

VI. If the MSPM Is Not Protected by Solicitor-Client Privilege, Should It Be Ordered to Be Produced?

[117] BMONB advances three alternative arguments for the non-disclosure of the MSPM. As explained below, the Court has thoroughly considered these arguments and the jurisprudence cited in support, and has concluded that, in the present circumstances, there is no impediment to issuing the order pursuant to section 231.7 for the production of the MSPM as requested pursuant to section 231.1 of the Act.

[118] I do not agree with BMONB that the Minister is attempting to use its audit powers for improper purposes.

A. *Is the Minister precluded from relying on section 231.1 or section 231.7 because there is no open audit or inquiry, as BMONB alleges?*

[119] As noted, BMONB argues that the Minister can no longer rely on section 231.1 or section 231.7 to seek compliance with the request for information, because the audit power only applies during the audit. BMONB argues that the 2016 audit has ended.

[120] First, there are no time limits for the Minister's exercise of its authorities pursuant to section 231.1 or 231.7 as suggested by BMONB.

[121] The Act is a long and detailed statute with interrelated provisions. Section 231.1 does not set out time limits for requests for information. If Parliament intended to impose time limits, it could have done so. The wording of section 231.1 is broad: “[a]n authorized person may, at all reasonable times, for any purpose related to the administration and enforcement of this Act...” Section 231.7 also does not impose a time limit on the Minister to seek compliance with a request made pursuant to section 231.1 or 231.2.

[122] In *Lin*, the Court found, at para 25, that there is no statutory time limit within which to make a request for information under subsection 231.1(1), relying on *Canada (Minister of National Revenue) v Stankovic*, 2018 FC 462 at para 34, which in turn relies on *Kitsch* at para 32.

[123] I acknowledge that in *Lin*, the Court cited jurisprudence that focussed on requests for information pursuant to section 231.2, not section 231.1. However, in *Kitsch* at para 32, the Court of Appeal made a more general statement that there is no statutory time limit for requests.

[124] More recently, in *BP*, the Court of Appeal emphasized, at paras 58–59, that the broad audit powers apply where the Minister’s purpose is related to the administration of enforcement of the Act:

[58] I agree with the Federal Court judge that subsection 231.1(1) could not have been drafted in broader terms. Based on the plain language of subsection 231.1(1), a document which “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 under [the] Act” is accessible under that provision.

[59] The introductory words of subsection 231.1(1) specify that in order to invoke this broad wording, the Minister must be acting for a purpose relating to the administration or enforcement of the Act. In the context of paragraph 231.1(1) (a), that purpose is verifying compliance with the Act.

[Emphasis added]

[125] Second, contrary to BMONB’s argument, the audit for 2016 with respect to the issue of the share repurchase transactions has not concluded. The Minister’s request for information was issued in the context of the 2016 audit for a specific purpose and remains unanswered.

[126] I do not agree with BMONB that the audit ended with the Minister’s notice of reassessment (June 2021). I also do not agree that BMONB’s notice of objection puts an end to the Minister’s authority pursuant to sections 231.1 or 231.7. BMONB’s reliance on CRA publications that describe the review by the CRA Appeals Division and its process do not support the contention that the audit powers are no longer applicable. In the present case, the Minister made the request for information pursuant to section 231.1 in 2019, long before the reassessment or notice of objection. BMONB’s refusal or inability to comply cannot provide a basis for its position that the Minister can no longer seek compliance.

[127] I agree with the Minister's comment that restricting a request for information to the pre-assessment or pre-reassessment period would not be in the spirit of the Act, which gives broad powers to ensure the administration and enforcement of the Act, and could promote non-compliance.

[128] Third, BMONB's reliance on *BP* in support of its broad proposition that the Minister can only rely on sections 231.1, 231.2, and 231.7 to seek information during an audit stretch the findings in *BP*.

