

BETWEEN:

NOVA SCOTIA POWER INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appellant's Motion for Respondent to provide fuller discovery
examination answers, 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. this motion brought by the Appellant seeking from the Respondent more complete discovery examination answers, in writing, is allowed in part;
2. the Respondent is to further answer each of the following discovery examination questions, consistently with the Court's "decision" for each such question in the accompanying Reasons for Order;

3. the discovery examination questions to be further answered are: Q1394, Q1356, Q1364-66, Q1367-68, Q1378-83, Q1385, Q1386 and Q6 (Dec. 22/22 letter);
4. these questions are to be further answered within 60 days of the date of this Order, subject to the parties' agreement otherwise;
5. the Respondent's nominee is to re-attend at the Respondent's expense to answer any questions arising from the further answers provided as ordered herein, within 30 days after delivery of those answers or as otherwise agreed by counsel; and
6. costs in the cause due to shared success.

Signed this 11th day of June 2026.

"B. Russell"

Russell J.

BETWEEN:

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Respondent.

REASONS FOR ORDER – APPELLANT’S MOTION

Russell J.

I. Introduction

[1] The appellant, Nova Scotia Power Inc. (NSPI) seeks an order compelling the respondent Crown, per the Minister of National Revenue (Minister), to provide “complete and responsive” answers to certain discovery examination questions. Specifically, NSPI seeks written, complete responses to the specified questions, within 60 days of the order. NSPI wishes also that the Minister’s nominee re-attend at the Minister’s expense within 30 days of receiving those responses, or as otherwise agreed. Also, NSPI seeks costs of the motion.

[2] The order is sought pursuant to Rules 4, 95, 107(3) and 110 of the *Tax Court of Canada Rules (General Procedure)* (Rule(s)).

[3] The appellant NSPI submits that the disputed questions are relevant to the issues in its appeal, and that the Minister wrongly refused to answer certain questions and, in some respects, provided incomplete and non-responsive answers.

[4] The respondent Crown contends that NSPI’s motion is improper as it seeks legal argument rather than factual answers. The Minister asserts that all undertakings have been satisfied and that the motion should be dismissed with costs.

[5] The Minister also maintains that with the primary issue under appeal being whether the disputed expenses should be classified as capital or current, NSPI alone

knows the relevant facts regarding its expenditures. Thus, the nature of the Canada Revenue Agency (CRA) auditor's review process is irrelevant, particularly as to the 2006 taxation year. Further, the Minister asserts that all relevant audit documents, including those related to 2006, have been disclosed.

[6] Ms. Dawn Brothers was the CRA auditor assigned to the appellant's NSPI file and was the respondent's nominee for examination for discovery.

II. Law

[7] Rule 95(1) requires parties in discovery examination to answer, "any proper question relevant to any matter in issue in the proceeding."

[8] In *Kossow v. R.*, 2008 TCC 422, Justice V. Miller summarized the general principles of discovery as follows:

1. The principles for relevancy were stated by Chief Justice Bowman [...]:

'Relevancy on discovery must be broadly and liberally construed and wide latitude should be given;

A motions judge should not second guess the discretion of counsel by examining minutely each question or asking counsel for the party being examined to justify each question or explain its relevancy;

The motions judge should not seek to impose his or her views of relevancy on the judge who hears the case by excluding questions that he or she may consider irrelevant but which, in the context of the evidence as a whole, the trial judge may consider relevant;

Patently irrelevant or abusive questions or questions designed to embarrass or harass the witness or delay the case should not be permitted.'¹

[...]

2. The threshold test for relevancy on discovery is very low but it does not allow for a 'fishing expedition'.²

¹ *Baxter v. R.*, 2004 TCC 636, para. 13

² *Lubrizol Corp. v. Imperial Oil Ltd.*, [1997] 2 FC 3 (FCA), para. 19.

3. It is proper to ask for the facts underlying an allegation as that is limited to fact-gathering. However, it is not proper to ask a witness the evidence that he has to support an allegation.³
4. It is not proper to ask a question which would require counsel to segregate documents and then identify those documents which relate to a particular issue. Such a question seeks the work product of counsel.⁴
5. A party is not entitled to an expression of the opinion of counsel for the opposing party regarding the use to be made of documents.⁵
6. A party is entitled to have full disclosure of all documents relied on by the Minister in making his assessment.⁶
7. Under the Rules a party is not required to provide to the opposing party a list of witnesses.⁷ As a result a party is not required to provide a summary of the evidence of its witnesses or possible witnesses.⁸
8. It is proper to ask questions to ascertain the opposing party's legal position.⁹
9. It is not proper to ask questions that go to the mental process of the Minister or his officials in raising the assessments.¹⁰

[9] And, per *Choate on Discovery*, the broad relevance test applicable to the production of documents is that a party entitled to discovery of a document or record if it directly or indirectly enables it to advance its own case or to destroy that of an adversary, or may fairly lead to a train of inquiry which may have either of these consequences.¹¹

³ *Sandia Mountain Holdings Inc. v. R.*, 2005 TCC 65.

⁴ *SmithKline Beecham Animal Health Inc. v. R.*, 55 DTC 192 (TCC), para. 11

⁵ *Ibid.*

⁶ *Amp of Canada Ltd. v. Canada*, [1987] F.C.J. No. 149 (FCTD)

⁷ *Singh v. R.*, 2005 TCC 588, para. 28

⁸ *Loewen v. R.*, 2006 TCC 498, para. 14

⁹ *Six Nations of the Grand River Band v. Canada*, [2000] OJ No. 1431 (ON SCDC); *Sandia Mountain*, *supra*.

¹⁰ *R. v. Riendeau*, [1991] 2 CTC 64 (FCA)

¹¹ Cudmore, G.D., *Choate on Discovery*, 2nd ed., loose-leaf (Toronto: Carswell, 2002), p. 3-70.20, as cited in *Sputek v. R.*, 2010 TCC 540, para. 10.

[10] In applying this test to discovery in tax litigation, courts have spoken in the following terms:

It seems to me that the clear right of the plaintiffs to have access to documents which may fairly lead them to a train of inquiry which may directly or indirectly advance their case or damage the defendant's case particularly on the crucial question of one party's version of the agreement being more probably correct than the other.¹²

[11] "Fishing expeditions" are not allowed in discovery questioning, as described by Hogan J. of this Court:

A 'fishing expedition' constitutes a line of inquiry that seeks to ascertain whether the Respondent has any ground of complaint. The line of inquiry must go outside of the bounds of the case as pleaded; the questions must be intended to determine if a case other than the one currently being pleaded might be established against the Appellant.

Because of the latitude which should be afforded to counsel for the CRA during examination for discovery, coupled with the desire to ensure that the trial judge be provided with all evidence which he might consider relevant, only clearly irrelevant, or abusive questions should not be permitted.[...]

[C]onnection between the questions posed and the Respondent's case against the Appellant [...] lifts them out of the realm of 'fishing expeditions.'¹³

[underlining added]

[12] Rule 95(1)(b) precludes questions directed solely to the credibility of the witness.

[13] However, the respondent still must answer the questions if they deal with credibility as the fallout of an otherwise relevant question. Such questions are not "directed solely to the credibility" of the appellant.¹⁴

[14] The Court also has discretion to disallow questions relevant but improper, notably where the questions are "materially ambiguous, vague, imprecise,

¹² *Sputek, supra*, para. 11, citing *Boxer v. Reesor* (1983), 43 B.C.L.R.352 (BCSC), p. 359

¹³ *Ibid.*, para. 20-21 and 23.

¹⁴ See *Carson v. Canada*, [1995] 2 C.T.C. 2364 (TCC) at para. 19-21 and 24

scandalous (e.g., defamatory) or vexatious (e.g., harassing); or seeks privileged information, seeks the work product of counsel, seeks the disclosure of evidence rather than fact or seeks an opinion (i.e., inference from facts) rather than fact.”¹⁵

[15] Further, in *Burlington Resources*¹⁶ Justice D’Auray of this Court opined that “taking a question under advisement” amounts to a refusal.¹⁷ Under Rule 107, a party must answer the question or refuse with a stated reason; or provide an undertaking if the party does not know the answer.

[16] The Court in *Burlington Resources* held that “under advisement” responses deprive the questioning party of a chance to reformulate or clarify their question. Consequently, the Court ordered the responding party to re-attend discovery at their own expense, to answer previously refused questions.

[17] The practice of using the quasi-objection “under advisement” should end. It is not a response contemplated by Rule 107. It in effect deprives the questioning party opportunity to reformulate, reframe or narrow a question in response to a proper refusal (i.e., if a question was refused for being too broad or not clear).

