

BETWEEN:

NOVA SCOTIA POWER INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Respondent's Motion heard January 7 and 8, 2025 at Toronto, Ontario

Before: The Honourable Justice Bruce Russell

Appearances:

Counsel for the Appellant: Carrie D'Elia
Carly Fidler
Leandra Gupta

Counsel for the Respondent: Elizabeth Chasson
Brent Cuddy
Ian Pillai

ORDER

IT IS ORDERED THAT:

1. The Respondent's motion is allowed in part.
2. Pursuant to *Tax Court of Canada (General Procedure)* Rule 93(2), Mr. Darryl Jack of Emera Inc. is named as replacement person to be examined for discovery on behalf of the Appellant.
3. Mr. Jack is to answer for the Appellant the following discovery examination questions plus any proper follow-up questions arising therefrom, as reflected

in the Court's "decision" for each such question, expressed in the accompanying Reasons for Order.

4. The discovery examination questions to be answered are: Q831, Q841, Q1036-37, Q1128-1131, Q1841, Q1844 and Q2013-2014.
5. This further discovery examination is to be carried out within 60 days of the date of this Order, subject to the parties' agreement otherwise.
6. Costs to be in the cause.

Signed this 11th day of June 2026.

"B. Russell"

Russell J.

BETWEEN:

NOVA SCOTIA POWER INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR ORDER – RESPONDENT’S MOTION

Russell J.

I. Introduction:

[1] The underlying appeal concerns whether certain expenses incurred by the appellant Nova Scotia Power Inc. (NSPI) should be classified as current expenses, as now claimed by NSPI, or remain as capital expenditures as NSPI originally reported and as maintained by the respondent Crown (and Minister of National Revenue (Minister)).

[2] The appeal relates to the 2006 - 2010 taxation years of NSPI. For 2006 NSPI has appealed its own objection; the Minister thus for that taxation year has no assumptions of fact.

[3] NSPI initially filed its returns treating the disputed expenses as capital expenditures and so claimed capital cost allowance per sections 9 and 13 and paragraphs 18(1)(b) and 20(1)(a) of the federal *Income Tax Act* (Act).

[4] In 2012, NSPI amended its T2 returns, waiving the normal reassessment periods, and reclassified the denied expenses as current expenses deductible on income account under section 9 of the Act. The reclassification was initiated by Mr. Darryl Jack who was involved in NSPI's amended tax filings and had authored the NSPI request to re-characterize of the herein disputed expenditures.

[5] This motion of the respondent Crown seeks that NSPI be ordered to have the aforementioned Mr. Jack as its replacement discovery examination nominee, replacing its current nominee, Mr. Paul Dandurand.

[6] The respondent Crown asserts that Mr. Dandurand, speaking on behalf of NSPI, was unable to answer prior discovery questions respecting - (a) the criteria used when reviewing NSPI expenditures which culminated in NSPI's amendment request; (b) NSPI's method to determine which expenses would be included in paragraph 38 of the Amended Notice of Appeal and which expenditures were included in paragraph 39 thereof; (c) what prompted the review or the request to re-characterize as current expenses some but not all of the expenditures characterized as capital expenditures on initial T2 filings; (d) NSPI's treatment of expenditures on filing its T2 return; and (e) whether the T2 returns included in NSPI's list of documents were the T2 returns filed by NSPI.

[7] NSPI submits that there is no basis for the respondent Crown's request for a new NSPI nominee, as the Crown has already examined NSPI via Mr. Dandurand as NSPI's nominee.

[8] Also, the respondent Crown seeks responses to 14 discovery questions that it considers that Mr. Dandurand for NSPI was unable to and did not fully answer.

[9] NSPI's Amended Notice of Appeal¹ provides that there is \$181,863,631 of NSPI expenses in issue, in respect of NSPI's sought being reclassified from reported as capital account expenses, to being reported as wholly deductible current expenses.

II. Facts:

[10] Mr. Jack was an NSPI employee from 2006 to 2018, and subsequently moved to employment by NSPI's parent corporation, Emera Inc., as Senior Director, Corporate Tax.

[11] Mr. Dandurand, a mechanical engineer, commenced NSPI employment in 2009. He is NSPI's senior manager of asset management operations and capital planning and is a member of NSPI's asset management team.

¹ paras. 4 and 38

[12] During NSPI's discovery examination, Mr. Dandurand said he had prepared for the examination by viewing existing corporate records and by discussions with colleagues including Mr. Jack, to help inform him. But he had not been involved in preparation of NSPI tax filings nor in reclassification of NSPI expenses.

III. Respondent Crown's Motion:

[13] The first of the two parts of this motion is the order sought pursuant to Rules 107 and 110, directing the appellant NSPI to re-attend the Crown's discovery examination of it, for "responsive answers" to 14 identified questions. These questions (from the Dandurand transcript) are those numbered 831, 841, 913, 1024, 1036-1037, 1128, 1129, 1130, 1131, 1841, 1844, 1849, 2013 and 2014.

[14] These questions now will be re-addressed, including noting NSPI's responses, and in each instance followed by my decision re same.

[15] Question 831:

Q831: Mr. Dandurand, as your counsel has directed me to ask you specific factual questions, please explain and provide all details with respect to the discussion with Mr. Jack of what you have just stated, the characterization of expenses. I'd like the discussion about that in particular.

Ms. Fidler (NSPI counsel): Counsel, that is the same line or type of questioning. You're asking the witness to tell you what he spoke about with an individual in preparation for discoveries, as opposed to asking him factual questions about the issues in dispute.

[16] Decision Q831. As can be seen, this question sought that Mr. Dandurand explain and provide "all details" respecting his discussion with Mr. Jack about characterization of the expenses.

[17] Mr. Dandurand had limited knowledge as to details of the subject re-characterization of expenses. On the other hand, Mr. Jack was quite knowledgeable of this, having initiated and led this expenses reclassification program for NSPI.

[18] The focus was on what details Mr. Dandurand could provide regarding characterization of expenses, upon Mr. Jack having informed him on this topic. If this motion results in Mr. Jack becoming NSPI's nominee then the focus would be

directly on details that he can personally provide, and he would likewise be expectantly knowledgeable in responding to proper follow-up questions.

[19] In conclusion my decision is: that NSPI is to answer Question 831, and as well any proper follow-up questions.