[129] In *BP*, the Federal Court of Appeal did not refuse to order compliance with the Minister's request for information solely because the audit for a specific year had concluded, but because the information had been requested for broader purposes, other than the issues identified in the audit, and the issues identified in the audit had already been addressed. The Court found that the broad request would impose an obligation on the taxpayer to self-audit prospectively.

[130] As noted in *Canada (National Revenue) v Atlas Tube Canada ULC*, 2018 FC 1086 at para 63 [*Atlas Tube*], referring to facts and findings in *BP*:

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.

[Emphasis added]

[131] In the present case, unlike *BP*, the Minister identified the specific purpose of the Request for Information related to the 2016 audit. This information has not been provided and the issue identified in the audit has not been resolved.

[132] As attested by Ms. Brar, the Request for Information pursuant to section 231.1 was issued on July 4, 2019 “with respect to NBI’s decision to enter into certain share repurchase agreements and related transactions during the 2015 and 2016 taxation years (termed the ‘Strategy’) that resulted in deemed dividends.” In other words, it was for a specific issue in the context of the audit for 2016.

[133] Fourth, BMONB’s reliance on paragraph 231.8(b) as “stopping the clock” does not assist its argument that the 2016 audit has concluded and/or that the Minister cannot rely on the audit powers. Paragraph 231.8(b) provides for a suspension of the time for the Minister to assess or reassess a taxpayer pursuant to subsection 152(4), including during the compliance order proceeding (i.e., pursuant to section 231.7, as in this proceeding) regardless of whether the Minister’s Request for Information was issued pursuant to section 231.1 or 232.1. The time to assess or reassess is suspended from the date of the taxpayer’s notice of appearance in response to the Minister’s application pursuant to section 231.7 until the Court’s final determination of the section 231.7 application. In the present case, the Minister issued the notice of reassessment on June 18, 2021. BMONB filed its notice of appearance, in response to the Minister’s section 231.7 application, on June 24, 2021. It is not apparent how any suspension of the time for the Minister to reassess BMONB for the 2016 taxation year applies or affects this proceeding given

that the reassessment was issued before the notice of appearance. More generally, section 231.8 does not address the position asserted by BMONB that the audit has ended or that the Minister can no longer pursue compliance with the Request for Information.

B. *Is the MSPM a TAWP—and if it is, should the Court compel its production?*

[134] As noted, BMONB submits that the redacted MSPM is a TAWP and relies on *BP* to argue that its production should not be compelled. Mr. Sheikh explains that financial reporting standards require BMO to determine accounting reserves for uncertain tax positions and that TAWPs are prepared in connection with these accounting reserves.

[135] As noted above, Mr. Sheikh states that the redacted column in the MSPM “computes reserves, if any, in respect of share repurchase transactions in a manner consistent with the legal advice and forms part of BMO Financial Group’s TAWPs.”

[136] In *BP*, the Court of Appeal described TAWPs at paras 48–49, noting that “their purpose is to identify uncertain tax positions and provide for reserves which will allow the independent auditors to certify that the financial statements fairly and accurately reflect the financial situation of the corporation under audit.”

[137] Mr. Sheikh’s evidence establishes that the MSPM is, to some extent, a TAWP or that it could be a TAWP (given that he qualifies his response that the redacted MSPM computes reserves “if any”). The issue is therefore whether, as a TAWP, the MSPM can be ordered to be produced.

[138] BMONB's submission that, in accordance with *BP*, the production of the MSPM should not be compelled stretches the Court of Appeal's findings in *BP*. In addition, the present facts differ from those in *BP*.

[139] In *BP*, the Federal Court of Appeal summarized its overall conclusion at para 4:

For the reasons which follow, I am of the view that the documents ordered to be produced, given the purpose for which they were sought, are beyond the reach of the Minister, and that the Federal Court judge committed a number of legal and factual errors in ordering their production. Therefore, I propose that the appeal be allowed.