III. Analyses/Decisions

[18] The core issue in this motion is whether the respondent Crown rightly refused to answer or inadequately answered various NSPI’s discovery questions. NSPI challenges the Minister’s rejection of certain aspects of its T2 adjustments. For the 2006 taxation year the Minister denied all NSPI’s expense reclassification requests. For the 2007-2010 taxation years, the Minister allowed certain amounts to be deducted as current expenses but kept the remaining disputed expenses as capital expenditures.

[19] The adequacy of the Minister’s responses must be assessed considering the undertakings given during discovery. A party that undertakes to provide additional information must either fully answer the question or justify on legal grounds a refusal to do so.

¹⁵ *Contractor v. The Queen*, 2021 TCC 46 at para. 22

¹⁶ *Burlington Resources Finance Company v. R.*, 2017 TCC 144

¹⁷ *Ibid.*, para. 80

[20] The Minister's counsel answered various discovery questions by, in each instance, stating that the question would be "taken under advisement." As noted above, jurisprudence establishes that taking a question under advisement is equivalent to refusing to answer the question - unless subsequently it is answered, fully.

[21] Accordingly, this motion will determine whether, for any question "taken under advisement", counsel subsequently provided legitimate reasons for refusing to answer or more fully answer same.

[22] The disputed questions relate to factual assumptions made by the Minister, the Minister's grounds relied upon pleaded in the Second Amended Reply and the relevance of section 9 of the federal *Income Tax Act* (Act) in denying NSPI's reclassification requests.

[23] The Minister's assumptions of fact are pleaded in the Second Amended Reply, which cites audit documents and working papers as the basis for the appealed reassessments. All relevant audit documents were disclosed to NSPI, including those concerning the 2006 taxation year.

[24] Rule 95(1) provides for fact-finding questions being generally permissible, in seeking to establish the factual basis of the respondent Crown's position. However, questions requiring the respondent to explain how facts relate to a legal position (i.e., seeking legal reasoning rather than factual information) are improper.

[25] The following categories of questions are improper, per jurisprudence: those requiring the Minister or counsel to categorize or interpret documents (*Kossow*); those seeking the work product of counsel (*Kossow*); those demanding an expression of legal opinion from the Minister (*Burlington Resources*); and those directed at the mental processes of the Minister or CRA officials in raising an assessment (*Kossow*).

[26] The respondent Crown's refusals to answer several of the disputed questions addressed below are improper, for failing to satisfy its obligations under Rule 95(1). The appellant NSPI's questions sought clarification of the factual assumptions and positions pleaded in the respondent Crown's Second Amended Reply. These questions mostly are relevant, properly framed and necessary - put to permit the appellant to understand and accordingly respond to the case it will meet at trial. The Crown's blanket refusals – often on the basis that the questions sought "legal

argument” - are unpersuasive where the appellant limited its inquiries to factual applications of the Crown’s pleadings.

[27] Per *Burlington Resources* and *Kossow*, discovery extends to the facts underpinning a party’s position. The respondent may be compelled to identify which pleaded assumptions apply to which facts, and to clarify how its pleadings relate to particular projects. The respondent’s references to voluminous audit working papers do not satisfy its duty to provide meaningful responses, particularly where it undertook to do so but later refused. This approach undermines the objectives of fairness and efficiency that discovery is meant to promote.

[28] Below are set out, in turn, the appellant’s disputed questions and the respondent’s responses, followed by my corresponding decisions.

IV. Disputed Questions (Dawn Brothers transcript)

Question 1394 and follow up:

Q1394. I’m going to go back to the amended reply and take you to paragraph 50(e). This is the paragraph titled the “Disputed Expenses”. Can you identify the projects giving rise to the disputed expenses provided in the table at 50(e) by project and by year? And if it’s more efficient or easier for the respondent, the appellant is prepared to accept agreement with the response that the appellant provided to an undertaking in lieu of the respondent creating its own work. So, you can review our undertaking and let me know whether or not you agree with that. Or if you don’t want to do that, please identify the projects giving rise to the disputed expenses provided in the table at 50(e) by project and by year?

Mr. Cuddy (counsel for respondent Crown): We’ll take that under advisement.

[29] Respondent’s Answer (December 2, 2022): The disputed expenses referred to in paragraph 50(e) are contained in the materials provided to the Agency by NSPI and the working papers, memoranda and audit reports prepared by the Minister with respect to the matters under appeal.

[30] Follow-up Question (January 16, 2023): We understand the respondent’s answer to refer to the general asset review working papers (NSP0004398, R0011, R0012, R0009, R0015, and R0013) and the audit reports for the relevant taxation

years (NSP0004469, NSP0004413, NSP0004475, NSP0004528, and NSP0004537). If it is anything else, please advise.

[31] Does the respondent agree that the projects listed in the appellant's response to Question 326 are the projects that give rise to the Disputed Expenses? If not, please advise of any specific disagreements.

[32] Follow-up Answer (April 12, 2023 / April 28, 2023): See the previous response to the question.

[33] Decision re Q1394 and follow-up: the appellant asked the respondent to confirm whether the projects listed in response to Q326 correspond to those giving rise to the Disputed Expenses identified in paragraph 50(e) of the Second Amended Reply. This is a clear and narrowly framed factual question. In response, the respondent merely referred to previously disclosed audit materials without expressly agreeing or disagreeing with the appellant's compilation.

[34] Kossow affirms that discovery under Rule 95 extends to clarifying how pleaded assumptions apply to particular facts or documents. The respondent Crown may be required to confirm whether specific facts, such as a project list, correspond to its pleaded assumptions - particularly where that connection is essential to the issues at trial.

[35] This question does not seek legal argument or impose an unreasonable burden. It simply asks the respondent to state whether it agrees with a defined list of projects already identified by the appellant or to identify discrepancies. This is information squarely within the Minister's knowledge and foundational to the issues in dispute.

[36] In conclusion my decision re Q1394 and follow-up is: that the respondent is to confirm whether the projects listed in Q326 correspond to those giving rise to the Disputed Expenses under paragraph 50(e) of the Second Amended Reply, and if not, to specifically identify discrepancies.

Question 1356 and follow-up:

Q1356. Can you tell me which of the – sorry, for each of the projects that are identified to be applicable to this factual assumption I want to know, where the Minister assumed there was a replacement what was replaced?

I want to know, where the Minister assumed there was a refurbishment what was refurbished?

Where the Minister assumed there was an improvement what was the nature of the improvement?

And for each of the projects identified what was the asset?

Mr. Cuddy: to the extent that it's not already listed there we'll make efforts to advise by answers to those questions.

[37] Respondent's Answer (December 2, 2022): The Minister's assumptions as to what was replaced, refurbished and/or improved upon for each project in which current expense recharacterization amendments were not allowed are contained in the materials provided to CRA by NSPI and in the working papers, memoranda and audit reports prepared by the Minister with respect to the matters under appeal.

[38] Follow Up Question (January 16, 2023): The undertaking has not been satisfied. The respondent undertook to provide answers to the following questions posed to the extent that the information was not already listed in the "Notes" column in the general asset review working papers for each year under appeal (see the discussion starting at question 1342 of the transcript from the appellant's examination of Dawn Brothers).

[39] Where the Minister assumed there was a replacement, what was replaced? If an asset was replaced, what was the asset?

[40] Where the Minister assumed there was a refurbishment, what was refurbished? If an asset was refurbished, what was the asset?

[41] Where the Minister assumed there was an improvement, what was the nature of the improvement? If an asset was improved, what was the asset?

[42] The appellant is entitled to know the position the respondent intends to advance at trial regarding what was replaced, refurbished or improved where the respondent's position is that a Disputed Expense resulted in the replacement of, refurbishment to or improvement to an existing capital asset. The appellant is also entitled to know the facts relied on by the Minister in support of the assumptions.

[43] In addition, the respondent has now advised in response to question 1358 that assumption 50(f) in the Second Amended Reply applies to all the projects at issue. Therefore, the respondent is required to provide answers to the questions above for all of the Disputed Expenses.

[44] Please provide a specific answer to the undertaking for each project identified in the general asset review working papers at NSP0004398, R0011, R0012, R0009, R0015, R0013, and any general asset review working papers produced by the respondent after the examination for discovery of the respondent.

[45] Follow Up Answer (April 12, 2023 / April 28, 2023): The information has been provided in the working papers and audit reports prepared by the Canada Revenue Agency. The respondent refuses to provide its legal argument.

[46] Decision re Q1356 and follow-up: The respondent's answer is unsatisfactory. The appellant asked the respondent to identify, for each project giving rise to Disputed Expenses, what was replaced, what was refurbished, and the nature of any improvements pursuant to the Minister's assumptions in paragraph 50(f) of the Second Amended Reply.

