Docket: 2003-4034(IT)G

BETWEEN:

AVENTIS PHARMA INC.
(FORMERLY: HOECHST MARION ROUSSEL CANADA INC.),

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Motion heard on November 29, 2006, at Montréal, Quebec.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the Appellant :	Wilfrid Lefebvre Lysane Tougas
Counsel for the Respondent:	Josée Tremblay

ORDER

Upon the Respondent's motion filed under paragraph 110(*a*) of the *Tax Court of Canada Rules (General Procedure)* ("the Rules") to compel Pierre Legault, the Appellant's main witness, to reattend for the continuation of his examination for discovery and answer any questions pertaining to two specific matters, namely

(1) the facts that explain the way in which the moneys were repatriated to Canada from Portugal and then redirected to Ireland, and

(2) the facts, circumstances and events surrounding the loans made by HIFC (Hoechst International Financial Company, in Ireland) to the Appellant,

The motion is dismissed, with costs.

Signed at Montréal, Quebec, this 18th day of October 2007.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 5th day of February 2008.

François Brunet, Revisor

Citation: 2007TCC629
Date: 20071018
Docket: 2003-4034(IT)G

BETWEEN:

AVENTIS PHARMA INC.
(FORMERLY HOECHST MARION ROUSSEL CANADA INC.),

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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REASONS FOR ORDER

Lamarre J.

[1] The Respondent has brought a motion before this Court under paragraph 110(*a*) of the *Tax Court of Canada Rules (General Procedure)* ("the Rules") to compel the Appellant to answer certain questions that were asked during his examination for discovery. In particular, the Respondent seeks an order compelling Pierre Legault, the Appellant's main witness, to reattend for the continuation of his examination for discovery and answer any questions pertaining to two specific matters, namely

(1) the facts that explain the way in which the moneys were repatriated to Canada from Portugal and then redirected to Ireland, and

(2) the facts, circumstances and events surrounding the loans made by HIFC (Hoechst International Financial Company, in Ireland) to the Appellant.

[2] The Respondent also asks that this Court, in issuing its order, compel Pierre Legault to make all reasonable inquiries regarding these two matters in issue from all officers, servants, agents and employees, past or present, either within or outside Canada, in accordance with subsection 95(2) of the Rules.

[3] Lastly, the Respondent asks this Court for leave, under section 54 of the Rules, to amend her Reply to the Notice of Appeal ("the Reply") once again after the Appellant's answers to her questions are obtained.

[4] The Respondent also demands that the Appellant pay her the costs of this motion, along with the costs for the continuation of the examination for discovery, or any costs thrown away, in accordance with paragraph 110(*d*) of the Rules, without delay.

[5] Counsel for the Appellant objected to further questioning about these two specific matters at Pierre Legault's examination for discovery. He submits that this questioning relates to a series of facts which the Respondent has indeed denied or claimed to have no knowledge of, but on which the Minister of National Revenue ("the Minister") relied in making the assessments under appeal. Despite this questioning, the Respondent has alleged no facts aimed at taking any alternative stance whatsoever.

[6] The grounds, relevant to this debate, that the Respondent sets forth in the Reply to justify the assessments under appeal are as follows:

> (1) With respect to the 1996, 1999 and 2000 taxation years, the Respondent relies on subsection 95(6) of the *Income Tax Act* ("the Act") and submits that since the principal purpose for the Appellant's acquisition of the shares of Marion Merrell Dow International Servicios de Gestao Ltda ("Gestao") (Portugal) and HIFC (Ireland) was to enable it to avoid, reduce or defer the payment of tax or any other amount that would otherwise be payable under the Act, the said shares are deemed not to have been acquired (see paragraph 21 of the Reply).
>
> (2) With respect to the taxation years 1994 through 1999, and should subsection 95(6) of the Act (and in particular paragraph 95(6)(*b*)) be determined to be inapplicable to the case at bar, the Respondent submits that the General Anti-Avoidance Rule (GAAR), that is to say, section 245 of the Act, applies. In support