[Emphasis added]

[140] The Court explained the purposes for which the documents were sought in its reasons, noting at para 59:

The introductory words of subsection 231.1(1) specify that in order to invoke this broad wording, the Minister must be acting for a purpose relating to the administration or enforcement of the Act. In the context of paragraph 231.1(1)(a), that purpose is verifying compliance with the Act. In the present case, the Minister has made clear that the purpose is to seek access to BP Canada's uncertain tax positions. The Minister wants to use these positions as a roadmap in order to facilitate audits conducted under the Act. Based on a literal reading of the introductory words, this looks like an authorized purpose.

[141] However, the Court elaborated at para 67, noting that despite the broad wording in the Act, the issue is whether "general and unrestricted access" was sought and whether this is allowed:

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.

[142] The Court of Appeal reviewed the circumstances that led the Minister to seek the documents and bring the application, and the Federal Court to grant it. The Court of Appeal concluded, at para 78, that the compliance order was sought and ordered by the Federal Court on the "sole basis" that the documents were compellable without restriction.

[143] The Court of Appeal noted, at para 79, that the impact of the Federal Court's decision—which would authorize the Minister to resort to subsection 231.1(1) to gain access to TAWPs "without advancing any particular justification for their production"—would be to impose on BP and other taxpayers a requirement to routinely provide the Minister with their uncertain tax positions every year onward.

[144] The Court of Appeal found at para 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.

[145] The Court of Appeal noted the distinction between self-assessment, upon which compliance with the Act relies, and self-audit, which is not required (at paras 81–83). The Court of Appeal explained the bounds on the auditors to “poke and check” at para 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”.

[Emphasis in the original]

[146] The Court of Appeal found that if the decision of the Federal Court were left uncorrected, it would confirm the Minister’s access to the documents every year from the date of the audit onward, and “[would allow] the Minister to compel BP Canada to self-audit” (at para 85).

[147] The Court of Appeal concluded at para 99 that the Minister could not rely on subsection 231.1(1) to obtain general and unrestricted access to BP’s documents that revealed its uncertain tax positions. The Court stated, more generally, “[i]n practical terms, this means that the Minister cannot enlist taxpayers who maintain TAWPs to perform the core aspect of audits conducted under the Act.”

[148] In *Atlas Tube*, the Court considered the application of *BP*. The Court found that the documents sought from Atlas Tube were not protected by solicitor-client privilege. The Court

also found that, although the documents were in part TAWPs, they should be ordered to be produced pursuant to section 231.7, as this would not impose an obligation to self-audit. The Court carefully considered whether and how *BP* applied and found that it had a more limited application than asserted, noting at para 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.

[149] In *Atlas Tube*, the Court found at para 65 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." The Court noted that in *BP*, the Court of Appeal distinguished the Minister's powers in the context of an audit, noting the Court of Appeal's statement at para 67 of *BP* that the documents would be accessible "if required, in order to respond to a specific inquiry made in the context of an audit."

[150] The Court found on the facts of *Atlas Tube*, at para 66, that "[u]nlike 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” and that its production would not offend the principle that a taxpayer is not required to self-audit.

[151] In the present case, BMONB submits that the production of the redacted MSPM would reveal its uncertain tax positions, and also suggests that the Minister is seeking the information for future audits, which in BMONB’s submission goes against *BP*.

[152] The evidence supports that the Minister seeks the MSPM for the purposes set out in the Request for Information issued in 2019 related to the 2016 audit. As noted in Ms. Brar’s affidavit, the request was about NBI’s decision to enter into certain share repurchase agreements and related transactions during the 2015 and 2016 taxation years that resulted in deemed dividends. Although the Minister notes that the information may also be relevant to the 2017 return, a separate request for information was made for that taxation year. Unlike *BP*, the concerns arising from the tax year under audit have not been addressed. Unlike *BP*, the Minister has not sought access to the MSPM (whether or not it is a TAWP) without advancing a particular justification.

[153] In *BP*, the FCA emphasized that the broad powers of subsection 231.1(1) should be used with restraint, but not that the powers could not be used at all with respect to TAWPs. The FCA’s caution was against imposing an obligation to self-audit.

