Docket: 2011-269(IT)G

BETWEEN:

BRIAN MORTON HARTMAN,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Motion heard on December 13, 2022 at Vancouver, British Columbia

Before: The Honourable Justice Henry A. Visser

Appearances:

Counsel for the Appellant:	Robert W. Grant K.C. Wendy Zhang
Counsel for the Respondent:	Ifeanyi Nwachukwu Shubir (Shane) Aikat Gabriel Caron

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ORDER

The Appellant's motion is allowed in part in accordance with the attached Reasons. The Respondent is ordered to list and disclose the following:

(a) a complete and unredacted copy of the Canada Revenue Agency ("CRA") memorandum by Roy Shultis dated September 9, 1997 a copy of which is included at tab 25 of the Sealed CRP Documents;

(b) to the extent they have not already been provided to the Appellant, a complete and unredacted copy of the CRA memorandum by Wayne Adams dated December 22, 1997 and the Department of Finance

memorandum by Daniel MacIntosh dated May 20, 1998, copies of which are included at tab 24 of the Sealed CRP Documents; and

(c) copies of all other documents, communications, notes, records, and materials in the Respondent's possession, control, or power which may be considered extrinsic evidence with institutional quality from January 1, 1996 that concern the purpose, intention, meaning, or interpretation of the term "Canadian Resource Property" in subsection 66(15) of the *Income Tax Act*, including in particular to the amendments thereto that are at issue in these appeals.

Costs of this motion shall follow the cause.

Signed at Ottawa, Canada, this 3rd day of May 2024.

"Henry A. Visser"

Visser J.

Citation: 2024 TCC 57
Date: 20240503
Docket: 2011-269(IT)G

BETWEEN:

BRIAN MORTON HARTMAN,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR ORDER

Visser J.

[1] The Appellant, Brian Morton Hartman, is one of over 700 taxpayers (the "Red Mile Investors") who invested in certain limited partnerships commonly referred to as the "Red Mile" partnerships in the years 2005-2009. Mr. Hartman was reassessed by the Minister of National Revenue (the "Minister") by way of Notice of Reassessment dated June 9, 2010 in respect of his 2006 taxation year, pursuant to which the Minister disallowed Mr. Hartman's claim to $18,810 in limited partnership losses and $37,345 in CDE deductions.[1] Mr. Hartman filed his Notice of Appeal with the Court on January 25, 2011.

[2] Mr. Hartman's appeal is a lead case for many of the other Red Mile Investors who have agreed to be bound by the outcome of his appeal. There are also a substantial number of Red Mile Investors who have not agreed to be bound by the lead case. Many of the related appeals are still at the CRA objections stage. While there is some ambiguity as to the total number of related objections and appeals, the

[1] See Respondent's Further Amended Reply at paragraph 22.

Respondent has previously estimated that Red Mile Investors have filed 1093 Notices of Objection, of which 879 signed test case agreements.[2]

[3] The Red Mile Investors were previously the subject of six applications by the Respondent under section 174 of the *Income Tax Act*[3] seeking to bind all of the various Red Mile Investors to the Court's determination of one or more common questions (the "Common Questions"). The Respondent subsequently withdrew the section 174 applications following the decision of the Federal Court of Appeal in *Canada (National Revenue) v. Boguski*, 2021 FCA 118.

[4] This motion, brought by the Appellant, relates to the pre-trial production by the Respondent of various documents (the "CRP Materials") which the Appellant argues are relevant to the determination of the Common Questions and the outcome of the Appellant's lead case appeal. In his Amended Notice of Motion, Mr. Hartman requests an order, under section 88 of the *Tax Court of Canada Rules (General Procedure)* (the "Rules"), that:[4]

> 1. the Respondent list and disclose all relevant documents in the Respondent's possession, control, or power relating to the purpose, intention, meaning, or interpretation of the definition of the term "Canadian Resource Property" in subsection 66(15) of the *Income Tax Act* (the "Act"), including:
>
>   (a) a complete and unredacted copy of the Canada Revenue Agency ("CRA") memorandum (the "CRA Memorandum") by Roy Shultis dated on or about September 9, 1997;
>
>   (b) copies of all documents, communications, notes, records, and materials in the Respondent's possession, control, or power that relate to the exchange between

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[2] See Respondent's correspondence to the Court dated July 6, 2017. As some taxpayers invested in Red Mile partnerships in multiple years, the total number of objections and potential appeals is greater than the total number of affected individual taxpayers. The Respondent also advised that some taxpayers signed test case agreements even though they did not have live objections.

