Docket: 2018-3082(IT)G

BETWEEN:

CHETNABEN CONTRACTOR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard by videoconference on June 10, 2021 at Ottawa, Ontario

Before: The Honourable Justice John R. Owen

Participants:

Counsel for the Appellant:	Jeff D. Pniowsky Matthew Dalloo
Counsel for the Respondent:	Elizabeth Tutiah

ORDER

WHEREAS the Respondent brought a motion to compel the Appellant to answer undertakings arising from her oral examination for discovery;

AND UPON reviewing the affidavit evidence and the oral and written submissions of counsel for the Appellant and counsel for the Respondent;

IN ACCORDANCE with the attached Reasons for Order, it is ordered that the motion is denied with costs to the Appellant in accordance with Tariff B of the *Tax Court of Canada Rules (General Procedure)*.

Signed at Ottawa, Canada, this 29th day of July 2021.

"J.R. Owen"

Owen J.

Docket: 2018-3084(IT)G

BETWEEN:

YOGESHKUMAR CONTRACTOR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard by videoconference on June 10, 2021 at Ottawa, Ontario

Before: The Honourable Justice John R. Owen

Participants:

Counsel for the Appellant:	Jeff D. Pniowsky Matthew Dalloo
Counsel for the Respondent:	Elizabeth Tutiah

ORDER

WHEREAS the Respondent brought a motion to compel the Appellant to answer undertakings arising from his oral examination for discovery;

AND UPON reviewing the affidavit evidence and the oral and written submissions of counsel for the Appellant and counsel for the Respondent;

IN ACCORDANCE with the attached Reasons for Order, it is ordered that the motion is denied with costs to the Appellant in accordance with Tariff B of the *Tax Court of Canada Rules (General Procedure)*.

Signed at Ottawa, Canada, this 29th day of July 2021.

"J.R. Owen"

Owen J.

Docket: 2018-3086(IT)G

BETWEEN:

1685326 ONTARIO LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard by videoconference on June 10, 2021 at Ottawa, Ontario

Before: The Honourable Justice John R. Owen

Participants:

Counsel for the Appellant:	Jeff D. Pniowsky Matthew Dalloo
Counsel for the Respondent:	Elizabeth Tutiah

ORDER

WHEREAS the Respondent brought a motion to compel the Appellant to answer undertakings arising from its oral examination for discovery;

AND UPON reviewing the affidavit evidence and the oral and written submissions of counsel for the Appellant and counsel for the Respondent;

IN ACCORDANCE with the attached Reasons for Order, it is ordered that the motion is denied with costs to the Appellant in accordance with Tariff B of the *Tax Court of Canada Rules (General Procedure)*.

Signed at Ottawa, Canada, this 29th day of July 2021.

"J.R. Owen"

Owen J.

Citation: 2021 TCC 46
Date: 20210729
Docket: 2018-3082(IT)G

BETWEEN:

CHETNABEN CONTRACTOR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2018-3084(IT)G

AND BETWEEN:

YOGESHKUMAR CONTRACTOR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2018-3086(IT)G

AND BETWEEN:

1685326 ONTARIO LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Owen J.

I. Background

A. The Reassessments Under Appeal

[1] Chetnaben Contractor ("CC") and Yogeshkumar Contractor ("YC") are spouses and 50-50 common shareholders of 1685326 Ontario Ltd. (the "Corporation") (collectively, the "Appellants"). The Corporation has operated a Super 8 Motel franchise since 2006. Each of the three Appellants is appealing the reassessments of their 2013, 2014 and 2015 taxation years (the "Taxation Years").

[2] The reassessments of the Corporation's Taxation Years are based in part on a net worth calculation in support of the position of the Minister of National Revenue (the "Minister") that the Corporation had undeclared revenues in each year. The Minister also denied expenses, capital cost allowance and terminal loss claimed by the Corporation in each of the Taxation Years (collectively, the "Expenditures") and assessed the Corporation a penalty under subsection 163(2) of the *Income Tax Act* (the "ITA") for each of the Taxation Years.

[3] The additional income of the Corporation and the Expenditures for each of the Taxation Years are stated in the Reply filed by the Minister for the Corporation's three appeals (the "Corp Reply") as follows:[1]

		2013	2014	2015
	Previous net income for tax purposes	18,143	9,787	77,648
1.	Include unreported revenue from Net Worth	76,165	34,665	135,057
2.	Disallow supplies expense	42,878	49,785	18,210
3.	Disallow insurance expense	8,520	5,700	6,670
4.	Disallow capital cost allowance claimed	6,402	9,574	10,265
5.	Disallow terminal loss claimed	10,116	0	396
	Total Adjustments to Income	**$144,081**	**$99,724**	**$170,598**
	Revised Net Income for Tax Purposes	**$162,224**	**$109,511**	**$248,246**
6.	Apply non-capital losses	18,143	1,574	0
	Revised taxable income	**144,081**	**107,937**	**248,246**
7.	Impose federal gross negligence penalties (with respect to items 1, 2 and 3)	7,016	4,958	$8,797

[4] The amount of the Expenditures denied to the Corporation in each of its 2013, 2014 and 2015 taxation years was $67,916, $65,059 and $35,541, respectively.

[5] The reassessments of CC and YC for the Taxation Years reflect the assessment of a shareholder benefit equal to the aggregate of one-half of the additional revenue attributed to the Corporation for each of the Taxation Years and a portion of the Expenditures for each of the Taxation Years that the Minister says were personal expenses of the shareholders paid by the Corporation. As well, the Minister assessed YC for a penalty in each of the Taxation Years under subsection 163(2) of the ITA.

[1] Paragraph 7 of the Corp Reply. The shading of four rows is on the Court's copy of the Reply and has not been added by the Court.

[6] The additional income of each of CC and YC is stated in the Replies filed by the Minister for the CC appeal (the "CC Reply") and the YC appeal (the "YC Reply"), respectively, as follows:

Taxation Year	Benefit Conferred on Shareholder	Taxable Benefits from 1685326 Ontario Ltd.	Total Adjustments to Income	Income Reported per para 6	Revised Total Income
2013	$38,081	$9,320	$47,401	$12,628	$60,029
2014	$17,332	$7,109	$24,441	$14,380	$38,821
2015	$67,528	$125	$67,653	$16,331	$83,984

Taxation Year	Benefit Conferred on Shareholder	Taxable Benefits from 1685326 Ontario Ltd.	Total Adjustments to Income	Income Reported per para 6	Revised Total Income
2013	$38,082	$9,320	$47,401	$12,628	$60,030
2014	$17,332	$7,109	$24,441	$25,300	$49,741
2015	$67,529	$125	$67,653	$24, 277	$91,931

[7] The additional income of each of CC and YC identified as a "benefit conferred on shareholder" is 50% of the additional income of the Corporation for the same taxation year. The additional income of each of CC and YC identified as "taxable benefits from" the Corporation is 13.72%, 10.93% and 0.35% of the Expenditures.

[8] The penalties assessed against YC are as follows:

Taxation Year	Penalties
2013	$6,099.62
2014	$2,789.10
2015	$10,209.20

B. The Motions

[9] The Respondent has brought two motions (the "CC Motion" and the "YC Motion") to compel CC and YC to answer undertakings arising from their respective oral examinations for discovery. The oral examination of CC was held on

October 30, 2019 and the oral examination of YC was held on October 31, 2019 and for two hours on November 1, 2019.

[10] In each motion, the Respondent requests "an Order pursuant to sections 7, 12, 65, 75, 95, 96, 105, 110, 107(3), 108, 108(2), 110, and 116 of the *Tax Court of Canada Rules (General Procedure)*".

[11] The request in the CC Motion is to "[p]rovide answers to the following Undertaking Nos. 1, 3-6 and 8-16 arising from the examination for discovery of Chetnaben Contractor held on October 30, 2019, and the follow up questions regarding same".

[12] The request in the YC Motion is to "[p]rovide answers to Undertaking Nos. 1, 3, 8, 11 and 12-28 arising from the examination for discovery of Yogeshkumar Contractor held on October 31, 2019 and November 1, 2019 and the follow up questions regarding same".

[13] I will refer to the undertakings identified in the two motions as the "Disputed Undertakings".

[14] The Respondent submitted two affidavits of a paralegal with the Department of Justice—one in support of the CC Motion (the "CC Affidavit") and one in support of the YC Motion (the "YC Affidavit"). The CC Affidavit states that CC was examined in her personal capacity and on behalf of the Corporation[2] and the YC Affidavit states that YC was examined in his personal capacity and on behalf of the Corporation.[3]

II. Analysis

A. The Rules

[15] The sections of the *Tax Court of Canada Rules (General Procedure)* (the "Rules").[4] relevant to these motions include sections 4 and 92 and subsections 81(1), 93(1), 95(1), 105(2), 107(1) and 108(1), which state:

> **4** These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

[2] Paragraph 11 of the CC Affidavit.
[3] Paragraph 9 of the YC Affidavit.
[4] Unless otherwise stated, all section references are to the Rules.