[154] BMONB has not established that production of the MSPM would impose on it an obligation to self-audit into the future or that its uncertain tax positions would be revealed.

[155] BMONB's argument that the Minister's own policy, set out in a communiqué issued following the Federal Court of Appeal's decision in *BP*, goes against ordering it to produce the unredacted MSPM overlooks that the communiqué states that a TAWP can be requested where it is relevant to a specific item under audit. In the present case, the MSPM is sought for the specific purpose identified regarding the share repurchase agreements.

C. *Will ordering production undermine the discovery in the Tax Court of Canada?*

[156] BMONB has not established that the Minister's Request for Information or summary application is for any improper purpose, including that of seeking some advantage in the proceedings in the Tax Court with respect to the appeals regarding the 2012 taxation year. I note that BMO and NBI did not file their appeals to the Tax Court until October 2021. The Minister's Request for Information was made in July 2019 and the Minister's proposal and notice of reassessment both preceded BMONB's notices of appeal to the Tax Court. There is nothing to suggest that the Minister was aware that BMONB would appeal with respect to the 2012 taxation year before BMONB did so.

[157] In addition, BMONB mischaracterizes the jurisprudence as leaving the issue open regarding whether a compliance order to produce a document requested pursuant to section 231.1 (in this case, the MSPM) should be refused because it would undermine the discovery process in the Tax Court proceedings and prejudice the appellant.

[158] In *Cameco FC*, the Minister had sought to use the powers under section 231.1 to compel 25 Cameco employees to be interviewed. The Federal Court noted, at paras 34–35, relying on

BP, that although the Minister's powers are broad, they are not unlimited. The Court refused to order compliance with the request. With respect to the issue of whether ordering the interviews of the employees would replicate or circumvent discoveries in proceedings in the Tax Court, the Court referred to the Tax Court of Canada Rules, and stated at para 47:

I cannot do it as it would disregard the Tax Court of Canada Rules and possibly prejudice the proceedings currently before the Tax Court of Canada, with subsequent tax years in the pipeline to be heard, by enabling the Minister to bolster evidence (if necessary) for subsequent trials regarding other audited years.

[159] In *Cameco FCA*, the Federal Court of Appeal agreed that the Minister could not compel the employees to submit to oral interviews, basing its decision on the proper interpretation and legislative history of the relevant statutory provisions.

[160] Contrary to *BMONB*'s submission that the Court of Appeal dismissed the appeal without addressing the interaction between the Minister's audit powers pursuant to section 231.1 and the discovery regime in the Tax Court of Canada Rules, the Court of Appeal found that the Federal Court's comments were *obiter* and did not reflect the law. The Court of Appeal found that the Tax Court of Canada Rules are not a factor in determining the Minister's powers under section 231.1. The Court of Appeal noted that the Tax Court of Canada could sort out any issues regarding the admissibility of the evidence or potential prejudice arguments. The Court of Appeal stated at paras 40–41:

[40] I turn to the question whether compelling answers could compromise *Cameco*'s position in on-going and prospective litigation in the Tax Court of Canada. This consideration weighed heavily in the Federal Court judge's consideration of whether to grant the order.

[41] In the absence of a specific intersection between the Income Tax Act and the Tax Court Rules, the Rules as subordinate legislation do not assist the interpretation of the scope of the Minister's power under paragraph 231.1(1)(a). Additionally, whether questions posed in the course of an audit might have direct or collateral consequences on ongoing or prospective litigation is not a relevant discretionary consideration. The issue of the admissibility of evidence and any prejudice to the taxpayer arising from answers given in the course of an audit is to be dealt with by the Tax Court judge, under established substantive and procedural rules of evidence, and not at the audit stage.

[161] In the present case, as noted in *Cameco FCA*, the Tax Court of Canada can address the scope of discovery in the context of those proceedings and can address any argument by BMONB that the Court's order pursuant to section 231.7 to produce the MSPM as requested—for the purposes specified and in the context of the 2016 audit—has prejudiced BMO or NBI in their appeals with respect to the 2012 taxation year.