[3] R.S.C., 1985, c. 1 (5th Supp.), as amended.

[4] See Respondent's Motion Record, at tab 8.

the CRA and the Department of Finance over the purpose, intention, meaning, or interpretation of subsection 66(15) of the *Act*; and

(c) copies of any other documents, notes, records, and materials in the Respondent's possession, control, or power from January 1, 1996 that concern the purpose, intention, meaning, or interpretation of the amendments to the definition of the term "Canadian Resource Property" in subsection 66(15) of the *Act*.

[5] For the reasons that follow, it is my view that the Appellant's motion should be allowed in part.

BACKGROUND FACTS

[6] The facts in this motion are generally not in dispute. The parties jointly submitted a letter dated September 13, 2022 in which they advised the following:[5]

> We wish to advise that the parties have agreed to the following facts for purposes of the appellant's document production motion only:
>
> 1. All documents prepared, considered or relied on (by those Canada Revenue Agency officials involved) as part of the audit and assessing process leading up to the issuance of the notice of reassessment dated June 9, 2010, currently under appeal in this proceeding (the "NOR"), have been disclosed and produced to the appellant;
>
> 2. The documents sought by the appellant in this motion were not prepared, considered or relied on (by those Canada Revenue Agency officials involved) as part of the audit and assessing process leading up to the issuance of the NOR;
>
> 3. The issue of whether the general anti-avoidance provision under section 245 of the *Income Tax Act* applies was not considered by the Minister of National Revenue as part of the assessing process relating to the NOR. Rather, the issue was added by the Attorney General of Canada (the "AGC") in their Further Amended Reply filed November 5, 2012 (the "Reply");

[5] See Respondent's Motion Record, at tab 3.

> 4. The issues of whether:
>
> a. The “annual basic royalty” and the net profit interest under the Royalty Agreements were computed by reference to the actual amount or value of production from a mineral resource within the meaning of “Canadian Resource Property” under paragraph 66(15)(e) of the *Income Tax Act*; and/or
>
> b. 90% or more of the "annual basic royalty” or the net profit interest was payable out of, or from the proceeds of, the production from the mineral resource, within the definition of “Canadian Resource Property” under paragraph 66(15)(e) of the *Income Tax Act*;
>
> were not considered by the Minister of National Revenue as part of the assessing process relating to the NOR. Rather, the issues were added by the AGC in their Reply.
>
> 5. For greater certainty, the appellant does not agree that all documents relevant to any matter in issue in this appeal which are within the respondent’s possession, control or power for the purposes of section 82 of the *Tax Court of Canada Rules (General Procedure)* have been disclosed and/or produced to the appellant. [italics added]

[7] The parties also submitted the following affidavits:

(a) an affidavit of Yina Qi, of the City of Vancouver, legal assistant, dated December 9, 2022;[6]

(b) an affidavit of Anni Lam, of the City of Vancouver, legal assistant, dated April 12, 2017;[7] and

(c) an affidavit of Swati Kinkar, of the City of Brampton, Appeals Officer, dated July 20, 2022.[8]

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[6] See Appellant’s Motion Record, at tab 5.

[7] See Respondent’s Motion Record, at tab 1.

[8] See Respondent’s Motion Record, at tab 2.

[8] In relation to this motion, the Respondent submitted various documents to be held by the Court under seal (the "Sealed CRP Documents"). In the accompanying cover letter dated July 21, 2022, the Respondent notes the following:[9]

> ... We understand that the enclosed documents comprise a substantial portion of the documents which are being sought by the appellant, although it is acknowledged that if the appellant is successful on his motion and a subsequent Order confirming same is issued, a further search may have to be carried out. We further note that the enclosed listing does not include any documents withheld on grounds of cabinet confidence, which the appellant is no longer seeking (a listing of such documents has been provided to appellant's counsel).
>
> The respondent takes the position that all of the enclosed documents are not relevant to the proceeding. However, where specific additional privileges are claimed, they have been indicated. Further, as indicated in the appellant's motion materials, much of the requested documentation was subject to a previous Access to Information Request. The document index provides some particularization of the relationship between the enclosed documents and that process.

[9] The index to the documents held by the Court under seal and subject to this motion is included in both the Respondent's[10] and Appellant's[11] Motion Records.