[47] This is a proper and relevant factual inquiry directed at clarifying the foundation of the respondent's pleaded position. In response, the respondent initially undertook to provide this information to the extent that it was not already contained in the general asset review working papers. However, in its follow-up response, the respondent declined to provide further particulars, stating only that the information was available in the audit documents and refusing to provide any further explanation, on the basis that it would amount to legal argument.

[48] In *Kossow*, the Court emphasized that Rule 95 permits parties to compel clarification of how the opposing party's assumptions relate to the facts at issue. It is not sufficient for the Crown to refer to voluminous audit materials without identifying what portions support its assumptions. Where assumptions are pleaded globally, the Crown may be required to confirm how they apply on a project-by-project basis.

[49] The appellant is not seeking legal reasoning or argument but rather factual clarification: what did the Minister assume was replaced, refurbished, or improved and what was the asset in question. This information is fundamental to understanding

the respondent's recharacterization of the Disputed Expenses as capital in nature. Given the respondent's pleading that assumption 50(f) applies to all projects at issue, it must provide answers for each project identified in the general asset review working papers.

[50] In conclusion my decision is: regarding Q1356 and follow-up is that the respondent is to fulfill its undertaking and provide a clear response identifying for each project its understanding as to what was replaced, refurbished, or improved.

Questions 1364-1366 and follow-up:

Q1364. I'd like to ensure that I know the case I need to meet at trial with respect to the Attorney General's position, that the expenses in dispute were capital expenses. So if we could look at paragraph 54 of the Amended Reply? It's under "Grounds Relied on and Relief Sought", the disputed expenses are capital expenditures.

[51] And paragraph 54 reads: the disputed expenses each have some or all of the following characteristics;

- a) the expenditure was not a recurring expenditure, but made once and for all;
- b) the expenditure conferred an enduring benefit of the trade, in that the expenditure replaced, refurbished to a like-new condition, or improved an existing capital asset;
- c) the expenditure was incurred to support the appellant's business structure;
- d) the value of the expenditure was large relative to the value of the asset to which the expenditure relates;
- e) the expenditure was classified as a capital expenditure for financial reporting purposes; and,
- f) the expenditure was classified as capital expenditure for regulatory purposes, i.e., represented as capital expenditures to the review board for electricity rate-setting purposes.

[52] For each of the projects giving rise to expenses in dispute, so the projects listed in the final general asset review working papers as we defined it earlier, where an amount appears in the “Capitalized Per CRA” column, that’s a column in the final general asset review working papers, can you advise as to the position of the Attorney - that the Attorney General intends to take at trial regarding which of the characteristics identified in paragraph 54 are applicable?

[53] So meaning, for each project I want to know if the Attorney General intends to rely on (a) only, or (a) and (b), or (a), (b) and (c). That’s what I want to know for each of the projects.

Mr. Cuddy: To the extent that it hasn’t already been covered by the nominee’s information provided by the nominee in response to your questions, or it doesn’t already appear in documents that we’ve referred to, being what I’ll refer to as the final general asset review working papers, we can make efforts to advise.

Q1365. Just to be clear, I’m not looking for the Minister’s position, I’m looking for the Attorney General’s position. If you want to tell me that the Attorney General’s position is limited to the what is stated in the "Notes" column of the final general asset review working papers that’s an answer, but is that what you’re saying?

Mr. Cuddy: I’m saying we’ll make efforts to advise you.

Q1366. This one is really important. I need to understand the case that I have to meet when I go to trial. I can’t prepare for trial if I don’t know what the Attorney General’s position is with respect to each project at issue.

[54] That’s the whole purpose of discovery is to make the trial fair and efficient by allowing each party to fully inform themselves prior to trial of the precise nature of the parties’ positions, so the issues have to be fully defined. We need to be well informed about the positions that the Attorney General intends to take at trial and really cannot be ambushed by a vague response.

Are you going to give me an undertaking or are you refusing to answer the question?

Mr. Cuddy: No, I told you we’d make efforts to provide those - that information, so I think - I’m not refusing to answer the question.

[55] Respondent’s Answer (December 2, 2022): The Attorney General intends to rely on the same position as the Minister regarding the grounds for relief in

subparagraph 54(a) to (f) of the Amended Reply and proposed Second Amended Reply as they apply to the matters under appeal. The Attorney General relies on all working papers, audit reports, memoranda and all information provided by NSPI to the Agency.

[56] Follow Up Question (January 16, 2023): This is an undertaking to advise of the Attorney General's position regarding which of the characteristics listed in paragraph 54(a) to (f) (paragraph 55(a) to (f) of the Second Amended Reply) apply to each individual project with Disputed Expenses. Specifically, for each project, please advise whether the Attorney General takes the position that paragraph 55(a) applies, 55(b) applies, 55(c) applies, 55(d) applies, 55(e) applies or 55(f) applies or if multiple paragraphs apply, to advise which paragraphs apply to each project. This is an undertaking and must be answered.

[57] Follow Up Answer (April 12, 2023 / April 28, 2023): The undertaking given has been answered. The follow up questions seek the respondent's legal argument. The respondent refuses to provide its legal argument.

[58] Decision re Q1364-1366 and follow-up: The respondent's answer is unsatisfactory. The appellant requested that the respondent clarify its position regarding the applicability of subparagraphs 54(a)–(d) of the Amended Reply (now 55(a)–(d) of the Second Amended Reply) to individual projects giving rise to the Disputed Expenses. Specifically, the appellant asked the respondent to identify: (i) the asset that was replaced, refurbished, or improved; (ii) the nature of any “enduring benefit” claimed; (iii) the “business structure” allegedly supported; (iv) the value of the relevant expenditure and of the related asset; and (v) what the Attorney General contends is “non-recurring” if subparagraph 55(a) is relied upon.

[59] These questions do not seek legal argument or interpretation. They are directed at identifying factual components of the respondent's own pleaded assumptions and are necessary to understand how the Crown intends to apply those assumptions to the Disputed Expenses. As held in *Burlington Resources*, Rule 95(1) entitles a party to clarification of how pleaded assumptions apply to the facts in dispute.

[60] The respondent Crown's response - that it will not provide legal argument and refers back to the Amended Reply - fails to discharge its obligations under Rule 95(1). As confirmed in *Contractor v. R.*, 2021 TCC 46, where a party pleads

assumptions in general form across numerous items, it may be compelled to clarify how those assumptions apply on an item-by-item basis.

[61] In conclusion my decision is: that the respondent is directed to fully answer Q1364-66, in accordance with my foregoing statements.

Questions 1367-1368 and follow-up:

Q1367. Can you also advise the following, with respect to any project where paragraph 54(b) is stated to be applicable, in your response to undertaking that you just gave, what position does this Attorney General intend to assert at trial regarding what the asset is being - what the asset is that is being replaced, refurbished to a like-new condition or improved?

Also what position does the Attorney General intend to assert at trial regarding the “enduring benefit”, if it’s anything more than the asset that you referred to in your response to my first question? So if you say the enduring benefit is the asset, that’s the answer; if it’s anything else please let me know.

I have additional questions so I’m happy to read them all and then seek your response, or if you want to go one-by-one, whatever’s easier?

Mr. Cuddy: Why don’t you just give me all of what it is you’re seeking.

Q1368. Sure, so that’s with respect to 54(b).

With respect to any project where paragraph 54(c) is stated to be applicable, what position does the Attorney General intend to assert at trial regarding what the “business structure” is that was supported and how the expense supported that structure?

With respect to any project where paragraph 54(d) is stated to be applicable, what position does the Attorney General intend to assert at trial regarding what the value of the expenditure is?

Also with respect to paragraph 54(d), what position does the Attorney General intend to assert at trial regarding what the asset is to which the expenditure related?

And also with respect to paragraph 54(d), what position does the Attorney General intend to assert at trial regarding what the value of this asset is?

And with respect to paragraph 54(a), to the extent that the Attorney General is taking the position that an expenditure is not “recurring”, what does the Attorney General say is that is not recurring?

Mr. Cuddy: So in response to that series of questions we’ll take those under advisement and give you our position.

[62] Respondent’s Answer (December 2, 2022): The respondent will not provide its legal argument. The position of the respondent is pleaded in its Amended Reply and the proposed Second Amended Reply.

[63] Follow-Up Question (January 16, 2023): The appellant is not seeking the respondent’s legal argument. The appellant asked for the respondent’s position and the facts relied on in support of that position. The Second Amended Reply does not identify the respondent’s position as to which characteristics apply to which Disputed Expenses nor does it identify the applicability of each characteristic to each Disputed Expense.

[64] Follow-Up Answer April 12, 2023 / April 28, 2023): Please see the previous response to this question.