[20] Question 841:

Q841: Okay. I don't agree with you but your witness just said, then makes a determination about whether the expense is -- whether the amount is a capital expense -- or a current expense for tax purposes. Can I please have all the -- can you please tell me the analysis that Nova Scotia Power undertook to make the determination that an expense is a capital -- on capital account or a current expense?

Ms. Fidler: I'm not sure if the process by which Nova Scotia Power makes a determination as to the characteristic of an expense is relevant. We know what the -- what the treatment was that Nova Scotia Power requested and that's not at issue. What is at issue is whether that's correct or not.

[21] Decision Q841: I concur with the respondent that Question 841 should be answered. The question properly seeks disclosure of the factual analysis undertaken by appellant NSPI to determine whether any particular expense reported as a capital expense should instead be classified as being a current expense. This line of inquiry is squarely within the scope of discovery under Rule 95(1).

[22] As affirmed in *Morguard Corp.*² and *Samaroo*³, a discovery nominee must be informed of all relevant matters in issue and be able to explain the factual basis for the particular corporation's position. In this matter, the nature and classification of NSPI's disputed expenses are central to the appeal. The manner in which NSPI conducted its internal classification analysis is a factual aspect of central relevance, all the more so as it is understood that NSPI initiated reclassification of expenses based on criteria applied within its own internal review process.

[23] The objection raised by NSPI's counsel - that NSPI's internal classification process is irrelevant - is not accepted. While ultimately the legal correctness of NSPI's treatment is for the Court to decide, the discovery examination process

² *Morguard Corp. v. R.*, 2011 TCC 116, para. 48

³ *Samaroo v. Canada Revenue Agency*, 2016 BCSC 531

extends to any facts that might reasonably assist in assessing the position advanced at trial. Understanding NSPI's process - including any parameters, project selection rationale or decision-making logic - would illuminate whether the treatment of particular expenses was reasonable, or in any event consistent with taxpayer obligations under section 9 and paragraph 18(1)(b) of the Act.

[24] In conclusion, my decision is: that Q841 be answered by NSPI, together with any proper follow-up questions.

[25] Question 913:

Q913. Can I get an undertaking to advise whether the document that appears at NSP0006990 is a copy of the T2 return filed by Nova Scotia Power with respect to its taxation year ended December 31, 2010?

A. Yes.

[26] Appellant's Answer (September 25, 2023): The appellant confirms that NSP0006990 is a copy of the T2 return filed by Nova Scotia Power with respect to its taxation year ended December 31 2010.

[27] Decision Q913: I find that the appellant NSPI provided a clear and complete answer to this question. This answer is not ambiguous.

[28] In conclusion, my decision is: that Q913 need not be again or further answered.

[29] Question 1024:

Q1024. Sure. Can you please produce for me any and all working papers or notes, or scribbles, or things reduced to writing, or electronic records, relating to that review of the specific projects which ultimately culminated in the adjustment request?

Ms. Fidler: Again, I'm not going to repeat what I just said, but I'll refer to what I said earlier about relevance. And unless you want to tell me why it's relevant, the process that the company went through, I'm happy to consider that and change my position, but as of now we take the position that that is not relevant. I'm still allowing the witness to answer any questions that you're asking him, to the extent he's able to. So he's answering under objection on the basis of relevance. So I'm

not refusing a request that you've made. I'm allowing the witness to answer under objection.

[30] Appellant's Answer (December 2, 2022): In the response to the undertaking provided at questions 1128-1129, Mr. Jack advises of the process and analysis that was conducted, culminating in the amendment requests. A request for the totality of all information (and any recording in any form of that information, including "scribblings") detailing every step in the analysis, all of the parameters employed in the review of each project and criteria considered in the process that culminated in the amendment requests is not relevant and furthermore, is overbroad and burdensome. In addition, what was in the mind of Mr. Jack, at every step in the process, including the initiation of the review through to the filing of amendment requests is not relevant to the determination of this appeal. The question in this appeal is whether or not Nova Scotia Power's tax treatment of the expenses in dispute is correct.

[31] Decision Q1024: Q1024 seeks production of "any and all working papers or notes, or scribblings, or things reduced to writing, or electronic records" relating to NSPI's internal review of specific projects that culminated in its amendment request. NSPI objected to the request as overbroad and irrelevant and pointed to its answers at Questions 1128–1129, which described the process followed.

[32] The appellant NSPI has disclosed the parameters, process and categories reviewed during its reclassification analysis. That disclosure includes summaries of Mr. Jack's process, references to the CRA letters and amendment requests, and the involvement of Ernst & Young. While the Minister is entitled to know the factual basis of NSPI's reclassification decisions, it is not entitled to the exhaustive internal paper trail described in this question - all the more so when framed to include materials as undefined and excessive as "scribblings".

[33] The proportionality principles emphasize that discovery must be focused and manageable. In this instance, the respondent Crown's request is overly expansive and not tailored to what is necessary for resolving the core issue - whether the expenses in dispute were properly classified.

[34] In conclusion my decision is: that no further response is required in respect of Q1024.

[35] Question 1036-37:

Q1036. Okay. Can you ask Mr. Jack to advise you what were the criteria that he applied in reviewing the work which culminated in the adjustment request? I'm assuming that Mr. Jack was the lead person carrying out this task?

A. Yes, that's my understanding, is that Mr. Jack was the lead that was carrying out this task.

Q1037. Counsel, will you give me that undertaking?

Ms. Fidler: I will take that request under advisement on the same basis that I did regarding the working paper request.

[36] Appellant's Answer (December 2, 2022): See the answers to the undertaking given at Q1128-1129.

[37] Decision Q1036-37: the appellant's reliance on the answers provided at Undertakings 1128–1129 does not satisfy its obligation under Rule 95(1). Those answers were overly general and lacked the factual specificity necessary to identify the actual criteria Mr. Jack applied in reviewing expenses for inclusion in the amendment request.

[38] As established in *Morguard Corp.*, 2011 TCC 116 and *Samaroo*, 2018 BCSC 324; rev'd 2019 BCA 113, discovery extends to the factual foundation of a party's position, including clarification of the process and criteria used to formulate claims or adjustments.

[39] NSPI has not provided sufficient detail to permit the respondent to understand how the reclassification analysis was carried out. That information is directly relevant to the issues raised in this appeal.