[10] The Appellant's Motion Record also included copies of The Amended Reference (the first section 174 application), the Further Amended Reply and the Amended Answer.[12]

[11] The Respondent's Motion Record also included copies of the Reply to the Appellant's Notice of Appeal, the Amended Reply to the Appellant's Notice of Appeal, and the Further Amended Reply to the Appellant's Notice of Appeal.[13]

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[9] See Appellant's Motion Record, at tab 1.

[10] See Respondent's Motion Record, at tab 4.

[11] See Appellant's Motion Record, at tab 1.

[12] See Appellant's Motion Record, at tabs 2-4.

[13] See Respondent's Motion Record, at tabs 5-7.

[12] The Appellant's Amended Notice of Motion also includes the following summary of his grounds for the motion:[14]

> 1. The Respondent filed an application under section 174 of the *Act* on or about January 27, 2016, (the "Application"), relating to Red Mile Resources Fund No. 3 Limited Partnership. The Respondent filed an Amended Reference under section 174 of the *Act* on March 10, 2017. Also on March 10, 2017, the Respondent filed applications substantially similar to the Application, relating to each of Red Mile Resources Fund No. 2 Limited Partnership, Red Mile Resources Fund No. 4 Limited Partnership, Red Mile Resources Fund No. 5 Limited Partnership, Red Mile Resources Fund No. 6 Limited Partnership, and Red Mile Resources Fund No. 7 Limited Partnership (collectively with the Application, as amended, the "Applications").
>
> 1.1 The Respondent subsequently withdrew the Applications under section 174, not because the issues were no longer key issues in the Appeals, but because the decision of *Canada (National Revenue) v Boguski*, 2021 FCA 118 (*Boguski*) rendered an application under section 174 procedurally unworkable.
>
> 1.2 The issues raised in the Applications further confirm that one of the key issues that remains to be decided is the meaning and application of subsection 66(15) of the *Act*.
>
> 2. In the Applications, the Respondent sought to have determined certain common questions. One of the common questions was whether or not 90% or more of the annual Basic Royalty in the Red Mile transactions was "payable out of, or from the proceeds of, the production from the mineral resource" for the purposes of paragraph (e) of the definition of "Canadian Resource Property" in subsection 66(15) of the *Act* (the "Question").
>
> 3. The phrase "if the payer of the rental or royalty has an interest in, or for civil law a right in, the mineral resource and 90% or more of the rental or royalty is payable out of, or from the proceeds of, the production from the mineral resource" in subsection 66(15) of the *Act* was added to the Act on or around December 20, 2002, when draft legislation was introduced to add the words to the definition (the "Amendments").

[14] See Respondent's Motion Record, at tab 8, at pages 3-5.

4. The Amendments ultimately became law on December 15, 2011, effective for rights acquired after December 20, 2002. The wording was added to bring the definition in line with the CRA's policy regarding net profits interest as a Canadian Resource Property as stated in *Income Tax Technical News* No. 10 dated (July 11, 1997).

5. There is no jurisprudence that has considered either the meaning of the word "payable" or the phrase "payable out of" in the context of paragraphs (d) and (e) of the definition "Canadian Resource Property".

6. Documents such as background papers, ministerial statements, and committee reports are admissible to assist the Court in determining the legislative purpose of an amendment and the proper interpretation of a provision in the *Act* (or any amendments).

7. The Documents sought in this application are required as an aid to the interpretation of paragraph (e) of the definition of "Canadian Resource Property" in subsection 66(15) of the *Act*, which is the central legal issue in the Appeal.

8. Counsel to the Applicant, Gall Legge Grant & Zwack LLP ("GLGZ"), received certain documents (the "Canadian Resource Property Documents") relevant to the Question through a request made to the Department of Finance pursuant to the *Access to Information Act*.

9. As is set out in the Affidavit of Anni Lam:

   (a) the Canadian Resource Property Documents include an extensively redacted copy of the CRA Memorandum prepared by and for the Respondent and provided by the Respondent to the Department of Finance;

   (b) the Canadian Resource Property Documents further include correspondence between the Respondent and the Department of Finance which indicates that there are more documents relevant to the Question which have not been listed and disclosed by the Respondent;

   (c) GLGZ provided the Canadian Resource Property Documents to the Respondent and requested disclosure of an unredacted copy of the CRA

Memorandum, as well as additional relevant documents from the Respondent, in a letter dated May 25, 2016;

(d) GLGZ followed up on their May 25 request in a letter dated July 19, 2016;

(e) The Respondent replied in a letter dated November 25, 2016, denying the Applicant's request; and

(f) To date, GLGZ has not received the requested documents from the Respondent.