> of her position that the GAAR applies, the Respondent cites a series of transactions that allegedly resulted in tax benefits for the Appellant. This series of transactions includes, *inter alia*, the incorporation of Gestao (in Portugal) and HIFC (in Ireland), the investment of capital by the Appellant in Gestao and HIFC, the transactions aimed at redirecting the amounts invested by the Appellant from Gestao to HIFC, and the transactions that enabled the Appellant to repatriate the amounts invested to Canada. In the Respondent's submission, this series of transactions, and each transaction that is part of the series, constitute avoidance transactions within the meaning of subsection 245(3) of the Act in that they were not undertaken primarily for bona fide purposes other than to obtain a tax benefit (see paragraphs 23, 25 and 26 of the Reply).

[7] Thus, counsel for the Appellant submits that since the Respondent based her assessments on subsection 95(6) and section 245 of the Act and did not take any alternative position, the Respondent is not at liberty, in an examination for discovery, to ask a whole series of questions regarding facts that were relied upon in making the assessments under appeal. He argues that if the Respondent doubted the veracity of the facts on which the Minister relied in making the assessments, such questioning should have taken place during the Minister's audit. In his submission, an examination for discovery is not meant to be a substitute audit, and once the points in issue have been set out clearly in the pleadings, the Respondent is not at liberty to go on a fishing expedition to see whether she might be able to alter the basis of the assessments under appeal.

[8] Counsel for the Appellant argues that four principles must be adhered to:

> (1) The reason for which pleadings are filed in this Court is to delineate the dispute between the parties, that is to say, to determine what is at stake both factually and legally.
>
> (2) Once the issues have been made known, the purpose of an examination for discovery is to enable the parties to know each other's factual positions precisely, in order to prevent surprises.
>
> (3) Once a fact has been admitted to, it is no longer permitted to ask any questions about that fact at an examination for discovery.

(4) There are limits to examinations for discovery in legal proceedings. They cannot be used to complete an audit that should have been done administratively by the Minister's representatives.

[9] Counsel for the Appellant adds that the Appellant has already graciously accommodated the Respondent's numerous questions. Pierre Legault was examined for five days on a whole series of questions that resulted from the full disclosure of the documents requested by the Respondent under section 82 of the Rules. These questions frequently strayed from the dispute outlined by the pleadings. Pierre Legault answered 164 undertakings. He has already repeatedly answered numerous relevant questions concerning the reasons that Gestao and HIFC were acquired — reasons that are at the core of what subsection 95(6) of the ITA covers. The Reply contains no allegations of fraud or misrepresentation. Counsel for the Appellant submits that the Respondent amply covered the dispute between the parties at Mr. Legault's examination for discovery, an examination which, as he repeated, spanned five days.

[10] Hence, counsel for the Appellant objects, on grounds of relevance, to the questions that the Respondent wishes to continue to ask. In his submission, the Appellant is entitled to know the Respondent's position, and the Respondent is not entitled to use the examination for discovery to broaden the dispute beyond what she framed in her Reply.

[11] For her part, counsel for the Respondent submits that she is entitled, as part of the examination for discovery, to verify whether the facts alleged in the twice-amended Reply to the Notice of Appeal ("the Notice of Appeal") are true. This accounts for the denial, or the purported lack of knowledge, of most of the facts in the Reply. Counsel for the Respondent submits that the Appellant did not provide auditor Johanne Clément with all the information that it was asked to provide at the audit. For example, Ms. Clément allegedly asked for the details of the gain realized upon buying back and selling the shares of Gestao in January 1996. Counsel for the Respondent says that she wished to obtain this information by asking the Appellant questions that its counsel is objecting to. In addition, it appears that certain information given to the auditor was contradicted at the examination for discovery. In this regard, she noted that Gestao is alleged to have made a loan to the Appellant, but that the information obtained by Ms. Clément is that Gestao made this loan to a related German company. Another example given by Ms. Clément was that, during the audit, the Appellant apparently said that HIFC only lent money. However, according to the documents produced as part of the full disclosure under

section 82 of the Rules, the Appellant also made temporary investments in banks, and served as a conduit to reduce the Part 1.3 Canadian corporations tax. The other contradictions that were identified pertain to the documentation apparently brought to Ms. Clément's attention (I am referring to the Respondent's motion record, at tab 4B).