81(1) A party shall, within thirty days following the closing of the pleadings, file and serve on every other party a list of the documents of which the party has knowledge at that time that might be used in evidence,

(a) to establish or to assist in establishing any allegation of fact in any pleading filed by that party, or

(b) to rebut or to assist in rebutting any allegation of fact in any pleading filed by any other party.

92 An examination for discovery may take the form of an oral examination or, at the option of the examining party, an examination by written questions and answers, but the examining party is not entitled to subject a person to both forms of examination except with leave of the Court.

93(1) A party to a proceeding may examine for discovery an adverse party once, and may examine that party more than once only with leave of the Court.

95(1) A person examined for discovery shall answer, to the best of that person's knowledge, information and belief, any proper question relevant to any matter in issue in the proceeding . . . 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.

105(2) Where a person admits, on an examination, that he or she has possession or control of or power over any other document that relates to a matter in issue in the proceeding and that is not privileged, the person shall produce it for inspection by the examining party forthwith, if the person has the document at the examination, and if not, within ten days thereafter, unless the Court directs otherwise.

107(1) Where a question is objected to, the objector shall state briefly the reason for the objection, and the question and the brief statement shall be recorded.

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.

B. Oral Examinations for Discovery in the Tax Court of Canada

[16] Subject to section 17.3 of the *Tax Court of Canada Act* (the "TCCA"), section 92 provides for examinations for discovery either by oral examination or, at the option of the examining party, by written questions. Whether the format is oral or written, an examination for discovery involves the asking and answering of questions.[5]

[17] The purposes of oral discovery are recited by the Federal Court of Appeal in *R. v. Lehigh Cement Ltd.*:[6]

> (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 procedure and trial;
>
> (e) to eliminate or narrow issues; and
>
> (f) to avoid surprise at trial.

[5] See, for example, subsections 95(1), 96(1) and 98(1) and sections 97 and 113 to 116.
[6] 2011 FCA 120 ("*Lehigh*").

[18] These purposes are informative but do not directly address the permissible scope of oral discovery under the Rules, which is rooted in the words of subsection 95(1) viewed in the light of the principle of proportionality.[7]

[19] To be permissible under subsection 95(1), a question must satisfy two conditions: the question must be proper and the question must be relevant to any matter in issue in the proceeding. To ensure a coherent application of these conditions elsewhere in the discovery Rules, where the term "proper question" is used[8] the term should be read as a reference to a question that is both proper and relevant.[9]

[20] In *Lehigh*, the Federal Court of Appeal described the scope of permissible discovery under the Rules as follows:

> The scope of permissible discovery depends upon the factual and procedural context of the case, informed by an appreciation of the applicable legal principles.[10]

[21] The Court in *Lehigh* explains the Tax Court of Canada's ("Tax Court") discretion to disallow questions even though they meet the "relevant to" condition in subsection 95(1):

> Where relevance is established the Court retains discretion to disallow a question. The exercise of this discretion requires a weighing of the potential value of the answer against the risk that a party is abusing the discovery process. . . . The Court might disallow a relevant question where responding to it would place undue hardship on the answering party, where there are other means of obtaining the information sought, or where "the question forms part of a 'fishing expedition' of vague and far-reaching scope".[11]

[22] I would add that the Tax Court's discretion to disallow questions that are relevant but not proper may also be exercised if the question is materially ambiguous, vague, imprecise, misleading, scandalous (e.g., defamatory) or vexatious (e.g., harassing); or seeks privileged information, seeks the work product

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[7] *R. v. Cameco Corporation*, 2019 FCA 67 at paragraph 42.
[8] See section 110 (preamble), subsections 96(1) and 116(2) and (4) and paragraphs 100(6)(d) and 110(a). In addition, paragraphs 108(1)(a) and 117(a) refer to "improper questions", which in this context can only mean questions that are not proper questions.
[9] See, generally, *Charlebois v. Saint John (City)*, [2005] 3 S.C.R. 563, 2005 SCC 74 at paragraph 21.
[10] At paragraph 24. Not surprisingly this general approach is very similar to the general approach to whether a question is proper.
[11] At paragraph 35.

of counsel, seeks the disclosure of evidence rather than fact or seeks an opinion (i.e., inference from facts) rather than fact.

[23] With respect to the "relevant to a matter in issue in the proceedings" requirement, in *Teelucksingh v. R.*,[12] the Tax Court states:

> Examination for discovery is an examination as to the information and belief of the other party as to facts that are relevant to the matters in issue, as defined by the pleadings.[13]

[24] When reviewing the pleadings for this purpose, the pleadings should be construed with fair latitude[14] and due regard should be had to the substantive law.[15]

[25] The questions on oral examination for discovery must be relevant to the matters in issue between the party being examined[16] and the party examining. The core issue between any appellant and the respondent in an income tax appeal under subsection 169(1) of the ITA is the correctness of the assessment or reassessment that is being appealed[17] and therefore as a general proposition it is the facts directly or indirectly[18] relevant to that core issue that may be explored in an oral examination for discovery.

[26] With respect to the degree of connection that is required by the phrase "relevant to any matter in issue in the proceeding",[19] in *Lehigh* the Federal Court of Appeal states at paragraph 34:

> The jurisprudence establishes that a question is relevant when there is a reasonable likelihood that it might elicit information which may directly or indirectly enable the party seeking the answer to advance its case or to damage the case of its adversary, or which fairly might lead to a train of inquiry that may either advance the questioning party's case or damage the case of its adversary.

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[12] 2010 TCC 94 ("*Teelucksingh*").
[13] At paragraph 15(i).
[14] Gordon D. Cudmore, *Choate on Discovery*, 2nd ed. (Scarborough, Ont: Carswell, 1993)(loose-leaf updated 2018, release 6) at section 2.16, page 2-76.12.
[15] Sidney N. Lederman, Alan W. Bryant and Michelle K. Fuerst, *Sopinka, Lederman & Bryant, The Law of Evidence in Canada*, 5th ed. (Markham, Ont.: LexisNexis, 2018) at paragraph 2.47.
[16] Generally, a party will be examined when the party is an individual, and a nominee of the party will be examined when the party is not an individual. For exceptions, see subsections 93(5), (6) and (7).
[17] *Main Rehabilitation Co. v. R.*, 2004 FCA 403 at paragraphs 6 to 8 and *Johnson v. R.*, 2015 FCA 52 at paragraphs 3 to 6.
[18] One example of a fact that is indirectly relevant is a fact that is relevant to credibility.
[19] Subsection 95(1).

[27] Recently, in *Madison Pacific Properties Inc. v. R.*,[20] the Federal Court of Appeal confirmed the approach in *Lehigh*:

> In *Lehigh*, this Court held that the Tax Court had applied the correct legal test for disclosure in a case such as this, which defines relevance on discovery as requiring that the disputed question or production request give rise to a reasonable likelihood that it might lead to a train of inquiry that may advance a party's case or damage that of its opponent. . . .[21]

[28] Discovery does not permit fishing expeditions. More precisely, questions that constitute a fishing expedition are not proper questions either because they are overly broad and/or an abuse of the discovery process or because they have no connection to the matters in issue in the proceeding, or both.[22] The facts and circumstances will determine the appropriate determination.[23]

[29] The matters in issue in a proceeding may include a law or policy. In *R. v. CHR Investment Corporation*,[24] the Federal Court of Appeal stated in paragraphs 25 and 31 that subsection 95(1) permitted questions to ascertain the opposing party's legal position and that the person being examined would be obliged to answer the questions.[25]

[30] In *Madison*, the Federal Court of Appeal observed that documents identifying a purported policy in the ITA were of limited relevance and were likely inadmissible at the hearing of the appeal because "the question of the policy in the ITA that the taxpayer is alleged to have avoided is ultimately a question of law".[26]

[31] Based on *CHR* and *Madison*, examination for discovery may be used to ascertain the fact of a particular legal position that is relevant to any matter in issue in the proceeding, but any statement of that position in the examination has no bearing on the question of whether the legal position is in law correct or applicable.

[32] In many cases, it will be reasonably clear whether a question meets or does not meet the conditions in subsection 95(1) (i.e., whether a question is a proper question). However, where there is doubt, consistent with the purposes of discovery

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[20] 2019 FCA 19 ("*Madison*").
[21] *Madison* at paragraph 23.
[22] See, for example, *Madison* at paragraph 19, where the request at issue in that case was referred to as a "vague, broad and ill-defined production request" that would be "difficult to satisfy".
[23] *Lehigh* at paragraph 24.
[24] 2021 FCA 68 ("*CHR*").
[25] See, also, *Teelucksingh* at paragraph 15(ix).
[26] At paragraph 28.

recited in *Lehigh*, it is generally better to err on the side of allowing the question. The trial judge can then determine whether information (if any) elicited from the question is admissible at the hearing of the appeal.