[65] Decision re Q1367-1368 and follow-up: The respondent’s refusal to answer is unsatisfactory. The appellant requested that the respondent clarify its position regarding the applicability of subparagraphs 54(a) - (d) of the Amended Reply (now 55(a) - (d) of the Second Amended Reply) to individual projects giving rise to the Disputed Expenses. Specifically, the appellant asked the respondent to identify: (i) the asset that was replaced, refurbished, or improved; (ii) the nature of any “enduring benefit” claimed; (iii) the “business structure” allegedly supported; (iv) the values of the relevant expenditure and asset; and (v) what the Attorney General contends is “non-recurring” if subparagraph 55(a) is relied upon.

[66] These questions do not seek legal argument or interpretation. They are directed at identifying factual positions underlying the Crown’s own pleaded assumptions. As held in *Burlington Resources*, discovery obligations under Rule 95(1) extend to clarifying how a party’s pleadings apply to the facts in dispute.

[67] The respondent’s refusal - based on the premise that legal argument is being sought - is insufficient. As confirmed in *Contractor*, where the Crown pleads broad

assumptions applying to multiple disputed items, it may be required to clarify those assumptions on a project-specific basis.

[68] In conclusion my decision is that the respondent is to answer Q1367-1368 by identifying, for each applicable project, the relevant asset, the claimed enduring benefit, the supported business structure, and the values relied upon. These clarifications are necessary to ensure fairness at trial and to allow the appellant to understand the case it must meet.

Questions 1378-83 and follow-up:

Q1378. Does the Attorney General intend to assert at trial any position other than the position taken by the Minister with respect to the projects identified in the final general asset review working papers, and in particular the conclusion stated in the “Notes” column?

Mr. Cuddy: Again, for the same reasons I’ve expressed, I will take that under advisement.

Q1379. It’s a proper question for the appellant to ask whether the Attorney General intends at trial to take a different position than the Minister. Because you won’t tell me whether you will answer that question or not I need to start with the Minister’s position; I need to clearly understand it and then have your position as to whether or not you intend to deviate from that position.

So I’m going to start with the final general asset review working papers and ask a series of questions about those. Again I’m happy to go one at a time or to read them out and then get your response, whatever is easier for you, counsel.

Mr. Cuddy: Why don’t we go through them and then we can provide a response.

Q1380. Okay. For each project identified as “Capitalized Per CRA”, which is a column in each of the final general asset review working papers, so for each project identified as “Capitalized Per CRA” please advise as to the Attorney General’s position regarding the following; any time the word “asset” appears in the “Notes” column, whether it’s replaced, repaired, acquired, as long as the word “asset” appears, advise what was the asset? That’s the first request.

[69] Any time the words “long-lived” appear in the "Notes" column, advise what facts were relied upon in support of the conclusion, the conclusion being that it was long-lived.

[70] Any time the word “replacement” appears in the “Notes” column, advise what “replacement” means and what is being replaced.

[71] Any time the “Notes” column refers to a number of years, advise of the facts that were relied upon in support of coming to that number of years. So if it says 30 years advise of the facts relied upon in determining that it was 30 years.

[72] Any time the words “enduring benefit” appear in the “Notes” column advise what the enduring benefit was.

[73] Any time the words “support business structure” appear in the “Notes” column advise what business structure was being supported and how.

[74] Any time the words “end of useful life” appear in the “Notes” column, please provide a factual basis for this statement. What was at the end of its useful life? So advise what was at the end of its useful life.

[75] Any time the word “refurbishment” appears in the “Notes” column advise what does “refurbishment” mean in that context and what was refurbished?

[76] Any time the words “major repair” appear in the “Notes” column advise what “major repair” means; advise what the asset that was being repaired is; and why the determination was made that the repair was major?

[77] Any time the words “preserve and protect asset” appear in the “Notes” column, what does “preserve and protect” asset mean in that context? Advise what asset is being preserved or protected.

[78] Any time the words “re-establish advantage” appear in the “Notes” column, what does “re-establish advantage” mean in that context? Advise what is the advantage being reestablished?

[79] Any time the word “rebuild” appears in the “Notes” column advise what “rebuild” means in that context? And if the “Notes” column says “major rebuild” advise what is major and what was being rebuilt?

[80] Any time the words “capitalized poles, conductors, lines” appears in the “Notes” column, advise whether the determination as to why the expenses associated

with that project are capital expenses is that the project involved the replacement of poles, conductors or lines or something else? And by something else I mean some other basis, for the determination that the expenses associated with that project are capital expenses.

Mr. Cuddy: Sorry, can I just ask you to go through that one again? I didn't quite understand exactly what you're looking for.

Q1381. Yes, of course.

Mr. Cuddy: Thank you.

Q1382. Any time the words "capitalized poles, conductors, lines" appears in the "Notes" column, can you advise if the basis for the determination that the expenses associated with that project are capital expenses, is that the project involved the replacement of poles, conductors or lines? Or is the determination on some other basis?

[81] Any time the following words appear in the "Notes" column, so "functional improvement" what does "functional improvement" mean and what is being improved?

[82] Any time the following words appear in the "Notes" column, the words being "major restoration", how was the determination made that a restoration was major and what was being restored?

[83] Any time the words "major refurbishment" appear in the "Notes" column, how was the determination made that the refurbishment was major and what was being refurbished?

[84] Any time the words "tangible property" appear in the "Notes" column advise what was the tangible property identified?

[85] Any time the words "refurbishment/replacement" appear in the "Notes" column advise what was refurbished or replaced?

[86] And where the words "original condition" appear in the notes what was the relevance of "original condition" to the conclusion that the expenses associated with that project were capital expenses?

That's the end for that line of questioning.

Mr. Cuddy: So you're asking for this in respect of each general asset review, am I correct?

Q1383. Yes, for all of the projects listed in the final general asset review working papers. Every time those words appear for each project I'm asking for a response to my questions. And, sorry, I'm only asking for the ones that were identified as "capitalized per CRA", so the ones that were allowed.

Mr. Cuddy: I understand that. Thanks. Again for the reasons that I previously referred to we'll take you [sic] requests under advisement.

[87] Respondent's Answer (December 2, 2022): The respondent intends to rely on its pleaded positions as well as the documents produced by the parties. If the respondent intends to change its position regarding the characterization of a particular expenditure, it will so advise. Note that the respondent has corresponded with counsel for the appellant regarding the expenditure described as Biomass Expenses but to date has not received a written response. The respondent refuses to provide its legal argument.

[88] Follow Up Question (January 16, 2023): The appellant is not seeking the respondent's legal argument. The appellant asked for the respondent's position and the facts relied on in support of that position. The respondent has not advised of its position regarding each individual Disputed Expense. The appellant is entitled to know whether the Attorney General's basis for determining that the Disputed Expenses are capital expenses is the same basis as the Minister's and, if not, to advise of the Attorney General's position in respect of each Disputed Expense. The appellant is also entitled to know facts that the Attorney General relies on in support of its position. Please provide an answer for each Disputed Expense.

[89] Follow Up Answer April 12, 2023 / April 28, 2023): Please see the previous response to the question.

[90] Decision Q1378-83 and follow-up: The respondent's refusal to answer these questions is improper. The appellant asked the respondent to clarify, for each project labeled "Capitalized Per CRA" in the general asset review working papers, the specific factual basis for various terms used in the "Notes" column - such as "asset,"

“replacement,” “refurbishment,” “long-lived,” “enduring benefit,” and “major repair.” The appellant did not seek legal reasoning or internal evaluative processes, but rather asked for what was replaced, what was refurbished, and what was the asset or business structure affected. These are all proper factual inquiries under Rule 95(1).

[91] As confirmed in *Burlington Resources* discovery entitles a party to know, further to the pleadings, the specific facts and positions the opposing party intends to advance at trial. The questions here do not require the respondent to explain why an expense was characterized as capital, but only to identify the underlying factual assumptions or positions associated with that characterization. Courts have repeatedly held that factual explanations regarding pleaded terms - such as “enduring benefit” or “long-lived asset” - are discoverable, so long as they do not compel legal argument (*Kossow, Contractor*).

[92] In conclusion my decision is: that the respondent is answer Q1378-83 and follow-up, excluding any requirement to answer that seeks the “why” of a drawn legal conclusion. That limitation does not justify a blanket refusal to otherwise answer these questions.

Question 1385 and follow-up:

Q1385. I just have some additional questions about paragraphs 55 and 56 of the Amended Reply, that are on the screen now.

With respect to paragraph 55, what is the Attorney General’s position regarding what the advantage is, the advantage referred to in this paragraph?

And what is the Attorney General’s position regarding what was the enduring benefit in the context of paragraph 55?

And what is the Attorney General’s position regarding what was nonrecurring, as stated in paragraph 55?

Mr. Cuddy: Again, we’ll take that under advisement, for reasons that we’ve already provided.