[12] Counsel for the Respondent is not alleging fraud or misrepresentation. She says that she is unable, at this stage in the proceedings, to assert that the facts invoked by the Minister relied — based on the information provided by the only party in possession of the facts, namely the Appellant — are true.

[13] With respect to the repatriation, to Canada, of the moneys invested in Gestao, and their redirection to HIFC, she submits that it might, for example, be important to know who looked after the management in Portugal, and whether the situation in Portugal is consistent with the description given by the Appellant in its Notice of Appeal. As for the loans made by HIFC to the Appellant, she says that it is important to verify the nature of the loans made by HIFC.

[14] Counsel for the Respondent admits that the answers yielded by this line of questioning could result in an amendment to the Reply that raises new facts in support of her allegations regarding the current basis of the assessments, and could perhaps ultimately even result in a change to the basis of the assessments, which would be allowed by subsection 152(9) of the Act. However, she says that things have not yet reached this stage, and that if the examination for discovery shows that the facts alleged in the Notice of Appeal are true, the Reply will simply not be amended at all. On the contrary, there could be an agreement as to the facts in such a case.

ANALYSIS

[15] Based on a reading of the Notice of Appeal and the Reply, there are indeed several points which have been denied or claimed not to be known by the Respondent, but on which the Minister relied in making the assessments under appeal. I shall set out these points below.

[16] At paragraph 2 of the Notice of Appeal, it is alleged that Gestao incorporated under Portuguese law in early 1994. At paragraph 4 of her Reply, the Respondent admits that Gestao incorporated in early 1994, but denies or claims to have no knowledge of the other facts. However, at subparagraph 16(l) of the Reply, the Respondent acknowledges that, in making the assessments, the Minister

relied on the assumption or determination that Gestao incorporated as a Portuguese resident corporation.

[17] At paragraph 3 of the Notice of Appeal, it is alleged that the Appellant held 50% of the shares of Gestao and that the other 50% was owned by Biochimica (MI), an Italian company related to the Appellant. This is first denied by the Respondent at paragraph 3 of the Reply, and then included in the Respondent's assumption of fact in subparagraph 16(n) of the Reply.

[18] Paragraph 8 of the Notice of Appeal states that Gestao used the proceeds from the issuance of shares, plus the income generated, to make loans to non-resident corporations to which the Appellant and Gestao are related. This is denied by the Respondent at paragraph 2 of the Reply, but elsewhere, at subparagraph 16(q), the Respondent states that Gestao used the invested moneys to make a loan to the related German corporation.

[19] At paragraph 14 of the Notice of Appeal, it is alleged that, in 1994, the Appellant and its wholly-owned subsidiary MMDCRI formed HIFC, a limited liability partnership under Irish law. The Respondent denies this at paragraph 2 of the Reply, but, in the same breath, at subparagraph 16(y), she assumes this to be a fact. It is even specified that HIFC was incorporated under the exact terms set out by the Appellant, and it is added that this took place on November 22, 1994.

[20] Paragraph 16 of the Notice of Appeal states that HIFC's business is to lend money to non-resident corporations within the group, which corporations are related to the Appellant and MMDCRI. This is first denied by the Respondent in paragraph 2 of the Reply, and yet paragraph 16(cc) of the Reply sets out the factual assumption that HIFC uses the moneys invested by the Appellant and MMDCRI to make certain loans to related non-resident corporations.

[21] Paragraph 36 of the Notice of Appeal alleges that, on December 30, 1999, the Appellant's Canadian subsidiary (HMRCRI) was wound up into the Appellant. At paragraph 3 of the Reply, the Respondent claims to have no knowledge of this fact, but the fact is assumed to be true at sub-subparagraph 16(ii)(vi).

[22] At paragraph 38 of the Notice of Appeal, it is alleged that, on December 14, 1999, HIFC agreed to pay a US$43,000,000 dividend to the Appellant and to lend the Appellant US$208,000,000. At paragraph 3 of the Reply, the Respondent claims to have no knowledge of this fact, but the fact is relied upon as a basis of the assessment at sub-subparagraphs 16(ii)(i) and 16(ii)(iv).