10. The Canadian Resource Property Documents confirm that relevant documents in the Respondent's possession, control, or power have been omitted from the Respondent's affidavit of documents.

11. The Applicant seeks production of all relevant materials so that the further conduct of the appeal may proceed without delay and with all relevant evidence.

12. As the Applicant requested in their May 25, 2016 letter to the Respondent, the following materials are required:

a. an unredacted copy of the CRA Memorandum;

b. copies of all documentation, communications, notes, records, and materials in the Respondent's possession, control, or power in respect of the exchange between the CRA and the Department of Finance over subsection 66(15) of the *Act*;

c. copies of any other documentation, notes, records, and materials in the Respondent's possession, control, or power from the period of January 1, 1996 to December 31, 2012 in respect of the legislative amendments to the definition of "Canadian Resource Property" in subsection 66(15) of the Act; and

d. copies of any other documentation, notes, records, and materials in the Respondent's possession, control, or power in respect of the determination of the common questions in the Respondent's Applications.

13. The Applicant submits that any relevant documents and materials in the possession, control, or power of the Respondent include all such documents and materials in the possession of the Minister of Finance, including materials pertinent to the legislative history of subsection 66(15) of the *Act*, such as background papers, ministerial statements, and committee reports.

14. It is respectfully submitted that it is in the interest of the parties, the Court, and the administration of justice to issue the requested order for the disclosure and production of all relevant documents (in unredacted form) in the Respondent's possession, control, or power.

LAW AND ANALYSIS

[13] The issue in this motion is whether the CRP Materials, including the Sealed CRP Documents, should be disclosed pursuant to Rules 82 and 88, which provide that:

> 82. (1) The parties may agree or, in the absence of agreement, either party may apply to the Court for an order directing that each party shall file and serve on each other party **a list of all the documents** that are or have been in that party's possession, control or power **relevant to any matter in question** between or among them in the appeal.
> …
>
> 88. Where the Court is satisfied by any evidence that a **relevant document in a party's possession, control or power** may have been omitted from the party's affidavit of documents, or that a claim of privilege may have been improperly made, the Court may,
>
> (a) order cross-examination on the affidavit of documents,
>
> (b) order service of a further and better affidavit of documents,
>
> (c) order the disclosure or production for inspection of the document or a part of the document, if it is not privileged, and

> (d) inspect the document for the purpose of determining its relevance or the validity of a claim of privilege. [emphasis added]

[14] The Appellant argues that the key issue in these appeals is the statutory interpretation of subsection 66(15) of the *Act*, including in particular the statutory amendments thereto which became law on December 15, 2011 with retroactive effect for rights acquired after December 20, 2002.

[15] The Appellant submits that the CRP Materials, including the Sealed CRP Documents, are extrinsic evidence that are relevant for the purpose of undertaking a textual, contextual and purposive analysis of subsection 66(15) of the *Act*. The Appellant further submits that relevance is an inherently broad concept and that relevant documents include anything that "may directly or indirectly aid the party seeking the discovery to maintain its case or combat that of its adversary".[15]

[16] The Respondent submits that the CRP Materials, including the Sealed CRP Documents, are not relevant because they were not prepared, considered, relied upon or used in any manner by the Minister in the course of the Minister's audit of the Appellant. The Respondent further submits that they do not clarify the Crown's legal position and the Respondent has not disclosed or otherwise conceded them to be relevant. The Respondent further submits that the CRP Materials, including the Sealed CRP Documents, are not permissible extrinsic aids because they were not before Parliament when considering and enacting the relevant legislation. The Respondent relies on cases such as *CHR Investment Corporation v. The Queen*, 2021 FCA 68 in support of its position.

[17] I generally agree with the Appellant's submissions in this motion. In my view, the outcome of any motion dealing with the production of documents at discovery always turns on relevance in the context of the facts in the particular case. The issues in this motion are distinguishable from the issues in cases such as *Canada v. CHR Investment Corporation*, 2021 FCA 68. For example, the key issue in this motion is not in relation to the Minister's position on the application of GAAR, but rather the production of extrinsic aids in relation to the statutory interpretation of subsection

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[15] See Applicant's written Reply Representations Regarding Notice of Motion for Document Production, at paragraphs 10 and 14, and *Canadian Imperial Bank of Commerce v. The Queen*, 2015 TCC 280, para. 18 and *Paletta v. The Queen*, 2017 TCC 233, para. 12.

