Federal Court Cour fédérale

Date: 20240328

Docket: T-121-24

Citation: 2024 FC 494

Ottawa, Ontario, March 28, 2024

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Applicant

and

ASB HOLDINGS LIMITED
CEB HOLDINGS LIMITED
NSB HOLDINGS LIMITED
SDH HOLDINGS LIMITED
SDS HOLDINGS LIMITED

Respondents

ORDER

[1] The underlying proceeding is an application brought by the Applicant pursuant to section 231.7 of the *Income Tax Act*, RSC 1985, c 1, for a compliance order requiring the Respondents to provide certain specified documents to the Applicant for the 2019 and 2020 taxation years.

[2] Following the completion of the cross-examinations, a number of interlocutory motions and the filing of the application records, this application was scheduled to be heard on the merits

on March 22, 2024. However, at an urgently convened case management conference held March 19, 2024, the Respondents sought leave to file an affidavit from Peter Grater [Grater Affidavit]. The request was opposed by the Applicant. I indicated to the parties at the case management conference that I was not prepared to exercise my discretion to refuse to entertain the motion, nor was I willing to determine the motion informally at the case management conference due to the Applicant's opposition thereto. As such, I adjourned the hearing of the application on the merits and, in its place, I heard the Respondents' motion.

[3] For the reasons that follow, the Respondents' motion is dismissed.

I. Background

[4] On January 22, 2024, the Applicant commenced this application and scheduled it to be heard on February 6, 2024.

[5] On January 24, 2024, the Applicant served the affidavits of Francois Cloutier and Ian Charpentier.

[6] On January 31, 2024, the Applicant served and filed their complete application record. In the underlying application, the Applicant asserts that:

A. Abraham Bleeman [Abraham] and his spouse, Eva Bleeman [Eva], have five children: Aaron Bleeman [Aaron], Eli Bleeman [Eli], Nathan Bleeman [Nathan], Deena Smursz [Deena], and Shifra Hofstedter [Shifra] [collectively, the Siblings].

B. The Respondents, ASB Holdings Limited [ASB], NSB Holdings Limited [NSB], CEB Holdings Limited [CEB], SDS Holdings Limited [SDS] and SDH Holdings Limited [SDH], are corporations incorporated under the laws of Ontario. Aaron is a shareholder and director of ASB, Nathan is a shareholder and director of NSB, Eli is a shareholder and director of CEB, Deena is a shareholder and director of SDS and Shifra is a shareholder and director of SDH.

C. The Bleeman Family Trust was established on November 30, 1998 [1998 Trust]. Abraham is the settlor of the 1998 Trust, as well as one of its trustees along with Eva, Aaron and Nathan. The Siblings are the beneficiaries of the 1998 Trust. The 1998 Trust's 21st anniversary occurred on November 30, 2019.

D. Asden Holdings Inc. [AHI] and Bleeman Holdings Limited [BHL] are corporations incorporated under the laws of Ontario. The 1998 Trust, the Respondents, 1206139 Ontario Limited, Abraham and the Siblings, are or were shareholders of BHL. The Respondents, Abraham and the Siblings are or were shareholders of AHI.

E. The Aaron Bleeman 2019 Family Trust, The Nathan Bleeman 2019 Family Trust, The Eli Bleeman 2019 Family Trust, The Deena Smursz 2019 Family Trust and The Shifra Hofstedter 2019 Family Trust were all established on July 31, 2019 [collectively, the 2019 Trusts]. Abraham is the settlor of the 2019 Trusts. The Siblings are trustees of each of their respective 2019 Trusts as well as beneficiaries.

F. The Respondents, Abraham, Eva, the Siblings, the 1998 Trust, the 2019 Trusts, AHI and BHL, are collectively referred to by the Applicant as the "Bleeman Group."

G. During the 2019 and 2020 taxation years, the Bleeman Group engaged in estate freeze transactions under sections 51, 85 and/or 86 of the Income Tax Act. These transactions

included the Siblings transferring their shares in AHI and BHL to the respective Respondents on January 1, 2019, in exchange for shares of the Respondents. As a result of the transactions, the Respondents and the 2019 Trusts held all the preference and common shares of the Respondents.

H. The Siblings each filed section 85 elections forms with the Canada Revenue Agency [CRA] claiming that the fair market value [FMV] of the 1,000 issued and outstanding BHL common shares was $1,097,973,630.

I. The CRA is engaged in audits of the Bleeman Group for the 2019 and 2020 taxation years, which commenced on or about March 22, 2022 [Audits].

J. The purpose of the Audits is to verify whether members of the Bleeman Group complied with their duties and obligations under the Income Tax Act and properly reported their worldwide income for the 2019 and 2020 taxation years. This includes verifying the FMV of the AHI and BHL shares as at January 1, 2019, and whether the transactions comply with sections 51, 85 and/or 86 of the Income Tax Act.

[7] The documents for which a compliance order is sought in the underlying application are the following:

A. The valuation report for the purchase of the shares in AHI and BHL that occurred on January 1, 2019, or, if there is not such a valuation report, the documents evidencing the FMV of the transferred property [Request 1].