[23] Paragraph 39 of the Notice of Appeal states that, on December 23, 1999, HIFC's board of directors agreed to change HIFC's residency from Ireland to Canada effective January 1, 2000. The Appellant [*sic*], at paragraph 3 of the Reply, initially claims to have no knowledge of these facts, but then relies on them at sub-subparagraphs 16(ii)(v) and 16(ii)(vii) as a basis of the assessments.

[24] Paragraph 42 of the Notice of Appeal states that, on April 3, 2000, the HIFC articles were amended so that all but two common shares would be converted into 214,234,844 shares redeemable for US$1 per share. The Respondent initially claims, at paragraph 3 of the Reply, to have no knowledge of this fact, but it is then relied upon as a basis of her assessments at sub-subparagraph 16(ii)(x).

[25] Paragraph 43 of the Notice of Appeal adds that HIFC bought back its 214,234,844 redeemable shares from the Appellant following this conversion, and paid the redemption price by issuing a new common share of HIFC to the Appellant. The Respondent claims, at paragraph 3 of the Reply, to have no knowledge of this fact, but later relies upon it as an assumption of fact at sub-subparagraph 16(ii)(xii).

[26] Paragraph 44 of the Notice of Appeal states that HIFC transferred US$214,234,843 of its capital to its distributable reserve at that time. Initially, at paragraph 3 of the Reply, the Respondent claims to have no knowledge of this, but then, at sub-subparagraph 16(ii)(xiv), she relies on it as a basis for the assessments.

[27] At paragraph 45 of the Notice of Appeal, it is noted that, following the conversion of HIFC's capital into a distributable reserve, HIFC declared a dividend of US$215,000,000 to the Appellant on April 3, 2000, and another dividend of US$1,128,411 on June 28, 2000. At paragraph 3 of the Reply, the Respondent claims no knowledge of this fact, but she then relies on it at sub-subparagraphs 16(ii)(xv) and (xvi). The Respondent also acknowledges, at sub-subparagraph 16(ii)(xvii), that the amount payable by HIFC on account of the redemption of the shares held by the Appellant is US$216,128,411. Counsel for the Respondent now cast doubt on this fact.

[28] Like counsel for the Appellant, I acknowledge that the Respondent's approach is very unusual. Based on the Respondent's reasoning, the approach would open the door to new evidence that was not referred to in the pleadings. This is not, in my view, the purpose of an examination for discovery.

[29] The scope of an examination for discovery in an appeal before our Court is specified in section 95 of the Rules, which reads:

> *Scope of Examination*
>
> 95(1) A person examined for discovery shall answer, to the best of that person's knowledge, information and belief, any proper question relating to any matter in issue in the proceeding or to any matter made discoverable by subsection (3) and no question may be objected to on the ground that
>
> (*a*) the information sought is evidence or hearsay,
>
> (*b*) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness, or
>
> (*c*) the question constitutes cross-examination on the affidavit of documents of the party being examined.
>
> (2) Prior to the examination for discovery, the person to be examined shall make all reasonable inquiries regarding the matters in issue from all of the party's officers, servants, agents and employees, past or present, either within or outside Canada and, if necessary, the person being examined for discovery may be required to become better informed and for that purpose the examination may be adjourned.
>
> (3) A party may on an examination for discovery obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that relate to a matter in issue in the proceeding including the expert's name and address, but the party being examined need not disclose the information or the name and address of the expert where
>
> (*a*) the findings, opinions and conclusions of the expert relating to any matter in issue in the appeal were made or formed in preparation for contemplated or pending litigation and for no other purpose, and
>
> (*b*) the party being examined undertakes not to call the expert as a witness at the hearing.
>
> (4) A party may on an examination for discovery obtain disclosure of the names and addresses of persons who might reasonably be expected to have knowledge of transactions or occurrences in issue in the proceeding, unless the Court orders otherwise.