[33] Several cases have provided helpful guidance regarding specific issues that arise in respect of examinations for discovery. For example, in paragraph 18 of *Cherevaty v. R.*,[27] the Federal Court of Appeal adopts the following propositions:

> In *HSBC Bank Canada v. Her Majesty the Queen*, 2010 TCC 228, [2010] T.C.J. No. 146, C. Miller J. summarized the principles that had been applied by that Court in relation to discovery examinations:
>
> **13** Both parties provided useful summaries of how this Court has in the past addressed the question of the scope of examinations for discovery. Justice Valerie Miller recently summarized some of the principles in the case of *Kossow v. R* [2008 D.T.C. 4408]:
>
> 1. The principles for relevancy were stated by Chief Justice Bowman and are reproduced at paragraph 50 [of *Kossow*]:
>
> a) Relevancy on discovery must be broadly and liberally construed and wide latitude should be given;
>
> b) A motions judge should not second guess the discretion of counsel by examining minutely each question or asking counsel for the party being examined to justify each question or explain its relevancy;
>
> c) The motions judge should not seek to impose his or her views of relevancy on the judge who hears the case by excluding questions that he or she may consider irrelevant but which, in the context of the evidence as a whole, the trial judge may consider relevant;
>
> d) Patently irrelevant or abusive questions or questions designed to embarrass or harass the witness or delay the case should not be permitted.

[27] 2016 FCA 71.

2. The threshold test for relevancy on discovery is very low but it does not allow for a "fishing expedition": *Lubrizol Corp. v. Imperial Oil Ltd.*, [1996] F.C.J. No. 1564.

3. It is proper to ask for the facts underlying an allegation as that is limited to fact-gathering. However, it is not proper to ask a witness the evidence that he had to support an allegation: *Sandia Mountain Holdings Inc. v. The Queen*, [2005] T.C.J. No. 28.

4. It is not proper to ask a question which would require counsel to segregate documents and then identify those documents which relate to a particular issue. Such a question seeks the work product of counsel: SmithKline Beecham Animal Health Inc. v. R., [2002] F.C.J. No. 837.

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

6. A party is entitled to have full disclosure of all documents relied on by the Minister in making his assessment: *Amp of Canada Ltd., v. R.*, [1987] F.C.J. No. 149.

7. Informant privilege prevents the disclosure of information which might identify an informer who has assisted in the enforcement of the law by furnishing assessing information on a confidential basis. The rule applies to civil proceedings as well as criminal proceedings: *Webster v.R.*, [2002] T.C.J. No. 689.

8. Under the *Rules* a party is not required to provide to the opposing party a list of witnesses. As a result a party is not required to provide a summary of the evidence of its witnesses or possible witnesses: *Loewen v. R.*, [2006] T.C.J. No. 384.

9. It is proper to ask questions to ascertain the opposing party's legal position: *Six Nations of the Grand River Band v. Canada*, [2000] O.J. No. 1431.

10. It is not proper to ask questions that go to the mental process of the Minister or his officials in raising the assessments: *Webster v. The Queen*.

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

1. The examining party is entitled to "any information, and production of any documents, that may fairly lead to a train of inquiry that may directly or indirectly advance his case, or damage that of the opposing party": *Teelucksingh v. The Queen* [2010 TCC 94]

2. The court should preclude only questions that are "(1) clearly abusive; (2) clearly a delaying tactic; or (3) clearly irrelevant": *John Fluevog Boots & Shoes Ltd. V. The Queen* [2009 TCC 345]

15 Finally in the recent decision of *4145356 Canada Limited v. The Queen* [2009 TCC 480] I concluded:

(a) Documents that lead to an assessment are relevant;

(b) Documents in CRA files on a taxpayer are *prima facie* relevant, and a request for those documents is itself not a broad or vague request;

(c) Files reviewed by a person to prepare for an examination for discovery are *prima facie* relevant; and

(d) The fact that a party has not agreed to full disclosure under section 82 of the Rules does not prevent a request for documents that may seem like a one-way full disclosure.

C. Application of the Principles Applicable to Oral Discovery to these Motions

[34] Counsel for the Appellants and for the Respondent advised the Court that oral discovery of all the Appellants was agreed to by the parties. Counsel for the Appellants explained that his experience was that an appeal was more likely to be settled if there was an oral examination for discovery of the taxpayer and that he believed the Respondent was aware that CC had little information to contribute to the process because her role in the Corporation's business was limited to housekeeping. This also appears to be the reason why all the appeals were filed under the general procedure even though most of the appeals appear to fall below the

$25,000 threshold of the informal procedure.[28] The rules governing the informal procedure do not provide for discovery.[29]

[35] The YC Reply states as assumptions of fact that YC "was responsible for the day-to-day operation of the Corporation" and that YC "maintains the Corporation's books and records".[30] No such assumptions are made in the CC Reply. However, the Corp Reply states as an assumption of fact that "the Shareholders maintained" the Corporation's books and records.[31]

[36] As well, the CC Reply and the YC Reply state as assumptions of fact that the "Corporation is a family business run by" CC, YC, their two sons and YC's daughter (referred to in all three Replies as the "Shareholders' Family")[32] and the Corp Reply states that the Corporation's "business is run by" the Shareholders' Family.[33]

[37] Since it is the pleadings that define the permissible scope of questioning in an examination for discovery, the issue is not how much knowledge CC had but rather the questions that are permitted in oral discovery to explore the extent of her knowledge.

[38] Counsel for the Appellants made extensive submissions regarding the behaviour of counsel for the Respondent during the examination for discovery of CC to support the position that the examinations were an abuse of the discovery process. If counsel for the Appellants was of the view that the examination for discovery of CC or YC was not being conducted appropriately, the proper course of action would have been to adjourn the discovery and seek directions from the Court under subsection 108(1). That did not occur and further steps in the form of responding to undertakings have occurred.[34] Consequently, I will limit my review to addressing the issues raised by the Respondent in the motions.

[39] I will note however that counsel conducting examinations for discovery do have an obligation to behave appropriately during the examinations. A document

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[28] The $25,000 threshold for the informal procedure is applied to each assessment/reassessment under appeal: subsection 169(1) of the ITA and section 2.1 of the TCCA. Each of the Appellants had three reassessments under appeal—one for each taxation year: *3488063 Canada Inc. et al. v. R.*, 2016 FCA 233 at paragraphs 46 to 48.

[29] Subject to the discretion of the Tax Court to order otherwise under subsection 21(4) of the *Tax Court of Canada Rules* (*Informal Procedure*), or under its implied jurisdiction to manage its own process.

[30] Paragraphs 10(k) and (l) of the YS Reply.

[31] Paragraph 10(k) of the Reply filed in the Corporation's appeal.

[32] Paragraph 9(j) of the CC Reply and paragraph 10(j) of the YC Reply.

[33] Paragraph 10(j) of the Corp Reply.

[34] Sections 7 and 8.

titled "Discovery Best Practices – General Guidelines for the Discovery Process in Ontario" provides the following instructive commentary:

> A lawyer should never conduct oral discovery for an improper purpose, for example, to harass, intimidate or unduly burden the opposite party with unreasonable demands for information or document production. Lawyers should conduct themselves with decorum and should never verbally abuse or harass a witness or unnecessarily prolong an examination.
>
> Counsel must keep in mind that their purpose is not to protect their client from "bad facts" that are relevant and within the scope of an examination, regardless of whether those facts hinder the client's position. A useful guide for all counsel in conducting himself or herself at discovery is this: do nothing, which one would not do at trial, with a judge in attendance.[35]

[40] The CC Affidavit and the YC Affidavit respectively state that CC and YC were being discovered both in their personal capacity and on behalf of the Corporation. The Respondent was not entitled to examine two representatives of the Corporation. It is also up to the Corporation (not the Respondent) to put forward a suitable representative for the examination.[36] If the Respondent is not satisfied with that representative then the Respondent may apply to the Court to name some other person.[37]

[41] During the hearing of the motions I raised this issue with counsel for the Respondent, who acknowledged that only YC could be examined in his personal capacity and on behalf of the Corporation and that consequently CC was examined only in her personal capacity. Since counsel for the Appellants did not object to that proposition, I will address the Disputed Undertakings on that basis.

[42] The CC Transcript and the YC Transcript indicate that the Appellants and the Respondent agreed that the appeals of CC, YC and the Corporation would proceed on common evidence. However, no direction was obtained from the Court under section 26 that the proceedings be consolidated, be heard at the same time, or be heard one immediately after the other.

[43] An informal agreement of counsel that appeals will be heard on common evidence has no bearing on the permissible scope of oral discovery. However, the fact that assessments issued against different appellants arise from a common set of

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[35] At page 11.
[36] Subsection 93(2).
[37] Ibid.

circumstances does allow for questions to each appellant (or to a corporate appellant's representative) about those circumstances.