B. Any tax planning memo and related documents (i.e. closing agenda for the transaction) [Request 2].

C. The presentation of the transaction to the Respondents [Request 3].

[8] On January 31, 2024, after the Applicant filed their application record, the Respondents served their responding affidavit from Michael Belz. For the purpose of this motion, the key portions of Mr. Belz's affidavit state as follows:

> [3] On November 4, 2022 I spoke with Mr. François Cloutier, CRA, with respect to the 1st Demands; however, I did not represent to him that valuation reports for the AHL and BHL shares had been prepared by KPMG LLP. The purchase of the shares of AHL and BHL on January 1, 2019 occurred pursuant to subsection 85(1) of the *Income Tax Act* (Canada) on a tax-deferred basis at cost (as recorded in the relevant T2057 forms previously provided to the CRA). As the valuation of the transferred shares was inconsequential to the transaction, no formal valuation report was sought in respect of the 2019 Share Transfers.
>
> [4] To the best of my knowledge, any tax planning memo and related documents regarding the 2019 Share Transfers were prepared by legal counsel and are therefore solicitor-client privileged.
>
> [5] To the best of my knowledge, no presentation of the transaction was made to the taxpayer.

[9] On February 2, 2024, Mr. Belz was cross-examined on his affidavit. A significant portion of Mr. Belz's cross-examination focused on the extent of his personal knowledge of the matters addressed in his affidavit and, where his evidence was based on belief, the source of his belief. During his cross-examination, Mr. Belz admitted that his knowledge about the non-existence of certain documents came from Mr. Grater.

[10] On February 2 and 5, 2024, Mr. Cloutier was cross-examined.

[11] On February 5, 2024, the Respondents served a notice of motion for an order adjourning the February 6, 2024 hearing of the underlying application or, in the alternative, striking the affidavits of Mr. Cloutier and Mr. Charpentier and dismissing the summary application. However,

no motion record was filed and the Respondents also did not file their responding application record (or seek an extension of time to do so) for the hearing on the merits scheduled for February 6, 2024.

[12] On February 6, 2024, the Applicant brought a motion to terminate Mr. Cloutier's cross-examination or, alternatively, restrict the amount of time the Respondents could cross-examine Mr. Cloutier.

[13] On February 6, 2024, the parties appeared before Justice McHaffie, who determined that the hearing of the underlying application could not proceed and that the Court would only hear the Applicant's motion. In his Order dated February 8, 2024, Justice McHaffie found that a review of the transcripts from the cross-examination of Mr. Cloutier revealed inefficiency in the Respondents' conduct of the cross-examination and some improper conduct on the part of counsel for the Respondent. Specifically:

A. A considerable waste of time was spent on multiple entirely inappropriate questions regarding Mr. Cloutier's choice to be cross-examined in French, including inappropriate insinuations that the choice was made for tactical advantage and that he should choose to be examined in English for the convenience of counsel, whose questions went well beyond reasonable confirmation that Mr. Cloutier understood the evidence in his affidavit and in the documents and conversations to which he referred;

B. A considerable waste of time was spent on the repetition of questions to which objections had already been made, including questions with respect to whether Mr. Cloutier has authority under section 231.2 of the *Income Tax Act*, questions regarding Mr. Cloutier's

understanding of the law of hearsay evidence, questions regarding correspondence in August and September 2023 that Mr. Cloutier testified he could not recall having seen at the time and questions regarding the underlying transactions;

C. Some waste of time resulted from counsel's repeated indications that he intended to ask the Court to draw adverse inferences from objections to questions; and

D. The Respondents' submission, that significant delays were occasioned by the Minister's counsel running interference and making improper objections to relevant and proper questions, was largely unfounded.

[14] I have reviewed the recording of the hearing before Justice McHaffie and, as stated by the Applicant in their written submissions on this motion, Justice McHaffie did raise concerns about the sufficiency of the Respondents' evidence regarding the non-existence of responsive documents in relation to Requests 1 and 3 and the claim of privilege in relation to Request 2, as well as Mr. Belz's knowledge of the facts.

[15] Justice McHaffie ordered that the Respondents could continue the cross-examination of Mr. Cloutier for a maximum period of one half day and that the underlying application was to be set down for a full-day hearing.

[16] On February 23, 2024, prior to the continuation of Mr. Cloutier's cross-examination and following Justice McHaffie's comments regarding Mr. Belz's evidence, Mr. Charpentier received a fax from counsel for the Respondents, which was copied to Mr. Cloutier, enclosing a letter from Mr. Grater dated February 16, 2024 [Grater Letter]. The Grater Letter stated, in part, as follows:

> I have reviewed the Taxpayers' records and can confirm:
>
> a) With respect to Item 2, there is no valuation report as described therein.
>
> b) With respect to Item 5, a memo dated July 6, 2027 was prepared by Dentons Canada LLP and it is protected from disclosure by solicitor-client privilege.
>
> c) With respect to Item 6, no presentation of the transaction were made to the Taxpayers.