[30] In *Shell Canada Ltd. v. Canada*, [1996] T.C.J. No. 1313 (QL), Judge Christie of our Court (as he then was) addressed the scope of examinations for discovery. He wrote as follows at paragraphs 9-10:

> 9 In *569437 Ontario Inc. v. The Queen*, 94 D.T.C. 1922 (T.C.C.) this is said at page 1923:
>
> > Subsection 95(1) of the *Tax Court of Canada Rules (General Procedure)* ("the General Rules") requires that a person examined for discovery shall answer, to the best of that person's knowledge, information and belief, any proper question relating to any matter in issue in the proceedings. Reference is also made to *Sydney Steel Corp. v. Ship Omisalj et al.*, (1992) 52 F.T.R. 144, wherein Mr. Justice MacKay of the Federal Court-Trial Division said at page 147:
> >
> > > Counsel for the parties are essentially agreed that the standard for propriety of a question asked in discovery is less strict than the test for admissibility of evidence at trial and the appropriate standard is whether the in-formation solicited by a question may be relevant to the matters which at the discovery stage are in issue on the basis of pleadings filed by the par-ties. As noted by the defendants the test is as set out by Norris, D.J.A., in *McKeen & Wilson Ltd. v. Gulf of Georgia Towing Co. Ltd. et al*., [1965] 2 Ex. C.R. 480, at p. 482:
> > >
> > > > ... the questions objected to may raise matters which are relevant to issues raised on the pleadings. This is all that the defendants are required to show. As to whether or not they are relevant and admissible at the trial is a matter for the learned trial judge.
> >
> > And at page 148:
> >
> > > When objection is taken that a question is not proper because it is not relevant for reasons given, the party asking the question must satisfy the court that the information it seeks may be relevant to a fact in issue. That standard is not likely to be difficult to meet in light of the goal of openness which the rules seek to foster in pretrial proceedings, particularly discovery, a goal which is the same whether discovery be oral or by written questions. Moreover, it is settled that where there is doubt as to whether the question need be answered the benefit of that doubt, in light of the

> principal goal of openness, favours requiring the answer to be given: (*Royal Specialty Sales v. Mayda Industries Ltd.* (1986), 4 F.T.R. 77, *per* Madame Justice Reed at p. 79).

> I adopt these two propositions in the reasons for judgment delivered by Chilcott J., in *Algoma Central Railway v. Herb Fraser and Associates Ltd. et al.*, (1988) 36 C.P.C. (2d) 8. He was sitting as a member of the Divisional Court of the Supreme Court of Ontario on an appeal from an order of Montgomery J. First, there is a broader standard of relevance regarding questions asked at the discovery stage of proceedings than at trial. Second, questions asked on examination for discovery may be proper bearing in mind that issues of admissibility and weight to be assigned to evidence at trial are for the trial judge to determine.

10 See also Holmested & Watson, *Ontario Civil Procedure*, under the heading "SCOPE OF EXAMINATION: GENERAL, Rule 31.06(1)" at 31-48:

> What is relevant to the matters in issue, as defined by the pleadings, is extremely broad. The examining party is entitled to discover for the purpose of supporting her own case and to put that case to the opponent to obtain admissions and to limit the issues. She is entitled to interrogate to destroy the adversary's case or to find out the case she has to meet and the facts (and now the evidence) that are relied upon by the adversary in support of his case. And it is not a valid objection that the examining party already knows those facts. The examiner is entitled -- indeed, it is a major purpose of discovery -- to obtain admissions that will facilitate the proof of that party's case or will assist in destroying the adversary's case. See generally Williston and Rolls, *The Law of Civil Procedure* (1970), 782-787.