66(15) of the *Act*. In addition, the parties have both agreed that none of the documents sought were considered by the Minister during the audit, as the key issues in relation to subsection 66(15) of the *Act* were only raised by the AGC for the first time in the Respondent's Further Amended Reply filed on November 5, 2012.

[18] In my view, the principles set out by the Federal Court of Appeal in *Ahamed v. Canada*, 2020 FCA 213 apply in the circumstances of this case. In that case, Locke J.A. noted the following at paragraphs 19 to 32:

> 19 On the overarching issue of relevance, the Tax Court correctly noted various general principles applicable to discovery, including (i) that it should be broadly and liberally construed, (ii) that the threshold is lower in discovery than at trial, (iii) that earlier drafts of a final position paper do not have to be disclosed, and (iv) that even where relevance is established, the Court has a residual discretion to refuse document production.
>
> 20 The appellant argues that the redacted internal Department of Finance documents are relevant to statutory interpretation, and should be produced in unredacted form. The appellant argues that documents prepared by government employees participating in the legislative process are admissible as permissible extrinsic aids. The appellant argues that relevance is not limited to documents that are published or otherwise available to the public.
>
> 21 The Tax Court based its finding that the internal documents in question are of marginal relevance on *Superior Plus Corp. v. R.*, 2016 TCC 217 (T.C.C. [General Procedure]) at para. 34, which provides such documents are not relevant to ascertaining the Minister's mental process in auditing and assessing a taxpayer, unless they have been communicated to the Minister. The respondent argues that the Tax Court was correct to apply the same reasoning to statutory interpretation: internal finance documents that have not been communicated to the Minister are not relevant to ascertaining Parliamentary intent.
>
> 22 It is tempting to follow this reasoning and to agree with the respondent's position that documents must be publicly available in order to be relevant to statutory interpretation. Otherwise, it would be possible for members of the public to be left without access to certain information that is necessary to fully understand a particular law with which they are required to comply. Such a situation would be problematic for the reasons mentioned in *Pepper (Inspector of Taxes) v. Hart*, [1992] 3 W.L.R. 1032 (U.K. H.L.) at 1042:
>
> > A statute is, after all, the formal and complete intimation to the citizen of a particular rule of the law which he is enjoined, sometimes under penalty, to obey

> and by which he is both expected and entitled to regulate his conduct. We must, therefore, I believe, be very cautious in opening the door to the reception of material not readily or ordinarily accessible to the citizen whose rights and duties are to be affected by the words in which the legislature has elected to express its will.

23 Notwithstanding this concern, the appellant argues that the scope of documents that could be relevant to statutory interpretation is viewed more broadly. For example, the appellant cites *Delisle c. Canada (Sous-procureur général)*, [1999] 2 S.C.R. 989 (S.C.C.) (*Delisle*), which concerned an argument that a provision of a federal statute violated the *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11. As part of his analysis on behalf of the majority of the Court in *Delisle*, Bastarache J. considered the purpose of the statutory provision in question in the course of interpreting it. At para. 17, he stated as follows:

> [...] Although extrinsic sources may be used to interpret legislation and to determine its true meaning, when the meaning of the challenged provision is clear, they are of little assistance in determining the purpose of a statute in order to evaluate whether it is consistent with the *Charter*. Generally, the Court must not strike down an enactment which does not infringe the *Charter* in its meaning, form or effects, which would force Parliament to re-enact the same text, but with an extrinsic demonstration of a valid purpose. That would be an absurd scenario because it would ascribe a direct statutory effect to simple statements, internal reports and other external sources which, while they are useful when a judge must determine the meaning of an obscure provision, are not sufficient to strike down a statutory enactment which is otherwise consistent with the *Charter*. Legislative intent must have an institutional quality, as it is impossible to know what each member of Parliament was thinking. It must reflect what was known to the members at the time of the vote. It must also have regard to the fact that the members were called upon to vote on a specific wording, for which an institutional explanation was provided. The wording and justification thereof are important precisely because members have a duty to understand the meaning of the statute on which they are voting. This is more important than speculation on the subjective intention of those who proposed the enactment. (emphasis added)

24 This passage recognizes the potential relevance of internal documents to the interpretation of "obscure" statutory provisions. It is not clear what constitutes "obscure", and I do not reach a conclusion on this point. I note that this passage does not state clearly whether internal, non-public documents can be relevant to statutory interpretation. In fact, the focus on "what was known to the members [of Parliament] at the time of the vote," suggests that non-public documents are *not* relevant.