[93] Respondent’s Answer (December 2, 2022): The respondent refuses to provide its legal argument.

[94] Follow Up Question (January 16, 2023): The appellant is not seeking the respondent's legal argument. The question asked what the Attorney General's position was with respect to: (a) the enduring benefit in the context of paragraph 55 of the Amended Reply (paragraph 56 of the Second Amended Reply); and (b) what was nonrecurring, as stated in paragraph 55 of the Amended Reply (paragraph 56 of the Second Amended Reply). Please answer the question.

[95] Follow Up Answer (April 12, 2023 / April 28, 2023): Please see the previous response to the question.

[96] Decision re Q1385 and follow-up: the respondent's refusal to answer Q1385 is unsatisfactory. The appellant requested clarification of the Attorney General's position on three factual elements contained in paragraph 55 of the Amended Reply (now paragraph 56 of the Second Amended Reply): (i) the "advantage" conferred by the Disputed Expenses, (ii) the "enduring benefit" alleged, and (iii) what aspect of the expense is characterized as "nonrecurring."

[97] These are not requests for legal reasoning or interpretation. Rather, they seek factual particulars concerning how the respondent's pleadings are said to apply to the evidence. Factual clarifications of pleaded assertions fall within the scope of discovery and are necessary to define the case to be met at trial.

[98] The respondent's generalized refusal, on the basis that legal argument is being sought, is misplaced. As held in *Burlington Resources*, discovery may compel a party to articulate the factual basis supporting its own pleadings, particularly where terms such as "advantage" or "enduring benefit" are central to the positions advanced.

[99] In conclusion my decision is: that the respondent identify, for each of the three elements referenced in paragraph 56 of the Second Amended Reply, the specific factual bases it intends to rely on at trial. This information is necessary to ensure fairness and adequate trial preparation.

Question 1386 and follow-up:

Q1386. And with respect to paragraph 56 the asbestos removal costs, what assets were being preserved and or protected?

Mr. Cuddy: Again for the reasons provided we'll take that under advisement, thank you.

[100] Respondent's Answer (December 2, 2022): Refusal: The respondent refuses to provide its legal argument.

[101] Follow Up Question (January 16, 2023): The appellant is not seeking the respondent's legal argument. The question asked what the Attorney General's position was with respect to: (a) the enduring benefit in the context of paragraph 55 of the Amended Reply (paragraph 56 of the Second Amended Reply); and (b) what was nonrecurring, as stated in paragraph 55 of the Amended Reply (paragraph 56 of the Second Amended Reply). Please answer the question.

[102] Follow Up Answer (April 12, 2023 / April 28, 2023): Please see the previous response to the question.

[103] Decision re Q1386 and follow-up: the respondent's refusal to answer Q1385 is unsatisfactory. The appellant asked the respondent to clarify what asset or assets were being preserved or protected by the asbestos removal costs described in paragraph 56 of the Second Amended Reply. This is a narrow factual inquiry aimed at determining the factual basis for the respondent's assumption that these costs produced an enduring benefit or conferred an advantage consistent with capital treatment.

[104] The respondent refused to answer on the basis that the question seeks legal argument. However, the question clearly seeks a factual explanation: what specific asset was affected by or benefited from the asbestos removal. As emphasized in *Burlington Resources*, a party may be required to specify how its pleaded assumptions apply to individual facts or categories of expenses.

[105] The appellant is not seeking interpretive reasoning or legal theory. Rather, it seeks to understand how the respondent links the asbestos removal costs to particular assets, a matter fundamental to the Respondent's recharacterization of those expenses as capital in nature.

[106] In conclusion my decision is: that the respondent is to answer Q1386 and identify the specific assets or classes of assets that it alleges were preserved or protected by the asbestos removal costs.

Questions 464-68 and follow-up:

Q464. And this is a question for your counsel, but does the Crown intend to take a different position in this appeal, i.e., a position that the amounts listed here that I just went over, the ones for routine projects and non-routine projects that they should be treated on capital account?

Mr. Cuddy: Well, there was never any reassessment, there was never any determination. And, to my understanding, this recommendation was never acted on by Appeals because the appellant appealed to the Tax Court. So where we are right now is the numbers in dispute are as set out in the pleadings.

Q465. So will you advise me if the Crown, in this appeal, is going to take the position that these amounts should be treated on capital account?

Mr. Cuddy: My view is that I think we've already done that because that's the way things were set out in the pleadings, because no reassessments were ever issued.

Q466. So if that is the position that the Crown is going to take can you advise me what facts you intend to rely on in support of that position?

Mr. Cuddy: I think that part of our position is just legal argument.

Q467. The facts that you intend to rely on are legal argument? Sorry, I just didn't hear.

Mr. Cuddy: So I think the determination that these were capital or income is a legal determination, and so at this point all these amounts are at issue, as set out in the pleadings.

Q468. So, no, you're not going to answer that question, that's a refusal?

Mr. Cuddy: Yes.

[107] Decision Q464-468: these questions concern the 2006 taxation year, which was not reassessed after the notice of objection respecting reclassification of expenses had been filed, as the appellant commenced the appeal before the respondent had responded to the objection.

[108] In conclusion my decision is: that the respondent Crown's refusal to answer Questions 464 to 468 is justified, as there had been no reassessment or determination

following the notice of objection before the appeal was filed; thus no Ministerial assumptions of fact etc.

Question follow-ups 10 (a)-(s):

[109] Follow Up Question (January 16, 2023): Q 10. What is reflected in the “Note” column?

[110] Where there is a reference to a project involving a “long lived asset replacement”, what was the “asset”?

[111] Please provide this information for each project where it was concluded an “asset” was replaced.

[112] Please advise if the Attorney General intends to take a different position at trial. If the Attorney General intends to take a different position than the Minister at trial, please advise of the Attorney General’s position and the facts relied on in supporting of that position.

[113] Where there is a reference to “replacement”, what does that mean? What is the asset being replaced?

[114] Please provide this information for each project where it was concluded that there was a replacement.

[115] Please advise if the Attorney General intends to take a different position at trial. If the Attorney General intends to take a different position than the Minister at trial, please advise of the Attorney General’s position and the facts relied on in supporting of that position.

[116] Where there is a reference to a specific number of years, what does that mean? Where did you get that number from?

[117] Please provide this information for each project where there is a reference to a number of years.

[118] Where there is a reference to “line rebuild”, what does that mean?

[119] Please provide this information for each project where there is a reference to a line rebuild.

[120] Please advise if the Attorney General intends to take a different position at trial. If the Attorney General intends to take a different position than the Minister at trial, please advise of the Attorney General's position and the facts relied on in supporting of that position.

[121] Where there is a reference to an "improvement", what does that mean?

[122] Please provide this information for each project where there is a reference to an improvement.

[123] Please advise if the Attorney General intends to take a different position at trial. If the Attorney General intends to take a different position than the Minister at trial, please advise of the Attorney General's position and the facts relied on in supporting of that position.

[124] Where there is a reference to an "enduring benefit", what was the enduring benefit to the Appellant's business?

[125] Please provide this information for each project where there is a reference to an enduring benefit.

[126] Please advise if the Attorney General intends to take a different position at trial. If the Attorney General intends to take a different position than the Minister at trial, please advise of the Attorney General's position and the facts relied on in supporting of that position.

[127] Where there is a reference to "end of useful life – replacement", what did that mean? What was the asset at the end of its useful life?

[128] Please provide this information for each project where there is a reference to an end of useful life replacement.

[129] Please advise if the Attorney General intends to take a different position at trial. If the Attorney General intends to take a different position than the Minister at

trial, please advise of the Attorney General's position and the facts relied on in supporting of that position.

[130] Where there is a reference to "refurbishment", what did that mean? What was the asset being refurbished?

[131] Please provide this information for each project where there is a reference to a refurbishment.

[132] Please advise if the Attorney General intends to take a different position at trial. If the Attorney General intends to take a different position than the Minister at trial, please advise of the Attorney General's position and the facts relied on in supporting of that position.

[133] Where there is a reference to "major repair", what did that mean? What was the asset being repaired? Why was the repair major?

[134] Please provide this information for each project where there is a reference to a major repair.

[135] Please advise if the Attorney General intends to take a different position at trial. If the Attorney General intends to take a different position than the Minister at trial, please advise of the Attorney General's position and the facts relied on in supporting of that position.

[136] Where there is a reference to "preserve and protect asset", what does that mean? What asset is being preserved or protected?

[137] Please provide this information for each project where there is a reference to preserving and protecting an asset.

[138] Please advise if the Attorney General intends to take a different position at trial. If the Attorney General intends to take a different position than the Minister at trial please advise of the Attorney General's position and the facts relied on in supporting of that position.