[40] In conclusion my decision is: that the appellant NSPI must provide a comprehensive response to Q1036-37 that *inter alia* identifies the criteria applied by Mr. Jack in carrying out the review that led to the amendment request.

[41] Question 1128-1131:

Q1128. Can you please ask Mr. Jack, with respect to all of the expenses in paragraph 38, whether he reviewed all expenses of Nova Scotia Power?

Ms. Fidler: We'll undertake to ask Mr. Jack to advise as to the categories of expenses he reviewed. The reason I'm not saying expenses is -- I don't know if he would be able to respond to that question.

Q.1129. What are the categories of expenses that you just referred to?

Ms. Fidler: Maybe I should use the word you used earlier, which is parameters. I will undertake to ask Mr. Jack what were the parameters of the review that he undertook for the expenses in the years that are at issue in this appeal.

Q1130. Thank you, that's not what I'm looking for. I would like you to ask Mr. Jack the parameters he used to consider, but there's got to be some kind of parameter which he applied, because we've already heard that not all the expenses are in paragraph 38. And there are other expenses referenced in paragraph 39 which are not in dispute. I want to know what Mr. Jack considered, what he looked at and what are the parameters that he applied? Because the nominee that's supposed to know everything about Nova Scotia Power doesn't seem to know even if these -- how these expenses that they were part of the -- these were -- if the amounts referred to in paragraph 38 and 39 were or were not included in the capital projects for the ACE plan or the U&U, or really anything. So that's what I'm trying to find out.

Ms. Fidler: I don't agree with the statement you just made. My recollection is the witness did advise that the amounts in paragraph 38 were subject to approval by the UARB. He also just told you that for 2006, at least the generation disputed expenses are not the totality of all capital projects that were approved and -- approved by the UARB and undertaken by Nova Scotia Power in 2006. We will undertake to ask Mr. Jack what process he used or followed to identify the projects that were subject to his review.

Q1131. And can you ask Mr. Jack was the set of projects that he was -- he must have been given a set of projects from which he made a selection. I want to know what was the set of projects that he was looking at, and then how he made his selection and what is that selection?

Ms. Fidler: There's too many assumptions in that request, that there was a set, that he reviewed a set. So I will undertake to ask him what the process was that he undertook to identify the projects that he did look at, but that's as far as I can go.

[42] Appellant's Answer (December 2, 2022): What was in the mind of Mr. Jack, at every step in the process, including the initiation of the review through to the filing of amendment requests is not relevant to the determination of this Appeal. The question in this Appeal is whether or not Nova Scotia Power's tax treatment of the expenses in dispute is correct.

[43] Mr. Jack advises that the information below is his best recollection of how he conducted a review of the expenses incurred in the 2006-2010 taxation years and capitalized for accounting purposes to identify amounts which should be treated as current expenses for tax purposes. Mr. Jack advises that he undertook the review of capital expenses incurred by Nova Scotia Power because he was of the view that, subsequent to *Canderel*, Nova Scotia Power should not merely follow its accounting capitalization when determining the treatment of the expenses for tax purposes. Nova Scotia Power initially identified a number of overhead expenses that were misclassified as capital expenses for income tax purposes. After Nova Scotia Power and the CRA reached an agreement about the deductibility of overhead expenses that had been capitalized for accounting purposes, Nova Scotia Power retained Ernst & Young to assist in performing a review of Nova Scotia Power's projects giving rise to expenses that had been capitalized for accounting purposes, to assess whether any of the related expenses should be currently deductible. The review was focused on understanding the work that was being performed and then making a determination, based on the facts of each project, as to the proper treatment for tax purposes. In making this determination, Nova Scotia Power and Ernst & Young relied upon CRA administrative positions and relevant caselaw. In 2008, Ernst & Young provided Nova Scotia Power with a number of reports containing their analysis. Nova Scotia Power reviewed and implemented a number of Ernst & Young's conclusions when preparing its tax filings (including amendment requests). Following the delivery of the Ernst and Young reports in 2008, Nova Scotia Power continued with its own review and analysis going forward.

[44] Mr. Jack also notes that the process he followed was refined as time progressed, and that his process was described, in part, in two letters to the CRA as follows:

3. A letter addressed to Ms. Dawn Brothers dated February 16, 2012 relating to NSPI's T2 Amendment Request for the 2007 taxation year (the February letter at NSP0004278 With attachment at NSP0004279 - collectively, the "February 2012 Letter"). NSPI's T2 Amendment Request for the 2007 taxation year, filed November 17, 2008, can be located at NSP0003100 the "2007 T2 Amendment Request".

4. The letter and attachments that accompanied NSPI's T2 Amendment Request for the 2006-2009 taxation years, dated April 25, 2012 (found in the Respondent's productions at R0020 or NSPI's Productions at NSP0004298-NSP0004304) (the "2006-2009 T2 Amendment Request").

Process and Categories of Expenses Reviewed:

The first category of expenses that was reviewed was projects associated with expenses that were capital "additions" for accounting purposes in those years. Mr. Jack advises that NSPI filed its 2007 return on the basis that certain of these expenses were currently deductible for tax purposes. (See the column entitled "R&M Expenses Claimed as Deductible on Original Filing and Not Audited" in the spreadsheet provided in response to the undertaking given at question 1866.)

The next category of expenses that was reviewed is known as "construction work in progress" (or "CWIP") (described at page 3 of the letter at NSP0004278).

The 2007 T2 Amendment request (filed November 17, 2008) related to a review of projects and project descriptions that were still CWIP at the end of the 2007 taxation year. These amounts were identified after the 2007 return was filed and therefore those that were identified as giving rise to current expenses for tax purposes were the subject of the 2007 T2 Amendment Request (the project descriptions were reproduced in the attachment to the February 2012 Letter at NSP0004279).

Subsequent to filing the return for the 2007 taxation year, NSPI continued its review of various categories of expenses for the purposes of identifying amounts that should be treated as currently deductible expenses for tax purposes - a number of these amounts were treated as currently deductible when each of the 2008, 2009 and 2010 returns were filed (see the columns entitled R&M Expenses Claimed as Deductible on Original Filing and Not Audited in the spreadsheet provided in response to the undertaking given at question 1866.).