D. The Disputed Undertakings

[44] I will first address the Disputed Undertakings that did not arise out of questions at all but as unilateral statements by counsel for the Respondent. Three examples of these undertakings from the transcripts of CC's examination for discovery are as follows:

> Undertaking 1 of CC
>
> And I'm going to make an undertaking, Mrs. Contractor, that you will, after your husband provides his evidence at discovery, that you review the transcript of his evidence and advise if there is anything that you disagree with with [*sic*] your husband Yogeshkumar's discovery transcript and his evidence given during his discovery.[38]
>
> Undertaking 3 of CC
>
> All right. Mrs. Contractor, I'm going to make an undertaking for you to review these assumptions of fact that are listed in our reply and advise which facts you disagree with, the facts that you have knowledge of that contradict those facts and the basis for all of that.[39]
>
> Undertaking 4 of CC
>
> Mrs. Contractor, attached to this reply are schedules and there's Schedule 1, Schedule 2, Schedule 3, Schedule 4 and Schedule 5. I'm going to make an undertaking for you to provide an undertaking to provide the specifics, when you review each of the schedules, on what you disagree with, if anything, and provide the basis for that disagreement.[40]

[45] Other such purported undertakings are CC undertaking numbers 12, 13, 14 and 15 and YC undertaking numbers 1, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23 (collectively, with undertakings 1, 3 and 4 of CC, the "Unilateral Undertakings"). In each case, the undertaking is not preceded by even a single question regarding the

[38] Question 23 of the transcript of the examination for discovery of CC (the "CC Transcript"). The undertaking is repeated in different terms at question 24 of the CC Transcript. The undertaking is repeated as undertaking 15.
[39] Question 307 of the CC Transcript. The undertaking is repeated in different terms at question 308 of the CC Transcript.
[40] Question 309 of the CC Transcript.

topic of the undertaking but rather is simply a statement of an undertaking by counsel for the Respondent.

[46] The approach of counsel for the Respondent in simply stating the Unilateral Undertakings misapprehends the purpose of oral examination for discovery, which is to ask questions of the individual being examined (the "examinee") who is then required to answer those questions to best of his or her knowledge, information and belief.[41] In *Burlington Resources Finance Company v. R.*,[42] the Tax Court judge explains what an examinee may do in response to a question:

> According to the *Rules*, a nominee either answer[s] the question, refuses to answer and explains the basis for such refusal, or takes an undertaking if he or she does not know the answer.[43]

[47] If no question has been asked of the examinee then there is nothing for the examinee to refuse to answer and there is no basis for an undertaking, never mind an undertaking unilaterally stated by examining counsel.

[48] This is not a trivial matter but an issue of fundamental fairness. There are potentially severe consequences if during an oral examination for discovery the examinee refuses to answer a proper question, including, where the examinee is the appellant, dismissing the appeal.[44] It is not proper for the Respondent to seek to impose any of those consequences when no question has been asked and refused. For this reason alone, I find that no response is required to the Unilateral Undertakings.

[49] I also note however that in two cases (CC undertaking number 1 and YC undertaking number 1) the undertaking purports to require the witness to review discovery transcripts that are subject to the implied undertaking without the express consent of the examinee[45] or a court order.[46] Counsel for the Respondent justified this on the basis that the parties agreed that all the appeals would be heard on common evidence.

[50] In my view, an informal agreement of counsel that the appeals in issue will be heard on common evidence is not sufficient to override the important protection

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[41] Subsection 95(1).
[42] 2017 TCC 144 ("*Burlington 2017*").
[43] *Burlington 2017* at paragraph 80.
[44] Sections 96 and 110.
[45] Or the party on whose behalf the examinee is being examined.
[46] *Morrison v. R.*, 2015 TCC 319 at paragraph 24.

from disclosure provided by the implied undertaking.[47] Simply put, counsel for the Respondent cannot require a party being examined to review the discovery transcript of another taxpayer because it is up to the other taxpayer (or the Court) to determine whether that discovery transcript is released from the implied undertaking.

[51] The remaining undertakings in issue in these motions are CC undertaking numbers 5 to 11 and 16 and YC undertaking numbers 3, 8, 11 to 13 and 24 to 28. I will address each of these in turn.

CC Undertaking No. 5:
Provide information on all policies that are held on Mr. and Mrs. Contractor and the names of the companies who the beneficiaries are.

[52] CC undertaking number 5 is stated by counsel for the Respondent.[48] The undertaking is made immediately after the following questions and answers:

> 424. Q. So your husband was required to get life insurance in the name of the Motor City Credit Union as beneficiary. Were you also required to get a similar policy?
> A. He knows.
> 425. Q. I'm sorry, who is "he"?
> A. The lawyer knows.
> 426. Q. The lawyer knows. I'm asking you if you know.
> A. She heard that they were talking about her not being able to get one insurance.[49]

[53] In response to CC undertaking number 5, counsel for the Appellants provided a copy of a letter addressed to CC from Empire Life identifying a single policy of which CC was the insured, Motor City Credit Union was the revocable beneficiary and Motor City Community Credit Union was the holder of a collateral assignment.[50]

[54] CC undertaking number 5 does not reflect the subject matter of the question that CC could not answer. However, the response does directly address that question. CC is not required to provide any further response to CC undertaking number 5.

CC Undertaking No. 6:

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[47] As to the importance of the implied undertaking, see *Juman v. Doucette*, 2008 SCC 8 and *Silver Wheaton Corp. v. R.*, 2019 TCC 170.
[48] Question 427 at page 85 of the CC Transcript.
[49] Question 424 at page 85 of the CC Transcript.
[50] Tab 2 of Exhibit H of the CC Affidavit.

Advise who owned the five vehicles for the years 2013, 2014 and 2015 and to whom the vehicles were registered to [sic] during that time.
Response:
All together [sic], the Appellant and her husband owned a total of 4 vehicles at a time during the audit period. Two vehicles were used exclusively for business (the Prius and the Camry). Prior to purchasing the Prius in 2014, the PT Cruiser was the second vehicle used for the business.

[55] CC undertaking number 6 is stated by counsel for the Respondent.[51] The undertaking is made immediately after the following questions and answers:

> 453. Q. So in the years in question, 2013, 2014 and 2015, your evidence is there were four vehicles that you had between you and your husband and you don't know which ones were his and which ones were yours; is that right?
> A. Yes.
> 454. Q. And then sometime later you got a 2007 PT Cruiser and so that was the fifth vehicle that you owned between yourself and your husband; is that right?
> A. Yes.
> 455. Q. And like the other four vehicles, it was registered either in your husband's name or your name and you just don't recall which?
> A. True.[52]

[56] CC gave complete answers to the questions asked. The undertaking is asking about five vehicles when CC states that there were four vehicles during 2013, 2014 and 2015. The subsequent response to the undertaking also states that there were four vehicles during those taxation years.

[57] CC gave clear and unequivocal answers to the questions asked in the oral examination for discovery. The undertaking was not required and should not have been made by counsel for the Respondent as reinforced by the fact that the response simply repeats the answers given in the examination for discovery. CC is not required to provide any further response to CC undertaking number 6.

CC Undertaking No. 8:
Provide information on whether the accountant gets information, such as logs or diaries or other information which records mileage, to determine how much of the car was driven that year and expenses, for each car, per year.
Response:

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[51] Question 456 at pages 89 to 90 of the CC Transcript.
[52] Questions 453 through 455 at page 89 of the CC Transcript.

No logs were kept for the vehicles. No mileage division was required since the Toyota Prius and the Toyota Camry were used exclusively for business.

[58] CC undertaking number 8 is stated by counsel for the Respondent.[53] The undertaking is made immediately after the following question and answer:

> Q. Do you know, does the accountant get information that would be potentially in the logs? For example, does your husband tell him the mileage to determine how much of the car was used for corporate work and for personal use?
> A. I have no idea.[54]

[59] The question asks whether CC has knowledge of a fact that is solely within her knowledge (i.e., whether CC knows something) and CC responds that she does not know. The question was answered and therefore an undertaking was not required and should not have been made by counsel for the Respondent. CC is not required to provide any further response to CC undertaking number 8.[55]

CC Undertaking No. 9:
Provide any receipts for all vehicles used in the years 2013, 2014 and 2015.
Response:
All relevant documents located to-date have been produced in the Appellant's book of documents.

[60] CC undertaking number 9 is stated by counsel for the Respondent.[56] The undertaking is made immediately after the statement of CC undertaking number 8 and therefore is not directly preceded by a question. However, since there was a question before CC undertaking number 8, I will proceed on the basis that CC undertaking number 9 is in respect of that question.

[61] As stated in respect of CC undertaking number 8, the question asks whether CC has knowledge of a fact that is solely within her knowledge and CC responds that she does not know. The question was answered and therefore an undertaking was not required and should not have been made by counsel for the Respondent. CC is not required to provide any further response to CC undertaking number 9.

CC Undertaking No. 10:

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[53] Question 513 at page 98 of the CC Transcript.
[54] Question 512 at page 98 of the CC Transcript.
[55] Undertaking number 7 also addresses the existence of logs but is not in issue.
[56] Question 513 at pages 98 to 99 of the CC Transcript.

Produce all information kept in the files with respect to the operating expenses of each vehicle for 2013, 201[4] and 2015.
Response:
All relevant documents located to-date have been produced in the Appellant's book of documents.

[62] CC undertaking number 10 is stated by counsel for the Respondent.[57] The undertaking is made immediately after the following question and answer:

> Q. And do you have any records of any operating expenses of each vehicle? Any records that are kept at all?
> A. He keeps it in the file.