And at pages 31-49:

> It is a cardinal rule that discovery is limited by the pleadings. Discovery must be relevant to the issues as they appear on the record: *Playfair v. Cormack* (1913), 4 O.W.N. 817 (H.C.); *Jackson v. Belzburg*, [1981] 6 W.W.R. 273 (B.C.C.A.). The party examining has no right to go beyond the case as pleaded and to interrogate concerning a case which he has not attempted to make by his pleadings. But 'everything is relevant upon discovery which may directly or indirectly aid the party seeking discovery to maintain his case or to combat that of his adversary': *McKergow v. Comstock* (1906), 11 O.L.R. 637 (C.A.). While clearly irrelevant matters may not be inquired into,

> relevancy must be determined by the pleadings construed with fair latitude: *ibid*. The court should not be called upon to conduct a minute investigation as to the relevance of each question and where the questions are broadly related to the issues raised, they should be answered: *Czuy v. Mitchell* (1976), 2 C.P.C. 83 (Alta. C.A.). The tendency is to broaden discovery and the "right to interrogate is not confined to the facts directly in issue, but extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue": *Marriott v. Chamberlain* (1886), 17 Q.B.D. 154.

And at pages 31-55 and 56:

> Not only must a party examined give his information, he must inform himself. In *Rubinoff v. Newton*, above, Haines J. said: "I can think of no more simple and direct question than, 'On what facts do you rely?". The witness may not know those facts but he must be informed by his counsel. It must be kept in mind that on an examination for discovery a party must qualify himself to give an intelligent statement of his case.

[31] In the civil law, there are two kinds of examination for discovery: the examination before defence, provided for in article 397 of Quebec's *Code of Civil Procedure* (C.C.P.); and the examination after defence, provided for in article 398 C.C.P.

[32] Denis Ferland and Benoît Émery explain the role of judges on an examination for discovery in their treatise entitled *Précis de procédure civile du Québec*:[1]

> **[TRANSLATION]**
>
> ***1.2 The judge's role on an examination for discovery***
>
> In keeping with their decisions which interpret articles 397 and 398 C.C.P. broadly, and subject to the restrictions set out below, the courts have held that a judge entertaining an objection must be very cautious, because it is difficult for such a judge to gauge the potential relationship between an issue and the allegations in a pleading. That said, the questions must still pertain to facts relating to the claim (*demande*) (art. 397 C.C.P.) or dispute (*litige*) (art. 398 C.C.P.). [The English version of the Code does not draw this

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[1] Denis Ferland and Benoît Emery, *Précis de procédure civile du Québec*, 4th ed. (Cowansville, Qc.: Yvon Blais, 2003), vol. 1, arts. 1 to 481 C.C.P., at pages 568 *et seq*.

> distinction; both articles refer to the "facts relating to the issues between the parties."] Thus, the judge cannot interpret the two articles in a manner that extends beyond their precise wording. In fact, we shall see later on that when issues that do not come within the major principles have been involved, parties have often been prevented in practice from obtaining the disclosure of a document.
>
> The basic role of the judge who is initially entertaining an objection is to determine whether the terms of articles 397 and 398 C.C.P. authorize the question, that is to say, whether the question relates to the claim (art. 397 C.C.P.) or the dispute (art. 398 C.C.P.). The judge must nonetheless comply with the rules of evidence, and cannot, for example, allow someone to obtain a copy of a privileged or confidential document. The probative value is left to the trial judge to assess.
>
> . . .
>
> ***1.6 Facts that can be examined upon***
>
> The scope of an examination before defence (art. 397 C.C.P.) is different from the scope of an examination after defence (art. 398 C.C.P.). In the former, the examination can pertain solely to the facts related to the claim, whereas, in the latter, it may pertain to all facts related to the dispute. Thus, the scope of the examination before defence is more limited . . .
>
> [Footnotes omitted.]

[33] In Quebec, the case law has also laid down certain principles. For example, in *Labarre c. Spiro Mega Inc.*, REBJ 99-14772 (S.C.), [1999] J.Q. No. 4690 (QL), the Quebec Superior Court held as follows, at paragraph 19, with respect to the purpose of an examination for discovery:

> 19 The purpose of arts. 397, 398 *et seq*. C.C.P. is settled: to enable one party to get the other party to disclose, prior to the hearing, all facts and documents relevant to the dispute. In *150460 Canada Inc. c. Gazin* , [1999] J.Q. No. 2750 (QL), J.E. 99-1683 (S.C.), I wrote:
>
> > [TRANSLATION] In short, since 1983, it has been a procedure for disclosing evidence that is under the opposing party's control, and it has been limited to the context delineated by the record, which therefore bars fishing expeditions, or questions the answers to which would not constitute evidence (e.g. breaches of professional privilege). It seeks to achieve two distinct objectives: to reveal the facts and documents under the control over the opposing party; and to obtain elements likely to constitute evidence at the trial.