Finally, the 2006-2009 T2 Amendment Request (filed April 25, 2012) resulted from a review of transmission and distribution "Routine" expenditures arising in the 2006-2009 taxation years, as well as a review of all other "non-routine" projects that resulted in capital spend for accounting purposes in the 2006 taxation year. Mr. Jack reviewed the project descriptions for projects giving rise to these expenses to identify projects that should be considered to give rise to expenses that are currently deductible for tax purposes (see page 3 of the attachment to the 2006-2009 T2 Amendment Request entitled Capital Review Information - NSP0004301).

[45] Parameters of the Review: The parameters of the review (being the criteria applied to determine whether an expense should be treated as currently deductible for tax purposes) are described in detail in the 2006-2009 T2Amendment Request at pages 3 and 4 of the cover letter to the 2006-2009 T2 Amendment Request [NSP0004302] and the attachment to that letter entitled Capital Review Information [NSP0004301]. Mr. Jack reviewed the project descriptions (and obtained additional information regarding the project where necessary to evaluate), with reference to the factors set out in the CRA's administrative position outlined in IT-128R and the relevant caselaw to make a determination as to whether or not the project gave rise to currently deductible expenses for tax purposes.

[46] Follow Up Question (January 16, 2023): In respect of the retainer of Ernst and Young: who made this decision? Please provide a copy of any correspondence or communication produced in course of deciding to retain Ernst and Young.

[47] Please provide a copy of the reports Ernst and Young provided to the appellant.

[48] Which of Ernst and Young's conclusions did the appellant implement when preparing its tax filings and amendment requests?

[49] Under the heading "Process and Categories of Expenses Reviewed" refers to expenses that were capital additions, and CWIP as the categories of expenses reviewed. The explanation at the fourth bullet point refers to "various categories of expenses": what were these "various categories of expenses"?

[50] Please produce a copy of any notes, working papers, memoranda or other documents Mr. Jack prepared in the course of his review of Nova Scotia Power's capital expenses.

[51] Follow Up Answer (March 10, 2023): Mr. Jack advises that in addition to himself, Brian Rendell would have been involved in the decision to retain Ernst & Young.

[52] With respect to the request for correspondence produced in the course of deciding to retain Ernst & Young, see the following:

- NSP0010954 • NSP0010955 • NSP0010958 • NSP0010959 • NSP0010962
- NSP0010963 • NSP0010960 • NSP0010961

[53] Ernst & Young provided reports to Nova Scotia Power as reflected in the response to follow-up question 574-575.

[54] For the 2006 and 2007 Taxation Years, Nova Scotia Power implemented Ernst & Young's recommendations regarding current deductions, with the exception of Ernst & Young's recommendation to treat the expenses related to the following projects as deductible: 2006: - P711, S787, S981, H466, H479, H478, S122, S921, H494, S93, S948 and 2007: - D979, S980.

[55] With respect to the question relating to the fourth bullet, there were no other "categories" of expenses identified for specific review. The point of the fourth bullet was simply to note that once Nova Scotia Power filed its tax return and amendment request relating to the 2007 Taxation Year in 2008, Nova Scotia Power's understanding of the projects which should be treated as currently deductible evolved as the return filings for each of the 2008, 2009 and 2010 Taxation Years were prepared (and the 2006-2009 Amendment Request was made), with Nova Scotia Power identifying additional R&M projects giving rise to expenses which it treated as currently deductible on filing. Some of the other categories reviewed by Mr. Jack prior to the review of the R&M expenses are set out in response to follow-up question 1116.

[56] The request for "any notes, working papers, memoranda or other documents Mr. Jack prepared in the course of his review of Nova Scotia Power's capital expenses" is overbroad. However, Nova Scotia Power has now produced below documents created in the course of undertaking the review of projects capitalized for accounting purposes (that are located within Nova Scotia Power's electronic income tax files) to identify expenses that should be treated as currently deductible for tax purposes.

- NSP0010964 • NSP0010965 • NSP0010966 • NSP0010967 • NSP0010968
- NSP0010969 • NSP0010970 • NSP0010971 • NSP0010972 • NSP0010973
- NSP0010974 • NSP0010976 • NSP0010977 • NSP0010978 • NSP0010979
- NSP0010980 • NSP0010981 • NSP0010982 • NSP0010983 • NSP0010984
- NSP0010985 • NSP0010986 • NSP0010987 • NSP0010988 • NSP0010989
- NSP0010990 • NSP0010991 • NSP0010992 • NSP0010993 • NSP0010994

• NSP0010995 • NSP0010996 • NSP0010997 • NSP0010998 • NSP0010999
• NSP0011000 • NSP0011001 • NSP0011002 • NSP0011003 • NSP0011004
• NSP0011005 • NSP0011006 • NSP0011007 • NSP0011008 • NSP0011010
• NSP0011013 • NSP0011014 • NSP0011015 • NSP0011016 • NSP0011017
• NSP0011018 • NSP0011019 • NSP0011020 • NSP0011021 • NSP0011022
• NSP0011023 • NSP0011024 • NSP0011025 • NSP0011026 • NSP0011027
• NSP0011028 • NSP0011029 • NSP0011030 • NSP0011031 • NSP0011032
• NSP0011033 • NSP0011034 • NSP0011036 • NSP0011037 • NSP0011038
• NSP0011039 • NSP0011040 • NSP0011041 • NSP0011042 • NSP0011043
• NSP0011044 • NSP0011045 • NSP0011046 • NSP0011050 • NSP0011051
• NSP0011052 • NSP0011054

[57] Below are the documents retained by Nova Scotia Power as supporting documentation for its Schedule 1 adjustments with respect to the original tax filings: 2007 – NSP0010975 2008 – NSP0011053 2009 – NSP0011009, NSP0011011, NSP0011012 [and] 2010 – NSP0011035.

[58] Decision Q1128-31: These are undertakings to question Mr. Jack and obtain his responses to same. They justify the Minister's motion request that he be the replacement nominee for NSPI in answering further discovery questions for NSPI.

[59] These questions sought to clarify the parameters Mr. Jack used to review and reclassify capital expenses for current deductibility. While NSPI provided undertakings, follow-up responses, and voluminous documentation, these materials do not clearly set out the selection criteria or decision-making process actually applied by Mr. Jack across the tax years at issue.