[17] On February 23, 2024, the cross-examination of Mr. Cloutier was completed. During that attendance, the Respondents advised the Applicant, for the first time, of their intention to cross-examine Mr. Charpentier and served a Direction to Attend for a cross-examination to be conducted on March 5, 2024.

[18] On March 5, 2024, the cross-examination of Mr. Charpentier was conducted and completed.

[19] Following the issuance of Justice McHaffie's Order, the parties advised the Judicial Administrator that they were available for the hearing of this application on March 22, 2024, and the matter was set down for a full-day hearing before me on that date.

[20] On March 7, 2024, I convened a case management conference to address the timetable for the delivery of the Respondents' responding application record. During that case management conference, the Respondents raised, for the first time with the Court, their need to bring a refusals motion arising from the cross-examinations of both of the Applicants' affiants. I set a timetable for the delivery of motion materials (in chart form) to enable the refusals motion to be heard on an

expedited basis and cautioned the parties against seeking the Court's adjudication of unnecessary questions, refusing to answer relevant questions and failing to take advantage of answering questions under reserve of objection under Rule 95(2) of the *Federal Courts Rules*, SOR/98-106.

[21] On March 15, 2024, I issued an order dismissing the Respondents' refusals motion in its entirety and requiring the Respondents to pay a heightened cost award of $22,000 ($1,000 per refusal) on the basis that the motion should never have been brought.

[22] At the end of the day on Friday, March 15, 2024, the Respondents served and filed a letter requesting an urgent case management conference to be held over the weekend or by no later than Monday, March 18, 2024 to, among other things, discuss seeking leave of the Court to file an additional, unidentified affidavit.

[23] On March 16, 2024, I issued the following direction:

> The Court is in receipt of the Respondents' letter of today's date seeking an urgent case management conference this weekend or on Monday. The basis for the request is that the Respondents seek to discuss "among other things" seeking leave pursuant to Rule 84(2) to file an additional affidavit in response to the application, which is scheduled to be heard on March 22, 2024.
>
> The Court will not entertain the Respondents' request for an urgent case management conference until such time as the Respondents: (a) provide an agenda detailing all of the issues they seek to address at the case management conference, together with particulars of the Respondents' position in relation to each issue; (b) serve and file the proposed affidavit (which need not be sworn or affirmed); and (c) canvas the availability of counsel for the Applicant and provide joint dates and times of availability for a case management conference.
>
> To the extent that the Court may be prepared to entertain the hearing of yet another motion on this file, any such motion will need to be

> brought and heard on an expedited basis so as to preserve the hearing date.

[24] The Court did not receive any response to the direction over the weekend or by the end of the day on Monday, March 18, 2024. Rather, the Respondents served and filed their responding application record.

[25] However, on Tuesday, March 19, 2024, the Court received an urgent letter from the Respondents seeking a case management conference to address, among other issues, leave to file the Grater Affidavit, which was appended to the letter. The Grater Affidavit states, in its entirety, as follows:

> [1] I am the Chief Financial Officer of Medallion Properties Inc. ("Medallion"), the head office of which is located at Suite 304, 970 Lawrence Avenue West, Toronto, Ontario, M6A 3B6 ("304-970 Lawrence Avenue West"). This is also the same office address for each of the Respondents.
>
> [2] As a result of my position as CFO of Medallion, I have familiarity with corporate transactions involving companies related to Medallion, including the purchase of the shares of Asden Holdings Inc. and Bleeman Holdings Limited that occurred on January 1, 2019.
>
> [3] Accordingly, I have personal knowledge of the matters referred to in this affidavit, save and except for what is stated to be based upon information and belief, and where such facts and matters are stated, I verily believe them to be true.
>
> [4] By letters dated November 4 and December 5, 2022, addressed to the Respondents at 304-970 Lawrence Avenue West, the Canada Revenue Agency ("CRA") requested the Respondents to:
>
> > (a) Provide the valuation report for the purchase of the shares in Asden Holdings Inc. and Bleeman Holdings Limited that occurred on January 1, 2019, or, if there isn't any, the documents evidencing the fair market value of the transferred property ("Request 1");

> (b) Provide any tax planning memo and related documents, i.e. Closing agenda ("Request 2"); and
>
> (c) Provide the presentation of the transaction to the taxpayer ("Request 3").
>
> [5] With respect to Request 1, there is no valuation report nor other documents evidencing the fair market value of the transferred property as described therein.
>
> [6] With respect to Request 2, a memo dated July 6, 2017, was prepared by Dentons Canada LLP to Shifra Hofstedter and it is protected from disclosure by solicitor-client privilege.
>
> [7] With respect to Request 3, no presentation of the transaction was made to the Respondents.
>
> [8] On February 16, 2024, I wrote to Messrs. Ian Charpentier and Francois Cloutier, CRA regarding the above-referenced requests. My letter was also copied to Mr. Aaron Tallon, counsel for the Applicant. Attached as Exhibit "A" to my affidavit is a true copy of my letter dated February 16, 2024. To date I have not received any response from the CRA to my letter.
>
> [9] I make this affidavit in accordance with the *Federal Courts Rules* SOR/98-106, as amended, and in support of the Respondents' response to the herein application, and for no other or improper purpose.