Thus, the situation in Quebec is identical to the situation in the other provinces, where "Examination for Discovery" is defined as follows in *The Dictionary of Canadian Law*, 2d ed. (Carswell, 1995):

> " . . . [E]mbraces two main elements: discovery of facts in the hands of an adversary and, the obtaining of admission for use in evidence. . . ." *Minute Muffler Installations Ltd v. Alberta*, (1981) 23 C.P.C. 52 at 54, 16 Alta L.R. (2d) 35, 23 L.C.R. 128, 30 A.R. 447 (C.A.) . . .

In our neighbouring province, Mr. Justice Trainor of the Ontario Superior Court of Justice stated as follows in *Ontario Bean Producers' Marketing Board v. W.G. Thompson & Sons Ltd.*, (1981), 32 O.R. (2d) 69, aff'd (1982), 35 O.R. (2d) 711 (Div. Ct.), at page 72:

> The purposes of discovery are:
>
> > (a) to enable the examining party to know the case he has to meet;
> > (b) to procure admissions to enable one to dispense with formal proof;
> > (c) to procure admissions which may destroy an opponent's case;
> > (d) to facilitate settlement, pre-trial procedures and trials;
> > (e) to eliminate or narrow issues;
> > (f) to avoid surprise at trial . . .

The law in Quebec is the same.

[Footnotes omitted.]

[34] Similarly, in *Commercial Union Assurance Company of Canada c. Nacan Products Limited*, EYB 1991-63809 (C.A.), [1991] A.Q. No. 818 (QL), the Quebec Court of Appeal provided its interpretation of examinations before and after defence (articles 397 and 398 C.C.P.) at paragraphs 13, 14 and 15:

[TRANSLATION]

13 A simple comparison of the wording of these two provisions discloses the essential difference between the objectives that the legislator sought to achieve in enacting each of them. The first provision (article 397) merely enables the party being sued to find out about the facts and evidence that his opponent intends to rely upon when the merits of the action are debated. Thus, its sole objective is to facilitate the preparation of an informed and appropriate defence. By contrast, once the defence has been filed, the factual allegations are known and the respective legal positions have been taken, thereby placing article 398 in a new and broader context. The provision seeks to facilitate, to the fullest possible extent and within certain limits, a generous disclosure of the evidence that each party intends to use at the hearing.

14 Upon considering article 398, it is clear that, in order to give effect to its purpose, it must be applied broadly. In my opinion, any evidence, whether it stems from a question that was asked or a document that one wishes to obtain, is admissible at an examination after defence provided

(1) it appears, at least *prima facie*, to relate to the dispute;
(2) its disclosure would tend to advance the inquiry by making facts or writings available to the questioner that he does not already have personal knowledge of (facts) or does not already have in his possession (writings);
(3) the questions asked and the documents sought are sufficiently precise and adequately circumscribed to prevent the search for evidence from degenerating into a "fishing expedition"; and
(4) in the case of a writing, that it actually constitutes evidence.

15 Our Court has applied the above principles several times. I am content to cite *Blaikie c. Commission des valeurs mobilières du Québec* - C.A. Montréal, Docket No. 500-09-001530-898, 1990-03-16, J.E. 90-595, where our colleague Baudouin J.A. set out an exhaustive study of article 398, the general principles that apply to the provision, and the exceptions to those principles.

[35] Thus, the most important thing to be retained from the doctrine and the cases quoted above is that the questions to be asked at an examination for discovery pertain to points that are relevant to the issues raised in the written pleadings.