VII. Conclusion

[162] I have concluded, for the reasons set out above, that the Minister is entitled to the order sought under subsection 231.7(1) of the Act, compelling BMONB to provide the MSPM in an unredacted form.

VIII. Costs

[163] Both parties requested their costs in the event that they were successful in this application. Given the outcome, the Minister is entitled to costs. The parties should consult to seek to reach an agreement with respect to costs. If no agreement is reached within 30 days of

the issuance of this decision, the parties may make submissions to the Court, not to exceed three pages, on the issue of costs.

ORDER in file T-865-21

THIS COURT ORDERS that:

1. The material filed with the Court at the hearing of this application under seal shall be treated as confidential, and counsel 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 subsection 231.7(1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) to provide to the Applicant, within 30 days of the date of this order, the document sought by the Applicant from the Respondent pursuant to requests made of the Respondent under subsection 231.1(1) of the Act and dated July 4, 2019.
3. The Applicant is awarded costs of this application.
4. The parties shall confer with each other on the quantification of costs and, within 30 days of the date of this order, shall
 - a) advise the Court in writing if agreement has been reached on such quantification; or
 - b) failing such agreement, provide the Court with written representations not to exceed three pages on such quantification.

"Catherine M. Kane"

Judge

ANNEX 1Relevant Provisions of the *Income Tax Act*

231.1 (1) An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Act,

(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

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

and for those purposes the authorized person may

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

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

(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.

(2) Where any premises or place referred to in paragraph 231.1(1)(c) is a dwelling-house, an authorized person may not enter that dwelling-house without the consent of the occupant except under the authority of a warrant under subsection 231.1(3).

(3) Where, on ex parte application by the Minister, a judge is satisfied by information on oath that

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) 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.

(2) Lorsque le lieu mentionné à l'alinéa (1)c) est une maison d'habitation, une personne autorisée ne peut y pénétrer sans la permission de l'occupant, à moins d'y être autorisée par un mandat décerné en vertu du paragraphe (3).

(3) Sur requête ex parte du ministre, le juge saisi peut décerner un mandat qui autorise une personne autorisée à pénétrer dans une maison d'habitation aux conditions précisées dans le mandat, s'il est convaincu, sur dénonciation sous serment, de ce qui suit :

(a) there are reasonable grounds to believe that a dwelling-house is a premises or place referred to in paragraph 231.1(1)(c),

a) il existe des motifs raisonnables de croire que la maison d'habitation est un lieu mentionné à l'alinéa (1)c);

(b) entry into the dwelling-house is necessary for any purpose relating to the administration or enforcement of this Act, and

b) il est nécessaire d'y pénétrer pour l'application ou l'exécution de la présente loi;

(c) entry into the dwelling-house has been, or there are reasonable grounds to believe that entry will be, refused,

c) un refus d'y pénétrer a été opposé, ou il existe des motifs raisonnables de croire qu'un tel refus sera opposé.

the judge may issue a warrant authorizing an authorized person to enter the dwelling-house subject to such conditions as are specified in the warrant but, where the judge is not satisfied that entry into the dwelling-house is necessary for any purpose relating to the administration or enforcement of this Act, the judge may

Dans la mesure où un refus de pénétrer dans la maison d'habitation a été opposé ou pourrait l'être et où des documents ou biens sont gardés dans la maison d'habitation ou pourraient l'être, le juge qui n'est pas convaincu qu'il est nécessaire de pénétrer dans la maison d'habitation pour l'application ou l'exécution de la présente loi peut ordonner à l'occupant de la maison d'habitation de permettre à une personne autorisée d'avoir raisonnablement accès à tous documents ou biens qui sont gardés dans la maison d'habitation ou devraient y être gardés et rendre tout autre ordonnance indiquée en l'espèce pour l'application de la présente loi.