[26] A lengthy case management conference was held the afternoon of March 19, 2024, during which the Applicant confirmed that they opposed the motion. After hearing from the parties, I directed that motion materials were to be filed on an expedited basis for the hearing of a motion for leave to file the Grater Affidavit and that the motion would be heard on March 22, 2024, so as not to waste the hearing time that had already been booked for this matter. The hearing of the underlying application was adjourned.

[27] The Respondents delivered their moving motion record on March 20, 2024, which included a further affidavit from Mr. Grater in support of the motion.

[28] On March 21, 2024, the Applicant cross-examined Mr. Grater on his affidavit in support of the motion and then later that afternoon, the Applicant served and filed their responding motion record.

II. Preliminary Issue

[29] As with all other cross-examinations that have been conducted in this matter, the cross-examination of Mr. Grater on his affidavit in support of this motion was contentious. Both parties complain of the conduct of the other and ask the Court to make findings arising from such conduct either in relation to the merits of the motion or as it relates to the costs of this motion.

[30] In relation to the cross-examination itself, I find that counsel for the Respondents obstructed the cross-examination by making objections to proper questions asked about whether Mr. Grater drafted the Grater Letter (after he stated that he had been requested to sign the Grater Letter) and whether Mr. Grater had a discussion with Mr. Belz about the issues raised in the underlying application.

[31] Moreover, counsel for the Respondents refused to let Mr. Grater answer questions related to when he was first contacted by counsel for the Respondents about this application, or other communications with counsel for the Respondents about giving evidence in this proceeding, on the basis that their communications were protected by solicitor-client privilege or some other form of unidentified privilege. After stating that refusal, counsel for the Respondents then refused to permit any questions about when the retainer began and in what capacity counsel for the Respondents was retained. These questions were all refused in the face of paragraphs 13 and 14 of

the Respondents' written representations in support of this motion that expressly referred to communications between counsel for the Respondents and Mr. Grater in relation to this proceeding.

[32] In relation to the re-examination, the purpose of re-examination is largely rehabilitative and explanatory. Re-examination on an affidavit must be confined to dealing with or explaining matters which have been raised in cross-examination, and cannot be used as an excuse for introducing evidence which should have been put in the affidavit [see *Monarch Marketing Systems, Inc v Glenwood Label & Box MFG Ltd*, [1988] FCJ No 1206, 20 CIPR 99; *R v Candir*, 2009 ONCA 915 at para 148].

[33] I find that it was improper for the Applicant to prevent the Respondents from putting the Notice of Application to Mr. Grater on re-examination. The Applicant had cross-examined Mr. Grater as to whether he knew the issues in the underlying application. Mr. Grater responded that, "[f]rankly, there are so many issues that I would need to actually see this in order to know and be reminded exactly what this is" and confirmed that, at that time, he was unable to tell counsel what the issues were. When asked if he had read the Applicant's application record, Mr. Grater responded that he was sure he had but could not recall when he read it and stated that, "if I could see the document I could tell you."

[34] On re-examination, counsel for the Respondents put the Notice of Application to Mr. Grater and attempted to ask him questions about his understanding of the issues referred to in various paragraphs thereof. The Applicant objected to the line of questioning and refused to permit

Mr. Grater to answer the majority of the questions raised by counsel for the Respondents. As the Applicant had asked Mr. Grater if he knew the issues in the underlying application, and Mr. Grater had indicated that he would benefit from seeing the application record, I find that counsel for the Respondents' questions about Mr. Grater's understanding of the issues constituted proper re-examination.

[35] However, counsel for the Respondents' line of questioning then immediately became improper when he asked Mr. Grater a number of questions about his knowledge about facts relating to the issues raised in the underlying application. Mr. Grater's knowledge of facts, as opposed to his knowledge of the issues themselves, was not raised on cross-examination. Over the objections of the Applicant, counsel for the Respondents then attempted to canvas with Mr. Grater additional evidence about the existence of responsive documents not in the Grater Affidavit or in any other affidavit before the Court in the underlying application. I find that this line of questioning was an abusive attempt to improperly supplement the evidentiary record in blatant disregard for the rules of evidence and the *Federal Courts Rules*. All of this improper re-examination is accordingly struck.

III. Issues

[36] The issues for determination on this motion are as follows:

A. Whether the Respondents should be granted leave to file the Grater Affidavit; and

B. Whether an award of costs should be made on this motion and, if so, to whom and in what amount.

IV. Analysis

A. *Applicable Legal Principles*

[37] Rule 84(2) of the *Federal Courts Rules* provides that a party who has cross-examined the deponent of an affidavit filed in an application may not subsequently file an affidavit in that application, except with the consent of all other parties or with leave of the Court.