[60] The appellant NSPI's position that the process evolved over time only reinforces the need for oral clarification. A static description in two letters or a general narrative in undertakings is insufficient to explain how project decisions were made in practice, particularly given that Mr. Jack played a central role in developing and implementing the reclassification process.

[61] Under *Samaroo*, where the factual foundation of pleaded assumptions remains unclear or incomplete, the Crown is entitled to compel answers from a witness with direct knowledge. Mr. Dandurand, who had not been involved in NSPI's reclassification of expenses, deferred to Mr. Jack who had been much involved in NSPI's reclassification of expenses.

[62] In conclusion my decision is: that these Q1128-1131 questions are directed to Mr. Jack, and he would be the proper person to respond to them as well as to any proper follow-up questions. As stated, Mr. Jack was NSPI's principal person guiding it respecting these matters at issue, specifically referenced in Q1128-1131. The lengthy third-person responses set out above that were provided to Q1128-1131 inadequately focus on directly answering the actual Q1128-1131 questions. I have thus decided that Q1128-1131 are again to be addressed - this time specifically and directly.

[63] Question 1841:

Q1841. No, counsel. Let me try my question for the third time.

I'm trying to understand and I want production of all analysis, all considerations, all reviews, all documents done by Nova Scotia Power, or somebody acting for Nova Scotia Power, or somebody working for Nova Scotia Power, wherever they need be in the world, whoever they may be in the world, whoever they may be paid by, that relates to paragraph -- the determination -- the analysis which led to the determination of whether a particular expense over \$10 would be referenced in paragraph 38 of the Amended Notice of Appeal, or paragraph 39 of the Amended Notice of Appeal. And I plan on asking that exact -- well, hopefully the exact question, probably not verbatim, with respect to each and every project that's in each and every annual capital expenditure plan, 2006, 2007, 2008, 2009, 2010.

I'm also going to ask that with respect to 2004, 2005, because that's been included in the production as a document upon which the appellant relies. And I have no way of knowing what possible connection that has. So I plan on doing that. So if you want to answer that question terrific. If you want to refuse, please put your refusal on the record.

Ms. Fidler: So my previous comments and questions were targeted at the need for me to understand the relevance of that question in order for me to answer whether or not we can give you an undertaking or whether or not I'm going to refuse. So I'm struggling with the relevance as to the analysis that was or was not conducted by Nova Scotia Power.

The underlying thinking or work that may have been done in order to file their tax return or to make an amendment request, how that work has anything to do with whether or not an expense is properly on an income account or properly on a capital account and that's what I'm asking.

[64] Decision Q1841: This question seeks production of documentation of NSPI, e.g. analyses, considerations and reviews essentially respecting matters raised in Questions 1128–1131.

[65] These questions sought to clarify which expenses NSPI reviewed, what parameters or criteria were used by Mr. Jack in conducting that review, and how NSPI identified the projects that were ultimately included in the amendment requests. These are not speculative or legal questions but are factual inquiries directly relevant to the classification of the disputed expenses, which is central to the issues under appeal.

[66] While the appellant provided a lengthy answer through undertakings and follow-up responses - including background on NSPI's engagement with Ernst & Young and general descriptions of reviewed categories - the responses ultimately failed to specify the actual parameters applied by Mr. Jack or clearly explain how the specific projects in paragraph 38 were identified. As noted in *CUV Ventures*, it is not enough for a party to respond with vague references to broad review processes or third-party assistance. Where a party advances a position based on selective inclusion or exclusion of expenses, it must identify the factual basis for those decisions.

[67] The requirement under Rule 95(1), as emphasized in *Morguard Corp.* and *Samaroo*, is that a discovery nominee must take reasonable steps to become informed about the factual basis of the party's position. In this case, despite the production of extensive documentation, the appellant failed to clarify the key process of how projects were filtered and selected for inclusion in the amendment request - information necessary for the respondent to test the reliability and completeness of the appellant's reclassification.

[68] In conclusion my decision is: that the Minister is entitled to a more specific answer regarding the specified matters, and of which Mr. Jack would have knowledge and be best to answer.

[69] Question 1844:

Q1844. Okay. So I pointed you to your pleading. That makes it relevant, counsel. You choose not to agree with me, of course that's your choice, that's your position. But I have directed you several times to your own pleading. Therefore, you have

made it relevant, not us. I shouldn't say "you" counsel. Nova Scotia Power has made it relevant. So I will take your position as a refusal and the basis of that position is relevance and I will move on to the very next project and I will ask the exact same series of questions.

Ms. Fidler: Just with respect to this line of questioning. The questioning for the analysis, the thought of Nova Scotia Power in determining whether or not an expense should be treated on income account or capital account, we're going to refuse that line of questioning. So I appreciate you want to ask it for every project in the ACE plans that are in the appellant's production. I'm going to refuse that specific question each time. Though, I'm happy to give you a blanket refusal on that specific question and then you can feel free to ask the witness any other questions you have about the project, the facts about it, anything like that.

[70] Appellant's Answer (December 2, 2022): Please see the answer to the undertaking given at questions 1128-1131. What was in the mind of Nova Scotia Power, at every step in the process including the initiation the review through to the filing of amendment requests is not relevant the determination of this Appeal. The question in this appeal is whether or not Nova Scotia Power's tax treatment of the expenses in dispute is correct.

[71] Decision Q1844: this seeks disclosure of the criteria or methodology applied by NSPI in determining whether individual project expenditures were treated on capital or income account. NSPI refused to answer, stating that its internal reasoning was not relevant to the appeal.

[72] That refusal is improper. As clarified in *Morguard Corp.*, discovery under Rule 95 extends to the factual foundation of a party's position. The Minister is not seeking legal argument or privileged communication but rather the facts considered by NSPI when classifying expenses.

[73] The appellant's reliance on its responses to Undertakings 1128–1131 is also insufficient. As explained in *CUV Ventures Corp.*, generalized summaries are inadequate where the request is project-specific and the classification rationale is not otherwise apparent from the record.

[74] In conclusion my decision is: that the respondent is entitled to a complete response to Q1844. The current nominee did not so respond. This question's proper

answer should explain NSPI criteria for determining if an expense would be on income account or capital account for each ACE project.