[36] In addition, while the range of things related to the issues defined in the pleadings can be very broad, one must not forget that the purpose of this exercise is to limit the dispute to the extent possible and to obtain such admissions, if any, as one can. Thus, if the party that is asking the questions already knows the facts, it is entitled to obtain admissions that help it to present its evidence or rebut its adversary's evidence. This does not, however, mean a fishing expedition for facts

that, in my opinion, could have been discovered before the pleadings defined the points in issue.

[37] In the case at bar, I have read the transcripts of Pierre Legault's examination for discovery in their entirety, along with that of Patrice Legault, another representative of the Appellant, who answered questions that the Respondent asked about another point in issue that does not pose a problem at this stage. I also read the transcript of the discoveries of Johanne Clément and Pierre Jollin, the Minister's two auditors.

[38] Ms. Clément said that she spent at least 570 hours on this audit, including at least 250 hours on the transactions in issue (see the Respondent's motion record at tab 4B, page 1). This does not include the time spent by other representatives of the Minister on this matter. It is true that she asked for certain information that she did not obtain before she closed the assessments; however, for most of the facts, her examination shows that she accepted the information without trying to look into it more thoroughly. The same can be said about Mr. Jollin, who did not seek to scrutinize the details of the information obtained from the Appellant's representatives.

[39] In the course of the judicial proceedings, the Appellant graciously acceded to the Respondent's request, under section 82 of the Rules, for a full list of the documents in its possession relating to any matter in question between or among them. Fortunately, this approach is not a standard one in our Court, and the parties generally avail themselves of section 81 of the Rules, which providing for the partial disclosure of documents that might be used in evidence at the trial, either to establish or assist in establishing any allegation of fact in any pleading filed by that party, or to rebut or assist in rebutting any allegation of fact in any pleading filed by any other party.

[40] By voluntarily acceding to a full disclosure of documents, the Appellant was forced to provide the Respondent with a myriad of e-mails, information and documentation that was not necessarily relevant or useful for the trial. The Respondent used this abundant documentation to impose a five-day examination for discovery on Pierre Legault, who, several years later, was not often able to provide the explanations requested. On several occasions, it was the Appellant's counsel who had to attempt an explanation.

[41] In my opinion, Pierre Legault and Patrice Legault have already abundantly answered whatever questions the Respondent might have had about the matters in

issue and the matters about which no answers were provided during the audit. If the auditors had wanted to scrutinize the information obtained during the audit more carefully, they could have done so at that time. In fact, the audit spanned four years, which gave the Minister ample time to obtain the information desired, if he had deemed it useful to do so.

[42] Once the matters in issue have been defined by the pleadings, counsel must work within the judicial process. In my opinion, the role of an examination for discovery is to circumscribe the scope of the dispute to some degree, not broaden it. I believe it would be helpful for me to use subsections 107(3) and 108(1) of the Rules to put an end to the Appellant's examination for discovery insofar as the matters in issue in this motion are concerned. Those subsections provide:

Objections and Rulings

107. (3) A ruling on the propriety of a question that is objected to and not answered may be obtained on motion to the Court.

Improper Conduct of Examination

108. (1) An examination may be adjourned by the person being examined or by a party present or represented at the examination, for the purpose of moving for directions with respect to the continuation of the examination or for an order terminating the examination or limiting its scope, where

(*a*) the right to examine is being abused by an excess of improper questions or interfered with by an excess of improper interruptions or objections;

(*b*) the examination is being conducted in bad faith, or in an unreasonable manner so as to annoy, embarrass or oppress the person being examined;

(*c*) many of the answers to the questions are evasive, unresponsive or unduly lengthy, or

(*d*) there has been a neglect or improper refusal to produce a relevant document on the examination.

[43] In my opinion, the Respondent has reached a point where her questions are becoming excessive and unjustified. I would dismiss the Respondent's motion and terminate the Appellant's examination for discovery insofar as any matter covered by this motion is concerned.

[44] The Appellant is entitled to the costs of this motion.

Signed at Montréal, Quebec, this 18th day of October 2007.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 5th day of February 2008.

François Brunet, Revisor

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PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	November 29, 2006
REASONS FOR ORDER BY:	The Honourable Justice Lucie Lamarre
DATE OF ORDER:	October 18, 2007

APPEARANCES:

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