25 Ruth Sullivan, in *Sullivan on the Construction of Statutes*, 6th ed., (Toronto: LexisNexis, 2014) at §23.11 casts a broad net for the types of documents that can be relevant to statutory interpretation:

> Like evidence of external context, opinions about the purpose and meaning of legislation can be found anywhere: before enactment, in the materials generated by government employees participating in the legislative process (instructing officers, drafters, legal opinion givers) and, after enactment, in interpretive guidelines issued by administrative agencies, in judicial or administrative case law and in the daily decisions of government employees charged with administering the legislation. Until recently, the primary source of opinion about the meaning of legislation was judicial case law. Courts were unwilling to look at the practice of bureaucrats or the opinions of administrative tribunals and, except for standard textbooks, scholarly opinion was largely ignored. The current tendency, however, is to look at any material that meets the threshold test of relevance and reliability.

26 Again, this passage does not state clearly that non-public documents can be relevant to statutory interpretation. However, it does appear that the legislative process (during which relevant documents could be created) begins early. In *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765 (S.C.C.) (*Mikisew Cree First Nation*) at para. 120, Brown J. stated that "the legislative process begins with a bill's formative stages, even where the bill is developed by ministers of the Crown." Brown J went on in paragraph 121 to state

> Public servants making policy recommendations prior to the formulation and introduction of a bill are not "executing" existing legislative policy or direction. Their actions, rather, are directed to informing potential changes to legislative policy and are squarely legislative in nature.

27 Care must be taken not to read *Mikisew Cree First Nation* too broadly. That case concerned whether the law-making process (described at paragraph 116 thereof as the steps from initial policy development to royal assent) was subject to the Crown's duty to consult indigenous peoples about steps that could adversely affect their rights. *Mikisew Cree First Nation* was not concerned with statutory interpretation.

28 Sullivan, relying on the Newfoundland Court of Appeal decision in *Reference re Upper Churchill Water Rights Reversion Act, 1980* (1981), 134 D.L.R. (3d) 288, 36 Nfld. & P.E.I.R. 273 (Nfld. C.A.), rev'd [1984] 1 S.C.R. 297 (S.C.C.) (*Upper Churchill*), goes on at §23.13 to state:

> When the purpose of a provision is discussed or its meaning explained during the enactment process, and the legislation is then passed on that understanding,

> the explanation or discussion offers persuasive (if not conclusive) evidence of the legislature's intent.

29 However, the Supreme Court of Canada in *Upper Churchill* offered a more nuanced approach to the relevance of extrinsic evidence. After discussing the relaxation of the former general exclusionary rule against admissibility of extrinsic evidence, the Court stated at p. 318:

> It will therefore be open to the Court in a proper case to receive and consider extrinsic evidence on the operation and effect of the legislation. In view of the positions of the parties, particularly the appellants' contention that the *Reversion Act* has extra-provincial effect, this is, in my opinion, such a case.
>
> I agree with the Court of Appeal in the present case that extrinsic evidence is admissible to show the background against which the legislation was enacted. I also agree that such evidence is not receivable as an aid to construction of the statute. However, I am also of the view that in constitutional cases, particularly where there are allegations of colourability, extrinsic evidence may be considered to ascertain not only the operation and effect of the impugned legislation but its true object and purpose as well. This was also the view of Dickson J. in the *Reference re Residential Tenancies Act*, 1979, [[1981] 1 S.C.R. 714], at p. 721, where he said:
>
> > In my view a court may, in a proper case, require to be informed as to what the effect of the legislation will be. The object or purpose of the Act in question may also call for consideration though, generally speaking, speeches made in the Legislature at the time of enactment of the measure are inadmissible as having little evidential weight.
>
> This view is subject, of course, to the limitation suggested by Dickson J., at p. 723 of the same case, that only evidence which is not inherently unreliable or offending against public policy should be admissible...