[75] Question 1849:

Q1849. Let me try this again. What I'm asking -- and I would like an omnibus position about the following question. I would like the Nova Scotia Power to let me know and to produce any documents related to any analysis, consideration, review, completed by anyone, not limited to an employee of Nova Scotia Power, which was undertaken to determine whether an expense, a cost, a payment would be included in paragraph 38 or paragraph 39 of the Amended Notice of Appeal as pleaded by the appellant. And, in particular, my question relates to each and every project included in each and every annual capital expenditure plan, as well as any project that was -- been referenced by the nominee as a U&U, unplanned and -- can you help me out again, Mr. Dandurand, what does "U&U" stand for?

A. Unforeseen and unbudgeted.

[76] Decision Q1849: the respondent's motion with respect to Q1849 seeks disclosure of any analysis, consideration, or review - by NSPI or any third party - undertaken to determine whether an expense should be included in paragraph 38 or 39 of NSPI's Amended Notice of Appeal. The question extends to all projects in the annual capital expenditure (ACE) plans, as well as any "unforeseen and unbudgeted" (U&U) projects referenced by NSPI's nominee.

[77] The question is relevant. It seeks factual information about how NSPI classified projects between paragraph 38 and paragraph 39 of its pleadings, classifications that NSPI itself placed in issue through its pleadings. As noted above, discovery encompasses the factual foundation of a party's pleaded case, including how and why positions were advanced.

[78] However, NSPI cannot be compelled to search for and produce documents regarding every project in the ACE plans unless those projects are reasonably connected to the specific amounts or issues pleaded. The scope of production must remain proportionate and tied to the pleadings.

[79] In conclusion, my decision is: that the respondent Crown is entitled to having Q1849 answered at least in part. NSPI is thereby required to: (a) confirm whether any analysis or review was conducted to determine project placement under

paragraph 38 or 39 of the Amended Notice of Appeal; and (b) identify and produce any such documentation referencing such analysis or review. However, no production is required for projects unconnected to the amounts specifically pleaded.

[80] Question 2013-2014:

Q2013. As your nominee has repeatedly told me, the ACE plan is a forecast, yet 38 and 39 talk about amounts, like actual costs paid. And your nominee has repeatedly reminded me of that disconnect. So I don't have that information. The PowerPlan software has that information. He's already confirmed that. So you can tell me that number.

Ms. Fidler: You want to know the actual expense incurred by Nova Scotia Power in each year, identified by a project number, and whether or not it's on -- it's a generation, transmission or distribution project, is that correct?

Q2014. Yes. Did you include U&U in that? Yes.

Ms. Fidler: Yes. Can you give me a minute?

Ms. Chasson: Of course. Ms. Fidler: So with respect to the omnibus undertaking that you just put on the record, for the expenses in dispute, all of that information is already contained in the appellant's Rule 81 list of documents. With respect to expenses that are not in dispute, I'm prepared to take the entire request under advisement for following reasons: One, the appellant does not see the relevance of the information relating to expenses not in dispute. Two, the respondent is asking for documents to be prepared in order to answer that information. And just for your knowledge, the reports that are listed on the appellant's Rule 81 list of documents for the expenses that are in dispute took months to prepare. And three, I'm not sure whether or not Nova Scotia Power may have other information available that could satisfy the inquiry. So I need to look into that to see whether or not there is anything available.

[81] Appellant's Answer (December 2, 2022): Q2013. As noted in the response to question 2014, detailed information relating to expenses that are not in dispute is not relevant to the issues in dispute in this Appeal.

[82] However, Nova Scotia Power is prepared to provide the following answer. In the response to the undertaking given at question 1866, Nova Scotia Power has provided a table NSP0010939 which details, for each of the 2006-2010 taxation years, the total spend associated with each project treated as capital for accounting

purposes, although the total spend for each project does not reflect adjustments for AFUDC, Applied Overhead and Capitalized Pension. The spend can be identified as generation transmission or distribution with reference to the project number. Projects starting with an S H or W are all “generation” projects (S for steam, H for hydro and W for wind). Projects starting with a T are “transmission” projects. Projects starting with a D are “distribution” projects. Projects starting with a P are “general property” and, for the purposes of this Appeal may be associated with generation, transmission or distribution, depending on the context.

[83] Decision Q2013-2014: these two questions seek detailed factual information on the actual costs incurred by NSPI - categorized by project number and project type (generation, transmission, or distribution) - including whether the expenses were part of U&U (Unforeseen and Unbudgeted) projects. This information is sought in relation to projects referenced in paragraphs 38 and 39 of the Amended Notice of Appeal.

[84] NSPI’s nominee confirmed that this data exists in the company’s PowerPlan software. While NSPI has produced some aggregate cost data through document NSP0010939, it objects to producing further project-level details for expenses not explicitly in dispute. NSPI notes that generating such reports previously took months and argues that non-disputed expenses fall outside the scope of discovery.

[85] The request, as framed, encompasses both disputed and non-disputed projects. Under Rule 95(1), discovery is permitted where the information sought is relevant and material to the pleadings. The case law- *Morguard Corp* and *Samaroo* - confirms that while proportionality is a live consideration, it does not displace the central requirement of relevance.

[86] Here, the requested cost data for projects referenced in paragraphs 38 and 39 is relevant and material. However, compelling NSPI to generate new reports for all non-disputed projects would be disproportionate.

[87] In conclusion, my decision is: that this request is granted in part: NSPI is to provide project-level cost details, categorized by project number and type, only for those expenses explicitly referenced in paragraphs 38 and 39. No production is required for projects falling outside those paragraphs.

[88] I now move to part two of this motion brought by the respondent Crown. Part two is that the respondent Crown seeks an order pursuant to Rule 95(2) [presumably Rule 93(2)] naming the aforementioned Mr. Darryl Jack, noted above as a former employee of the appellant NSPI and current employee of NSPI's parent company Emera Incorporated., to attend the examination for discovery to provide answers for the questions addressed immediately above on behalf of NSPI, as well as for any proper questions arising from the answers provided.

[89] The respondent Crown asserts that replacing NSPI's discovery examination nominee with Mr. Jack is required as Mr. Dandurand proved unable to provide sufficient responses to key questions concerning NSPI's expense characterizations. He had had little or nothing to do with the reclassification of expenses, whereas Mr. Jack had commenced that initiative and carried it out for NSPI.