[38] As applications are summary proceedings that should be determined without undue delay, the discretion of the Court to permit the filing of additional material should be exercised with great circumspection [see *Mazhero v Canada (Industrial Relations Board)*, 2002 FCA 295 at para 5].

[39] The following factors must be considered and weighed by the Court in determining whether to grant leave: (i) the relevance of the proposed evidence; (ii) whether the proposed evidence was available and/or could be anticipated as being relevant prior to the cross-examinations; (iii) absence of prejudice to the opposing party; (iv) whether the proposed evidence assists the Court in making its final determination; and (v) whether the proposed evidence serves the interests of justice [see *Janssen-Ortho Inc v Canada (Health)*, 2009 FC 1179 at para 9; *Pfizer Canada Inc v Rhoxalpharma Inc*, 2004 FC 1685 at para 16; *Havi Global Solutions LLC v IS Container PTE Ltd*, 2020 FC 803 at paras 6 and 33, 39-40 [*Havi*]; *NOCO Company, Inc v Guangzhou Unique Electronics Co, Ltd*, 2023 FC 208 at para 59].

[40] The factors noted above are not discrete, mandatory requirements. Rather, they are factors that must be considered by the Court and weighed when determining whether to exercise the Court's discretion to grant leave. The failure to establish any one factor is not necessarily fatal to the request for relief and no individual factor is determinative [see *Havi, supra* at para 58]. Each

case will involve a different weighing depending on the factual circumstances before the Court [see *Campbell v Electoral Canada*, 2008 FC 1080 at paras 25-27].

[41] In relation to the second factor, it must be recalled that Rule 84(2) is not there to allow a party to split its case. A party must put its best foot forward at its first opportunity [see *Rosenstein v Atlantic Engraving Ltd*, 2002 FCA 503 at para 9 [*Rosenstein*]]. The further affidavit sought to be filed must not deal with evidence that could have been made available at the time the initial affidavits were filed, unless its relevance could not have been anticipated at that time [see *Pfizer Canada Inc v Canada (Minister of Health)*, 2006 FC 984 at paras 21-22].

B. *Leave will be denied*

[42] The Respondents assert that leave should be granted to permit them to rely on the Grater Affidavit as they satisfy all of the factors that the Court must consider.

[43] The focus of the Respondents' submissions at the hearing of the motion was the Respondents' explanation for why the Grater Affidavit was only being advanced at this stage of the proceeding. The Respondents assert that the Applicant unexpectedly took a new position at the cross-examination of Mr. Belz—that it was Mr. Grater who has knowledge of the relevant transactions as opposed to Mr. Belz, to whom the demands for production had been sent. This new position had never been previously communicated by the Applicant and there was no reference to Mr. Grater anywhere in the Applicant's application record.

[44] The Respondents assert that the Applicant is not being transparent with the Court, as nowhere in the Applicant's materials does the Applicant admit that the Applicant did in fact receive a response from the Respondents that documents responsive to Requests 1 and 3 do not exist and documents responsive to Request 2 are protected by solicitor-client privilege. By continuing with the underlying application after receiving these responses from the Respondents, the Respondents assert that the Applicant has "changed the goal posts." Now, the Respondents argue, the Applicant is saying that they are not satisfied with the Respondents' answers and are asking for evidence about responsive documents from someone else who the Applicant believes has better first-hand knowledge, namely, Mr. Grater. It is for this reason that the Respondents now seek to rely on the Grater Affidavit.

[45] The Respondents further assert in their written representations that, for some unknown reason, during the cross-examination of Mr. Charpentier, counsel for the Applicant asserted they had a lack of knowledge as to who Mr. Grater was and how his evidence would be relevant, which led to confusion on the part of the Respondents, as Mr. Grater had been referred to during Mr. Belz's cross-examination. However, at the hearing of this motion, counsel for the Respondents conceded that it was a different counsel appearing for the Applicant on Mr. Charpentier's cross-examination than had appeared on Mr. Belz's cross-examination, and that this could have accounted for their lack of knowledge about Mr. Grater.

[46] The Respondents assert that they "could not have reasonably anticipated that Mr. Belz's status could become a point of contention in this Application or that the Applicant would take a position that Mr. Grater is the more knowledgeable affiant while also dismissing [it]". As such,

the Respondents assert that they have demonstrated that the Grater Affidavit could not have been anticipated as being relevant prior to the cross-examinations.

[47] I find that the Respondents' explanation for why they are only now seeking to introduce the Grater Affidavit is disingenuous. It should not cause confusion or come as a surprise to the Respondents that the Applicant would seek to "test" Mr. Belz's personal knowledge on cross-examination. The Respondents' counsel, who is an experienced litigator, knows that Rule 81(1) of the *Federal Courts Rules* provides that affidavits must be confined to facts within the affiant's personal knowledge except on motions, in which statements as to the affiant's beliefs (with the grounds for the beliefs) may be included. Moreover, Rule 81(2) provides that where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence from a person having personal knowledge of material facts. Mr. Belz's affidavit clearly stated that, in relation to documents responsive to Requests 2 and 3, his evidence was "to the best of [his] knowledge" and provided no particulars as to the basis for his knowledge.