[63] Counsel for the Appellants suggested that such questions "may be questions that are more appropriate for Mr. Yogeshkumar Contractor" and that the undertaking would "probably be much more easily satisfied by Mr. Yogeshkumar Contractor". Counsel for the Respondent acknowledged that that might be the case but maintained that as an Appellant CC could also be asked for this undertaking.[58]

[64] YC was to be examined the next day in his personal capacity and as the representative of the Corporation. As stated by counsel for the Appellants, the appropriate course of action would have been to ask YC about the vehicle records and obtain undertakings to the extent required. This approach is consistent with the proportionality principle as explained by the Supreme Court of Canada in *Hryniak v. Mauldin* ("Hryniak"):[59]

> Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pretrial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.
>
> . . .
>
> . . . Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised.

[57] Question 516 at page 99 of the CC Transcript.
[58] Page 99 of the CC Transcript.
[59] 2014 SCC 7, [2014] 1 SCR 87.

> However, undue process and protracted trials, with unnecessary expense and delay, can *prevent* the fair and just resolution of disputes. The full trial has become largely illusory because, except where government funding is available, ordinary Canadians cannot afford to access the adjudication of civil disputes. . . .
>
> . . .
>
> . . . A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.[60]

[65] I also note that the reassessments of CC include in CC's income amounts as shareholder benefits that the Minister asserts arise either from undeclared income of the Corporation or from expenses incurred or paid for by the Corporation that the Minister maintains are for the benefit of CC and YC equally. The reassessments of CC do not raise the existence of expenses incurred or paid for by the Corporation but the character of such expenses as business expenses of the Corporation or personal expenses of CC and YC. Accordingly, the undertaking is not addressing a matter in issue between CC and the Respondent.

[66] Finally, returning to the question, counsel asks CC whether she has any records of any operating expenses of each vehicle and a reasonable interpretation of CC's answer is no because YC keeps the records in the file. The question was answered and in doing so CC did not admit to having possession or control of or power over these records, and the fact that CC was a shareholder of the Corporation does not in and of itself constitute such an admission. In fact, CC answer states that YC and/or the Corporation had possession of the records. As a result, subsection 105(2) is not applicable.[61]

[67] For the foregoing reasons, an undertaking was not required and should not have been made by counsel for the Respondent. Consequently, CC is not required to provide any further response to CC undertaking number 10.

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[60] *Hryniak* at paragraphs 2, 23, 24 and 28.

[61] Two Tax Court decisions (*4145356 Canada Limited v. R.*, 2009 TCC 480 at paragraph 23 and *HSBC Bank Canada v. R.*, 2010 TCC 228 at paragraph 15) suggest that subsection 105(3) also provides a basis to request documents. With respect, subsection 105(3) is an adjunct to paragraph 105(1)(b), which addresses examinations that are not examinations for discovery, but, in any event, the request in issue did not arise in a notice to attend for examination or in a subpoena.

CC Undertaking No. 11:
Inquire of Mr. Contractor and look at the records to see if there are any details about any conferences attended in 2013, 2014 and 2015 for the Super 8 Motel.
Response:
This request to gather information from Mr. Contractor is improper and irrelevant having regard to the fact that you were able to depose Mr. Contractor directly.

[68] CC undertaking number 11 is stated by counsel for the Respondent.[62] The undertaking is made immediately after the following questions and answers:

> 596. Q. And just so we're clear, that's a conference for the Super 8 Motel?
> A. Yes.
> 597. Q. And how often does Super 8 have these conferences?
> A. Once a year.
> 598. Q. And what time of the year are they held?
> A. It could be April, May. Depends. It varies.
> 599. Q. So in the spring?
> A. It's not certain, but it could be summer or spring.
> 600. Q. Okay. And how long is it for?
> A. Three to four days.
> 601. Q. And what do you do at those conferences? Do they train you or give you new ideas or what happens?
> A. They have different demos for sheets, blankets, mattresses.
> 602. Q. Are you required from the Super 8 chain to attend these conferences or is it optional, you can go or not go?
> A. They have to register. If they go or not go, that's up to them, but money is spent on it.
> 603. Q. Do you have a list of all the conferences that you've gone to as required by the Super 8 Motel for the years 2013, 2014 and 2015?
> A. I don't remember. My husband may have record.[63]

[69] Counsel for the Appellants responded to the undertaking as follows: "We won't provide that undertaking. That will be an undertaking that Mr. Yogeshkumar can provide though."[64]

[70] The question immediately preceding the undertaking asks if CC has a list of all the conferences attended and a reasonable interpretation of CC's response is not

[62] Question 604 at page 121 of the CC Transcript.
[63] Questions 596 to 603 at pages 120 to 121 of the CC Transcript.
[64] Page 121 of the CC Transcript.

that I recall but YC may have a copy. CC does not admit to having possession of a copy of the list requested.

[71] Considering CC's answer and the fact that YC was to be examined the following day, my comments above regarding proportionality also apply here. Counsel for the Respondent should have asked YC the question rather than stating an undertaking that required CC to question YC. Consequently, CC is not required to provide any further response to CC undertaking number 11.

CC Undertaking No. 16:
Advise of any other documents that Mrs. Contractor intends to rely upon in the proceeding and provide them.
Response:
This is not a proper question on discovery. The Tax Court Rules allow a party to produce new documents in a supplemental list at any point prior to the hearing.

[72] CC undertaking number 16 is stated by counsel for the Respondent.[65] The undertaking is made immediately after the following question and answer:

> 865. Q. And are there any other documents that you have not disclosed that you intend to rely upon for this matter, Mrs. Contractor?
> A. My husband knows everything.[66]

[73] The question and undertaking address the strategy of CC's counsel. The Rules dictate what documents must be produced and the timing of that production, as well as consequences for failing to comply with the Rules. CC is not required to provide any further response to CC undertaking number 16.

YC Undertaking No. 3:
To advise when Ken Smith met with CRA on Mr. Contractor's behalf.
Response:
The Appellant does not have any record of the date that Ken Smith met with CRA on Mr. Contractor's behalf. Mr. Ken Smith was working for Hyatt Lassaline LLP at the relevant time. The Appellant contacted this firm for the purposes of this undertaking but was told that he doesn't work there anymore.

[65] Question 866 at page 160 of the CC Transcript.
[66] Question 865 at page 160 of the CC Transcript.

[74] YC undertaking number 3 is made in the course of the following questions and answers:

> 66. Q. Okay. And just for the record that Mr. Ken Smith?
> A. Yes, Ken Smith.
> 67. Q. Okay.
> A. So I– so I–
> 68. Q. (Interposing) He's in Windsor?
> A. Yeah, he's in Windsor.
> 69. Q. Okay.
> A. So I hire him.
> 70. Q. Yes.
> A. And I explain him everything.
> 71. Q. Yes.
> A. Say, "Go and tell like that. That I want to explain this, this, this.", but nobody is going to be listen me. They say, "You don't know. You don't know. You. . ." . . . I say, "Why I don't know?".
> 72. Q. Okay.
> A. "I'm doing my business and I don't know about this accountant—accounting?".
> 73. Q. I'm going to interrupt you for a minute. So is Mr. Ken Smith also still working with you—
> A. No.
> 74. Q. —on these—
> A. No.
> 75. Q. —matters? No? So he worked for you for what period of time?
> A. I think just couple of month. Whatever this audit—
> 76. Q. (Interposing) And what year would that have been?
> A. I don't know the time, exact time, but if you want I can provide you what time to what time.
> 77. Q. That's fine. If you can do that, please. I'd like an undertaking for that of what period of time he worked for you.
> A. I think one or two, two months—
> 78. Q. Yes.
> A. —when there was a meeting with the CRA. So one meeting. . . I think either one or two meeting he attended.
> MS. TUTIAH: Okay. That's fine, Mr. Contractor.[67]

[75] The question that YC could not answer was the exact period of time that Mr. Ken Smith worked for YC and/or the Corporation and the undertaking as stated in the YC Transcript was for that information. I have not been advised how that

[67] Questions 66 to 78 at pages 23 to 25 of the YC Transcript.

undertaking was transformed into the version stated in the Respondent's motion materials.

[76] In any event, the questions and answers clearly indicate that Mr. Smith was engaged for approximately two months to meet with the CRA in the course of the audit that resulted in the reassessments under appeal. I can identify no connection whatsoever between the information requested regarding Mr. Smith and any of the matters in issue in the appeals. Nor can I identify how the information could possibly assist the Respondent's case or hurt YC's or the Corporation's case. Accordingly, the question was not a proper question and YC is not required to provide any further response to YC undertaking number 3.

YC Undertaking No. 8:
To search for and produce the CRA deficiency letter to Mr. Contractor.
Response:
The Appellant is unable to locate a CRA deficiency letter.

[77] YC undertaking number 8 is stated by counsel for the Respondent in the following exchange with YC:

> 2052. Q. I'm going to ask you then, Mr. Contractor, since you don't seem to know if you signed this deficiency letter or not for maintaining proper books and records and you don't know if it went back to CRA as they requested or if you've still got it at home, I'm going to make an undertaking that you provide us with the proper books and records letter.
> A. No, no, I don't have this letter.
> 2053. Q. That's what I'm asking you to look for.
> A. Maybe I give it to back to CRA.
> 2054. Q. Yes, that's what I'm asking you to look for. You can tell me.
> A. How can I tell you?