(d) order the occupant of the dwelling-house to provide to an authorized person reasonable access to any document or property that is

or should be kept in the dwelling-house, and

(e) make such other order as is appropriate in the circumstances to carry out the purposes of this Act,

to the extent that access was or may be expected to be refused and that the document or property is or may be expected to be kept in the dwelling-house.

231.2 (1) Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act (including the collection of any amount payable under this Act by any person), of a listed international agreement or, for greater certainty, of a tax treaty with another country, by notice sent or served in accordance with subsection (1.1), require that any person provide, within such reasonable time as is stipulated in the notice,

(a) any information or additional information, including a return of income or a supplementary return; or

(b) any document.

231.2 (1) Malgré les autres dispositions de la présente loi, le ministre peut, sous réserve du paragraphe (2) et, pour l'application ou l'exécution de la présente loi (y compris la perception d'un montant payable par une personne en vertu de la présente loi), d'un accord international désigné ou d'un traité fiscal conclu avec un autre pays, par avis signifié ou envoyé conformément au paragraphe (1.1), exiger d'une personne, dans le délai raisonnable que précise l'avis :

a) qu'elle fournisse tout renseignement ou tout renseignement supplémentaire, y compris une déclaration de revenu ou une déclaration supplémentaire;

b) qu'elle produise des documents.

(1.1) A notice referred to in subsection (1) may be

(a) served personally;

(b) sent by registered or certified mail; or

(c) sent electronically to a bank or credit union that has provided written consent to receive notices under subsection (1) electronically.

(2) The Minister shall not impose on any person (in this section referred to as a “third party”) a requirement under subsection 231.2(1) to provide information or any document relating to one or more unnamed persons unless the Minister first obtains the authorization of a judge under subsection 231.2(3).

(3) A judge of the Federal Court may, on application by the Minister and subject to any conditions that the judge considers appropriate, authorize the Minister to impose on a third party a requirement under subsection (1) relating to an unnamed person or more than one unnamed person (in this section referred to as the “group”) if the judge is satisfied by information on oath that

(1.1) L’avis visé au paragraphe (1) peut être :

a) soit signifié à personne;

b) soit envoyé par courrier recommandé ou certifié;

c) soit envoyé par voie électronique à une banque ou une caisse de crédit qui a consenti par écrit à recevoir les avis visés au paragraphe (1) par voie électronique.

(2) Le ministre ne peut exiger de quiconque — appelé « tiers » au présent article — la fourniture de renseignements ou production de documents prévue au paragraphe (1) concernant une ou plusieurs personnes non désignées nommément, sans y être au préalable autorisé par un juge en vertu du paragraphe (3).

(3) Sur requête du ministre, un juge de la Cour fédérale peut, aux conditions qu’il estime indiquées, autoriser le ministre à exiger d’un tiers la fourniture de renseignements ou la production de documents prévues au paragraphe (1) concernant une personne non désignée nommément ou plus d’une personne non désignée nommément — appelée « groupe » au présent article —, s’il est convaincu, sur dénonciation sous serment, de ce qui suit :

(a) the person or group is ascertainable; and	a) cette personne ou ce groupe est identifiable;
(b) the requirement is made to verify compliance by the person or persons in the group with any duty or obligation under this Act.	b) la fourniture ou la production est exigée pour vérifier si cette personne ou les personnes de ce groupe ont respecté quelque devoir ou obligation prévu par la présente loi;
[...]	[...]
231.7 (1) On summary application by the Minister, a judge may, notwithstanding subsection 238(2), order a 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	231.7 (1) Sur demande sommaire du ministre, un juge peut, malgré le paragraphe 238(2), ordonner à une 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.
(2) An application under subsection (1) must not be heard before the end of five clear days from the day the notice of application is served on the person against whom the order is sought.	(2) La demande n'est entendue qu'une fois écoulés cinq jours francs après signification d'un avis de la demande à la personne à l'égard de laquelle l'ordonnance est demandée.