[48] The Respondents have opposed this application primarily on the basis that responsive documents do not exist or are protected by solicitor-client privilege. What evidence to put forward to attest to the non-existence of the documents and to establish their privilege claim is entirely within the Respondents' knowledge and control, including from which affiant that evidence is obtained. The Respondents made the tactical choice to file evidence from Mr. Belz, rather than from a shareholder, director or officer of the Respondents, Mr. Grater or anyone else with personal knowledge of these matters

[49] The suggestion that the Respondents were somehow "duped" by the Applicant into selecting Mr. Belz as their affiant is without merit. I do not accept the assertion that the Applicants have "changed the goal posts." The Notice of Application, supporting affidavits and written representations of the Applicant on the underlying application clearly state that the basis for the request for a compliance order is that the Respondents have not provided the outstanding required material. That is entirely accurate and admitted by the Respondents. While the Respondents criticize the Applicant for not including in their application materials a September 5, 2023 letter from counsel for the Respondents asserting that the documents do not exist or are privileged, that letter was marked "without prejudice" and thus, I will not fault the Applicant for not referring to it in their materials. Moreover, this application was not brought on an *ex parte* basis. It was brought in an adversarial context, with the Respondents having the right and ability to put their evidence in opposition to the application before the Court, which they have done [see *Roofmart Ontario Inc v Canada (National Revenue)*, 2020 FCA 85 at paras 49-53].

[50] This is not a case where a new issue arose on cross-examination that could not reasonably have been foreseen. The issue of whether the documents exist or whether they are protected by privilege has been a live issue between the parties since at least September of 2023 and was squarely addressed in Mr. Belz's affidavit. The Respondents simply seek to supplement their record with evidence to address what the Applicant asserts are weaknesses in Mr. Belz's evidence and I find that they have offered no adequate justification for doing this [see *Blank v Canada (Justice)*, 2015 FC 956 at para 33]. I therefore reject the assertion that the relevance of the Grater Affidavit could not have been anticipated at the time that the Respondents filed their evidence in the underlying application.

[51] Notwithstanding the Respondents' arguments that the Applicant "changed the goal posts" and that it was for this reason the Respondents only now seek to file the Grater Affidavit, the Respondents also led evidence to attempt to establish that Mr. Grater was too ill to provide an affidavit at an earlier point in time. However, I am not satisfied that the evidence put forward by the Respondents establishes that was the case. In particular, Mr. Grater's affidavit on the motion is silent as to when the Respondents first communicated with him about his proposed evidence and whether he was available from January 22, 2024 to February 2, 2024, the relevant period during which the affidavits were served and Mr. Belz was cross-examined.

[52] Moreover, the case law is clear that the further affidavit sought to be filed must not deal with evidence that could have been made available at the time the initial affidavits were filed. The oddity of this case is that, according to the Respondents, the evidence they seek to file from Mr. Grater is "not new evidence," but rather the same evidence provided by Mr. Belz, now from a different source. Taking the Respondents' submission at face value then, this evidence is already before the Court, which leads me to question how it will be of assistance to the Court.

[53] In that regard, I will now turn to consider whether the proposed evidence assists the Court in makings its final determination. I would start by noting that the suggestion that the Grater Affidavit is needed by the Court runs counter to the Respondents' own submissions in the underlying application, where the Respondents assert that (prior to tendering the Grater Affidavit) they have already done everything that they could to establish the non-existence of the documents and their claim of privilege. Specifically:

> [57] The Respondents submit that the preponderance of the evidence before this Court demonstrates that valuation reports or documents

> as described in Request 1 do not exist. Since it is arguably not possible to definitively prove that something does not exist, Respondents have done all that can reasonably be expected to demonstrate that items demanded in Request 1 do not exist.
>
> [58] The Applicant has not adduced any evidence to rebut the above facts. At best, the Crown has attempted to suggest, during the cross-examination of Mr. Belz, that he could not have firsthand knowledge of whether documents responsive to Request 1 did or did not exist, and must have relied on Mr. Grater for this information. However, the Crown's position is untenable since the Requirements were sent to Mr. Belz, and he provided most of the responses. Mr. Belz also took the necessary steps and made the necessary inquiries to ensure he was knowledgeable and able to provide the responses set out in his affidavit.
>
> […]
>
> [59] With respect to Request 2, the Respondents submit that they have sufficiently demonstrated that the documents requested therein were protected from disclosure by solicitor-client privilege. This has been established in the affidavit and cross-examination of Mr. Belz, in the Respondents' Sept. 5th Letter, and in the Grater Letter.
>
> […]
>
> [61] With respect to Request 3, the Belz Affidavit attests that no presentation of the 2019 Share Transfer was made to the taxpayer. This was also confirmed in the Respondents' Sept. 5th Letter and the Grater Letter.
>
> [62] Accordingly, the Respondents submit that they have done all that they can do to demonstrate that no presentations as described in Request 3 exist.
>
> [Footnotes omitted, emphasis added.]