[78] YC stated that he did not have the CRA deficiency letter. However, it is clear from the questions preceding question 2052 that counsel for the Respondent did have a copy and had presented that copy to YC.[68] The response states that YC is unable to locate the letter.

[79] I can identify no connection between the request for production of the CRA deficiency letter and any of the matters in issue in the appeals. Whether YC received, or acknowledged receipt of, a letter from the CRA issued in the course of the audit

[68] Questions 2030 to 2051 at pages 277 to 280 of the YC Transcript.

of YC's and the Corporation's 2013, 2014 and 2015 taxation years addresses events that occurred after those taxation years. I also cannot identify how production by YC of the letter could possibly assist the Respondent's case or hurt YC's or the Corporation's case.

[80] To the extent the questions and YC undertaking number 8 are for the purpose of impeaching the credibility of YC, who unequivocally states that he does not have a copy of the CRA letter, the questions and the resulting undertaking are contrary to paragraph 95(1)(b).

[81] YC did not admit to having possession or control of or power over the letter and therefore subsection 105(2) does not apply.

[82] Finally, it is contrary to the proportionality principle for examining counsel to request from YC a copy of a CRA letter that is already in examining counsel's possession particularly when YC says he does not have a copy.

[83] For these reasons, YC is not required to provide any further response to YC undertaking number 8.

YC Undertaking No. 11
To advise the reason for the difference in monthly costs for the auto loans for 2013, 2014, and 2015.
Response:
The Appellant had a 2007 PT cruiser which was sold in 2013 for a terminal loss. The Appellant purchase financed a 2013 Toyota Camry in October 2013. The Appellant purchase financed a 2014 Toyota Prius in December 2014. See vehicle purchase agreements at Tab #4. For that reason, there is a difference in monthly auto loan costs over the course of the 2013, 2014, and 2015 tax years.

[84] Counsel for the Respondent was entitled to request from YC information regarding the monthly costs of the vehicles and to the extent YC could not provide that information an undertaking to do so was appropriate.

[85] In my view, the response provided by YC adequately addresses YC undertaking number 11, which requests only "the reason" for the difference in monthly costs. Consequently, YC is not required to provide any further response to YC undertaking number 11.

YC Undertaking No. 12:
To identify all corporate expenses for the years in question and provide all invoices for all expenses claimed for the years in question for the claimed corporate expenses.
Response:
Refusal. This undertaking is overly broad and onerous. The respondent had an opportunity to question the Appellant on individual business expenses and expense categories at the discovery.

[86] The excerpt from the YC Transcript provided in the YC Affidavit does not include the questions preceding this undertaking. However, volumes 1 and 2 of the YC Transcript were entered into the motion record on the Appellants' cross-examination of the affiant on the affidavits and volume 2 indicates that this undertaking followed a series of questions regarding specific expenses,[69] the last few of which were as follows:

> 3665. Q. Okay. So just to be clear this handwritten note where it says, "Visa Chetnaben August to September 2014" you've only written down—
> A. Did the—
> 3666. Q. (Interposing) —the personal ones.

[69] Questions 3512 to 3675 at pages 463 to 487 of the YC Transcript.

A. No, not personal ones.
3667. Q. The corporate ones?
A. The corporation ones.
3668. Q. All right. So to be clear on August to September 2014 you looked at her Visa statements—
A. Yeah.
3669. Q. —and you said, "Okay. I've added all the amounts. There's four hundred and sixty-seven dollars and seventy-three cents and those are corporate.".
A. Corporate.
3670. Q. Okay.
A. And that. . . Yeah, it shows in my book.
3671. Q. Okay. And everything else would be personal.
A. Personal, yes.
3672. Q. Okay. And that's how you went through it.
A. Yes.
3673. Q. So, for example, you've got "Taste of India a hundred and twenty-two ninety-eight". That you determined was personal or corporate?
A. So same thing I'm telling you some— some guest come and went to the restaurant.
3674. Q. So that would have been corporate as well.
A. Yeah.
3675. Q. And the New Kirin is there as well. And what is the SS Cargo? What's that for, eleven dollars and twenty-eight cents?
A. I don't remember. I have to check and reply.[70]

[87] The last answer prompted the following statement of YC undertaking number 12 by counsel for the Respondent:

> Okay. I'd like you to look at all of your expenses that you're claiming to be corporate expenses and confirm for me that they are corporate expenses and provide the invoices that support that because it appears that we haven't got all the documents and your memory. . . You can't tell me without looking at the invoices now. So that'll be my undertaking, please.[71]

[88] Counsel for the Appellants initially objected to the undertaking on the basis that the documents provided would be in compliance with the Rules but after a brief discussion stated that he would take the matter "under advisement". With respect to the latter position, I adopt the comments of the Tax Court judge in *Burlington 2017*

[70] Questions 3665 to 3675 at pages 485 to 487 of the YC Transcript.
[71] Page 487 of the YC Transcript.

regarding the use and meaning of the latter phrase when raising an objection to a question.[72] I will return to this point later.

[89] YC stated that he did not recall detailed information regarding a specific expense identified in a question by counsel for the Respondent and that he would have to check and reply. The undertaking as stated by counsel for the Respondent is overly broad and bears no resemblance to the question asked of YC or to YC's statement that he would have to check and reply regarding the expenditure identified in the question. The undertaking should have been limited to the information requested in the question that YC was not able to provide in the examination.[73] YC is not required to provide any further response to YC undertaking number 12.

YC Undertaking No. 13:
To provide details on all Mr. Contractor's personal expenditures debited to his shareholder loan, not just totals but the breakdown and specific[s] for each month in 2013, 2014 and 2015.
Response:
None.

[90] YC undertaking number 13 is stated by counsel for the Respondent.[74] The undertaking follows a series of questions relating to the Corporation's shareholder loan accounts. The questions and answers immediately before the undertaking are as follows:

> 3842. Q. My question is not about what you do at the end of the year. Please listen to the question. My question was every month you're going through the credit card statements that come in?
> A. Right.
> 3843. Q. Okay. And there's an invoice that is missing, is it not there; correct?
> A. Right.
> 3844. Q. You have to say yes or no?
> A. Yes.
> 3845. Q. What do you do? How do you know right then and there that month, what to say, whether it's corporate or personal, and how do you handle your books?
> A. I'm guessing that this is the personal and this is the--
> 3846. Q. Okay.

[72] *Burlington 2017* at paragraph 80.
[73] *Burlington 2017* at paragraph 80.
[74] Question 3848 at page 527 of the YC Transcript.

A. Suppose sometimes $60 invoice, I'm putting $40 in my house, $20 in motel. This is not big. If there is a big, I never miss the-- never, never miss the-- the bill. Invoice.

3847. Q. All right.

A. But in small amount, I don't know. Small amount, maybe it's—it's okay, because I-- I know that I have to cover end of the year.[75]

[91] Counsel for the Respondent then stated YC undertaking number 13 and counsel for the Appellants responded that the undertaking would be taken "under advisement".

[92] The series of questions preceding YC undertaking 13 addresses the process adopted by YC to segregate business expenditures from personal expenditures when both appear on the same invoice, or as a single entry on a credit card statement. YC explained the process and acknowledged that with small amounts there may be errors that would be addressed at the end of the taxation year.

[93] Given the subject matter of the questions, the undertaking stated by counsel for the Respondent is overly broad and imprecise and does not address the information requested in those questions. Nor does it address any failure by YC to answer those questions.

[94] Counsel for the Respondent was free to explore with YC his analysis of specific expenditures and how they were addressed in the shareholder loan accounts of CC and YC. To the extent YC could not recall the details of a particular expenditure, an undertaking may have been provided by YC and his counsel. That is not what occurred. Consequently, YC is not required to respond to YC undertaking number 13.

YC Undertaking No. 24:
To provide the daily statistics reports for 2014 and 2015.
Response:
None.

[95] YC undertaking number 24 is stated by counsel for the Respondent.[76] The undertaking is set out in the following exchange:

[75] Questions 3842 to 3847 at pages 526 and 527 of the YC Transcript.
[76] Question 3938 at page 543 of the YC Transcript.

> MR. DALLOO: You had requested an undertaking earlier and then started asking some questions.
>
> MS. TUTIAH: Oh. Yes, okay.
>
> MR. DALLOO: I was just wondering if you were expanding on the scope of that undertaking--
>
> MS. TUTIAH: No. No, I'm not, so maybe if you can--
>
> MR. DALLOO: --or if you want to maybe clarify the undertaking that you've requested.
>
> MS. TUTIAH: Yes. My undertaking is for Mr. Contractor. He's given me the yearly statistics report for 2013, 2014 and 2015 and the daily statistics report for the year 2013. He mentioned he has the daily ones for 2014 and 2015, so my first undertaking is to provide me with that information for 2014 and 2015.

[96] The YC Affidavit does not include the pages of the YC Transcript in which YC "mentioned he has the daily ones for 2014 and 2015". Nor could I find any such statement in volumes 1 and 2 of the YC Transcript entered by counsel for the Appellants.[77] Schedule A to the Corporation's supplemental list of documents filed on November 16, 2020 identifies year end statistics reports for 2013 to 2015 but makes no mention of monthly statistics reports.