(3) A judge making an order under subsection (1) may impose any conditions in respect of the order that the judge considers appropriate.

(3) Le juge peut imposer, à l'égard de l'ordonnance, les conditions qu'il estime indiquées.

(4) If a person fails or refuses to comply with an order, a judge may find the person in contempt of court and the person is subject to the processes and the punishments of the court to which the judge is appointed.

(4) Quiconque refuse ou fait défaut de se conformer à une ordonnance peut être reconnu coupable d'outrage au tribunal; il est alors sujet aux procédures et sanctions du tribunal l'ayant ainsi reconnu coupable.

(5) An order by a judge under subsection (1) may be appealed to a court having appellate jurisdiction over decisions of the court to which the judge is appointed. An appeal does not suspend the execution of the order unless it is so ordered by a judge of the court to which the appeal is made.

(5) L'ordonnance visée au paragraphe (1) est susceptible d'appel devant le tribunal ayant compétence pour entendre les appels des décisions du tribunal ayant rendu l'ordonnance. Toutefois, l'appel n'a pas pour effet de suspendre l'exécution de l'ordonnance, sauf ordonnance contraire d'un juge du tribunal saisi de l'appel.

231.8 The following periods of time shall not be counted in the computation of the period of time within which an assessment may be made for a taxation year of a taxpayer under subsection 152(4):

231.8 Les délais ci-après ne comptent pas dans le calcul du délai dans lequel une cotisation peut être établie pour une année d'imposition d'un contribuable en vertu du paragraphe 152(4) :

(a) where the taxpayer is sent or served with a notice of a requirement under subsection 231.2(1), the period of time between the day on which an application for judicial review in respect of the requirement is made and the day on which

a) si l'avis visé au paragraphe 231.2(1) est signifié ou envoyé au contribuable, le délai qui court entre le jour où une demande de contrôle judiciaire est présentée relativement à l'avis et le jour où la demande est définitivement réglée;

the application is finally disposed of; and

(b) where an application is commenced by the Minister under subsection 231.7(1) to order the taxpayer to provide any access, assistance, information or document, the period of time between the day on which the taxpayer files a notice of appearance, or otherwise opposes the application, and the day on which the application is finally disposed of.

b) lorsque la demande visée au paragraphe 231.7(1) est déposée par le ministre pour qu'il soit ordonné au contribuable de fournir tout accès, toute aide ou tous renseignements ou documents, le délai qui court entre le jour où le contribuable dépose un avis de comparution, ou conteste par ailleurs la demande, et le jour où la demande est définitivement réglée.

- Note – here the request was made pursuant to 231.2 and an Application has been brought pursuant to 231.7 – so (b) applies.

Section 152 (4) regarding the time for assessments

(4) The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if

(4) Le ministre peut établir une cotisation, une nouvelle cotisation ou une cotisation supplémentaire concernant l'impôt pour une année d'imposition, ainsi que les intérêts ou les pénalités, qui sont payables par un contribuable en vertu de la présente partie ou donner avis par écrit qu'aucun impôt n'est payable pour l'année à toute personne qui a produit une déclaration de revenu pour une année d'imposition. Pareille cotisation ne peut être établie après l'expiration de la période normale de nouvelle cotisation applicable au contribuable pour l'année que dans les cas suivants :