[54] On this motion, the Respondents also assert that allowing the introduction of the Grater Affidavit "will only help to develop a fuller and more accurate record that will assist the Court in determining the proper determination of this Application." I reject this assertion. I would note that a similar argument was rejected by Justice Perell in *Shah v LG Chem, Ltd.*, 2015 ONSC 776, where he stated:

> [38] As noted above, however, the plaintiffs submit that it is in the interests of justice to grant leave because the court itself would be prejudiced by the absence of the additional evidence because the court would be missing important information relevant to the jurisdiction analysis.
>
> [39] However, in the context of an adversarial system of justice, where there are rules of civil procedure and rules of evidence, I do not see how the court can be said to be prejudiced if it enforces the rules of civil procedure and the law of evidence.
>
> [40] I cannot speak for the inquisitorial system, because Ontario courts operate under the adversarial system, and under that system, with rules of engagement that include rules of civil procedure and the law of evidence, the opposing parties have a great deal of control over the evidence, and judges are frequently denied important information possibly relevant to coming to a decision or information a judge might just be curious about. That denial of information does not amount to the court being prejudiced. In any event, litigation under an adversarial system is not about the court's interest or curiosity; the administration of justice is about the parties' procedural and substantive rights, not the court's right to have information to decide cases.

[55] I agree with Justice Perell’s reasoning.

[56] Moreover, I am not satisfied that the Grater Affidavit would, in fact, assist me in determining the underlying application. Mr. Grater is not an officer, director or shareholder of any of the Respondents. The basis for his personal knowledge of the existence of responsive documents and the claim of privilege is not established in his affidavit. The relationship between the Respondents and Medallion Properties Inc. is not clearly established in his affidavit and, despite the urging of the Respondents, the fact that they share an office address is of no assistance in demonstrating his personal knowledge. He does not attest to having access to the books and records of the Respondents, to having conducted any searches of the books and records or to having made any inquiries into the existence of responsive documents.

[57] In relation to the documents over which solicitor-client privilege is claimed, it is entirely unclear to me how he would have any knowledge of the asserted privilege, save and except if the privilege had been waived and he had access to the documents. Other than identifying one of the two documents over which privilege has been claimed, his evidence is identical to that of Mr. Belz and thus provides nothing new to assist the Court in determining whether the Respondents have established a claim of privilege.

[58] The Respondents argue that the Grater Affidavit is clearly relevant and probative. I accept that the evidence of Mr. Grater is, on its face, relevant to the existence of the responsive documents and the Respondents' claim of privilege but, for the reasons noted above, I find that his evidence lacks probative value.

[59] Turning to the issue of prejudice, the Respondents assert that the Applicant will not suffer any prejudice or alternatively, any prejudice is compensable in costs. I agree with the Respondents that the costs associated with the cross-examination of Mr. Grater on his affidavit, the need to file any responding evidence and the need to file supplementary written representations are all prejudices associated with granting the requested relief that could be compensated for by an award of costs (notwithstanding that the Respondents assert that no costs should be payable).

[60] However, the Applicant asserts that further prejudices would arise. Specifically, the Applicant asserts that the Respondents' obstructionist conduct during the cross-examination of Mr. Grater is prejudicial to the fair hearing of the Application. While I do not agree with the characterizations made by the Applicant regarding Mr. Grater's evidence and his comportment

during his cross-examination, I do agree that counsel for the Respondents obstructed the cross-examination, as detailed above. This conduct was in keeping with counsel for the Respondents' conduct during earlier cross-examinations, found by Justice McHaffie and myself to be improper, abusive and lacking in civility. My review of the transcript of Mr. Belz's cross-examination also reveals obstructionist behaviour from Respondents' counsel during questioning designed to determine the extent of Mr. Belz's personal knowledge of the matters addressed in his affidavit.

[61] Were the Court to permit the Grater Affidavit to be filed, I have every reason to believe that the Respondents would obstruct the Applicant's ability to conduct a fair cross-examination, which would result in prejudice to the Applicant that is not compensable in costs. While the Applicant has asserted other grounds of prejudice, I need not consider them in light of this finding.

[62] Turning to the interests of justice, the *Federal Courts Rules* related to the delivery of evidence on an application are designed to fairly regulate and provide closure to the evidence gathering process for applications. Rule 84 is not intended to provide the Respondents with a "do over" and be used as a mechanism to correct asserted deficiencies in their evidence, which I find is what the Respondents are improperly attempting to do. This is the type of unacceptable, tactical conduct that the Federal Court of Appeal stated the courts would not countenance [see *Amgen Canada Inc v Apotex Inc*, 2016 FCA 121 at para 24].