[97] In an oral examination for discovery, examining counsel may request production of a document if the conditions in subsection 105(2) are satisfied. In the absence of any evidence to the effect that a question was asked of YC about daily statistics reports for 2014 and 2015 and of an admission by YC that he had possession or control of or power over such reports, I have no basis on which to allow YC undertaking number 24. It is incumbent on counsel for the Respondent to point to the relevant portions of the transcript that support the position put forth in the motions. Accordingly, YC is not required to respond to the undertaking.

[77] Counsel for the Appellants stated during the hearing of the motion that he had only the first two of three volumes of YC's oral examination for discovery. The second volume ends at question 3766.

YC Undertaking No. 25:
To confirm and advise what corporate credit cards were in use in 2013, 2014 and 2015.
Response:
None.

[98] YC undertaking number 25 is stated by counsel for the Respondent following two questions asked of YC about the number of corporate credit cards in use.[78] In response to the second question, YC indicates that he believes two but does not recall and will have to check his records. Counsel for the Appellants states the following: "we'll take that under advisement".

[99] YC undertaking number 25 was a valid undertaking in the circumstances. However, for the reasons given below under the heading "E. Application of Section 8 to YC Undertakings 13 to 28", YC is not required to respond to YC undertaking number 25.

YC Undertaking No. 26:
To provide all dates that Mr. Contractor attended Super 8 conferences in 2013, 2014 and 2015 and the locations of same.
Response:
None.

[100] YC undertaking number 26 is stated by counsel for the Respondent immediately after a single question and answer:

> 4818. Q. And in Las Vegas, you're saying all of those expenses are corporate expenses for when you had to go to the Super 8 conference?
> A. Yeah, but. . .
> 4819. Q. Okay. I'd like you to provide an undertaking to provide me with all the dates that you attended Super 8 conferences in 2013, 2014 and 2015. Let me know the dates of when you attended and where the conferences would've been. For example, were they in Las Vegas.
> A. Okay.[79]

[101] Counsel for the Appellants then states the following: "We'll take that under advisement".

[78] Questions 4182 to 4185 at page 576 of the YC Transcript.
[79] Questions 4818 and 4819 at page 670 of the YC Transcript.

[102] YC undertaking number 26 does not address the question that was asked. In the excerpts of the YC Transcripts that I have been provided, counsel for the Respondent did not ask YC about the dates that he attended Super 8 conferences in 2013, 2014 and 2015. It would have been a simple matter to do so and if YC did not know the answer, to request an undertaking to provide that information. Since there was no such question, YC is not required to respond to YC undertaking number 26.

YC Undertaking No. 27:
To provide all information regarding the power recliner loveseat and confirm to where it was delivered and where it is now located.
Response:
None.

[103] YC undertaking number 27 is stated by counsel for the Respondent[80] immediately after the following questions and answers:

4826. Q. Okay. And there's a Leon's Furniture receipt for $678 for a power recliner loveseat. Do you recall that?
A. Yeah, before we put.
4827. Q. What's that for?
A. Before we put in the-- my lobby, but after that--
4828. Q. (Interposing) I'm sorry, you put the power recliner in the lobby?
A. Yeah, power reclining in the lobby, but we-- we decided to not after that. After some times then we remove.
4829. Q. So you bought it at Leon's and it was delivered to the hotel address?
A. Yes, we put the hotel, but not they delivered by--
4830. Q. (Interposing) No, no. No, no, just listen please. You bought it at Leon's I can see from the receipt. Would you agree?
A. Yeah{, it—it's on my name.
4831. Q. And it's for a power recliner loveseat; that's correct?
A. Yes.
4832. Q. And it's about $700?
A. Yeah, 600 something.
4833. Q. Yes. And it was delivered from Leon's to the hotel?
A. Yes.
4834. Q. And you put it in the hotel lobby?
A. Yeah, for a couple of times.
4835. Q. And that--
A. (Interposing) For a couple of month.
4836. Q. Okay. And then you decided it wasn't working?
A. No.

[80] Question 4842 at page 672–673 of the YC Transcript.

4837. Q. So then what happened to it?
A. Then we remove.
4838. Q. And where did it go?
A. I don't remember where it was.
4839. Q. I'm sorry?
A. I have to ask. I have to. . .
4840. Q. You have to ask who?
A. I have to ask my daughter or my son.
4841. Q. Why?
A. Yeah, because that time maybe I was in India and when I came from the India, I think so. I'm not remember. I will give you reply later on.

[104] Counsel for the Appellants stated the following: "We'll take that under advisement".

[105] The question that YC could not answer was where the power recliner went after it was removed from the hotel lobby. YC undertaking number 27 is not limited to this question but also requires YC to provide "all information regarding the power recliner", which is an overly broad and imprecise request, as well as where the power recliner was delivered, which was asked and answered by YC.

[106] Only the portion of the undertaking to provide where the power recliner is "now located" addresses the question that was asked and that YC could not answer and therefore is appropriate in the circumstances. However, for the reasons given below under the heading "E. Application of Section 8 to YC Undertakings 13 to 28", YC is not required to respond to any portion of YC undertaking number 27.

YC Undertaking No. 28:
To provide receipts for the booking.com reservation in Frankfurt and the receipts for the booking.com reservation in Amsterdam.
Response:
None.

[107] YC undertaking number 28 was provided as part of the following exchange at the very end of the oral examination for discovery of YC:

4903. Q. Okay. And when I looked at the receipts, and I looked at them quickly again on our break, for booking.com you said the head office for booking.com was in Amsterdam, and so if I saw a receipt for booking.com, it was for that? For their booking services; correct?
A. Yes.

4904. Q. Okay. But I also saw a receipt for booking.com in Frankfurt as well as booking.com in Amsterdam. Is it possible that they have two head offices or that it's for something else?
A. Can I get you the invoice which I paid?
4905. Q. I would like you to answer, --
A. Yes.
4906. Q. --please? I need to go to the airport actually right now, so--
A. Yeah, yeah, but--
4907. Q. --I tried my best.
A. Yeah, but this booking.com which I paid,--
4908. Q. Yes.
A. --I will get the receipt from the booking.com.
4909. Q. Okay, if you could.
A. Okay. Yeah.
MS. TUTIAH: I'll make an undertaking then for the receipts and then we'll be able to understand that.

[108] YC was asked whether it was possible that booking.com had two head offices. YC did not respond to the question but instead offered to provide a receipt that it appears from the above excerpt counsel for the Respondent already had in her possession. The undertaking then asks for "the receipts". The undertaking as subsequently restated requires YC to provide "receipts for the booking.com reservation in Frankfurt and the receipts for the booking.com reservation in Amsterdam". These are the receipts in the possession of counsel for the Respondent during the examination for discovery of YC that on the face of the YC Transcript gave rise to the unanswered question. The request is therefore contrary to the principle or proportionality because it is asking for redundant information.

[109] In addition, I cannot identify any connection between the question that remains unanswered—whether booking.com has one or two headquarters, or issues receipts from more than one location in Europe—and any matter in issue in the appeals of YC or the Corporation. I also cannot identify how that information could possibly assist the Respondent's case or hurt YC's or the Corporation's case

[110] For these reasons, YC is not required to respond to YC undertaking number 28.

E. Application of Section 8 to YC Undertakings 13 to 28

[111] During the hearing of the motions, I requested submissions from the parties regarding the application of section 8 to YC Undertakings 13 to 28. The reason for this request was that an argument of counsel for the Appellants appeared to raise this rule without explicitly referring to the rule.

[112] Section 8 states:

> **8** A motion to attack a proceeding or a step, document or direction in a proceeding for irregularity shall not be made,
>
> (a) after the expiry of a reasonable time after the moving party knows or ought reasonably to have known of the irregularity, or
>
> (b) if the moving party has taken any further step in the proceeding after obtaining knowledge of the irregularity,
>
> except with leave of the Court.

[113] Section 8 applies if there is an irregularity, which is defined in section 7 as "a failure to comply with" the Rules. I agree with the Tax Court judge in *Burlington 2017* that a failure to answer a proper question because of an objection to the question coupled with a failure to state briefly the reason(s) for the objection is tantamount to a refusal to answer the question:

> In my view, the practice of using the quasi-objection "under advisement" needs to stop. It is not a response contemplated by section 107 of the *Rules*. According to the *Rules*, a nominee either answer[s] the question, refuses to answer and explains the basis for such refusal, or takes an undertaking if he or she does not know the answer. The "under advisement" quasi-objection is often a tactic used to gain time to reflect on which basis the question will be refused, without the party having to explain, at the time of discovery, why such question was refused. It deprives the party asking the question or the opportunity to rephrase the question. **In my view, taking a question under advisement amounts to a "refusal"**.[81]
>
> [Emphasis added.]

[114] Similarly, a refusal to satisfy an undertaking given in response to a question is tantamount to a refusal to answer the question. Such a refusal is a failure to comply with the Rules and therefore is an irregularity for the purposes of section 8.

[115] Counsel for the Appellants responded to YC undertaking numbers 13 to 27 by taking the undertakings "under advisement", which as stated is tantamount to refusing to answer the question giving rise to the undertaking. In most cases, however, there was no question that raised the subject matter of the undertaking

[81] *Burlington 2017* at paragraph 80.

stated by counsel for the Respondent. This issue is addressed in the substantive analysis of the Disputed Undertakings above.