30 Not only does the Supreme Court leave room for cases where extrinsic evidence will not be relevant, but it also limits the issues to which such evidence might be relevant. Moreover, it should be noted that *Upper Churchill* was in a constitutional law context, in which the Supreme Court has traditionally been more open to extrinsic evidence (see p. 317).

31 In the end, though there are good reasons to be reluctant to consider non-public documents in the exercise of statutory interpretation, it is difficult to state unequivocally that such documents could never be relevant. The better question is whether the documents in question in the present appeal have an institutional quality

> such that they could represent the government's position concerning the legislation at issue. If not, such documents are not relevant.

[19] As noted in *Ahamed*, non-public documents may be relevant as extrinsic evidence in certain cases for statutory interpretation, provided they have sufficient institutional quality so that they are not inherently unreliable. It is also my view that the categories of extrinsic evidence are not closed, and must be considered in the context of each case.

[20] In this case, the amendments at issue in paragraph (e) of the definition of "Canadian resource property" in subsection 66(15) of the *Act* were first announced in 2002 and not enacted until 2011 with retroactive effect. It is apparent to the Court that the legislative process relating to the amendments at issue in these appeals started well before 2002. This is a relatively obscure definition in a complex statute. In my view, considering the long development time for the proposed amendments and the complexity and retroactive effect of the relevant provisions, extrinsic evidence may be relevant to the Court in undertaking a textual, contextual and purposive analysis of the legislation in all of the circumstances of this case. It may also assist the Appellant in fully understanding the Respondent's position in these appeals and inform the Respondent of the reasonableness of its position.

[21] I note that *Tech Interp (external) 2003-004860A — Canadian resource property — rentals and royalties*, dated December 2, 2003, is an example of extrinsic evidence with institutional quality that relates directly to the issues under appeal herein. As it is a public document, disclosure of that document is not an issue in this motion.

[22] Applying these principles to this case, it is my view that none of the documents included in tabs 1-23 of the Sealed CRP Documents should be disclosed. In this respect, it is my view that those documents have little to no relevance to the issues under appeal in this case. It is also my view that they have little to no institutional quality.

[23] It is my view, however, that the documents set out in tabs 24 and 25 of the Sealed CRP Documents should be disclosed. In this respect, it is my view that those documents have sufficient relevance to the issues under appeal in this case and have sufficient institutional quality that they should be disclosed in all of the circumstances of these appeals.

[24] In its letter to the Court dated July 21, 2022 in relation to this motion, the Respondent advised the Court that "… it is acknowledged that if the appellant is successful on his motion and a subsequent Order confirming same is issued, a further search may have to be carried out." As such, the Respondent has acknowledged that it may have other relevant documents which should be produced in the context of these appeals.

CONCLUSION

[25] Based on all of the foregoing, Mr. Hartman's motion is allowed in part.

[26] The Respondent is ordered to list and disclose the following:

(a) a complete and unredacted copy of the Canada Revenue Agency ("CRA") memorandum by Roy Shultis dated September 9, 1997 a copy of which is included at tab 25 of the Sealed CRP Documents;

(b) to the extent they have not already been provided to the Appellant, a complete and unredacted copy of the CRA memorandum by Wayne Adams dated December 22, 1997 and the Department of Finance memorandum by Daniel MacIntosh dated May 20, 1998, copies of which are included at tab 24 of the Sealed CRP Documents; and

(c) copies of all other documents, communications, notes, records, and materials in the Respondent's possession, control, or power which may be considered extrinsic evidence with institutional quality from January 1, 1996 that concern the purpose, intention, meaning, or interpretation of the term "Canadian Resource Property" in subsection 66(15) of the *Act*, including in particular to the amendments thereto that are at issue in these appeals.

COSTS

[27] The costs of this motion shall follow the cause.

Signed at Ottawa, Canada, this 3rd day of May 2024.

"Henry A. Visser"

Visser J.

CITATION:	2024 TCC 57
COURT FILE NO.:	2011-269(IT)G
STYLE OF CAUSE:	BRIAN MORTON HARTMAN v. HIS MAJESTY THE KING
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	December 13, 2022
REASONS FOR ORDER BY:	The Honourable Justice Henry A. Visser
DATE OF ORDER:	May 3, 2024

APPEARANCES:

Counsel for the Appellant:	Robert W. Grant, K.C. Wendy Zhang
Counsel for the Respondent:	Ifeanyi Nwachukwu Shubir (Shane) Aikat Gabriel Caron

COUNSEL OF RECORD:

For the Appellant:

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