[90] Rule 93(2) reads, under the heading "Who May be Examined":

A party to be examined, other than an individual or the Crown, shall select a knowledgeable current or former officer, director, member or employee, to be examined on behalf of that party, but, if the examining party is not satisfied with that person, the examining party may apply to the Court to name some other person.

[underlining added]

[91] In *Samaroo v. Canada Revenue Agency*, 2016 BCSC 531, the British Columbia Supreme Court heard a motion to name a replacement individual for discovery examination of a corporate entity. The following test was applied, drawn from jurisprudence:⁴

- a) the discretion to permit a second representative to be appointed for examination for discovery should be exercised where the party applying shows that the first representative cannot satisfactorily inform him/herself about the subject of the examination for discovery, and discovery cannot be reasonably conducted on the basis of the examinee informing themselves.
- b) in determining whether the first representative can satisfactorily inform themselves, the Court should consider four factors, being (i) the

⁴ Such jurisprudence included *B.C. v. Doha, Jefferson et al*, 2007 BCSC 1709; as reviewed in *Conseil Scolaire Francophone v. B.C.*, 2012 BCSC 582

responsiveness of the original representative under examination; (ii) the degree to which the original representative has taken pains to inform him/herself; (iii) the nature and materiality of the evidence sought to be canvassed; and (iv) the most practical, convenient and expeditious alternative.

[92] Regarding this, Mogan J. of this Court in *Ashton v R.*, [2000] GSTC 31 wrote:

7. The respondent [Crown] must select a knowledgeable person to be examined. Upon failure to do so, which cannot be determined until an examination is conducted, it is appropriate for an appellant to seek relief under Rule 93(3). The reasoning of the Federal Court of Appeal is hard to resist. It is my view that the examination for discovery must be held or at least commenced and objectively found to be unsatisfactory before an application under Rule 93(3) can succeed. The logical basis for such dissatisfaction would be that the person being examined was not properly informed.⁵

[underlining added]

[93] Justice Mogan required that the discovery examination have been held or at least commenced before an application for substitution of the person examined can be made. Such is the situation here.

[94] Similarly, Justice Bell of this Court in 1999 in *General Motors Acceptance Corp. v. R.*⁶ noted that a motion for a new nominee is not justified solely because answers were vague. The questioning party must first seek clarifications or undertakings before demanding a replacement nominee. However, the failure to provide appropriate answers on those undertakings would constitute support for a motion for a new nominee.

[95] I return to *Samaroo* and its four factors in determining whether an initial speaker can inform him/herself.

[96] The first factor is responsiveness: the speaker's responsiveness is assessed by reviewing discovery transcripts and testimony. Lack of responsiveness was identified as including (i) direct or follow-up questions going unanswered; (ii) a

⁵ *Ashton*, para. 7

⁶ *General Motors Acceptance Corp. v. R.*, [1999] 1 CTC 2623, para. 9

general failure to engage with the subject matter; and (iii) ambiguous or incomplete responses.

[97] The second factor is steps taken to become informed: a speaker must take reasonable steps to prepare. Courts assess whether the speaker (i) consulted relevant documents; (ii) spoke with knowledgeable individuals within the company; and (iii) attempted to answer questions before refusing. The requirement to get informed must be met before the examination for discovery and begins when a person is appointed the party's speaker. The examination for discovery may be adjourned to allow the speaker to gather more information; in such a case, the additional steps taken at this time will also be taken into account.

[98] However, generally, steps taken are limited to what was done before the examination for discovery. Justice V. Miller of this Court in *Morguard Corp. v. R.*, 2011 TCC 166⁷ clarified that Rule 95(2) requires a discovery examination speaker to take reasonable steps to become informed; and that this duty is in addition to Rule 93(2), which requires the [corporate party] to nominate a knowledgeable person from the outset as its speaker for discovery examination purposes.

[99] Representatives are required to take reasonable steps to become informed because they must be able to answer any question that the company they are representing would have the knowledge to answer. Thus, the representative must carry out reasonable research to find the information that they are not personally aware of, but that the company they are representing would know of.

[100] In *Standard Mortgage Investment Corp. v. R.*, [1999] 4 C.T.C. 2869, the Tax Court observed that (i) the representative does not need to be the "most knowledgeable" person; and (ii) as long as the representative can obtain information from more knowledgeable individuals, courts will not exclude them from discovery.

[101] The third *Samaroo* factor is nature and materiality of the information - i.e., determining the nature and materiality of the information pertinent to the party, requires that party's representative to analyze the points at issue and the potentially relevant information in the file under dispute. It is unlikely that a representative can anticipate all the questions and directions that an investigation may take in highly

⁷ *Morguard Corp.*, para. 48

complex litigations; so this factor can make the Court reluctant to order a new representative.

[102] The fourth and final Samaroo factor is identify a practical, convenient and expeditious alternative. Here, the Court will balance efficiency and fairness when deciding whether to order a replacement representative. When the objective of the examination for discovery is affected by the representative's ineffectiveness, it can be more practical to order a new examination for discovery than to adjourn for the representative to get informed or better informed as to the questions asked.

[103] In *Morguard Corp.*, Justice V. Miller found the appellant had put forward an uninformed representative to obstruct discovery. The Court ordered a new representative with firsthand knowledge. Justice Miller's finding was based on the transcripts of the examination for discovery, which showed that the nominee was unaware of the basic facts of the dispute, while certain other employees still with the appellant were much more knowledgeable about the relevant facts.

[104] In *CUV Ventures Corp. v. BMO*, 2020 BCSC 1550, Veenstra J. ruled that a second representative is justified when: (i) the first nominee lacks personal knowledge of core issues; (ii) the discovery process becomes artificial and cumbersome due to excessive reliance on undertakings; and (iii) the most practical and cost-effective option is to name a better-informed nominee. Veenstra J. permitted the second representative, noting: "The key consideration is what is most practical and least expensive in the circumstances."

[105] Also, *Whistler Blackcomb Holdings Inc. v. R.*, 2025 DTC 1009 (TCC) provides that in naming an alternative person per Rule 93(2) to be examined, what must be shown is that the person to be replaced did not have personal knowledge of the relevant facts, and also was unwilling to make enquiries of those who should or would know such facts.

[106] Here, for whatever reason, Mr. Dandurand did not testify in any detail regarding the relevant facts, and he had no personal knowledge of this relatively complex matter. Whatever the reason for his inability to answer questions seeking detailed facts that Mr. Jack himself would know, many of such questions were left less than fully answered.