[139] Where there is a reference to "rebuild", what does that mean?

[140] Please provide this information for each project where there is a reference to a rebuild.

[141] Please advise if the Attorney General intends to take a different position at trial. If the Attorney General intends to take a different position than the Minister at trial, please advise of the Attorney General's position and the facts relied on in supporting of that position.

[142] Where there is a reference to "refurbishment - enduring benefit" - what was refurbished and how did that result in an enduring benefit?

[143] Please provide this information for each project where there is a reference to refurbishment - enduring benefit?

[144] Please advise if the Attorney General intends to take a different position at trial. If the Attorney General intends to take a different position than the Minister at trial, please advise of the Attorney General's position and the facts relied on in supporting of that position.

[145] Where there is a reference to replacement with new as well as complete refurbishment "like new" – what does this mean?

[146] Please provide this information for each project where there is a reference to a replacement with new as well as complete refurbishment "like new"?

[147] Please advise if the Attorney General intends to take a different position at trial. If the Attorney General intends to take a different position than the Minister at trial, please advise of the Attorney General's position and the facts relied on in supporting of that position.

[148] Where there is a reference to "long-lived asset replacement – enduring benefit" – what was the asset that was replaced and how did that result in an enduring benefit?

[149] Please provide this information for each project where there is a reference to long lived asset replacement – enduring benefit?

[150] Please advise if the Attorney General intends to take a different position at trial. If the Attorney General intends to take a different position than the Minister at trial, please advise of the Attorney General's position and the facts relied on in supporting of that position.

[151] Where there is a reference to "major repair – enduring benefit", how did Ms. Brothers conclude that the restoration was "major" and how did the "major restoration" result in an enduring benefit?

[152] Please provide this information for each project where there is a reference to major repair – enduring benefit?

[153] Please advise if the Attorney General intends to take a different position at trial. If the Attorney General intends to take a different position than the Minister at trial, please advise of the Attorney General's position and the facts relied on in supporting of that position.

[154] Where there is a reference to "refurbishment / replacement - enduring benefit" – what was refurbished or replaced and how did that result in an enduring benefit?

[155] Please provide this information for each project where there is a reference to refurbishment / replacement – enduring benefit?

[156] Please advise if the Attorney General intends to take a different position at trial. If the Attorney General intends to take a different position than the Minister at trial, please advise of the Attorney General's position and the facts relied on in supporting of that position.

[157] Where there is a reference to "replacement - enduring benefit" – what was replaced and how did that result in an enduring benefit?

[158] Please provide this information for each project where there is a reference to replacement – enduring benefit?

[159] Please advise if the Attorney General intends to take a different position at trial. If the Attorney General intends to take a different position than the Minister at trial, please advise of the Attorney General's position and the facts relied on in supporting of that position.

[160] Where there is a reference to “refurbishment - enduring benefit” – what was replaced and how did that result in an enduring benefit?

[161] Please provide this information for each project where there is a reference to refurbishment – enduring benefit?

[162] Please advise if the Attorney General intends to take a different position at trial. If the Attorney General intends to take a different position than the Minister at trial, please advise of the Attorney General’s position and the facts relied on in supporting of that position.

[163] Is the information in the “Notes” column the totality of conclusions relied upon in support of the Minister’s conclusions about the projects identified as “Capitalize per CRA”?

[164] Follow Up Answer (April 12, 2023 / April 28, 2023): The respondent refuses to answer the questions posed as they seek the respondent’s legal argument. As the appellant appealed directly to the TCC prior to a decision being made by the Canada Revenue Agency on the NOO, these questions are not relevant.

[165] Decision Q10 (a) - (s): the respondent’s refusal is proper.

[166] The Q10(a) - (s) questions relate exclusively to descriptive terms contained in NSPI’s draft 2006 General Asset Review Working Papers - terms such as “refurbishment,” “replacement,” and “enduring benefit.” The appellant seeks detailed factual explanations for each term, for every project identified.

[167] However, these working papers were never finalized, were not relied upon by the Minister in reassessing the taxpayer including for the 2006 taxation year and are not referenced in the Second Amended Reply. They therefore fall outside the scope of the respondent’s pleaded case.

[168] Rule 95(1) limits discovery to matters that are relevant and material to the issues raised in the pleadings. As confirmed in *Kossow*, discovery cannot be used to explore topics unrelated to the issues as framed by the parties’ pleadings.

[169] In conclusion my decision is: that the respondent’s refusal to answer Questions 10(a) - (s) is justified.

Questions 400-401:

Q400. Just with respect to the facts of NSPI, did you identify projects where there was an identical procedure or replacement being conducted on a recurring basis hundreds of times per year from year-to-year?

Mr. Cuddy: Again, this is just - you have our position. You're asking the same question a different way, and that's fine, but we have the same position in terms of our response.

Q401. My question was a purely factual one. I'm not asking was it similar to or anything else, I've already put that on the record and I hear your refusal. I'm asking Ms. Brothers, in the context of auditing NSPI and reviewing all the projects that we just went through the project descriptions for, did you identify any procedures or replacements that were conducted on a recurring basis?

Mr. Cuddy: Again, you're asking her to apply someone else's document and someone else's position, and someone else's view of what the case law is. So I think our objection would apply doubly. And you've asked her whether she took it into account and she's answered that question.

[170] Decision Q400-401: the respondent's refusal to answer Questions 400 and 401 is proper.

[171] Although the appellant framed the questions as factual, they effectively sought legal characterization of audit findings in light of case law concerning the distinction between capital and current expenditures—particularly the test of recurrence referenced in decisions such as *Atco Electric*. Specifically, the appellant asked whether the CRA nominee identified “procedures or replacements that were conducted on a recurring basis,” which invites a legal inference as to whether such expenditures should be treated as current rather than capital.

[172] Under Rule 95(1), a discovery nominee is required to answer questions of fact, not to interpret case law or articulate legal positions. As confirmed in *Kossow*, *Burlington Resources*, and *General Motors Acceptance Corp*, a nominee is not expected to evaluate factual scenarios through the lens of legal tests or provide legal conclusions. Further, the respondent had already provided responses on whether recurrence was considered during the audit process. Reframing the same issue to compel legal analysis under the guise of factual questioning exceeds the permissible scope of discovery.

[173] Additionally, it is well beyond the scope of what a nominee is expected to provide in discovery.

[174] In conclusion my decision is: that the respondent's refusal to answer Questions 400 and 401 is justified.

Questions 377-379:

Q376. And you mentioned that you determined that the facts in *Atco* were different than the facts that NSPI was presenting.

A. Yes.

Q377. Do you recall why?

Mr. Cuddy: Again, we're not here to talk about the case law and argue about the case law. She's advised that they considered it and didn't accept it. So I think in terms of legal analysis we're back to -- she's not here to give her opinion on the law, any more than any accountant who had the discussion was. So we don't believe she should answer the question.

Q378. Counsel, I haven't even identified any lawyers that have been involved in this analysis. As I understand it Ms. Brothers conducted the analysis and then referred to information provided by another individual, Mr. Bird, who is also not a lawyer. I'm not asking for a legal analysis. I'm asking for the analysis of the auditor at the time.

Mr. Cuddy: We've stated what our position is on the record.

Q379. Specifically what I'm asking for is, Ms. Brothers advised that the facts in *Atco* were determined to be distinguishable from the facts presented by NSPI. So my question is, what is the difference in the facts and how was the decision made that *Atco* was distinguishable from the circumstances presented by NSPI?

Mr. Cuddy: Again, you have our position.

[175] Decision Q377-379: the respondent's refusal is proper.

[176] These questions seek an explanation from the CRA nominee, Ms. Brothers, regarding why the facts in *Atco Electric* were determined to be distinguishable from the facts in NSPI's case. Although the appellant framed the questions as factual, they necessarily require the nominee to engage in legal analysis - specifically, to compare

jurisprudence to the facts of the audit and explain why a particular precedent was rejected or found inapplicable.

[177] This type of evaluative comparison is inherently legal in nature. As established in *Kossow*, *Burlington Resources*, and *General Motors Acceptance Corp.*, a discovery nominee is not required to interpret case law, provide legal reasoning, or articulate litigation positions. Under Rule 95(1), discovery is limited to factual matters known to the party through its representative. The decision to treat *Atco* as distinguishable involves legal interpretation, which falls outside the scope of permissible discovery.

[178] Furthermore, it is well beyond the scope of what a nominee is expected to provide in discovery.

[179] In conclusion my decision is: that the respondent was entitled to refuse to answer Questions 377 to 379.