[63] Moreover, contrary to the Respondents' repeated assertion at the hearing that the Grater Affidavit is not new evidence, that assertion is simply not accurate. The Grater Affidavit states that, in relation to Request 1, there are no other documents evidencing the FMV of the transferred

property. This evidence was not contained in Mr. Belz's affidavit. Notwithstanding that the Applicant raised the fact that the Grater Affidavit contained new evidence at the hearing, the Respondents were silent and provided the Court with no submissions as to why this evidence should be permitted. I find that the inclusion of this evidence is a clear attempt by the Respondents to improperly remedy a deficiency in their evidentiary record.

[64] Having considered and weighed the various factors, I am not satisfied that the Respondents have demonstrated that the Court should exercise its discretion to grant them leave to file the Grater Affidavit. Accordingly, the motion shall be dismissed.

V. Costs

[65] Pursuant to Rule 401 of the *Federal Courts Rules*, the Court may award costs of a motion in an amount fixed by the Court and where the Court is satisfied that the motion should not have been brought, the costs of the motion shall be payable forthwith.

[66] At the hearing of the motion (before the parties were aware as to whether the requested relief would be granted), the Respondents asserted that they should receive a heightened cost award on the basis that: (a) this motion should never have been opposed by the Applicant; (b) the Applicant refused to accept an offer to settle; (c) the Applicant badgered and insulted Mr. Grater on cross-examination and should be sanctioned for this misconduct; and (d) an extensive amount of work was required in connection with this motion in a truncated period of time. In keeping with the level of costs awarded on the refusals motion and taking into account the factors noted by the Respondents, the Respondents asserted that an appropriate quantum would be $44,000. However,

if the Respondents were unsuccessful on the motion, the Respondents asserted that costs of the motion should simply be costs in the cause.

[67] At the hearing of the motion, the Applicant asserted that they should be awarded their costs of the motion in any event of the cause as the Applicant is not to blame for this motion being brought. Given the amount of effort involved to respond to this motion on a truncated timetable and given the need to deter the Respondents' conduct, the Applicant asserted that an enhanced cost award of $45,000 payable to the Applicant is warranted.

[68] With respect to entitlement, I see no reason to depart from the general principle that the successful party should recover their costs of the motion. Contrary to the assertion of the Respondents, I am not satisfied that the conduct of the Applicant rises to the level that would warrant depriving them of their costs. While the Applicant's after-the-fact characterization of Mr. Grater's evidence given on cross-examination and his comportment during his cross-examination was somewhat inflammatory, I do not find that the Applicant badgered or insulted Mr. Grater as alleged. Moreover, while I found that certain of the Applicant's objections on re-examination were improper, I suspect that their attempts to shut down the re-examination were in large measure driven by their prior experiences with counsel for the Respondents and their attempts to introduce improper evidence on re-examination, which occurred on Mr. Belz's re-examination and then immediately after their objections, occurred on Mr. Grater's re-examination.

[69] As such, I find that the Applicant is entitled to their costs of this motion.

[70] With respect to quantum, there is some degree of consensus between the parties. Both parties agree that an extensive amount of work was required, on an expedited basis, to address this motion and that an enhanced cost award is warranted. Both parties have proposed that the appropriate quantum is in the range of $44,000-45,000.

[71] Given the Respondents' assertion that $44,000 is an appropriate quantum to be awarded to them should they be successful, I queried at the hearing why that would not then also be the appropriate quantum to award the Applicant if they were successful. The Respondents opposed such a suggestion on the basis of the Applicant's conduct, as described in paragraph 68 above. I find that there is no merit to the Respondents' position. It was appropriate for the Applicant to oppose the motion, the Applicant did not badger or insult Mr. Grater during his cross-examination and there was no offer to settle that would trigger any cost consequences. When I asked counsel for the Respondents at the hearing what the offer was, that he was referring to, he indicated that it was an offer that the Applicant consent to the relief sought. Such an offer has no degree of compromise and thus, cannot constitute a valid offer to settle for the purpose of triggering any cost consequences [see *Venngo Inc v Concierge Connection Inc (Perkopolis)*, 2017 FCA 96 at para 87].

[72] When parties make a submission as to a reasonable quantum of costs payable in relation to a matter, they must be prepared to accept that, depending on the circumstances, what is reasonable to be paid to them is also reasonable to be paid by them. Such is the case here, particularly given that: (a) the Respondents' attempt to blame the Applicant for the need to bring this motion was disingenuous; (b) the Respondents' motion should not have been brought, as it was an

unacceptable attempt to obtain a tactical advantage; (c) the Respondents have mischaracterized the Grater Affidavit as containing no new evidence; and (d) the Respondents have continued to engage in obstructive and improper conduct during the cross-examination and re-examination of their affiants.

[73] Accordingly, the Respondents shall pay to the Applicant costs of this motion in the amount of $44,000 payable forthwith and in any event of the cause.

THIS COURT ORDERS that:

1. The Respondents' motion is dismissed.
2. The Respondents shall pay to the Applicant their costs of the motion fixed in the amount of $44,000, which shall be payable forthwith and in any event of the cause.

"Mandy Aylen"
Judge