[107] The respondent Crown found Mr. Dandurand unable to provide adequate responses to its key discovery questions concerning the subject of this litigation being NSPI's expense characterizations. The questions, discussed above, are not unreasonable. There is clearly a knowledgeable person, Mr. Jack, who could respond to these questions - indeed as seen above, a number of these 14 questions specifically seek Mr. Jack's response - given his role as the person who both conceived and led this project of re-classifying many previously claimed expenses.

[108] Also to be considered is the above-cited *Samaroo* legal test, that requires the respondent Crown to establish that (i) Mr. Dandurand could not adequately inform himself, and (ii) discovery could not proceed effectively with him relying on second-hand information. As discussed above, courts assess this issue of being unable to adequately inform oneself through consideration of four key factors: (i) responsiveness, (ii) efforts to become informed, (iii) nature and materiality of the missing information, and (iv) the most practical, convenient, and expeditious alternative.

[109] Regarding the factor of "responsiveness", Mr. Dandurand was unable to respond fully to several factual inquiries relevant to the characterization of expenses. A speaker's responsiveness is assessed based on whether they provide complete, clear and direct answers, as outlined in *Samaroo* and *General Motors Acceptance Corp.* Here, however, multiple responses, noted above, were incomplete or were objections or undertakings that failed to deliver substantive factual content.

[110] In Question 841, Mr. Dandurand could not adequately explain NSPI's process for determining whether an expense was capital or current. This inquiry relates to NSPI internal processes - not legal conclusions - and is proper under Rule 95(1). It is a key factual aspect in this litigation.

[111] In Questions 1841–1844 and 1849, Mr. Dandurand did not provide clear answers regarding how NSPI categorized expenses in paragraphs 38 and 39 of the Amended Notice of Appeal. These questions target core factual matters underpinning the litigation.

[112] Questions 1036–1037 and 1128–1131 received only partial responses through undertakings. The responses to the undertakings were neither sufficiently detailed nor responsive to the parameters and criteria used in the expense reclassification process.

[113] While a nominee can provide undertakings, per *General Motors Acceptance Corp.*, excessive reliance on them without direct knowledge undermines the effectiveness of discovery. Mr. Dandurand’s lack of firsthand involvement in NSPI’s expense review led to fundamental information gaps.

[114] Regarding the factor of “efforts to become informed”, per *Morguard Corp.* a nominee must take reasonable steps to become informed, including reviewing relevant documents and consulting with individuals who have relevant knowledge.

[115] In this case, the record indicates that Mr. Dandurand relied heavily on discussions and documents. However, he was unable to explain the factual basis for classifying expenses as capital or current beyond general references to letters or reports.

[116] As well, his answers to Questions 1036–1037, 1128–1131, and 1841 and 1844 demonstrate lack of requisite familiarity with the methodologies NSPI applied respecting its expense reclassification process.

[117] As *Samaroo* reaffirmed, discovery cannot function effectively if the selected representative is unable to personally articulate key factual details. Again this is not met to criticize Mr. Dandurand, noting the many complicated aspects underlying the reclassification of over \$180 million of expenses. A representative not sufficiently informed cannot substitute generic or second-hand knowledge for direct responsiveness.

[118] Regarding the factor of “nature and materiality of the missing information”, *Samaroo* and *CUV Ventures* require courts to assess whether the missing information concerns the core issues in dispute. Here, expense classification is central to the appeal, making the factual basis for that classification critical. Also Questions 841, 1036–1037, and 1128–1131 pertain directly to the parameters, criteria and process used by NSPI to reclassify expenses.

[119] Additionally, Questions 1841 and 1844 concern how expenses were selected and organized under paragraphs 38 and 39 of the Amended Notice of Appeal. This lies at the heart of NSPI’s claims.

[120] These are not peripheral matters. They concern the factual underpinning of NSPI’s pleaded position.

[121] Finally, regarding the factor of “what is the most practical, convenient and expeditious alternative”, *Morguard Corp.* and *CUV Ventures* affirm that appointment of a replacement representative should only occur where it is the most efficient means to advance discovery. Here, Mr. Jack is uniquely positioned and able to explain NSPI’s reclassification process. Requiring his attendance is the most practical and effective step.

[122] However, Mr. Dandurand’s responses to Questions 913 and 2013–2014 were sufficient and do not require to be re-visited.

[123] Finally, broad or irrelevant requests, such as Questions 1024 and 913, were properly resisted and are not proper grounds for further discovery.

[124] Mr. Dandurand provided adequate answers to some factual questions, but his testimony fell short on others that are central to NSPI’s pleaded position.

[125] Accordingly, applying the *Samaroo* tests and guided by *Morguard*, and *CUV Ventures*, it is appropriate to order that Mr. Jack attend the sought supplemental discovery examination session as NSPI’s representative, to respond to the questions as noted above that yet to be substantively and fully answered, plus proper follow-up questions.

[126] Specifically, Mr. Jack will be required to orally answer Questions 831, 841, 1036–1037, 1128–1131, 1841 and 1844. They concern the actual factual bases and methodologies used in NSPI’s internal reclassification of expenses - with reclassification of expenses being the specific issue in this appeal. Mr. Dandurand, by contrast, did not demonstrate adequate familiarity with these processes and deferred to other sources, including Mr. Jack himself. The discovery examination did not proceed effectively, absent direct evidence from a knowledgeable representative.

[127] Conversely, the motion will not be allowed in respect of Questions 913 and 2013–2014, wherein I consider that NSPI has already provided adequate responses supported by documentation. Also, the motion will be partially denied with respect to overly broad Question 1849, only allowing questions respecting NSPI conduct of reviews or analyses informing its pleaded paragraph 38 and 39 categorizations.

[128] In conclusion the respondent Crown's motion will be granted as to the naming of a new nominee for NSPI. I name Mr. Jack as being the replacement person to speak for NSPI, in answering fully Questions 831, 841, 1036–1037, 1128–1131, 1841 and 1844, as well as any proper questions arising from those answers. As stated, these numbered questions concern the actual factual bases and methodologies used in NSPI's internal reclassification of expenses.

[129] Costs will be ordered in the cause.

Signed this 11th day of June 2026.

"B. Russell"

Russell J.

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MAJESTY THE KING

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