Questions 397-399:

Q397. So I'm at page 9 of the PDF. And the last paragraph on this page reads: "Both *Atco Electric* and *Rainbow Pipeline* cases highlight the Court's willingness to allow expenditures as deductible business expenses where a substantially identical procedure or replacement is being conducted on a recurring basis, hundreds of times per year, and from year-to-year." Did you take this statement into account when making your determination with respect to the disputed expenses?

A. Yes.

Q398. And what was the relevance of this statement to your analysis and determination?

Mr. Cuddy: Again I think we're going to object to this question because you're asking her for, basically, a legal opinion, which she is not qualified to provide.

Q399. Counsel so I understand your refusal to allow the witness to answer is on the basis that what she may say is privileged?

Mr. Cuddy: No, you're asking for her views on the case law. And, with respect, that's not why she's here, to speak on the case law. So to ask her what her opinion is on the law or on the cases is going to be -- we're going to refuse to answer questions of that nature.

Ms. Fidler: Ms. Brothers is the individual who performed the analysis, reviewed the information and came to a determination that is relevant to the matters at issue in this case. I'm entitled to ask her about what she took into consideration, what she thought - what was relevant to her analysis and eventually her determination, but I understand and I hear your refusal.

[180] Decision Q397-399: the appellant asked the respondent's nominee, Ms. Brothers, to explain the relevance of a legal principle—drawn from *Atco Electric* and *Rainbow Pipeline* - to her audit analysis and conclusions regarding the Disputed Expenses. Although framed as a question about what was considered in her analysis, the inquiry necessarily involves legal interpretation. It effectively asks the nominee to opine on how specific case law influenced the characterization of certain expenses, thereby requiring legal reasoning.

[181] Under Rule 95(1), discovery does not extend to legal opinions or arguments, particularly from lay witnesses not called in the capacity of legal experts. As discovery is intended to clarify factual positions - not to elicit legal analysis or interpretive views - refusing to answer such questions is proper and consistent with the scope of permissible discovery.

[182] In conclusion my decision is: that the respondent's refusal to answer Q397-399 is proper.

Appellant's Question 1 (December 22, 2022): Amendment to issues to be decided

[183] Paragraph 51(a) of the Second Amended Reply (Issues to be Decided) now reads "the Disputed Expenses are capital expenditures, such that section 9 and/or paragraph 18(1)(b) of the Act prohibits their current deduction from income;". The Appellant has the following questions with respect to the amendment.

[184] Is the Respondent's position that section 9 prohibits the current deduction of the Disputed Expenses dependent upon the characterization of the Disputed Expenses as "capital expenditures"?

[185] If no, what is the basis for the Respondent's position that section operates to prohibit the current deduction of the Disputed Expenses?

[186] Respondent's Answer (March 3, 2023): 1) The respondent's position is set out in the "Grounds Relied On and Relief Sought" section of the Second Amended Reply. The respondent will not provide its legal argument.

[187] Appellant's Additional Submission: The question does not seek legal argument but is seeking to understand the primacy of the respondent's positions [*Burlington Resources Finance Co. v R.* 2015 TCC 71 at para. 66]. The appellant is looking to clarify the basis for the respondent's position that section 9 of the *Act* may preclude a deduction of the Disputed Expenses, particularly whether the Respondent's position is dependent upon the characterization of the Disputed Expenses as capital expenditures.

[188] Decision Q1 (December 22, 2022 letter): the appellant asked whether the respondent's position under section 9 of the *Act* depends on the classification of the disputed expenses as capital expenditures and, if not, what alternative basis supports that position. Although the appellant framed the question as seeking clarification of the respondent's position, part (a) of the question expressly requests the legal rationale underlying the application of section 9.

[189] Discovery is limited to relevant and material factual matters and does not extend to legal reasoning, statutory interpretation, or argument. As confirmed in *Kossow* and *Burlington Resources Finance Co.*, discovery does not compel a party to disclose the interpretive basis for its legal positions.

[190] The respondent has already pleaded in paragraph 51(a) of the Second Amended Reply that section 9 and/or paragraph 18(1)(b) prohibit the deduction because the disputed expenses are capital in nature. That pleading is sufficient to inform the appellant of the respondent's position. The appellant is not entitled to seek further elaboration of legal doctrine or strategy through discovery.

[191] In conclusion my decision is: that the respondent was entitled to refuse to answer this question.

Appellant's Question 2 (December 22, 2022 letter): Amendment to Issues to be Decided

[192] Paragraph 51(a) of the Second Amended Reply (Issues to be Decided) now reads "the Disputed Expenses are capital expenditures, such that section 9 and/or

paragraph 18(1)(b) of the Act prohibits their current deduction from income;”. The Appellant has the following questions with respect to the amendment: ...

[193] 2. Is the Respondent’s position that section 9 operates independently from paragraph 18(1)(b) to deny the deduction of the Disputed Expenses?

[194] (a) If yes, is the Respondent’s position that section 9 is an independent basis for denying the deduction of the Disputed Expenses?

[195] (i) If so, what is the basis for that position?

[196] Respondent’s Answer (March 3, 2023): 2) The respondent’s position is set out in the “Grounds Relied On and Relief Sought” section of the Second Amended Reply. The respondent will not provide its legal argument.

[197] Appellant’s Additional Submission: The question does not seek legal argument, but is seeking to understand the primacy of the respondent’s positions. [*Burlington Resources*, 2015 TCC 71, para. 66]. The appellant is looking to determine whether the respondent’s position is that section 9 of the Act may preclude a deduction of the Disputed Expenses independently from paragraph 18(1)(b).

[198] Decision Q2 (December 22, 2022 letter): although the appellant contends that the question merely seeks to clarify the “primacy” of the respondent’s reliance on section 9 versus paragraph 18(1)(b), the structure and content of the question - particularly subparts (a) and (i)—clearly ask whether section 9 operates as an independent legal basis to deny the deduction and, if so, to explain why. This goes beyond a request for factual clarification and improperly seeks legal reasoning.

[199] As affirmed in *Kossow* and *Burlington Resources*, discovery does not extend to the interpretive rationale underlying a party’s statutory argument or legal strategy.

[200] Furthermore, paragraph 51(a) of the Second Amended Reply pleads that both section 9 and paragraph 18(1)(b) prohibit the deduction because the Disputed Expenses are capital expenditures. That is a sufficient factual basis for the respondent’s refusal to answer. Whether the respondent relies on one provision more than the other - or considers them to operate independently - is a matter of legal framing, not factual discovery.

[201] In conclusion my decision is: that the respondent's refusal to answer Question 2 is proper.

Question 4 (December 22, 2022 letter): Amendment to Issues to be Decided

[202] Paragraph 51(a) of the Second Amended Reply (Issues to be Decided) now reads "the Disputed Expenses are capital expenditures, such that section 9 and/or paragraph 18(1)(b) of the Act prohibits their current deduction from income;". The Appellant has the following questions with respect to the amendment. ...

[203] 4. If a particular Disputed Expense is found not to be a capital expenditure for the purposes of paragraph 18(1)(b), is it the Respondent's position that section 9 may still operate to preclude the current deduction of that particular Disputed Expense?

[204] (a) If yes, what is the Respondent's position regarding why section 9 may operate to preclude the current deduction of the particular Disputed Expense (which is found not to be a capital expenditure for the purposes of paragraph 18(1)(b))?

[205] Respondent's Answer (March 3, 2023): Q4, yes. See paragraph 53 of the Second Amended Reply. The respondent will not provide its legal argument.

[206] Appellant's Additional Submission: Paragraph 53 of the Second Amended Reply says "The appellant's reclassification of the Disputed Expenses as current expenses does not yield an accurate picture of the appellant's income for the taxation years under appeal." However, paragraph 53 appears under the subheading "The Disputed Expenses are capital expenditures."

[207] The question does not seek legal argument. Instead, the appellant is looking to determine whether the respondent's position is that section 9 of the Act may preclude a deduction of the Disputed Expenses independently from paragraph 18(1)(b) and, if so, on the basis that those amounts are capital expenses (as currently implied by the pleadings) or some other basis.

[208] Decision Q4 (December 22, 2022 letter): the appellant asked whether section 9 may preclude the deduction of a disputed expense even if that expense is found not to be capital in nature under paragraph 18(1)(b), and, if so, to explain why. This is not a request for factual clarification but a request for legal interpretation and

reasoning - specifically, a hypothetical legal application of section 9 in isolation. Such inquiries fall outside the permissible scope of discovery under Rule 95(1).

[209] As confirmed in *Kossow* and *Burlington Resources*, discovery does not compel disclosure of legal argument or statutory interpretation.

[210] Although the appellant points to paragraph 53 of the Second Amended Reply as ambiguous because it appears under the subheading “The Disputed Expenses are capital expenditures,” this does not alter the scope of discovery. Paragraph 53 states that the reclassification of expenses “does not yield an accurate picture of the Appellant’s income,” which is a factual pleading related to the respondent’s position under section 9. The appellant is not entitled to probe whether this constitutes an “independent basis” under section 9 in the absence of paragraph 18(1)(b) - that is a matter of legal framing to be addressed at trial or in submissions.