(a) the taxpayer or person filing the return	a) le contribuable ou la personne produisant la déclaration :
(i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act, or	(i) soit a fait une présentation erronée des faits, par négligence, inattention ou omission volontaire, ou a commis quelque fraude en produisant la déclaration ou en fournissant quelque renseignement sous le régime de la présente loi,
(ii) has filed with the Minister a waiver in prescribed form within the normal reassessment period for the taxpayer in respect of the year;	(ii) soit a présenté au ministre une renonciation, selon le formulaire prescrit, au cours de la période normale de nouvelle cotisation applicable au contribuable pour l'année;
(b) the assessment, reassessment or additional assessment is made before the day that is 3 years after the end of the normal reassessment period for the taxpayer in respect of the year and	b) la cotisation est établie avant le jour qui suit de trois ans la fin de la période normale de nouvelle cotisation applicable au contribuable pour l'année et, selon le cas :
(i) is required under subsection (6) or (6.1), or would be so required if the taxpayer had claimed an amount by filing the prescribed form referred to in the subsection on or before the day referred to in the subsection,	b) la cotisation est établie avant le jour qui suit de trois ans la fin de la période normale de nouvelle cotisation applicable au contribuable pour l'année et, selon le cas :
(ii) is made as a consequence of the assessment or reassessment pursuant to this paragraph or subsection 152(6) of tax payable by another taxpayer,	(ii) est établie par suite de l'établissement, en application du présent paragraphe ou du paragraphe (6), d'une cotisation ou d'une nouvelle cotisation concernant l'impôt

	payable par un autre contribuable,
(iii) is made	(iii) est établie, selon le cas :
(A) as a consequence of a transaction (as defined in subsection 247(1)) involving the taxpayer and a non-resident person with whom the taxpayer was not dealing at arm's length, or	(A) par suite de la conclusion d'une opération (au sens du paragraphe 247(1)) impliquant le contribuable et une personne non-résidente avec laquelle il avait un lien de dépendance,
(B) in respect of any income, loss or other amount in relation to a foreign affiliate of the taxpayer,	(B) relativement à un revenu, une perte ou un autre montant relatif à une société étrangère affiliée du contribuable,
(iii.1) is made, if the taxpayer is non-resident and carries on a business in Canada, as a consequence of	(iii.1) si le contribuable est un non-résident exploitant une entreprise au Canada, est établie par suite :
(A) an allocation by the taxpayer of revenues or expenses as amounts in respect of the Canadian business (other than revenues and expenses that relate solely to the Canadian business, that are recorded in the books of account of the Canadian business, and the documentation in support of which is kept in Canada), or	(A) soit d'une attribution, par le contribuable, de recettes ou de dépenses au titre de montants relatifs à l'entreprise canadienne (sauf des recettes et des dépenses se rapportant uniquement à l'entreprise canadienne qui sont inscrits dans les documents comptables de celle-ci et étayés de documents conservés au Canada),
(B) a notional transaction between the taxpayer and its Canadian business, where the transaction is recognized for the purposes of the computation of an amount under this Act or an applicable tax treaty.	(B) soit d'une opération théorique entre le contribuable et son entreprise canadienne, qui est reconnue aux fins du calcul d'un montant en vertu de la présente loi ou d'un traité fiscal applicable,
(iv) is made as a consequence of a payment or	(iv) est établie par suite d'un paiement supplémentaire ou

reimbursement of any income or profits tax to or by the government of a country other than Canada or a government of a state, province or other political subdivision of any such country,

d'un remboursement d'impôt sur le revenu ou sur les bénéfices effectué au gouvernement d'un pays étranger, ou d'un état, d'une province ou autre subdivision politique d'un tel pays, ou par ce gouvernement,

(v) is made as a consequence of a reduction under subsection 66(12.73) of an amount purported to be renounced under section 66,

(v) est établie par suite d'une réduction, opérée en application du paragraphe 66(12.73), d'un montant auquel il a été censément renoncé en vertu de l'article 66,

(vi) is made in order to give effect to the application of subsection 118.1(15) or 118.1(16), or

(vi) est établie en vue de l'application des paragraphes 118.1(15) ou (16),

(vii) is made to give effect to the application of any of sections 94, 94.1 and 94.2;

(vii) est établie en vue de l'application des articles 94, 94.1 ou 94.2;

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-865-21

STYLE OF CAUSE: MINISTER OF NATIONAL REVENUE v BMO
NESBITT BURNS INC.

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: DECEMBER 14, 2021

ORDER AND REASONS: KANE J.

DATED: FEBRUARY 8, 2022

APPEARANCES:

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