[116] Regardless, counsel of an examined party should always state briefly the reason for counsel's objection to a question or to an undertaking framed by opposing counsel.[82] In that way, there is an opportunity for any conflict to be resolved during the oral examination for discovery rather than dragging matters on unnecessarily.

[117] The crux of counsel for the Appellants' submission on section 8 is in the following paragraphs:

> The Respondent complains of an irregularity (failure to answer questions 13-28) for the first time in a motion made more than 9 months after undertakings were satisfied, and which questions were taken under advisement.
>
> The Respondent did not take issue with questions 13-28 during the discovery process. Rather, counsel for the Respondent specifically identified the questions it was taking issue with on more than one occasion—prior to the expiry of the period for answering undertakings. As such, the Appellants dedicated their resources and assembled the assistance of their counsel and accountants with respect to the questions/irregularities the Respondent considered outstanding within the close of the discovery period, namely the date to satisfy undertakings agreed to between the parties and ordered by the court.
>
> The first request for answers to questions 13-28 (the first complaint of irregularity) occurred after the original date the Crown was to put forth a motion (which date the Crown then extended). Thus, the Crown effectively sought to reopen the already closed discovery period during the motion period. This is not an efficient or orderly manner of proceeding. Rather, this process guarantees that questions that should be vetted at the discovery phase are put in issue in a motion for the first time, for a court to determine.
>
> Not only is the Crown's intended process not orderly, it is prejudicial to the Appellants who were already required to pay to assemble counsel and accountants to deal with the undertakings during the discovery period. Accepting the Crown's delay requires the Appellants to marshal resources for both a motion and a duplicative undertaking process which would involve the rehiring of accountants, in addition to lawyers, for the motion.

[82] Subsection 107(1). Normally an undertaking is given by an examinee who is unable to answer a question but undertakes to determine the answer. An examinee is not going to object to his or her own undertaking but could subsequently refuse to fulfil the undertaking.

> In *Dilalla v. Canada*, 2020 FCA 39, the Federal Court of Appeal addressed the purpose of Rule 8 as follows:
>
> > The fresh step rule is designed to ensure the orderly movement of litigation through to trial.
>
> In upholding the trial judge's application of the Rule the FCA noted the broader aggravating factors present, as well as the importance of prejudice to the party subject to the late request. There is no need to repeat the broader factors already raised at this motion. Also noteworthy is the Crown's delay in bringing the motion generally. Raising questions for the first time at the motions stage is inherently disorderly. It is particularly so when the motion is commenced long after the close of the discovery period. The Crown offered no explanation for the delay in raising the purported defects of questions 13-28, other than that it was an oversight. Such an oversight should not operate to prejudice the Appellants and violate the orderly trial process.

[118] In a brief rebuttal to the Respondent's submissions, counsel for the Appellants makes the additional point that YC undertaking numbers 13 to 28 were not undertakings at all because in using the phrase "under advisement" counsel for the Appellants was explicitly refusing to engage in the solemn promise of an undertaking. However, rather than stating that he would take the undertaking "under advisement", counsel should have stated briefly the reason for refusing to give the undertaking.

[119] The circumstances giving rise to the irregularities in issue are summarized by counsel for the Respondent in her reply to the submissions of counsel for the Appellants:

> . . . Justice Smith pronounced a Timetable Order on May 14, 2019 that provided for the completion of examination for discovery by November 9, 2019 and the satisfaction of undertakings by April 1, 2020. Despite follow up letters in advance of the deadline set out in the Timetable Order, counsel for the appellants did not meet this deadline and provided their response to some of the undertakings given at the examinations for discovery of Mr. and Mrs. Contractor on April 29, 2020. The respondent submits that, in addition to missing this deadline, the appellants failed to satisfy all of the appellants' undertakings.
>
> In any event, the respondent sought follow up and / or clarification on the answers provided on June 17, 2020, August 18, 2020, September 22, 2020 and October 27, 2020. Appellants' counsel did not respond until November 10, 2020, at which time they advised that they "wish to move past the undertakings stage and forward towards resolution."

> The Timeline Order provided that a status update was to be provided to the Court on June 1, 2020. However, due to the suspension period as a result of the COVID-19 pandemic, and the August 14, 2020 practice direction, this date was recalculated to December 3, 2020. The respondent advised the Court that the undertakings remained outstanding that their intention was to bring a motion to compel answers by January 15, 2021, later extended to February 15, 2021.
>
> While preparing the written representations for filing on February 15, 2021, it became apparent the undertakings from a third volume of the transcript for the examination for discovery of Mr. Contractor, namely undertaking nos. 13-28, had not been listed in counsel for the respondent's courtesy letters. Immediately after this discovery, the respondent informed appellants' counsel by way of letter, which included the list of undertakings from volume 3. No response to this letter was received.
>
> On February 12, 2021, the respondent filed motions to compel, written submissions and supporting affidavits affirmed by Pamela Fraser. A cross-examination of Ms. Fraser was scheduled for April 1, 2021. At this cross-examination, volumes 1 and 2 of the transcripts of Mr. Contractor's examination were put to Ms. Fraser and introduced into evidence. Despite being advised on January 15, 2021 that there was a third volume of the transcript of Mr. Contractor's examination, appellants' counsel expressed surprise when Ms. Fraser advised of same. The parties have had no further communication with respect to volume 3 since that time.

[120] The Respondent's description of the timeline reveals the core of the issue. Through inadvertence, counsel for the Respondent did not pursue a response to YC undertaking numbers 13 to 28 until a letter to opposing counsel dated January 15, 2021[83] and did not file a motion that addressed those undertakings until February 12, 2021.

[121] While counsel for the Respondent is under no obligation to pursue opposing counsel for a response to undertakings given by CC or YC in their oral examinations for discovery, counsel for the Respondent is required to pursue the remedy provided for in the Rules for failure to comply with requirements imposed by the Rules within a reasonable time following knowledge of the irregularity.[84]

[122] The irregularity identified by the motions is CC's and YC's failure to respond to undertakings purportedly resulting from questions asked during their oral examinations for discovery. I have already addressed the substance of this allegation for each of the Disputed Undertakings. However, even for those two instances in

[83] YC Affidavit, Exhibit L.
[84] Paragraph 8(a).

which I accept that YC was required to respond to all or a portion of the undertaking,[85] I am of the view that the Respondent did not seek a remedy for YC's failure to respond within a reasonable time following knowledge of the failure.

[123] Justice Smith's timetable order provided the parties with a total of 10½ months to complete all the steps in documentary and oral discovery (May 14, 2019 to April 30, 2020). In the absence of any communication between the parties regarding YC undertaking numbers 13 to 28, taking a further 9½ months to raise an irregularity in a motion is simply not acting within a reasonable time.

[124] The failure of YC to respond to YC undertaking numbers 13 to 28 was manifestly self-evident as of April 1, 2020—the date specified by Justice Smith for the conclusion of undertakings in his timetable order of May 14, 2019. At that time, no response to the undertakings had been provided by YC. After that date, counsel for the Respondent continued to pursue responses to the other undertakings but made no mention of YC undertaking numbers 13 to 28 and took no formal action to enforce these undertakings.

[125] I can identify no reliance by the Respondent on the actions of the Appellants vis-à-vis YC undertaking numbers 13 to 28 that might explain the delay of the Respondent in pursuing a remedy under the Rules for YC's purported failure to respond to these undertakings. Rather, by the Respondent's own admission, YC undertaking numbers 13 to 28 were simply overlooked by the Respondent. In the circumstances, I believe that it was reasonable for counsel for the Appellants to assume in November 2020 that any irregularity with respect to YC undertaking numbers 13 to 28 had been waived and was no longer in issue.

[126] In making these observations, I recognize that we are in difficult and unprecedented times because of the Covid-19 pandemic. However, the Respondent has not identified a connection between the delay in bringing a motion to address YC undertaking numbers 13 to 28 and the pandemic. Rather, the Respondent has admitted that the delay was wholly the result of an oversight by counsel for the Respondent. The Appellants should not be made to suffer the time and cost of addressing those undertakings more than nine months after the irregularity arose.

[85] YC undertaking numbers 25 and 27.

[127] I therefore find that section 8 applies to preclude any further action with respect to YC undertaking numbers 25 and 27. This finding also applies to YC undertaking numbers 13 to 24, 26 and 28, which I declined to enforce on the merits.

[128] For the above reasons, the motions are denied with costs to each of the Appellants in accordance with Tariff B of the Rules.

Signed at Ottawa, Canada, this 29th day of July 2021.

"J.R. Owen"

Owen J.

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COURT FILE NOs.:	2018-3082(IT)G 2018-3084(IT)G 2018-3086(IT)G
STYLES OF CAUSE:	CHETNABEN CONTRACTOR AND THE QUEEN YOGESHKUMAR CONTRACTOR AND THE QUEEN 1685326 ONTARIO LTD. AND THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	June 10, 2021
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DATE OF ORDER:	July 29, 2021

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