[211] This approach is consistent with *Quigley*, 2023 TCC 138, which emphasized that discovery must remain confined to the clarification of material facts and pleaded positions—not legal theories or interpretive strategies.

[212] In conclusion my decision is: the respondent’s refusal to answer Q4 is proper.

Question 6 (December 22, 2022 letter): Amendment to Grounds Relied on and Relief Sought

[213] The Second Amended Reply adds a new paragraph 53, under the heading “Grounds Relied on and Relief Sought” and subheading “The Disputed Expenses are capital expenditures”, which reads: “The Appellant’s reclassification of the Disputed Expenses as current expenses does not yield an accurate picture of the Appellant’s income for the taxation years under appeal.” The Appellant has the following questions with respect to the amendment.

[214] Is the new paragraph 53 an additional reason in support of the Respondent’s assertion that the Disputed Expenses are capital expenditures?

[215] The Second Amended Reply adds a new paragraph 53, under the heading “Grounds Relied on and Relief Sought” and subheading “The Disputed Expenses are capital expenditures”, which reads: “The Appellant’s reclassification of the Disputed Expenses as current expenses does not yield an accurate picture of the

Appellant's income for the taxation years under appeal." The Appellant has the following questions with respect to the amendment.

[216] 6. Is the new paragraph 53 an additional reason in support of the Respondent's assertion that the Disputed Expenses are capital expenditures?

[217] Answer: 6) This was already considered in the course of the respondent's review.

[218] Appellant's Additional Submission: The appellant does not understand the response to this question – it does not seem to answer the question posed.

[219] Decision Q6: the appellant asked a clear and narrow question: whether paragraph 53 of the Second Amended Reply constitutes an additional reason in support of the respondent's assertion that the Disputed Expenses are capital expenditures. The respondent's answer - "this was already considered during the respondent's review" - is ambiguous, non-responsive, and fails to clarify the function of the newly added paragraph.

[220] As held in *Burlington Resources*, discovery entitles a party to clarification of how pleaded positions are structured and whether new grounds have been introduced. This is consistent with the Court's approach in *Samaroo*, which affirms the importance of clarity in pleadings and their role in shaping the issues for trial.

[221] In conclusion my decision regarding Q6 is: that the respondent is to clarify whether paragraph 53 is pleaded as an additional ground for the disallowance of the Disputed Expenses or whether it merely supplements the existing assertions under paragraph 51(a).

Question 5 (December 22, 2022 letter): Appellant's Q5 (December 22, 2022): amendment to issues to be decided

[222] Paragraph 51(a) of the Second Amended Reply (Issues to be Decided) now reads "the Disputed Expenses are capital expenditures, such that section 9 and/or paragraph 18(1)(b) of the Act prohibits their current deduction from income;". The Appellant has the following questions with respect to the amendment: ...

[223] 5. Is it the Respondent's position that the current deduction of the Ash Cell Expenses is prohibited by paragraph 18(1)(b) only and that section 9 is not relevant to the question of whether or not the Appellant is entitled to a current deduction for the Ash Cell Expenses?

[224] Respondent's Answer (March 3, 2023): As stated in the issues, the respondent has also pleaded subsections 18(1) and 14(1) of the *Income Tax Act*.

[225] Appellant's Additional Submission: The respondent has not answered the question posed – the question is whether the respondent's position is that section 9 is not relevant to the current deduction of the Ash Cell Expenses, given that the respondent has not included Section 9 in the Issues to be Decided with respect to the Ash Cell Expenses.

[226] Decision Q5: the appellant's question asked whether the respondent takes the position that paragraph 18(1)(b) alone precludes the current deduction of the Ash Cell Expenses, and that section 9 is not relevant to that determination. The underlying concern was that paragraph 51(a) of the Second Amended Reply does not expressly mention section 9 in connection with the Ash Cell Expenses.

[227] In response, the respondent cited subsections 18(1) and 14(1) of the *Act* but did not clearly indicate whether section 9 is also relied upon. This answer does not constitute a refusal, but it is non-committal and unclear in a way that frustrates the clarifying purpose of discovery under Rule 95(1).

[228] While Rule 95 does not require disclosure of legal argument (*Kossow*; *Samaroo*), it does permit questions that clarify the factual framework and pleaded positions in order to define the case to be met (*Burlington Resources*). The appellant was entitled to ask whether section 9 was being invoked in respect of the Ash Cell Expenses specifically.

[229] That said, paragraph 51(a) of the Second Amended Reply pleads that section 9 and/or paragraph 18(1)(b) apply to the "Disputed Expenses" generally, which - on a fair reading - includes the Ash Cell Expenses. While the pleadings could be more precise, this wording is broad enough to suggest that section 9 has not been excluded as a ground.

[230] Thus, while the response is somewhat vague and could benefit from clarification, it is not such as to require a compelled further answer.

[231] In conclusion my decision is: that the respondent's answer to Q5 is adequate.

Questions 1388 and Question 3 (December 22, 2022 letter)

Q1388. Just to be clear, yesterday when we were going through the proposal letters and the audit reports section 9(1) was mentioned in certain place. So we're trying to understand 9 whether or not the Attorney General is asserting a position that relies on section 9? We understood from Ms. Brothers that the position taken by the Minister in issuing the assessments was that if an expense was not determined to be capital under paragraph 18(1)(b), then section 9(1) did not operate to preclude its deduction. We want to know whether or not the Attorney General intends to advance a different position at trial? That is assuming the Attorney General is going to rely on 9(1) and amend its pleadings in order to reflect that it is intending to rely on 9(1)? But if you tell me you aren't then I'll move on.

Mr. Cuddy: We'll consider what you've asked and take it under advisement and let you know.

Appellant's Question 3 (December 22, 2022): Amendment to Issues to be Decided

[232] Paragraph 51(a) of the Second Amended Reply (Issues to be Decided) now reads "the Disputed Expenses are capital expenditures, such that section 9 and/or paragraph 18(1)(b) of the Act prohibits their current deduction from income;". The Appellant has the following questions with respect to the amendment: ...

[233] 3. The position taken by the Minister in issuing the reassessments under appeal was that if an expense was not "capital" for the purposes of paragraph 18(1)(b), then section 9 did not operate to preclude the deduction of that amount.[footnote: see for example the response to Q. 852 during the appellant's examination for discovery of Ms. Brothers] Does the Respondent intend to take a different position at trial?

[234] (a) If yes, please specify the respondent's position and the factual basis for that position.

[235] Respondent's Answer (March 3, 2023): 3) The nominee's legal interpretation of the provisions of the Act are not binding on the respondent in this appeal. The

legal position of the respondent is set out in the “Grounds Relied On and Relief Sought” section of the Second Amended Reply.

[236] Appellant’s Additional Submission: The question asks whether the respondent intends to take a different position than the Minister with respect to the applicability of section if an expense was not “capital” for the purposes of paragraph 18(1)(b) and, if so, the position and factual basis for that position.

[237] Decision Q1388 and Appellant’s Q3 (December 22, 2022): both questions seek to determine whether the respondent intends to adopt a legal position at trial that departs from the Minister’s position during the audit - specifically, that section 9(1) does not independently preclude deduction where an expense is not “capital” for the purposes of paragraph 18(1)(b). The appellant also asks the respondent to confirm and explain the basis for any such divergence.

[238] While framed as a factual inquiry, these questions ultimately seek legal reasoning and litigation strategy, which are not discoverable under Rule 95(1). As confirmed in *Kossow and Burlington Resources Finance Co.*, Rule 95 confines discovery to matters of fact and does not compel a party to disclose its legal interpretations, theories, or how it intends to argue alternative statutory provisions at trial.

[239] Paragraph 51(a) of the Second Amended Reply pleads that section 9 and/or paragraph 18(1)(b) prohibit the deduction of the Disputed Expenses. This language is broad enough to put the appellant on notice that the Crown may rely on section 9 independently. There is no obligation to provide advance legal argument explaining how section 9 may apply in scenarios where paragraph 18(1)(b) does not per *Quigley*.

[240] In conclusion my decision is: that the respondent was entitled to refuse these questions.

V. Conclusion:

[241] As success is divided, costs will be in the cause.

Signed this 11th day of June 2026.

“B. Russell”

Russell J.

CITATION: 2026 TCC 110

COURT FILE NO.: 2019-4307(IT)G

STYLE OF CAUSE: NOVA SCOTIA POWER INC. AND HIS
MAJESTY THE KING

PLACE OF HEARING: Toronto, Ontario

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